Mozilla

PROVISIONAL DECISION REPORT PART 1, SECTION 11:
IMPLEMENTATION OF BROWSER REMEDIES UNDER THE MOBILE BROWSERS AND CLOUD GAMING MARKET INVESTIGATION[1]

Mozilla reiterates its strong support of the CMA's actions to investigate the barriers to mobile browser competition and its proposals of potential remedies to address these harms. This submission relates solely to Part 1 of Section 11 of the CMA's Provisional Decision Report. Responses to other parts of the Provisional Decision Report will be submitted in due course.

Mozilla respectfully submits that, in order to address the concerns raised most effectively, the CMA should swiftly implement remedies under its Enterprise Act 2002 market investigation powers rather than waiting to implement remedies under the Digital Markets, Competition and Consumers Act 2024. Delay would lead to further (and unnecessary) harm to UK consumers and browser competition. Moreover, the remedies initially implemented under the Market Investigation remedies could later be adopted and monitored under the DMCCA regime.

Introduction

Mozilla has long supported establishing a separate regulatory framework to address market power within digital markets. We welcome the introduction of the Digital Markets, Competition and Consumers Act 2024 (the "DMCCA") including the new powers the DMCCA will give the CMA to impose remedies addressing conduct which has the potential to result in harm to competition and to UK consumers.

However, as the CMA noted in Principle 8 of the provisional approach to implement the new Digital Markets competition regime, the new regime is not a panacea; there are, and will remain, instances where the best enforcement option available to the CMA as regards digital markets will be the use of its existing powers under the Competition Act 1998 ("CA98) or the Enterprise Act 2002 ("EA02") either as an alternative to or in combination with the tools available to the CMA under the new digital markets regime.

Mozilla submits that the CMA should implement remedies in the relevant mobile browser markets using its existing powers to do so pursuant to the market investigation regime under the EA02, rather than waiting to design and/or implement any remedies under the new digital

[1] This submission is focused on the procedural issue of whether remedies should be put in place by the CMA using its powers under the Enterprise Act 2002. Mozilla will in due course make a separate submission relating to the detail of the six potential remedies which the CMA identified in its provisional decision report as potential remedies to address the (but ultimately rejected in favour of a recommendation to the CMA Board).

markets regime established under the DMCCA. Mozilla notes that in the CMA's Provisional Decision Report published on 22 November 2024 ("PDR") the CMA has provisionally decided that, rather than imposing remedies under the EA02, it will recommend to the CMA Board that it pursue any appropriate interventions under the DMCCA framework.

Mozilla's main concern with waiting to impose remedies using the new DMCCA powers is that there would be a significant delay before any remedies package could take effect, given that the process of designating undertakings as having strategic market status ("SMS") under the regime is yet to begin and there will also need to be the drafting, consultation on and finalisation of specific conduct requirements (and possibly also interpretative notes) for each designated undertaking, plus any implementation period for the conduct requirements. Such a delay in imposing remedies - which could last a year or more - has the potential to accentuate any adverse effects on competition ("AEC") in mobile browsers[2]. This is particularly the case, given the delays of around a year (both outside the CMA's control) to each of the passage of the DMCCA and the Mobile Browsers And Cloud Gaming Market Investigation ("Market Investigation").

The CMA has already invested significant time and resources into the Market Investigation, including in scoping potential remedies. In the normal course of events, following such an exhaustive market investigation the CMA would proceed immediately to ordering remedies to any AECs identified, building on the findings of the investigation. The most efficient course of action in terms of use of public resources, which is also the most likely to prevent further harm to competition and to UK consumers, is for the CMA to proceed with a remedies package using its market investigation powers under the EA02.

It would remain open to the CMA to, at a later date, transition from monitoring compliance with any remedies under the EA02 framework to put in place conduct requirements under the DMCCA which are intended to cover the same ground and achieve the same objectives as the EA02 remedies order. Compliance with those conduct requirements could then be monitored under the DMCCA framework. This approach would have the benefit of avoiding an 'enforcement gap' during which any harm to consumers and to relevant browser markets would be accentuated. Indeed, having a remedies package already implemented and functioning at the time of the SMS designation process could prove useful to the CMA in informing its future work under the DMCCA more generally.

[2] Mozilla agrees with the CMA that the supply of browsers on Android and on iOS should be considered two separate product markets (see for example paragraph 3.27 of WP1). However, for the purposes of this submission, 'mobile browsers' is used as shorthand for (i) all relevant browser markets more generally or (ii) the particular relevant market referred to. In other words, where there is reference to a particular practice relating to iOS, any references to effects on 'mobile browsers' are to the supply of mobile browsers and browser engines on iOS; where there is reference to a particular practice relating to Android, any references to effects on 'mobile browsers' are to the supply of mobile browsers and browser engines on Android.

The need to avoid further delay is paramount for competition in mobile browsers; fast-moving technology markets where market power becomes more entrenched, and innovative challengers can thereby be weakened or deterred, with every passing week.

Moreover, the avoidance of delay through a remedies order immediately following the market investigation would be in line with the CMA's new duty of expedition (applying to all its functions) under s327 of the DMCCA.

The EA02 market investigations tool is well-suited to implement the remedies needed

For a remedies package to be effective, there needs to be a comprehensive range of remedies available to the CMA to put in place. The CMA set out a range of possible remedies in Working Paper 7. Some of the potential remedies proposed may require resourcing in the initial stages of implementation. For example, if Apple were required to permit interoperability with third party browser engines on iOS in the UK, once a workable set of conditions were established and third party browsers engines were successfully introduced, there may be less ongoing enforcement necessary. On the other hand, a requirement for Apple and Google to introduce browser choice screens at device set-up would require supervision, testing and trialling before release and most likely ongoing monitoring and adjustment to ensure compliance and effectiveness.

While the DMCCA regime is entirely necessary and fit-for-purpose, the market investigations regime under the EA02 remains suited to the implementation of remedies to address the AECs in mobile browsers: under s.138(2) EA02, where the CMA has identified one or more AECs in its final report, the CMA shall take any action it considers reasonable or practicable to remedy, mitigate or prevent the AEC (s.138(2)(a) EA02), and to remedy any detrimental effects on customers so far as they have resulted from, or may be expected to result from, the adverse effect on competition (s.138(2)(b) EA02). It is notable that consumer detriment includes, without limitation, "*lower quality, or less choice of goods or services…[or] less innovation in relation to such goods or services*" (s.134(5) EA02). As set out later in this submission, such measures of consumer detriment are present in the relevant mobile browser markets.

The remedies available to the CMA listed at Schedule 8 to the EA02 are broad in scope. Section 161(3)(b) EA02 also provides that a market investigation order may contain "*such supplementary, consequential or incidental provision as the person making it considers appropriate*."

Section 138(4) EA02 provides that in deciding on the appropriate action, the CMA should have regard to the need to achieve as comprehensive a solution as is reasonable and practicable. The guidance on market investigations inherited from the former Competition Commission states:

> "*The clear preference of the CC is to deal comprehensively with the cause or causes of*

AECs wherever possible, and by this means significantly increase competitive pressures in a market within a ***reasonable period of time***. [emphasis added]."[3]

The EA02 therefore empowers the CMA to put in place a range of different remedies, and the intention of the regime is that those remedies should be as comprehensive as possible. For a remedies package to be truly comprehensive (and effective), it needs to be introduced at the right time; and without delay where any delay would result in significant harm to consumers and competition.

At paragraph 11.36(e) of the PDR, the CMA references a statement made by Mozilla in its response to WP7:

> "*Mozilla submitted that the complex nature of browsers and browser engines means that it may not always be clear whether measures put forward by Apple and Google to address AECs are reasonable and effective*."

For the avoidance of doubt, Mozilla was not suggesting in the relevant submission that this complexity meant that the EA02 remedies regime was in some way not well-suited for putting forward a remedies package in relation to mobile browsers. Mozilla's view is that whichever legislative framework is used, there will need to be mechanisms put in place to ensure effective scrutiny of any measures put forward; this is not a reason in favour of implementing remedies under the DMCCA framework as opposed to the EA02 framework.

The EA02 gives the CMA the necessary flexibility to put in place effective scrutiny mechanisms. In due course, the responsibility for such scrutiny and monitoring can then later be transferred to the CMA Board under the DMCCA, assuming equivalent conduct requirements are put in place (as appropriate). Indeed, the likelihood of the remedies package being enhanced and improved under the DMCCA[4] would be greater in a scenario where the EA02 remedies had already been put in place, and had time to take effect, and see results (or lack of them). In that scenario, the CMA would have had the opportunity and time to observe which aspects of the EA02 remedies were working well, and which aspects were working less well and tailor the Conduct Requirements ("**CRs**") or pro-competitive interventions ("**PCIs**") accordingly.

CMA market investigation remedies have been successful in addressing harm to consumers and to competition in the past. The CMA estimates that the direct consumer benefits from the CMA's interventions through the markets regime[5] were £5.2 billion in total during the financial years from 2020/21 to 2022/2023, or an average of £1.7 billion per year[6].

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[3] Paragraph 330 CC3 (Revised), Guidelines for market investigations: Their role, procedures, assessment and remedies
[4] See paragraph 11.36(e) of CMA Provisional Decision Report.
[5] We understand that this includes estimated benefits from both market investigations and market studies.
[6] Impact Assessment 2022 to 2023 - GOV.UK

Additionally, there have been recent examples of remedies resulting from the market investigations process producing tangible positive change for consumers. As part of the remedies packages introduced under the *Retail Banking* market investigation[7], the CMA introduced the Open Banking Roadmap, an initiative intended to enable smarter payments and greater flexibility to bank customers across the United Kingdom. In September 2024, the CMA confirmed that all relevant banks had now implemented all of the requirements of the Open Banking Roadmap such that the Open Banking Roadmap implementation was complete.[8][9] As the CMA has noted during implementation of the Roadmap:

> "*Open Banking has been a major success in improving competition in retail banking and securing positive outcomes for consumers and businesses. There are now over 6.5 million active users of Open Banking-enabled products in the UK, providing UK consumers and SMEs with innovative products to help them better manage and make more of their money*."[10]

There is therefore evidence to suggest that a remedies package which is sufficiently comprehensive, introduced at the right time and effectively monitored and enforced, can be effective in promoting competition and reducing harm (and/or delivering benefits) to UK consumers. Although the market investigations regime would not be suited to addressing the range of issues which are likely to be subject to the DMCCA regime, it is sufficient in the specific area of mobile browsers, following the multi-year, in-depth Market Investigation. As such, a truly comprehensive approach here would involve implementing a remedies package as soon as is feasible on the basis that remedies are likely to be most effective where they are implemented at the right time, and that a significant delay cannot be justified when one considers the likely harm to competition and to UK consumers in the interim.

Waiting to implement remedies under the DMCCA likely to cause significant delay

At the time of writing, we understand that Part 1 of the DMCCA (and thus the digital markets regime) is expected to commence in January 2025, with the CMA expected to launch the first Strategic Market Status investigations shortly afterwards.[11]

Under s. 14(2) DMCCA, the CMA must set out its decision on SMS designation within nine months of the day on which the SMS investigation notice is given to the potential SMS undertaking. Mozilla also notes that s.104 (1) DMCCA gives the CMA the power to extend an

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[7] Retail banking market investigation - GOV.UK
[8] https://assets.publishing.service.gov.uk/media/66dea4cf561701fa1c214f65/cma_response_to_obl.pdf
[9] See CMA confirms full completion of Open Banking Roadmap, unlocking a new era of financial innovation
[10] https://assets.publishing.service.gov.uk/media/63da3a02d3bf7f251da28798/Transition_report_statement_-_FINAL.pdf
[11] See the statement made to this effect by Justin Madders, Minister for Employment Rights, Competition and Markets in Parliament on 9 September 2024: Implementation of the Digital Markets, Competition and Consumers Act and the statement at paragraph 477 of the PDR that commencement is "expected in January 2025."

investigation under Part 1 DMCCA (including an SMS investigation) for a period up to a further three months.

Of course, the SMS designation of Apple or Google would only be the start of the process in pursuing potential remedies in mobile browsers under the DMCCA. This is because any potential remedies available under the DMCCA, whether through enforcement of CRs or PCIs, may only be feasible after Apple and Google have been designated as having SMS. In practice, the CMA may also spend a considerable amount of time following the SMS designations consulting on the relevant CRs prior to them being imposed. There may then be an implementation period for designated undertakings to adapt their conduct in order to comply with the CRs and further delays before the CRs can be enforced, given that the CMA must first identify breaches of the CRs and then engage in conduct investigations where it suspects there are breaches, which can take up to six months.[12]

Should the CMA choose to go down the PCI route to impose a remedies package in mobile browsers, this will also only be possible after a significant delay, since an enforcement order (a pro-competition order under s. 51 DMCCA ("**PCO**")) can only be made following a PCI investigation which Mozilla understands can only be made after the SMS designation process has completed. The PCI investigation itself can take up to nine months, with the CMA having the power to extend the investigation for a further three months where it has special reasons to do so. Where the CMA decided to make a PCI, it has another four months (extendable by up to two months) to make a PCI.[13]

Against this background, it is possible that, if the CMA seeks to rely solely on its powers under the DMCCA to implement remedies in respect of mobile browsers, it may be several years before it is feasible that any remedies can be implemented. This would lead to a harmful and avoidable delay.

Such a delay can be compared to pursuing remedies under the EA02, where remedies must be in place within six months of the CMA's final market investigation report (s.138(A)(1) EA). While the CMA can extend this period by up to a further four months, in the worst case scenario, the remedy order would be in place by January 2026 at the latest.[14]

Further delay may accentuate harms to competition in mobile browsers and a further delay is unjustified given the CMA's findings on harm to UK consumers

The Furman Report[15] observes that due to network effects, among other factors, digital markets can be particularly prone to a tipping situation where the 'winner-takes-most'. As the CMA's final

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[12] s.30(2) DMCCA.
[13] ss.50(4) and (5) DMCCA.
[14] Mozilla appreciates that the CMA also has the power to 'stop the clock' under s.138A(3) to (5) EA02. However, the same is true under the DMCCA framework.
[15] See pages 4 and 35: [Report from the Digital Competition Expert Panel]

report following the Mobile Ecosystems Market Study illustrated[16] a 'winner-takes-most' environment certainly exists in mobile browsers where Apple's and Google's control over their respective mobile operating systems is part of the reason for Safari's and Chrome's positions on iOS and Android respectively. As the Furman Report argues, a 'winner-takes-most' environment can discourage market entry thereafter. Mozilla submits that as well as deterring market entry, a 'winner-takes-most' environment means that those competitors who do remain in the relevant markets can find it increasingly difficult to attract users, investment and ultimately to pose a competitive threat to Apple and Google. Mozilla submits that intervention in the supply of mobile browsers is required as soon as possible, since the sooner the harms are addressed, the sooner competitors will be able to accrue users and scale, thereby attracting greater investment and/or generating greater revenues, and the greater the chance they will be able to mount a competitive challenge to Apple and Google in the long run.

The Furman Report's observation about a winner-takes-most environment deterring entry has been borne out in mobile browsers. The CMA received submissions as part of the mobile ecosystems market study from browser vendors that, because of Apple's insistence upon the use of WebKit as the browser engine on iOS it is not possible to offer as attractive or differentiated features to users of browsers on iOS. Indeed, two browser vendors submitted they do not even offer a mobile browser on iOS due to the lack of differentiation, and the extra costs involved.[17] Mozilla itself delayed its entrance into iOS by around seven years because of the requirement to use WebKit.

A more competitive mobile browser environment is one which growth and innovation can more easily thrive. If the remedies succeed in lowering barriers to entry and expansion, this will in turn facilitate greater choice and innovation from competitors. Moreover, increasing the potential revenue pool available to Apple and Google's competitors in the UK could result in more investment into the UK market by those 'challenger' providers. It could potentially also have the same impact on Apple, who will be forced to compete with other browsers on the merits of their products. The potential of more equally dispersed revenues in the UK would mean browser and browser engine providers would have a greater incentive to innovate and to differentiate their product, with such innovation more likely to take place within the UK than would otherwise be the case. As the CMA itself has noted: "*Weak competition in mobile ecosystems is acting as a brake on innovation across the sector, reducing incentives for Apple, Google, and potential competitors to invest*."[18]

Harm is of course, not limited to harm to Apple and Google's competitors, or to a 'brake' on potential growth and innovation; a delay in implementing the remedies will also result in harm to iOS and Android users i.e. the vast majority of the UK population.

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[16] See, for example, Table 5.2, Paragraph 5.30 of [Mobile ecosystems - Market study final report - GOV.UK](https://www.gov.uk).
[17] *Ibid,* Paragraphs 5.47 to 5.49.
[18] *Ibid,* Page 255

In the case of iOS users, paragraph 5.50 of the CMA's final report notes that: "*A large number of stakeholders made submissions that WebKit lags behind other browser engines in terms of the developer features it supports and its user-facing performance and capabilities*." This illustrates that iOS users continue to miss out on features which may have been offered in the scenario where WebKit was facing competition from other browser engines.

Developers have also questioned Apple's incentive to invest in WebKit and Safari, with one developer noting that the "*lack of engine diversity means Safari does not have to prioritise fixing bugs and addressing issues developers have*" another noting that Apple '*has been able to slow the development for so long without real competition pushing them to evolve the engine like the others"* and another stating that Apple has underinvested in the web[19]. This is consistent with the CMA's own analysis of the relative investments made in Blink and WebKit respectively.[20]

Such issues will not be adequately addressed until remedies granting rival browser engines equivalent access to iOS and APIs used by WebKit and Safari (see some of the Option A remedies proposed in Working Paper 7), addressing issues with in-app browsing and webview (some of the proposed Option B remedies) and related to choice architecture (some of the proposed Option C remedies) have been implemented and Apple faces effective competition. Mozilla submits that UK iOS users should not have to miss out on the benefits of browser competition for any longer than is strictly necessary.

Even putting to one side the relative lack of functionality of, and investment into WebKit, the fact other browser engines are not supported on iOS causes harm to users by depriving them of the ability to choose a browser that they consider offers them the best experience overall. As the CMA noted at paragraph 5.72 of its mobile ecosystems market report: "*Users should be able to choose a browser which they consider offers the best combination of privacy and performance, as they can on Android*." Delaying giving consumers such a choice through delaying the remedies package for several years would allow this consumer harm to go unaddressed for longer than is strictly necessary.

While Android does permit the use of other browser engines and offers greater interoperability than iOS, the CMA also provisionally found that the pre-installation and choice architecture practices on both iOS and Android pushes users towards using Safari and Chrome respectively, and above other browsers.

There is no need to further delay potential remedies which restrict users from exercising effective choice, such as some of those outlined in relation to choice architecture in Working Paper 7. This includes remedies relating to choice architecture in factory settings, and also remedies in relation to certain choice architecture practices from Apple and Google after device set-up. The CMA could also require browser choice screens under its EA02 powers.

[19] *Ibid,* Paragraph 5.50.
[20] Paragraphs 36 to 40, [Appendix F: browser engines - GOV.UK]

Best use of public resources

The CMA has already completed a market study on mobile ecosystems, where it received detailed submissions and was able to reach conclusions on mobile browsers. The CMA's market investigation into mobile browsers is also sufficiently advanced for the CMA to have the information it needs in order to implement remedies. Significant time and resource (both from the CMA and from stakeholders who have contributed to these processes) has already been expended, and it would, Mozilla submits, not be a sensible use of public resources to delay remedies further, particularly if that would mean more information gathering and consultation would be required at a later date (as seems likely).

Indeed, the sheer speed at which digital markets develop is an important reason for remedying AECs as close to the findings as possible. Presently, this will require the CMA to use its powers under the EA02 through the market investigation regime. Taking such action would also be in line with the CMA's new duty of expedition (applying to all its functions) under s.327 of the DMCCA.

Transition from EA02 monitoring of remedies to monitoring of remedies using DMCCA

It is possible that one of the factors that the CMA is weighing up is the added cost (in terms of resource) which might be taken up by ongoing monitoring of EA02 remedies alongside any future DMCCA enforcement, and the potential for there to be 'divergence' in approach to remedies. Mozilla submits that any such concerns can be addressed by transitioning the monitoring of the remedies under the EA02 framework to, where appropriate, putting in place conduct requirements under the DMCCA framework, which cover the same ground and seek to achieve the same objectives as the EA02 remedies order.

There is precedent for the CMA varying elements of a remedies package in previous market investigations due to changes in circumstances meaning that compliance with a particular remedy could more efficiently be monitored under a separate regulatory framework. For example, in *Retail Banking* the CMA decided to remove Part 6 of the Retail Banking Market Investigation Order 2017, on the basis that new FCA rules were coming into force to deal with the particular issue covered by Part 6 (overdraft alerts).[21]

The CMA could adopt a similar approach here; it could put the relevant remedies in place in its market investigation order, and keep under review whether there is a need to vary the order at a later stage, if circumstances changed and the CMA concludes that the objectives of a particular remedy would be more efficiently achieved using the DMCCA framework (for example through putting in place conduct requirements which reflect and embody the purpose of certain remedies under the remedies order). There is a statutory basis for such a review and indeed such a review is inbuilt into the market investigations framework: under s.162 EA02 the CMA has a statutory duty to keep its enforcement orders under review.

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[21] Review of Part 6 of the Retail Banking Market Investigation Order 2017

Mozilla also notes that under the EA02, parties may be required to appoint and remunerate an independent third party to monitor and/or implement remedies and deal with disputes[22]. The cost of the monitoring of any remedies under the EA02, until monitoring under the DMCCA regime can come into effect, would therefore primarily be borne by Apple and Google (albeit the CMA will still need to be engaged with the process and it will be in its interests to be engaged).

At paragraphs 11.52 to 11.65 of the PDR, the CMA raises important points as to why the DMCCA regime is well-suited to dealing with competition issues in mobile browsers. This includes, among other reasons, the ability to impose requirements on multiple digital activities within an ecosystem, the flexibility of the regime for future variation and iteration, the powers under the DMCCA to test and trial potential interventions and the fact that an ongoing monitoring framework which will be in place under the DMCCA regime. While entirely valid, these are not necessarily arguments against putting in place EA02 remedies now; they are really arguments in favour of the CMA using the DMCCA powers to regulate the relevant mobile browsers markets in due course (something Mozilla strongly supports). The two approaches are not mutually exclusive. The best course of action is to pursue both and transition from monitoring remedies put in place under the EA02 to putting in place (where appropriate) equivalent conduct requirements under the DMCCA.

Specific risks of using the EA02 powers identified by the CMA in the PDR

Many of the risks identified by the CMA in the PDR would be manageable within the scope of a process where EA02 remedies were put in place in the first instance, with appropriate CRs and/or PCIs to follow under the DMCCA in due course. Taking several key examples:

- Throughout the PDR, the CMA identifies the possibility of putting in place ''high level or static" requirements as a risk of implementing remedies under the EA02[23]. As part of the process of designing its EA02 remedies package, the CMA, in consultation with key stakeholders, could put in place appropriately worded requirements which avoid the issue of being too high level, while still being drafted at the appropriate level of detail so as not to be too prescriptive. The drafting of these requirements could be finessed over six months from March 2025, in consultation with stakeholders.

- In relation to the danger posed by the requirements being 'static', they need only be static for so long as it takes for an equivalent CR to be put in place under the DMCCA. Indeed, to the extent that in practice, there turn out to be issues with the nature of the drafting of the requirements under an EA02 remedy, such issues could be used to inform the drafting of the CRs, and could be addressed in those CRs. If the CMA chooses not to put in place these remedies under the EA02, the CMA risks passing up an opportunity to test and trial the drafting of the relevant requirements.

[22] See paragraph 4.11 [Market Studies and Market Investigations: Supplemental guidance on the CMA's approach]
[23] See for example, paragraphs 11.128, 11.160 and 11.203, CMA Provisional Decision Report

- A similar counter-argument can be made in relation to the circumvention, monitoring and enforcement risks that the CMA identifies in relation to particular remedies[24]. While it is true that ongoing monitoring of the remedies would be required, this is possible under the EA02 where a monitoring trustee has been appointed. It may well be the case that the CMA is ultimately best placed to carry out this monitoring (and ultimately it will be the CMA that carries out enforcement), however, a monitoring trustee could be a good interim solution in the period before equivalent conduct requirements (as appropriate) have been put in place in due course under the DMCCA. Once again, experiences of how particular requirements have been complied with by Apple and Google under the EA02 remedies package is likely to be informative for the CMA and lead to better decision-making when the CMA is scoping out conduct requirements and using its enforcement powers under the DMCCA.

In relation to potential remedies 5 and 6, in relation to choice architecture on iOS and Android, the CMA identifies the need to trial and test user interaction remedies with users in advance. Mozilla submits that there is already valuable experience (and data on user interactions) which Apple, Google and other stakeholders have gained from the implementation of similar choice architecture remedies under the EU Digital Markets Act. This could be used to inform the design of choice architecture remedies which could be put in place under the EA02. It would also not negate the possibility of requiring trialling and testing (a point with which Mozilla strongly agrees) as part of the remedy. At the point at which equivalent conduct requirements are put in place under the DMCCA, the choice architecture remedies could then be refined to the extent necessary.

In the alternative, work on conduct requirements should run concurrently with work on SMS designations for each of Apple and Google

As explained above, in Mozilla's view there is a strong case for the CMA putting in place remedies using its powers to do so under the EA02.

However, if the CMA decides not to do this, and instead recommends to the CMA Board that they use DMCCA powers to put in place appropriate remedies/interventions, it is imperative that the process of designing conduct requirements for Apple and Google begins at the same time as the relevant SMS investigations. This is to reduce insofar as possible the 'enforcement gap' referred to above and put in place remedies as soon as feasible under the DMCCA. It will also free up DMU time and resources for other important designations, such as desktop operating systems.

The possibility of work on defining any conduct requirements running in parallel with an SMS investigation is envisaged at paragraph 3.34 of the CMA's draft Digital Markets Competition Regime Guidance[25]: "*The development of CRs, including information gathering and consulting, can run in parallel with and/or follow an SMS investigation or a PCI investigation*." Mozilla

[24] *Ibid,* paragraphs 11.128, 11.60 and 11.203.
[25] [Digital markets competition regime guidance - GOV.UK]

suggests that the process of consulting on CRs should begin on 'Day 1' of the relevant SMS investigations (not least because of the extensive information gathering and consultation process which has already taken place under the current market investigation and the mobile ecosystems market study). This would put the CMA in the best possible position to prevent any further unnecessary delay, and allow the implementation periods for conduct requirements (to the extent required) to begin at the earliest possible opportunity.

At paragraph 11.73 of the PDR, the CMA itself notes that "*we provisionally consider that there is a high likelihood that our recommendation to the CMA Board will be acted upon in a timely manner*." Mozilla's hope and expectation is that the implication of this is that the relevant conduct requirements will be in place by as soon as possible, since this is the moment at which the regime will begin to actually have an impact on competition in mobile browsers.

Conclusion

There is likely to be a significant delay in stopping and reversing the harms identified by the CMA through its mobile ecosystems market study and mobile browsers market investigation if the CMA waits to use its powers under the DMCCA to design and impose remedies.

Such a delay is unjustified in light of the significant harms to competition and to UK consumers that have been identified in this submission, and in light of the resources that have been expended to date on the market study and market investigation. As has been outlined above, the relevant markets are fast-moving digital markets where any delay could be particularly harmful. It is therefore imperative that the CMA acts quickly to address issues in the relevant markets and avoids further delay, in line with its new duty of expedition under s.327 of the DMCCA.

The CMA already has the tools it needs to address these harms under the EA02. However, ultimately, this is not a binary choice for the CMA between remedies under the EA02 or remedies under the DMCCA. The CMA could impose a remedies package using its EA02 market investigation powers to do so, while giving itself scope to review in the future some of these remedies should be reflected and embodied in the digital markets framework introduced by the DMCCA, through the incoming conduct requirements.

Mozilla remains available to discuss the issues set out in this submission, or in relation to the Mobile Browser Market Investigation more generally at the CMA's convenience.

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