

OEM RESPONSE TO PROVISIONAL DECISION ON REMEDIES IN THE SUPPLY OF MOBILE BROWSERS

- (1) OEM appreciates the further opportunity to comment on the CMA's provisional decisions ahead of its issuing of its Final Report. We remain on hand to assist the CMA further – not only in preparation of the Final Report, but also going forward as the CMA seeks to implement the Final Report's remedy(/ies).

- (2) OEM does not seek to comment on the CMA's provisional adverse effects on competition (AECs) findings. OEM welcomes the CMA's acknowledgment of some of the challenges and risks associated with imposing choice architecture remedies (particularly without adequate testing/trialing and ongoing monitoring). It nevertheless wishes to register some ongoing concerns regarding the following:
 - a. The potential scope of Potential Remedies 6(a)-(c):
 - i. which the CMA seems to advocate should be explored further under the Digital Markets, Competition and Consumers Act 2024 (DMCCA, once in force 1 January 2025) (subject to CMA Board discretion);
 - ii. suggests that a browser choice screen should appear (upon device set-up and thereafter for existing users) regardless of whether or not Google Chrome is set-up as the default – despite Chrome's market position and Google's control of choice architecture being the focus of the CMA's concerns in this respect in its finding on AECs; and
 - iii. could result in an ineffective, disproportionate and discriminatory remedy, which in fact further entrenches Chrome's market position, further curtails OEMs' limited control over device choice control architecture and creates needless compliance complexity, creating a divergent choice screen remedy from that adopted in the European Union (despite regulatory alignment being one of the CMA's considerations).
 - b. The CMA's provisional finding regarding OEM's incentive to compete with other mobile browsers via OEM's Browser.

A: The CMA's provisional decision to further investigate its choice architecture concerns using its more flexible DMCCA powers

- (3) In so far as the CMA has provisionally found that there are AECs for, inter alia, the supply of mobile browsers on Android, at least as a matter of principle, OEM agrees with the CMA's provisional remedies decision that these AECs (and any corresponding consumer detriment) will likely be most proportionately and effectively explored and, if necessary, addressed via the CMA's use of its new powers of investigation and intervention under the DMCCA. In this regard, OEM shares the CMA's concerns¹ that:
- a. the effectiveness of the choice architecture remedies previously considered by the CMA in 'Working Paper 7: Potential remedies dated 8 August 2024' (WP7), and again in its PDR, rely on accurately predicting when and how users will react to revised browser choices and related prompts; and
 - b. absent the CMA engaging in a careful, "iterative process" to test, trial and amend these remedies in light of consumer behaviour, market changes and Apple's/Google's own compliance efforts, there is a "significant risk" that such remedies – if imposed as a 'one-off' intervention following the Final Report, will:
 - i. not "be effective in achieving their intended aims" – namely addressing those mobile AECs focused on, e.g., Google's control of choice architecture and the entrenched market position of Chrome on Android devices; but
 - ii. instead, have unintended consequences which harm competition from those browser vendors (including OEM) which are not the focus of the CMA's concerns (and whose digital activities clearly do not benefit from 'strategic market status' (SMS) and multi-faceted control over a mobile ecosystem) – as previously explored in OEM's own response to WP7 and acknowledged in the PDR.

B: The PDR's suggestion that the choice architecture remedies already considered could be pursued under the DMCCA

- (4) OEM does however note that:

¹ Para. 11.316-320, PDR. See also paras. 11.39-11.42.

- a. as part of its provisional remedies decision, the CMA suggest that it may specifically recommend to the Board that, were the CMA ultimately to conclude that Apple and Google have SMS under the DMCCA, the CMA should consider "imposing appropriate interventions, *such as those...considered in this report*" (emphasis added) – including those addressing choice architecture²;
- b. despite not ultimately concluding to pursue these potential remedies (in part, due to the concerns touched-on above), in the PDR, the CMA:
 - i. goes into some detail as regards how those potential remedies could, "in principle [be] capable of addressing" the AECs and corresponding consumer detriment identified by the CMA,³ and
 - ii. expressly acknowledges that the CMA has previously stated that it will "build on and leverage its experience in areas it has already studied, such as mobile ecosystems."⁴

C: Potential Remedies 6(a)-(c) – OEM's ongoing concerns

- (5) Further to the above, OEM wishes to register its continued concerns with Potential Remedies 6(a)-(c) – particularly in so far as these remedies envisage presenting an end-user with a browser choice screen upon device set-up (for new users) or device update (for existing users) and reflect that choice in the 'dock'/'hot seat', regardless of whether Chrome is set as the default browser:

Potential remedy 6(a): A requirement for Google to ensure the use of browser choice screens at device set-up.

Potential remedy 6(b): A requirement for Google to ensure the placement of a default browser selected by the user in the 'dock'/'hot seat' or on the default home screen at device set-up.

² Para. 11.3 (a) (ii).

³ Para. 11.3 (b).

⁴ Para.11.68-11.71. It is notable that, in its PDR, the CMA: (a) recognizes that, under the DMCCA, it is ultimately the CMA Board's responsibility to decide whether to: (i) investigate and designate a digital activity as an SMS, (ii) impose any Conduct Requirements (CRs); or (iii) engage in procompetitive interventions (PCIs); and (b) in so far as it suggests that the Market Investigation may provide "good evidence" for subsequent DMCCA proceedings, the CMA refers to its findings regarding Apple's and Google's strategically significant market positions.

Potential remedy 6(c): A requirement for Google to ensure the use of a browser choice screen after device set-up.

- (6) As first identified in OEM's response to WP7, we continue to consider these three interrelated potential remedies will have the greatest effect on the take-up of alternative browsers, and the most serious unintended consequences - regardless of whether these are pursued under the CMA's market investigation (under the Enterprise Act 2002) or DMCCA powers. Any CMA intervention which mandates that such a choice screen remedy is uniformly applied to all Android devices (and OEMs), regardless of whether the device's default settings serve to support Chrome's preexisting strong market position, risk imposing a remedy which is both: (a) disproportionate; and (b) ineffective.

An indiscriminately applied choice screen remedy risks being disproportionate and discriminatory

- (7) First, in the PDR, the CMA suggests that Potential Remedies 6(a)-(c) are aimed at addressing AEC4 (supply of mobile browsers on Android) by which competition for such browsers may be prevented, restricted or distorted by, inter alia, Chrome's preeminent position as "the main browser" on Android⁵, Google's control over browser choice architecture⁶ and how this may reinforce or "pre-determine" the browser end-users engage with ("being largely influenced by the operation systems itself", i.e. Google Android).⁷
- (8) Yet, as currently described by the CMA at least, Potential Remedies 6(a)-(c) seem to go significantly beyond addressing these concerns regarding Google's control of browser choice architecture, but instead also:
- a. apply to those aspects of browser choice architecture which Android OEMs retain some control over (see below), regardless of whether the OEM in question has a commercial arrangement with Google by which to set Chrome as the default and/or appear in the 'dock'/hot seat;
 - b. prevent an Android OEM from entering into an agreement with a third-party browser vendor by which to boost the prominence and promote end-user engagement with a

⁵ Para. 10.11(a) PDR.

⁶ Paras. 10.11(d) and 11.273 PDR.

⁷ While end-users' low awareness and engagement of browsers are also acknowledged as a concern by the CMA, it is noted that this feature of the market "may to some extent be [a] intrinsic market feature...present to some degree even in a well-functioning market", whereas Google's specific controls over browser choice architecture relate to its conduct, which has a more direct impact on "reducing competition pressure on Chrome". (See paras. 10.11(c) and 10.12-14, PDR.).

challenger browser by making it the default- which could further serve the purpose of leveling the playing field and ensure better competition with Chrome; and

- c. therefore, impinge the Android OEM's commercial decision-making and arrangements, despite the fact that the Android OEM may ultimately use device set-up and related choice architecture not to enhance Chrome's market position, but rather boost the prominence of its own or another challenger browser.

(9) Unless adequately scoped in the Final Report or via a subsequent DMCCA investigation (see OEM's recommendation in this regard below), Potential Remedies 6(a)-(c) therefore risk: curtailing the decision-making of Android OEMs regarding device set-up regardless of whether this addresses, and is therefore proportionate to, the CMA's concern about Google's control over browser choice architecture on Android; and removing the ability of challenger browsers to gain market share via OEM deals relevant to default-setting regardless of the fact that such browsers are not in the same market position as Chrome and do not have the same ability to influence choice architecture (via Android) (with the result that the CMA will be treating differently situated undertakings the same).

(10) Secondly, as noted above, the CMA has suggested that the CMA Board could consider interventions under the DMCCA to pursue Potential Remedies 6(a)-(c). The CMA's current draft DMCCA Guidance⁸ also suggests that Potential Remedies 6(a)-(c) may be disproportionate to, e.g., the primary aims of what Conduct Requirements (CRs) imposed on SMS firms (including possibly Google) are designed to achieve. For example, the DMCCA Guidance suggests that a CR:

- a. can aim to promote "open choices", but must do so proportionately 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" - as opposed to being applied to all end-user settings and choices provided via an Android device, even if they do not necessarily advantage the potential SMS firm (in this case, potentially Google)⁹;
- b. must be "no more onerous than it needs to be" and "the least onerous CR(s), where the CMA has identified multiple equally effective options that would achieve the intended aim"

⁸ Draft Guidance on the digital markets competition regime set out in the Digital Markets, Competition and Consumers Act 2024, 24 May 2024 (**DMCCA Guidance**).

⁹ DMCCA Guidance, para. 3.17(a).

- in which regard, please see further below regarding choice screen remedies imposed under the EU Digital Markets Act)¹⁰; and

- c. should include an assessment of the effects on third parties likely to be affected by the CR(s) – as noted above these remedies would impinge on the commercial decision-making of Android OEMs, regardless of whether their commercial arrangements benefit Chrome.¹¹

(11) As the CMA will be aware, similar proportionality requirements to any pro-competition order (PCO) imposed by the CMA further to a pro-competition intervention (PCI) under the DMCCA.¹² Albeit, as acknowledged in the PDR, current draft DMCCA Guidance acknowledges the particular flexibility to test and trail PCOs prior to imposing them.¹³

(12) Thirdly, Potential Remedies 6(a)-(c) could be regarded as disproportionate in so far as they do not achieve "regulatory alignment" referred to by the CMA in the PDR when commenting on the feasibility of delivering these remedies and referring to choice screen remedies already implemented by both Apple and Google in the European Union via commercial arrangements with OEMs.¹⁴

(13) The CMA is correct to observe that:

- a. Google has developed "capabilities, infrastructure" by which to deliver a form of choice screen remedy in so far as this has been necessary pursuant to competition law enforcement by the European Commission, as well as for Google to comply with the EU Digital Markets Act as a designated 'gatekeeper' in respect of browsers – with such choice screen remedy being designed to create a more open and level playing field by which third-party browsers can more readily compete; and
- b. such compliance efforts by Google (as the investigated and regulated entity) have indirectly required Android OEMs to cooperate with Google's compliance efforts, with such choice screens impacting those Android OEM's own device set-up choices.

(14) But, contrary to what is suggested in the PDR, Google's prior European compliance efforts to institute choice screens do not necessarily provide "a clear pathway to implementation"

¹⁰ DMCCA Guidance, para. 3.30(c).

¹¹ DMCCA Guidance, para. 3.31(c).

¹² See DMCCA Guidance paras. 4.34 onwards.

¹³ Para. 11.61, PDR. See DMCCA Guidance, paras. 4.33 and 4.65 – 4.69.

¹⁴ Para. 11.284(2) PDR.

which achieves "regulatory alignment" between Potential Remedies 6(a)-(c) and those choice architecture remedies pursued by the European Commission. Rather, Potential Remedies 6(a)-(c) risk going further than those choice screen remedies already instituted by Google in the European Union, in so far as: Google's DMA compliance efforts implement a browser choice screen solely on devices that set Google Chrome as the default;¹⁵ whereas the choice screen remedy currently considered further to Potential Remedies 6(a)-(c) could apply indiscriminately to all Android OEM devices, regardless of whether Google Chrome is set as the default.

(15) This risks creating:

- a. unnecessary regulatory misalignment between the EU and the UK, in respect of a perceived, common issue regarding Google's control over mobile browser choice architecture via its Android ecosystem and the strategic (or 'gatekeeper') market status of its mobile browser, Chrome; and
- b. a disproportionate burden on both Google and Android OEMs to establish and comply with two separate technical methods of compliance, in circumstances where: (a) Potential Remedies 6(a)-(c) arguably go beyond what is necessary to address Google's use of default setting to advantage its own market-leading browser; and (b) as explored both in the PDR and Google's published DMA compliance report, these choice screen remedies require Android OEMs' ready cooperation to adopt Google's choice architecture standards; and
- c. as noted in OEM's response to WP7, potential confusion to the detriment of the consumer, Android OEMs and their distributors, particularly as some devices are shipped by OEMs for delivery in the UK and EU as a single stock keeping unit.

An indiscriminately applied choice screen remedy risks being ineffective, entrenching Chrome's leading market position

(16) First, as previously noted in its response to WP7, OEM is:

- a. aware that even though OEM'S BROWSER is installed and is technically the default browser, many end-users 'multi-home' across OEM'S BROWSER and Chrome. In fact, many users use Chrome for most of their browsing;

¹⁵ Alphabet (Google), EU Digital Markets Act (EU DMA) Compliance Report Non-Confidential Summary (2024), page 110, para. 3(b) and page 114, para. 29(b).

- b. concerned that by presenting a browser choice (e.g., at device set-up as per Potential Remedy 6(a)), even where Chrome is not set as the default, this will in fact cause a significant proportion of those multi-homing users/OEM'S BROWSER users to select Chrome as their default browser as it is the brand most familiar to them; and
- c. placing Chrome in the 'dock'/'hot seat', as per Potential Remedy 6(b), is likely to then further promote Chrome usage in circumstances where Chrome does not currently appear there on OEM devices - resulting in Chrome's position being further strengthened and OEM'S BROWSER's market share as a challenger browser being reduced further.

(17) Indeed, OEM's concerns regarding the effectiveness of such an indiscriminately applied choice screen are acknowledged by the CMA in its PDR, which records that:

- a. Chrome remains the "main browser" on OEM devices with end-user multi-homing and spending the majority of their browsing time on Chrome, despite OEM'S BROWSER being set as the default;¹⁶
- b. while there is end-user switching from OEM'S Browser to Chrome, the vast majority of this takes place only one way from OEM'S Browser to Chrome (further enhancing Chrome's market position);¹⁷ and
- c. a key motivation for end-user switching and choosing Chrome is its familiarity, suggesting that if end-users are presented with a choice to move away from their default challenger browser they may do so in favour of the recognizable Chrome brand.¹⁸

(18) Secondly, despite statements in the PDR noting that Google has already implemented infrastructure changes relevant to providing revised / additional choice screens further to, e.g., its DMA compliance efforts, it remains the case that these choice screen remedies cannot be readily and uniformly implemented across all Android devices. Google has no authority to install multiple browser apps, implement the browser choice screen or adjust the default home screen on non-Pixel Android devices, unless the Android OEM agrees to do so. That is why Google has specific, individually negotiated license and placement agreements in place with Android OEMs for Chrome and other Google applications. As a minimum, these remedies will require all Android OEMs to not only adopt:

¹⁶ Paras. 8.197, 8.206 and 8.226 PDR.

¹⁷ Para. 8.197 PDR.

¹⁸ Para. 8.202 PDR.

- a. Google's technical changes of its Mobile Services package of apps and services (relevant to device set-up for new Android device users); but also
 - b. OS-level updates necessary to display choice screens to existing Android device users – something which may cause delay to the full implementation of any Potential Remedy 6(c).¹⁹
- (19) Rather than having "a clear pathway to implementation"²⁰, Potential Remedies 6(a) to 6(c) therefore cannot be fully achieved without the consent of all Android OEMs (which is not guaranteed to be given)²¹, they cannot necessarily be implemented by Google alone on a consistent basis, and therefore cannot be readily assumed to be effective or readily enforceable remedies based on prior experience under the DMA.²²

How to ensure Potential Remedies 6(a)-(c) remain proportionately and effective, if considered further by CMA

- (20) OEM submits that – in its final consideration of potential remedies in its Final Report and, in turn, any subsequent DMCCA proceedings (further to its ultimate provisional remedy decision to make a recommendation to the CMA Board) – the CMA should:
- a. instead adopt a more targeted and balanced choice screen remedy along the lines of that already placed on Google under the DMA.
 - b. ensure that any such choice screen remedies are carefully trialed,²³ and subject to ongoing monitoring²⁴ – as already acknowledged by the CMA and discussed further above.
- (21) This would help alleviate significant risk of unintended consequences already acknowledged by the CMA and achieve regulatory alignment (thereby reducing regulatory burden on Android OEMs which are not the subject of the DMCCA), but nevertheless still address the CMA's core concerns regarding Google's potential control

¹⁹ As acknowledged by the CMA in paras. 11.300 and 11.306 PDR.

²⁰ Which is mentioned by the CMA as a key remedy consideration in para. 11.284(2) of the PDR.

²¹ As acknowledged by the CMA in WP7 – Potential Remedies, para. 7.23.

²² As the CMA will be aware, effectiveness is a key criterion in the design and implementation of CRs and PCOs imposed under the DMCCA.

²³ Paras. 11.316-11.317, PDR.

²⁴ Para. 11.319, PDR.

over and use of Android and device choice architecture to entrench Chrome's existing preeminent market position.

D: Pre-installation of mobile browsers

- (22) As a preliminary point, OEM welcomes the CMA's decision in its PDR not to further consider any potential remedy which would require a device to carry multiple browsers pre-installed. For the avoidance of doubt, OEM remains of the view that such a remedy would represent a disproportionate means by which to address any of the CMA's concerns regarding Google's control over browser choice architecture, which could result in consumer detriment for the following reasons:
- a. Consumers prefer to control their phone appearance and layout and curate the apps they need. Further, they value a user interface which is easy to understand and intuitive to use. OEMs seek to minimise the number of non-essential pre-installed apps for this reason. OEM itself has developed its approach to the user 'out-of-box experience' (OOBE) over time and seeks to streamline it as much as possible, limiting the presence of non-essential preloaded apps.
 - b. The installation of additional browsers would take up phone memory, contribute to a sense of being overwhelmed and/or 'app bloat'²⁵, and prevent users from only having the apps they need.
 - c. Pre-installing additional browser apps, which duplicate the functions of OEM'S Browser, and which are not familiar to the majority of end-users, may cause confusion and harm the overall user experience, without necessarily increasing usage of the browser apps in question.

E: OEM's incentives to compete with other mobile browsers

(23-25) [Confidential ancillary remarks not directly relating to any of the proposed remedies].

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²⁵ The end-user perception (also referred to as 'bloatware') that the device is overloaded with too many software applications and features, some of which are unnecessary, such that: (a) the relevant device/applications run more slowly; and/or (b) the end-user is unable to quickly and productively use the device as he/she cannot readily navigate between the relevant applications/features on offer.