Response to Consultation

NFC Access

Introduction

The Computer & Communications Industry Association (CCIA) is a not for profit international tech trade association. CCIA has multiple members that operate mobile ecosystems and/or provide digital services that reach UK consumers through those ecosystems.

Many of the questions in the consultation assume a certain kind of respondent, e.g. asking about the time it might take "you" to launch a new service using certain kinds of NFC technology. We have therefore provided a general response on the issues raised in the consultation rather than a question-by-question response. We have some concerns about the implications of this for the conduct requirement setting process, which were explained in our response to the prior call for evidence.

Over time, digital ecosystems trend toward interoperability, and governments can encourage this trend, for example, by procuring open and interoperable products and ensuring that intellectual property law does not impede interoperability. By contrast, mandatory interoperability with overly specific regulation of terms and conditions involves many of the trade-offs seen in regulation of utilities and will tend to undermine innovation and ultimately competition in dynamic digital markets.

Technological solutions

In terms of whether the requirement should specify that Apple provides HCE-only, SE-only or access via either approach, the Competition and Markets Authority (CMA) should be cautious of insisting on particular technological solutions. To the extent that there is any diversity in developer preferences, some will express a preference for an additional option, ignoring the costs from offering additional interoperability solutions alongside the one already offered. However, as noted in our prior consultation response, this needs to be balanced against:

- **Undermining ecosystem governance** - an important part of the role that Apple plays as a provider of an operating system is to make decisions about how best to improve the value of that ecosystem to its diverse participants. This includes choices over, for example, whether to provide developers with a common approach to a technology such as NFC, or enable multiple approaches. Inserting regulators into these design decisions replaces commercial discretion and market discovery (as other ecosystem providers make different choices) with a less flexible regulatory process. Over time this is likely to lead to missed opportunities to improve mobile ecosystems, particularly with regard to technologies like NFC with a wide range of potential use cases and complex potential privacy and security concerns. Regulatory intervention seems particularly hard to justify where an ecosystem provider is offering developers the same infrastructure used for its own services (e.g. Apple Pay and Wallet).
- **Additional costs** - there is necessarily additional cost in implementing, including both:

    - costs to the ecosystem operator, if they have to implement additional NFC approaches, but also
    - technical costs in terms of requiring devices and software to have the features needed to accommodate both means of technical access.
- **Complicating the introduction of new NFC technologies** - the CMA might characterise the choice now as HCE-only, SE-only or joint, but there is clearly the potential for change over time as new technological opportunities present themselves. Overly specific regulatory requirements risk requiring extensive regulatory negotiation before any new service is brought forward.
- **Undermining the incentive to introduce new NFC technologies** - an expansive technical requirement will mean that a mobile ecosystem operator bringing forward new NFC technologies might have to anticipate that they will then be required to add them to the list of interoperable technologies, raising the level of organisational commitment required and deterring such innovation.

In its provisional proportionality assessment, the CMA only considers the direct compliance costs (characterised as "additional" costs above). Whether or not they are recoverable it is plausible that these are a small part of the total economic costs of the measure when the other costs described above (and in CCIA's earlier submission) are considered. Given the CMA's wider priority in supporting growth, innovation and investment it should not be restricting its analysis to the static engineering costs of remedies, particularly in complex and innovative digital ecosystems.

While Chapter 4 considers these issues, it does not provide a limiting principle or balancing test that reflects the evident intent behind the requirement for the CMA to take the least onerous of equally effective options: that it should choose the least burdensome means of realising its policy objectives. The consultation notes, for example, that it might be "costly" to develop an NFC solution using SE when developers have already developed an HCE solution in the EEA or on Android (para 4.25) but the CMA does not consider whether the net cost across all involved parties (including Apple) will be lower.

The consultation states a provisional conclusion that requiring both will "maximise" opportunities for developers to scale their products and support the CMA's aims. However the analysis in the consultation does not establish whether the differences between allowing Apple to offer the infrastructure it uses itself and requiring it to develop an HCE/SE dual solution are sufficient that they should not be considered functionally equivalent, at which point the CMA should choose the lower-cost, less interventionist approach.

The CMA merely finds that some companies might prefer different kinds of access. One perspective cited in the consultation was that this would be because it limits the need to cooperate with third parties, which does not seem a legitimate concern for the CMA to address through a competition policy intervention.

Within the design of the conduct requirement, the CMA has not assessed the incremental cost of requiring that Apple cannot limit the number of times an Authorised Developer is able to call the Default Status API, or limit the frequency with which an Authorised Developer is able to issue prompts to consumers to switch their default settings. This is clearly ripe for abuse by developers seeking to manipulate user behaviour through repeated prompts and raises costs with no good justification. At a minimum, CMA should consider a

reasonable limit as an alternative (which is what Apple has done for its default checking API for browsers implemented through discussions with the European Commission under the DMA) and assess the risks associated with unlimited requests and the proportionality of this imposition.

Beyond this specific conduct requirement, CMA and regulated parties share a medium-term interest in avoiding micromanagement of technological choices. Demands for companies to not just meet (in this case) interoperability requirements, but do so in a specific form preferred by third parties, raises costs and is incompatible with the flexibility to innovate the DMCC regime is intended to preserve. It is also impractical for the CMA to deliver. The requirement to take the least onerous of equally effective options should be a regulatory "test" that safeguards against this sort of micromanagement.

Pricing

From its origin in the Furman Review (para 2.15) the goal for the DMCC has been to avoid utility-style price regulation where possible. The practical differences between the formerly-nationalised monopolies to which that regime has traditionally been applied and the dynamic mobile payments sector are enormous.

There are well-established challenges in establishing new payments technologies in a mature financial services market such as the UK. Those new technologies need to secure consumer trust and merchant acceptance, while offering a service sufficiently distinctive to attract users for whom physical cards are familiar and often adequate. The primary objective should be to maintain the incentive to invest in such networks and price regulation is likely to undermine that incentive. This would likely impact both Apple's own incentives and the incentives for any other potentially SMS-designated service that could create new pathways for payments innovation.

The same obstacles are a reason to be cautious about overly optimistic views from developers about the potential to increase deployment of new solutions if Apple's approach to NFC access changed. Even if those developers do feel that there are technical challenges created by any particular approach to NFC access, or would find it easier to go ahead without an appropriate charge for that infrastructure, any impacts are likely to be limited by other barriers to the adoption of novel solutions in the context of a UK market where many consumers and merchants may simply prefer to stick with existing solutions (e.g. existing contactless apps, payment cards, or even cash). The CMA should be cautious in its assumptions about the likely impact in its proportionality assessment. Other barriers besides NFC access such as this do not appear to have been considered in the provisional proportionality assessment.

The CMA should also be realistic about the investment Apple has made and the need to maintain an incentive for similar investments. Crucially, both past and future investments have been made in the context of a significant ex ante risk of failure, where there was an uncertain process to secure consumer and merchant acceptance for any change in a mature payments sector. Earlier attempts to establish NFC payments by companies including retailers and telecoms operators with their own significant resources and consumer reach had failed. There is a risk that any cost-modelling approach looks backward in the knowledge that Apple ultimately succeeded in establishing its NFC solutions, rather than

assuming a cost of capital that allows for the real prospect of failure such investments face ex ante.

CCIA recently commissioned research from S&W Consulting which investigated these issues with respect to app stores, but similar factors apply to NFC access:

> *Direct price controls are most familiar where there is a durable physical bottleneck, a tangible asset base, observable costs, stable demand and established mechanisms for protecting quality and investment. App-store ecosystems differ materially. Their value is created through common and intangible ecosystem investments — including trust, security, app review, developer tooling, discovery, payment confidence, fraud prevention and platform governance — that are difficult to allocate to a single transaction or Steering event. Utilities, telecoms, payments, financial services and FRAND licensing are useful as regulatory-design lessons; they are not templates for treating app stores as utilities.*

In that context, as the S&W research argues, the CMA should try less onerous alternatives (which do not appear to have been considered) first such as transparency and monitoring. Then, to the extent it concludes price-regulation is required, aim for a defensible two-sided value-based range.

Trade principles - Technical barriers to Trade

Finally, we believe that the CMA should consider the consistency of its preferred approach with the United Kingdom's obligations under the WTO's Agreement on Technical Barriers to Trade (TBT), provisions also replicated in various Free Trade Agreements the UK is party to. It is clear that what the CMA is proposing qualifies as a "technical regulation"[1] under these provisions, as it would mandate product characteristics for a specified import. Consistent with the points made above, such a mandate cannot be construed as necessary to achieving the policy goal sought, and thus fails to meet the standard of not being "...more trade restrictive than necessary to fulfill a legitimate objective" (Article 2.2).

If the CMA's objective is to expand access to NFC-enabled services, and the affected market participant has offered a viable path to that end, the burden on a government is to prove that the technical solution offered is insufficient—that the mandate is indeed "necessary." The CMA has not met that burden, and thus fails to meet the high threshold set by the TBT that would justify a highly prescriptive market intervention that could result in the broad-ranging harms detailed above.

[1] Annex 1, Article 1 of the WTO Agreement on Technical Barriers to Trade, https://www.wto.org/english/tratop_e/tbt_e/tbtagr_e.htm .