Justice for All

European Consumer Association
Accredited with the Portuguese Government
Member of the National Consumer Council

Comments to the Public Consultation launched by the Competition and Markets Authority on the Commitments Offered by Google regarding
Google Play's Rules on Billing System for In-App Purchases

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I. IUS OMNIBUS.

Ius Omnibus ("Ius"), with registered office at Second Home Lisboa, Mercado da Ribeira, Av. 24 de Julho, 1200-479 Lisbon, Portugal, is a non-profit association, created in March 2020, with the purpose of promoting and defending the rights and interests of consumers in the European Union. It is a consumer protection association registered with and recognized by the Portuguese Government, having filed several class actions within the scope of consumer protection.

II. The Public Consultation.

The Competition and Markets Authority (CMA) has opened a public consultation procedure inviting comments on commitments offered by Google in order to address specific competition concerns raised by the CMA in the context of an investigation under the Competition Act 1998. The investigation relates exclusively to Google Play rules that compel

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developers of apps offering digital content to use Google Play's own billing system for in-app purchases.

The commitments proposed by Google would give app developers the autonomy to offer a different payment system of their choice, identified as "Developer-Only Billing" (DOB), or, alternatively, to give users a choice between an alternative billing system or Google Play's billing system, dubbed "User Choice Billing" (UCB).

The CMA thus requests pronouncement on, primarily, the following issues:

- The extent of Google's proposed service fee reduction under each of the UCB and DOB agreements,
- The proposed process for reporting the turnover of in-app purchases to Google, either manually or using API, in order for a service fee to be calculated on in-app transactions,
- The use of information screens and, for UCB, a billing choice screen, and
- The CMA's proposed process for monitoring Google's compliance with the commitments, including in particular its commitment not to retaliate against app developers who opt to use UCB or DOB.

The following comments are submitted by Ius for CMA's consideration, in the hope of contributing to an outcome which better protects the rights of consumers and increases the benefits to consumers of the behavioural obligations to be imposed.

III. Scope of the investigation and need to avoid misunderstandings and manipulation.

As the CMA is surely aware, Google is – *inter alia* – a defendant in a number of antitrust private enforcement cases, filed in several jurisdictions by app developers and by consumer representatives, concerning anticompetitive agreements and abusive practices relating to Google's Play Store. Such practices include the one which is the object of this CMA investigation (Google's exclusive billing system for in-app purchases), but they are much broader. They extend, namely, to a large number of contractual and technical arrangements leading to de facto exclusivity of Google Play Store as a distribution platform for Android apps, to minimum prices for apps, etc. One of these cases, seeking injunctive and compensatory

relief for consumers, has been filed by Ius, in Portugal. At least one such consumer protection actions against Google is pending in the UK.

Accordingly, the scope of the CMA investigation and of the mentioned private enforcement actions may be visualized as concentric circles where the CMA investigation is represented by a much smaller circle within the larger one. While the CMA surely has its legitimate reasons to limit the scope of its investigation to the practices it is addressing, this partial overlap, unless duly explained, is likely to raise doubts and has the potential to be used by Google to suggest that the CMA believed the other practices within the broader circle are not anticompetitive.

As an example, the executive summary of CMA's Notice of intention to accept binding commitments in this case states: *"the CMA is considering Google's rules governing the distribution of apps on Android devices in the UK, specifically Google Play's rules which oblige app developers selling access to in-app digital content or services to use Google Play's billing system"*. Such a phrasing could be used to try to create the impression that the CMA looked at the broader set of Google's rules for the distribution of apps on Android devices, and that it deemed that only the billing system rules required an intervention.

It is true that the description of the investigation indicates that the focus has always been on payments alone (§2.2). And the CMA has been careful to stress that the *"Investigation does not cover other potential concerns that parties raised during the course of the MEMS relating to other aspects of Google Play's rules, for example, Google's right to charge a service fee for in-app purchases of access to digital content or services on Google Play in and of itself, the precise level of that service fee, or which transactions are subject to such a fee. The MEMS report concluded that there is a strong case for interventions across a number of different areas in relation to mobile ecosystems"* (§2.4). However, that sentence continues stating: *"but that many of these were more suited to being considered further – and as necessary addressed – by the proposed new DMU within the CMA, which will enforce the pro-competition regulatory regime for digital markets in the UK that the Government intends to establish"*.

It is clear that the CMA is aware of the risk mentioned above and intends to make sure that any commitments decision will not be used as evidence for the CMA's opinion of absence of

other antitrust infringement in the market for distribution of Android apps and in-app content, or that the commitments do anything beyond solving the very specific antitrust concerns which were at the core of this investigation.

Nonetheless, Ius invites the CMA to take the side of caution and to be particularly careful in the phrasing of its final commitments' decision, with this risk in mind. For example, references – such as the one quoted above – to other practices being more suitably addressed under other sets of rules, could potentially be manipulated by Google before national courts, arguing – albeit baselessly – that the broader set of practices should only be governed by new rules for digital market gatekeepers (such as the DMA in the EU), and that these should in some way be seen as excluding the application of competition law to the same practices.

IV. Potential to facilitate consumer redress in the UK

In the EU, CJEU case-law, starting with *Gasorba* (C-547/16), has clarified that national courts must take into account the European Commission's preliminary assessment preceding a commitment decision, and regard it as an indication, if not *prima facie* evidence, of the anticompetitive nature of the practice in question. As far as Ius is aware, the issue of the effects of CMA commitment decisions in follow-on private enforcement actions has not yet been addressed in the UK. Nonetheless, it is reasonable to expect that the opinion expressed by the CMA concerning the existence of anticompetitive practices (even if, ultimately, not declared) which are addressed by the commitments will be given some measure of value by British courts confronted with follow-on actions.

Ius thus invites the CMA, when drafting its commitments decision, to take into account that this decision is likely to be analysed in follow-on proceedings in the UK, namely in those aimed at seeking redress for consumers. The clarity or scarcity of the decision's reasoning can thus facilitate or hinder consumer redress. In particular, it would be important for the decision to clearly reaffirm the competitive analysis carried out by the CMA, which led it to identify certain anticompetitive concerns. This should include not only describing the practices and

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the reasons why they were of concern, but also providing the complete preliminary reasoning for the delineation of the relevant markets and for the identification of dominance.

V. Concerns raised by the proposed commitments.

Ius is endorses the CMA's efforts in the present investigation, ultimately aimed at protecting consumers, and congratulates it for having secured from Google a willingness to alter an anticompetitive behaviour which has been restricting competition.

In response to the CMA's concerns, Google proposes to allow developers to submit their apps to the Google Play Store and allow in-app purchases of digital goods and services to users to offer an alternative billing system through: (i) billing of choice or (ii) developer-only billing.

On the one hand, as a matter of principle, Ius believes that closing this investigation with a commitment decision is a bad decision for the broader goal of protecting consumers and dissuading infringements of competition law by powerful multinationals.

In recent years, competition authorities have shown a willingness to let companies "off the hook" with commitment decisions. This is sending a very wrong message to the market. Companies are starting to feel – if they do not feel already – that, as long as the antitrust infringement is complex and difficult to prove, they have every incentive and reason to infringe competition law and reap huge profits from such infringements. Even if their infringement is identified by a competition authority, it is enough for them to promise to change the behaviour for the future. This is destroying the dissuasive effect of antitrust law.

Companies need to understand that, if they break the law, they will be the target of a decision declaring the infringement (public recognition of their illegal behaviour), they will be fined, and they will be exposed to follow-on actions for damages. The proposed commitments make Google understand just the opposite.

In Ius' opinion, competition authorities should only consider closing an investigation with a commitment decision if: (i) the practice in question did not have a very significant effect on the market, relating to which the administrative resources required to prove the infringement

would be disproportionate; or (ii) if the commitments allow the authority to achieve behavioural changes which are greater than those it could obtain via an infringement decision, and more beneficial to competition and to consumers.

In this investigation, we have neither of these scenarios. The anticompetitive practices in question had a huge impact on the market and the commitments merely lead Google to do what it should have been doing from the start if it had complied with its legal obligations.

On the other hand, Ius feels that these specific commitments, while positive, address only a small part and a far less impactful set of the various problems consumers face as a result of Google's anticompetitive practices relating to the Play Store and to the distribution of Android apps and in-app content (already mentioned above).

Furthermore, it is not clear to Ius that the proposed commitments: (i) will provide meaningful benefits for consumers; and (ii) will adequately address the specific competitive concerns which are the centre of this investigation.

Ius believes the problem possibly lies in the original anticompetitive concerns identified by the CMA. Those concerns were phrased and clearly aimed at solving problems for app developers and for competitors in the payment services markets, not for consumers. This seems to be an – unfortunately frequent – consequence of public enforcement investigations driven by complaints from large undertakings and competitors. It is true that increasing competition in an upstream market is likely to have beneficial effects for consumers in a downstream market. But it is also true that this is not necessarily always the case, and that greater beneficial effects for consumers may be achieved by putting increase of consumer welfare at the centre of the public enforcement investigation's concerns.

As the commitments stand, with all due respect, it seems to Ius that the measures will, first and foremost, benefit app developers and payment services providers, with resulting or passed-on benefits to consumers being uncertain.

Ius does not believe the proposed reduced fee percentages (4% for UCB and 3% for DOB) are duly justified. If the idea is to reflect the value of the payment services which so far has been

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provided by Google, it would be important to understand how this figure was arrived at, and why a different value is set for UCB and for DOB.

Ius recognizes that there is a good chance that this fee reduction may lead to a reduction of prices to consumers. Indeed, payment processing services should be available on the market for rates lower than the reduction in question. But, first and naturally, the potential benefits for consumers would be greater if the reduction were greater. Second, the likelihood of the benefits of this reduction and of the lower cost of alternative payment services being passed on to consumers would greatly increase if, when carrying out a purchase, consumers could clearly identify the costs of the alternative payment methods. This could be achieved with various approaches. For example, by indicating the extra cost of that payment service or by updating the final price once a payment method has been selected. This would provide the consumer with visibility of the differentiated costs and create an added incentive for competition between payment service providers, as well as a way of those cost savings being passed on directly to consumers.

It would be important that the CMA's commitment decision explain how the 3% / 4% figure was arrived at, and why the CMA believes that such a reduction will benefit consumers. Including whether such benefit is likely to be felt only at the level of the quality of services, or also in the pricing of apps and in-app content. If the CMA is unable to identify these benefits for consumers, it is sufficient reason not to accept these commitments.

Because these commitments do not solve the anticompetitive practices which lead to the de facto exclusivity of the Play Store as the sole platform for the distribution of Android apps, the commitments provide for Google to be notified of all transactions carried out through alternative billing systems, so that it can control the commissions it is entitled to under its contracts with app developers. But this means that Google will continue to have access to exhaustive and disaggregated information concerning sales of apps and in-app contents, even when its payment services were not used. The data thus obtained will strengthen Google's knowledge about its direct competitors and allow it to continue to optimize its restrictive practices. Surely this goes beyond what is required to achieve the goal of allowing Google to understand the commissions it is entitled to. For that purpose, it is sufficient for it to have

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access to periodic aggregate data. This problem is exacerbated by the possibility given to Google to audit app developers who wish to use alternative payment systems. It would be important to clarify that these must be independent audits that preserve the confidentiality of app developers' data, providing Google only with the final conclusions concerning compliance with the rules and the amounts Google is entitled to.

It is unclear why (other than the fact that this will be written into contracts and that Google is dominant), when an alternative payment system is used, Google should still be entitled to a 26% or 27% commission on sales of in-app content for Android apps (if indeed this will be the case, as it seems). If a consumer is purchasing something through a developer's app, not through the Play Store, and is not using Google's payment services, what justifies Google's remuneration?

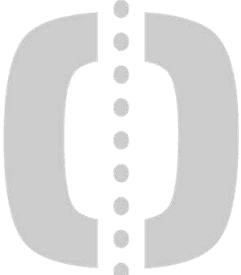
The commitments allow Google to prohibit app developers from using alternative payment systems, in case of non-compliance with the respective requirements. This is an understandable necessary provision. However, there is insufficient specification of how verifications will be carried out and how the truthfulness and objectivity of the assessment will be ensured. How will app developers be protected, in a timely manner (not requiring resorting to litigation which can take months or years), from a misuse of this power by Google?

Google seemingly reserves the right to make changes to the admissibility requirements as it sees fit. This is too broad a power, which can be used to subsequently deprive the commitments of their effectiveness and impact. Ius believes any changes to admissibility requirements should be treated as an amendment of the commitments and subject to CMA approval.

The reporting and compliance procedure also leaves great doubts as to its effectiveness. It is not clear exactly what kind of conditions and guarantees it provides, nor what the consequences are of any non-compliance by Google. It should be noted that, faced with a company that holds practically 100% of the market in which it operates, it is particularly important to anticipate all risks and to guarantee a monitoring and sanctioning procedure capable of dealing with such a powerful market operator. Particularly when the CMA is

already signalling that it has difficulty in taking an investigation against Google all the way to an infringement decision.

A commitments decision can be a useful tool for behavioural control and to facilitate the imposition of sanctions in case of violation of obligations which were already imposed by antitrust law (without having to discuss that indeed they already derived from the law). But they must allow the undertaking as little discretionary margin as possible in changing the behaviours it committed and in applying those commitments.



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