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CMA Mobile Ecosystems Market Study – Statement of Scope – Hausfeld & Co. LLP Response

Hausfeld & Co. LLP (“Hausfeld”) welcomes the opportunity to provide our views and comments on the CMA’s statement of scope for its proposed market study on mobile ecosystems (the “Market Study”).

About Hausfeld

Hausfeld is a leading disputes-only specialist law firm with offices in London, Amsterdam, Brussels, Paris, Berlin, Düsseldorf, Stockholm and throughout the US. We have pioneered competition damages actions in Europe since our launch in 2009 and managed some of the most high-profile and complex cases at the intersection of competition and technology. Our claimant-focused practice is currently involved in a number of landmark collective actions on behalf of consumers against Big Tech, both before the High Court in the context of breaches of data protection (*McCann v Google*, *Jukes v Facebook*) and before the Competition Appeal Tribunal in the context of breaches of competition law (*Which? v Qualcomm*, *Dr Kent v Apple*). In particular, the claims by Dr Kent concern Apple’s monopoly in its iOS mobile ecosystem and alleged abuses of that monopoly resulting in harm to consumers. As such, our practice, and our clients, are directly concerned with the issues raised in the Market Study.

Comments on the Market Study

The CMA has invited views and comments on five specific areas, which we address in turn below.

1. The CMA’s description of the sector, and whether this is broadly accurate

1.1. We consider the CMA’s description of the sector to be broadly accurate and have no further comments.

2. The proposed scope of the Market Study, including whether there are areas the CMA should focus on in particular, and whether there are important areas it has missed (for example, whether browsers on desktop should be included within its scope, alongside mobile browsers)

2.1. We consider that the proposed scope of the Market Study is sufficiently comprehensive, save that we would suggest a greater focus on Apple’s and Google’s data practices within their respective mobile ecosystems (as to which see point 3 below).

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3. The four themes identified, including views on the potential concerns that the CMA proposes to explore

- 3.1. We consider the four themes identified to be satisfactory in their scope. We would however propose the introduction of a fifth theme to the Market Study: Google's and Apple's preferential access to vast amounts of data within their respective mobile ecosystems, and its effect on competition, in particular as regards the distribution of mobile apps.¹ As the CMA has previously acknowledged, there are strong synergies between the interests of data protection and competition. In circumstances where competitors in a digital market have significantly differential access to data, competition on the merits is likely to be undermined. As a result, consumers will have less choice, and will ultimately lose out through higher prices, lower quality, and reduced innovation.²
- 3.2. In this regard, we welcome the CMA's preliminary observation at paragraph 150 of the statement of scope that "*weak competition in operating systems, browsers and app stores could lead to consumers sharing either more or less data than they would otherwise do, potentially leading to broader privacy concerns or impacts on their choice of apps.*" This is an issue that is being investigated by other regulators worldwide (in particular, the Australian Competition and Consumer Commission ("**ACCC**")) and, for the reasons set out below, we consider that it warrants further specific consideration by the CMA if the UK is to establish an effective pro-competition regulatory regime for digital gatekeepers.

(a) The effect of Apple's and Google's data practices on app developers

- 3.3. By virtue of their dominance in their respective app marketplaces, Apple and Google have multiple opportunities to gather information about apps, app developers and users. For example, as part of the app review process for apps wishing to be distributed via their marketplaces, developers are required to disclose several features of their apps, including a description, screenshots, listing details and price information.³ Further, Google and Apple require developers to use their proprietary billing systems within their respective app stores, which means they have preferential access to key commercial information such as app developer customer lists, purchasing activities, and the success of subscriptions and in-app products.⁴ Apple and Google may also collect more information about app usage through their proprietary apps; in Google's case, certain of its proprietary apps are pre-installed on many third-party devices, providing it with additional opportunities for app usage tracking⁵.
- 3.4. The net result is that Apple and Google are able to monitor the performance of all or the vast majority of apps in their respective ecosystems. In so doing they are likely able to gain valuable insights to assist the development of their own proprietary apps. This gives them a

¹ For clarity, we do not intend focus on, for example, the access to data that Google derives from its digital advertising business, or the use of such data outside of its ecosystem. This has been dealt with extensively by the CMA in the context of its Online Platforms and Digital Advertising market study, which we understand the CMA will refer to as part of the Market Study.

² Competition and data protection in digital markets: a joint statement between the CMA and the ICO, May 2021.

³ See Apple, [Required, localizable, and editable properties](#), App Store Connect Help; and Google, [Create and set up your app](#), Play Console Help. See also the [ACCC Digital Platform Services Inquiry, Interim Report No.2](#) ("**ACCC Interim Report**"), page 129.

⁴ ACCC Interim Report, page 129.

⁵ ACCC Interim Report, page 130.

considerable advantage over third-party developers, who typically only have information related to their individual apps. As the ACCC provisionally concludes, such conduct has the potential to impede competition in downstream app markets by reducing incentives for third-party app developers to innovate and pursue novel ideas for apps, given the risk of Apple or Google free-riding on their development and potentially limiting their success.⁶ The ACCC cites several examples of Apple and Google closely monitoring rivals and suppressing their user base.⁷ There are also academic studies which show that where app developers are wholly reliant on Apple or Google to reach their user base, and also face the constant risk of them appropriating their business value through rival apps, it is in turn less likely that these developers will be able to secure funding and develop their product in the first place⁸ – thereby stifling innovation to the detriment of consumers.

(b) The effect of Apple and Google’s data practices on end-users

3.5. There is a feedback loop between market power and data tracking, in that the absence of competitive threats enables the dominant firm to extract more data from consumers and further entrench its position in the market.⁹ Indeed, Apple’s and Google’s dominance in their app marketplaces and their conduct towards app developers may lead to an erosion of privacy and data protection for consumers, in addition to a decrease in quality and innovation.¹⁰ We have identified a few notable examples below.

TPLs, SDKs and other trackers

- 3.6. Following its Online Platforms and Digital Advertising market study, the CMA is familiar with the various methods of user data tracking on iOS and Android apps (such as Apple’s Identifier for Advertisers and Google’s Android Advertising ID; Software Development Kits (SDKs); and Third-party Libraries (TPLs)). As the CMA notes in that study, it is easier for trackers embedded in apps which are pre-installed and cannot be removed by the user – i.e. Google’s proprietary apps – to obtain access to sensitive data and circumvent users’ consent for dangerous permissions.¹¹ This makes the ecosystem of pre-installed apps on Android “*one of the least understood and potentially most important areas for understanding how trackers obtain user data in the mobile sphere*”.¹²
- 3.7. We suggest that the CMA explores this issue further in the context of the Market Study, focusing on the extent to which Google’s pre-installed app model impacts on users’ privacy as well as, ultimately, their choice of apps.

⁶ ACCC Interim Report, page 135.

⁷ ACCC Interim Report, pages 131-135. For example, Bitmoji which lost users to Apple’s rival Memoji; and Blix which brought proceedings against Apple on the basis that ‘Sign in with Apple’ infringed its patented sign-in technology.

⁸ ACCC Interim Report, page 131.

⁹ [US Subcommittee on Antitrust Investigation of Competition in Digital Markets, Final Report](#) (“US Report”), page 52.

¹⁰ US Report, page 37.

¹¹ See Appendix G to the CMA’s Online Platforms and Digital Advertising market study (“Appendix G”), paragraphs 106-128.

¹² Appendix G, paragraph 121. As the CMA notes, iOS’s pre-installed app ecosystem is different from Android’s. As a result of Apple’s integrated model, Apple manufactures and designs all iOS devices, all pre-installed apps on iOS are Apple-owned, and all pre-installed iOS apps can be removed by the user. Therefore, the issue is less prevalent on iOS.

- 3.8. Specific reported instances of Google’s extensive tracking practices, and how these are likely to be reinforced through the app pre-installation model, are set out below.

Android Lockbox

- 3.9. Google has been accused of selectively monitoring how users interact with non-Google apps, to help advance its own proprietary apps, as part of an internal program known as ‘Android Lockbox’.¹³ The program, which works via Google Mobile Services (a collection of Google apps and application programming interfaces), reportedly allows Google employees to see sensitive data about other apps, including how often they are opened and for how long they are used by users. Although Google maintains that developers can access the same types of data, Google’s reach with the program is likely to be far wider: whilst developers are only able to see the data related to devices where their app is installed and then only if they have been given access to it, Google can access data across the majority of Android devices due to the pre-installation of Google Mobile Services.¹⁴

The prevalence of Google tracking, in numbers

- 3.10. As a result of its model, Google tracks consumers extensively and combines data across its proprietary and third-party apps, as well as its consumer-facing services and trackers on third-party apps. According to research cited by the CMA in its Online Platforms and Digital Advertising market study, Google was present in 88% of apps in the Android ecosystem in 2018, and Alphabet was present in over 73% of apps in 2018.¹⁵ According to the ACCC, Google trackers have been found in 92% of popular apps on the Australian Play Store.¹⁶
4. **The range of potential remedies, including whether they would be appropriate, proportionate, and effective and whether there are other potential interventions the CMA should consider**

- 4.1. The CMA has identified a comprehensive range of potential remedies which seem appropriate in light of the proposed scope of the Market Study, and we have no comments at this stage.

5. **The CMA’s proposed approach to evidence gathering**

- 5.1. We note that the CMA does not intend to carry out its own consumer survey research at the outset of the study as it anticipates that both Apple and Google, and potentially other market participants, will have conducted extensive research to understand consumer preferences and behaviour. We suggest that the CMA gives serious consideration to supplementing any data it is able to gather from the incumbents with research from other sources in due course.¹⁷

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¹³ See: <https://www.theverge.com/2020/7/24/21336946/google-android-lockbox-data-rival-apps-antitrust-scrutiny>.

¹⁴ ACCC Interim Report, box 7.1, page 132.

¹⁵ Appendix G, paragraphs 302-303.

¹⁶ ACCC Interim Report, page 138.

¹⁷ For example, as regards consumers’ attitudes towards pre-installed apps and the extent to which data privacy considerations influence their choice of apps.