

11 July 2024

Feedback of

ACT | The App Association

to the

United Kingdom's Competition and Markets Authority

regarding its

Guidance to the Digital Markets, Competition and
Consumers Act 2024

Introduction and statement of interest

ACT | The App Association is a trade association representing small business technology companies from across the United Kingdom (UK), European Union (EU), and the United States (U.S.). Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology.

SMEs are a key engine of the UK technology economy

The UK has the third largest tech sector in the world, valued at more than \$1 trillion. In 2021, 56 per cent of the digital sector's £182.1 billion contribution to the UK economy came from SMEs. SMEs account for more than 50 per cent of all private sector jobs in the UK.¹

The app economy is important to UK prosperity

A huge amount of economic activity involves apps, much of which we do every day without a second thought. A few examples include shopping, booking travel, gaming, banking, watching media, working, communicating, teaching kids in school, monitoring our health, learning new languages, etc. The list goes on and on. Apps are also used to control our homes, cars, factories, and medical devices, plus countless more activities, via the internet of things (IoT). These activities don't just generate money, they increase sustainability, boost productivity, and provide genuine support to people with specific health needs.

The term for this broad ecosystem of economic benefit is 'the app economy', and it is a significant contributor to the country's economy. The direct revenues of the UK app economy in 2021 amounted to £33 billion. Including direct and indirect contributions, the app economy generated £74.8 billion in revenue throughout all sectors of the UK's economy in 2021, creating more than 400,000 jobs in the process.²

The App Association appreciates this opportunity to provide feedback to the CMA on its Guidance to the Digital Markets, Competition and Consumers Act 2024 (DMCCA).

App Association position on competition in digital markets: Preserving the benefits of app marketplaces

App marketplaces like Apple's App Store and the Google Play store, among many other digital platforms, have a central position in the app economy by creating a frictionless environment where app users and developers can interact easily. The mobile app market is a 'multi-sided market', bringing together and benefitting both app developers and mobile device users. It is vital to preserve both the privacy and security protections for consumers, as well as the tremendous benefits that small and medium-sized enterprise (SME) app developers have enjoyed through app marketplaces, including access to a global market, consumer trust, protection from intellectual property (IP) theft, and enhanced security.

¹ Tech UK - [UK Tech SMEs: A Global Force to Be Reckoned With | #techUKDigitalTrade](#) - 2023

² Deloitte – [The App Economy in Europe](#) – 2022

Platforms and marketplaces have transformed the software industry, enabling smaller companies to reach new markets and customers. Before app stores, distribution and marketing was much more complex for SMEs. The service and security provided by platforms enables app companies to focus their valuable resources on developing and updating their products. With lower costs and barriers to entry, both fledgling and established app developers can succeed. The single most important factor in the app ecosystem's dynamic growth and unrivalled success is the presence of curated platforms that allow end users to install third-party apps with confidence.

Platforms currently provide dispute resolution mechanisms when apps are introduced into the store that are either outright copies or include content that was not properly licensed. App developers can then leverage these mechanisms to confront entities that have allegedly infringed their intellectual property. Without these mechanisms, SME innovators are left with the oppressive and expensive burden of copyright infringement litigation in court, which can leave the legitimate IP owner with several thousand pounds per month in legal fees, and months or years of time diverted from company matters.

The net result of the benefits described above is consumer trust. From our bank details and family pictures to our health data, our mobile devices contain our most personal information. It is therefore remarkable that consumers will routinely download applications onto their mobile devices without considering who made the app, the size of the company, or the recognition of its brand. This is a huge benefit to SMEs, which can compete on merit alongside giant companies on the virtual supermarket shelves that app stores provide.

Comments on the draft Digital Markets Competition Regime guidance

We are eager to comment on the draft Digital Markets Competition Regime guidance and acknowledge the CMA's objective of pursuing fair competition, a principle we strongly believe in at the App Association. We appreciate that the DMCCA is adopting a more flexible, adaptable, and evidence-based approach compared to the EU's Digital Markets Act (DMA) regime, and we hope that throughout the DMCCA adoption process, CMA will aim to strengthen this objective. However, we are concerned with several aspects, such as vagueness and a lack of detail in parts of the text. For an effective and predictable system, additional guidance and explanation will be essential.

General process and participation

Initially, the App Association urges CMA to provide more detail with respect to its administrative and decision-making processes, to describe how SMEs can participate in these processes, and to explain how it is otherwise operationalising the DMCCA. This additional guidance will provide much-needed insights to App Association members looking to understand their obligations and rights in a straightforward and cost-effective way.

Varying and revoking conduct requirements

We appreciate the draft guidelines' flexible approach to varying and revoking conduct requirements. Not all businesses are the same and it is crucial to avoid imposing one-size-fits-all measures. Instead, promoting different approaches allows for differentiation among companies, fostering innovation. Flexibility in regulation ensures that businesses are not forced to adopt irrelevant models simply to comply but are instead guided by adaptable laws. This approach

reflects the core values of the App Association, including promoting freedom of innovation through laws that are flexible, adaptable, and capable of withstanding the test of time and development. It is essential that regulators support this by creating an environment where innovation can thrive independently.

We strongly support the provisions regarding the exception for consumer benefit, which emphasises the importance of flexibility and responsiveness to changing market conditions. Ultimately, the main objective of competition regulation should be to bring tangible benefits to consumers. This exception ensures that consumer welfare remains at the forefront of regulatory efforts, aligning with the fundamental goals of competition policy. Consistent with the above, it is important to include more detail illuminating what constitutes a 'consumer benefit' past the letter of the DMCCA itself. Clear definitions are crucial for ensuring that all stakeholders have a shared understanding and can uniformly apply the standards set forth in the DMCCA. Specifically, the guidance should provide more in-depth discussions around the application of privacy, cybersecurity, data protection, and disability access measures as being within the scope of a consumer benefit exception, and detail how they must be duly considered in relevant analyses. The guide should further recognise the importance of a balanced approach that does not reduce and eliminate these critical consumer benefits.

As we discuss above, protecting consumers and preserving their trust in the app ecosystem is essential for the SME digital economy innovators the App Association represents. SMEs greatly benefit from a system where consumers feel safe within trusted platform ecosystems, allowing consumers to confidently explore and try new products and services. This trust enables SMEs to compete with larger companies that enjoy heightened network effects and brand recognition. We are concerned that the possibility of having requirements, such as the ones in the DMA like forced sideloading, will undercut consumer trust and, consequently, harm SMEs. Consumers that are less well-versed in digital topics might not realise the risks associated with downloading apps from untrusted platforms, and any damage of trust by, for example, malicious or copycat apps that cannot be addressed at the platform level due to mandated sideloading, could undermine confidence in the entire ecosystem, adversely affecting all participants.

Evidence-based regime and engagement

We appreciate the CMA's dedication to focusing on evidence-based action. Incautious market interventions made based on edge use cases and hypotheticals create overspill effects on entire markets including SMEs. It is vital that such interventions are based on well-developed evidence bases demonstrating systemic issues, and that such interventions are appropriately scaled to the demonstrated harms.

In complex multi-sided digital markets, it is crucial that the DMCCA regime is evidence-led and that the relevant evidence is captured from all relevant stakeholders. The App Association appreciates the recognition of the importance of SMEs' involvement and advocates for the possibility of ongoing SME engagement. It is important to hear all stakeholders, including SME voices, because even when applied to larger companies/platforms, the DMCCA will acutely impact SMEs, with consequences for anyone participating on and relying on short messaging service (SMS) platforms. Unintended consequences may go further than expected, which is why industry feedback from SMEs is essential to anticipate and address these effects. Most UK SMEs are unlikely to be the subject of SMS designations, but all stages of CMA activity within the DMCCA should include consultation of *all* stakeholders, not merely the potential SMS companies

and their competitors. Stakeholder constituencies must be clearly defined, including the businesses that rely on SMS-designated services. In the current draft guide, SME input is implied but not guaranteed. Vague terms like ‘a wide range of stakeholders’ suggests that while SME input may be considered, there is no commitment to doing so in all instances. The App Association calls for SME stakeholder engagement to be clearly defined and mandated part of the SMS designation process.

Because it can be difficult for SMEs with limited time and resources to respond effectively, extra measures should be taken to ensure robust SME engagement with the CMA’s consultation processes. These include targeted outreach and education campaigns for SMEs by the CMA, partnering with trade bodies representing SMEs to facilitate comfortable discussions, and allowing SMEs to make short-form contributions. The recent Intellectual Property Office online SME survey³ on standard-essential patents is a good example of a consultation that was designed to be easier for small businesses to engage with. Empowering SMEs to engage in free-form discussions such as workshops and roundtables and tracking engagement indicators to monitor SME participation levels over time can also be effective.

Consistent with the above, we ask the CMA to update the Guidance to specify the kinds of evidence and experiences that the CMA is likely to consider pertinent to its decisions under the DMCCA regime, as well as the criteria it will take into account when evaluating those experiences and evidence. Measures such as allowing parties adequate time to prepare and submit evidence as well as assistance (through the Guidance and otherwise) to help them navigate the process, will ensure that all parties are better able to allocate resources to evidence sources most likely to assist the CMA in addressing any questions or concerns.

Comments on the draft guidance on the mergers reporting requirements for SMS firms

Success for a startup or small business can take a variety of forms, such as pursuing an initial public offering (IPO) or being acquired by a larger company with the resources and knowledge to improve the product and/or streamline market entry. Acquisition is often the best option for both the business owner(s) and consumers, as IPOs are expensive and fraught with risk and thus reduce the likelihood of consumer benefit. App Association members often start their businesses with the understanding that once their idea has been brought to fruition, their company may be acquired, allowing them to move on to develop new businesses. The UK economy and consumers have benefitted immensely from this freedom to combine the novel products created by small tech companies with the resources and technical and commercial knowledge of businesses that later acquire those innovations. A merger that helps deliver better products or services for consumers is often a small business’s desired outcome and is desirable from a competition policy standpoint. We encourage the CMA to recognise that mergers and acquisitions are a wanted outcome for many startups as well.

³ SEPs questionnaire for SME, small-cap and mid-cap businesses: Summary of Responses
<https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views/outcome/seps-questionnaire-for-sme-small-cap-and-mid-cap-businesses-summary-of-responses>

The App Association encourages that the SMS merger and acquisition guidelines be made cautiously and with a narrow scope, rather than blanket rewrites that create significant uncertainty in the broader business ecosystem. Upending the environment for mergers and acquisitions would reduce our members' ability to raise capital, create jobs, and realise success, eroding their willingness to innovate and take risks. The guidelines should maintain deference to a thorough economic analysis as a foundation of any merger review or enforcement and avoid making policy-level decisions based on edge cases or hypotheticals that do not reflect the reality of our business environment.

Conclusion

We are pleased to see the CMA moving forward with a flexible approach in the draft Digital Markets Competition Regime guidance. This adaptability is crucial for addressing the dynamic challenges of the digital economy. We hope that this flexible approach will continue to be maintained and that some of the current vagueness in the guidance will be addressed to ensure clarity and effectiveness.

Any new policy framework must be based on the identification of specific market failures and, if found, a data-driven and consultative assessment of the structural issues that are causing the market dysfunction. We advise that the Digital Markets Unit (DMU) be obliged under the legislation to ensure that any new pro-competitive interventions take an ecosystem-wide approach to impact assessment. This will help to minimise unintended consequences and to avoid harming small businesses. We support the objective of strengthening competition in the UK's digital economy and urge the DMU to refrain from using the SMS designation to interfere in markets without consulting on the potential consequences for SMEs. As for the guide, the lack of specific reference to SMEs and a commitment to consult and consider the impact on SMEs specifically is worrisome. We urge the CMA to draft more concrete and specific guidelines where the perspectives of all stakeholders are taken into consideration.

Mergers are a key aspect of innovation and accomplishment for SMEs; therefore, we urge the CMA to consider SME perspectives when engaging in activities around merger reporting as well as drafting the guides.

The App Association remains at your disposal to provide further input and would welcome the opportunity to contribute to developing practices and solutions that address competition issues in ways that benefit all market participants, especially innovative UK SMEs.

Sincerely,

A handwritten signature in black ink that reads 'S. Tulip'.

Stephen Tulip
UK Country Manager

Mike Sax
Founder and Chairperson