

[Redacted] Response to the CMA’s Invitation to Comment on Strategic Market Status Investigation into mobile ecosystems (the “ITC”)

[Redacted] welcomes the CMA’s SMS Investigation into Apple and Google’s mobile ecosystems (the “SMS Investigation”) and hereby provides its initial views on the SMS Investigation.

[Redacted] requests that its identity and any identifying information contained herein be treated as strictly confidential, as disclosure would likely severely harm [Redacted] legitimate business interests and may [Redacted] Apple or Google.

The CMA will be familiar with [Redacted] business from, among other matters, [Redacted]

Q1: Do you have any views on the scope of our investigations and descriptions of Apple’s and Google’s mobile ecosystem digital activities?

[Redacted] endorses the scope of the SMS Investigation and the proposed SMS designations of Apple and Google.

Q2: Do you have any submissions or evidence related to the avenues of investigation set out in paragraph 70-72? Are there other issues we should take into account, and if so why?

Please see [Redacted].

Q4: Which potential interventions should the CMA focus on in mobile ecosystems? Please identify any concerns relating to Apple’s or Google’s mobile ecosystems, together with evidence of the scale and/or likelihood of the harms to your business; or to consumers.

CMA should focus on dominance in the provision of native app distribution and, in particular, on 85(c) exploitative practices.

Q5: Are the potential interventions set out above likely to be effective, proportionate and/or have benefits for businesses and consumers?

See below for the response to this question.

Q6: What key lessons should the CMA draw from interventions being considered, imposed and/or implemented in relation to mobile ecosystems in other jurisdictions?

[Redacted] is of the view that app store fees are excessive and unfairly undermine its ability to compete by unreasonably raising its costs.

App store fees are significantly and persistently above the competitive level and have no reasonable relation to the economic value of the services supplied.

[Redacted] refers the CMA to [Redacted] for further information and supporting evidence.

Apple and Google do not incur the excessive commissions imposed on [Redacted] and on other app developers. As a result, [Redacted] is impeded from effectively competing with [Redacted] as the fees significantly increase [Redacted] costs.

Whilst alternative app stores and/or side-loading may be levers to introduce increased competition in native app distribution and to lower excessive fees in the long term, leaving the problem of unreasonable app store fee levels to be corrected only via interventions intended to spur new entrants is insufficient. Given the network effects that characterize the app stores, incumbent advantages and other barriers to entry, it is unlikely that excessive commissions will be reduced sufficiently and within a reasonable time by such measures alone.

We therefore believe the CMA should also consider alternative means to tackle unreasonable commissions and to prevent them simply migrating outside of app stores to be applied at OS or other levels, including for example via the imposition of FRAND requirements that are strictly applied and enforced to prevent circumvention.

Risk of circumvention

We encourage the CMA to examine closely the European Commission’s non-compliance investigation under the Digital Markets Act into Apple, in particular as regards Apple's new fee structure and other terms and conditions for alternative app stores and distribution of apps.¹

Ostensibly in order to comply with the requirements of the Digital Markets Act, Apple is offering so-called Alternative Terms Addendum for Apps in the EU (the “**Alternative Terms**”).² It is important to emphasize that Apple did not change its existing terms, but offered alternative terms that developers distributing apps in the EU could opt into. [Redacted].

The Alternative Terms [Redacted]. They introduce the application of two new types of fees outside of the App Store. This damages developers like [Redacted] and our users in the ways set out below. It also impedes the creation of a competitive market in native app distribution by undermining the benefits of alternative app stores and sideloading.

Firstly, the Alternative Terms include, in addition to other fees, Apple’s Core Technology Fee (the “**CTF**”) under which developers of third-party app stores and third-party apps must pay a €0.50 fee per installed app. The CTF is particularly problematic for developers [Redacted]. This is because [Redacted] are critical [Redacted] in particular, [Redacted].

Moreover, rival app stores also need to pay for every install they achieve on iOS, as would the apps that are distributed on those app stores – creating a significant barrier to entry for rival app stores, which would in turn need to also charge their own app store fees.

Secondly, the Alternative Terms charge developers a commission for “**Linking Out**” or a “**Link Out**”³ – i.e. for “*communicating and promoting offers, in [the developer’s] Application that is distributed through*

¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3433

² See here: <https://developer.apple.com/support/apps-using-alternative-payment-providers-in-the-eu/>
<https://developer.apple.com/contact/request/download/external/Alternative-EU-Terms-Addendum.pdf>

³ <https://developer.apple.com/help/app-store-connect/distributing-apps-in-the-european-union/commissions-fees-and-taxes>

the App Store, to end users regarding digital goods or services that are available for purchase in a distribution channel of [the developer's] choice.”⁴

Apple is thereby in practice discouraging developers from Linking Out and inhibiting the use of alternative distribution channels. This is ostensibly in breach of the requirements of the Article 5(4) of the Digital Markets Act which requires gatekeepers to allow business users “free of charge” to communicate and promote offers to end users.

Risk of ineffective solutions

We welcome CMA’s decision not to accept Google’s proposed commitments in relation to Google Play Billing. As [Redacted] minor reductions in the percentages of fee levels will not drive a market in alternative payment processing or alternative app distribution or alleviate excessive fees on developers.

As it considers potential interventions [Redacted] urges the CMA to be vigilant against unintended consequences and leaving room for circumvention. [Redacted] hopes the CMA avoids the scenario in which any Codes of Conduct result in only marginal change, or outcomes that are as bad or worse than the status quo. This would entrench and legitimize anticompetitive conduct.

[Redacted] requests that the CMA ensure that app developers (and ultimately UK consumers) are truly able to benefit from any SMS Codes of Conduct and any pro-competitive interventions. The CMA may seek to do this by (among other things):

- (i) ensuring that the terms of any Codes of Conduct and of any pro-competitive interventions are unambiguous

This is critical in order for app developers to be able to make informed decisions, to take advantage of such interventions, and to ultimately pass such benefits on to UK consumers. It is also critical in ensuring compliance – app store/OS providers should not be allowed to avoid compliance through obfuscation.

- (ii) ensuring that there is a material reduction in the fees that app developers such as [Redacted] face when distributing native apps to iOS and Android users

As noted above, [Redacted] faces excessive fees that impede it from effectively competing with Apple and Google.

⁴ According to the Alternative Terms “*The distribution channel can be a website, Alternative App Marketplace (EU), or another app, whether operated by [the developer] or someone else, and it can be accessed outside [the developer's] Application, or appear within [the developer's] Application as a web view.*”