5 June 2023

Submission from Gener8 to the Scrutiny Committee for the Digital Markets, Competition and Consumer Bill

About Gener8

Gener8 is a UK business empowering people to control and be rewarded from their data. On one side of our platform, we offer our users the chance to access, control, and earn rewards from their online data. On the business-facing side of the platform, we sell fully consented, anonymised and aggregated data products to the market intelligence sector. The revenue we earn from these sales then funds the rewards that our users can redeem. With this unique business model, we believe we are building the first commercially viable Personal Information Management Service (PIMS) in the world.

With consumers and regulators all around the world wising up to the extent of online surveillance, personal data management has the potential to be a multi-billion-pound, winner-takes-all global market. As it stands, Gener8 is well-positioned to win this race, and to bring more digital success to the UK.

Headquartered in London, we have grown to 25 employees, and our award-winning business is on track to be another UK tech unicorn this decade. Referred to as having given 'the best pitch ever' on Dragons Den, Gener8's founder Sam Jones has since been awarded 'Disruptor of the Year' in 2022 at the Great British Entrepreneur Awards, featured on the BBC, and has attracted investment from a range of high-profile individuals.

Regulation is necessary

Gener8 is a strong supporter and advocate for the new pro-competition regulatory regime, which we believe will provide the necessary predictability, transparency and fairness for investment and innovation to be maximised.

While many may view regulation as 'red tape' or bad for businesses, we believe that the new regulatory regime will be overwhelmingly positive for our prospects. As a small disruptive company providing an online service, we do not have the freedom to go elsewhere if we don't like the terms that we are offered or find the barriers to entry too great. The vast majority of small online retailers, app developers, companies operating a website, advertisers, and publishers of online content reach their customers via handful of platforms and companies that have become unavoidable trading partners.

The nature of the challenges that these dynamics pose are not well-suited to existing regulatory tools. The volume of complaints and concerns are too great to be addressed by slow-moving and uncertain competition law enforcement, while the solutions generally too iterative and complex to be implemented effectively as a one-off remedy.

A call for regulation does not imply that the world's biggest technology firms must be acting unlawfully or that big is necessarily bad for consumers. We too hope that our business will grow to become a global success, and we recognise that positive impacts that the firms in question have had on transforming the online ecosystem. It is merely an acceptance that the commercial incentives of a global corporation are not always perfectly aligned with optimal outcomes for our economy and

society. In circumstances where a single company can simultaneously operate as the rule maker, the referee, and a player in the game, some degree of ongoing oversight and transparency is clearly necessary.

Benefits for our business

Gener8 experiences a wide range of issues that have harmful effects for our business, ranging from increasing costs, restricting our revenue opportunities, holding back our user growth, and distorting our investment and innovation decisions. Below are a few examples of how we expect to benefit from the new regime:

- **Transparent and consistent app review:** conduct requirements for SMS firms operating app stores will improve the experience for the many thousands of businesses that are dependent on app stores for distributing their products and services. For Gener8, this will mean substantial cost savings, greater certainty for our investment and innovation decisions, and the ability to provide new features and bug fixes to our users more rapidly.

- **Transparent and consistent review of ads:** similar to our experience of app review, submissions of ads to major platforms can be randomly rejected with vague and typically open-ended justifications. Conduct requirements will provide greater predictability and clarity, enabling us to plan our growth and user acquisition with more certainty.

- **A level playing field for browsers:** interventions in the markets for general search and web browsers will create a more level playing field for Gener8's browser to compete with the incumbents. In addition to benefitting from the removal of barriers to entry and expansion for mobile and desktop browsers, the Gener8 browser would have wider revenue opportunities if there were multiple high-quality search engines to select as the default.

As the CMA has made clear in multiple publications over the last few years, it is unable to address these types of ongoing issues effectively with its existing toolkit.

Total clarity on scope is critical

The scope of the regime as defined by the Bill appears well-targeted, providing certainty and clarity to the many businesses that are obviously not intended to be captured, while giving the CMA the necessarily flexibility to adapt and respond to technological progress and market evolution. This flexible framework is essential to ensure that the regime is sufficiently future-proofed.

One digital activity that we must be in no doubt whether it is within the scope of the future regime is the operating systems for devices such as smartphones and tablets, laptops, TVs, smart speakers, cars, virtual reality headsets etc. These devices are all becoming increasingly critical access points through which individuals, consumers, and businesses access the internet and interact with each other. By securing a position of power in each of these key access points or 'gateways', the largest technology companies are able to involve themselves in an increasing proportion of economic transactions.

It is at the operating system level that many critical decisions are made that determine how downstream markets such as app stores, browsers, gaming, mapping, telecoms etc can function. Without being able to designate operating systems with SMS, the CMA will be extremely limited in its ability to implement Pro-Competition Interventions (PCIs) that open up competition effectively.

A strict reading of Clause 3 of the Bill may leave room for arguing that operating systems are not within the scope of the regime, as it refers to services provided by means of the internet, and the provision of digital content. On the other hand, further reading suggests that the intention may in fact be to include operating systems, as:

- clause 311 of the Bill, on Interpretation, states that "digital content" means data which is produced and supplied in digital form; and
- the Explanatory notes (1688) state that 'In relation to the definition of "digital content", "data" would include software.'

We are concerned that the Bill retains some degree of ambiguity and room for technological debate on this important issue, which could very easily be avoided. We therefore propose the following amendment to the Explanatory Notes for the Bill:

- **Proposed amendment 1:** Under 'Clause 3: Digital activities', in paragraph 85, for 'Examples are social media platforms and e-commerce platforms', insert 'Examples are social media platforms, e-commerce platforms, and mobile operating systems.'

A new approach to enforcement is needed

Once the Bill has received Royal Assent, the CMA will need to designate a handful of firms with Strategic Market Status, and in parallel introduce conduct requirements for a range of digital activities including most likely in relation to mobile operating systems, mobile app distribution, browsers, e-commerce, digital advertising, social media, and potentially several others.

Across these markets there are likely to be many thousands of disgruntled advertisers, publishers, app and web developers, and retailers that may consider their existing terms of platform access to be in breach of the new requirements. As a result, the CMA's DMU might start to receive hundreds of complaints per year once it is fully operational. It will never be able to meet this demand by taking up every complaint, and so some degree of prioritisation and triaging of issues is inevitable. But if the DMU is to resolve a material proportion of these concerns in a timeframe that is useful to the businesses involved, then formal enforcement procedures cannot be the only way forward.

The formal process for conduct investigations and enforcement appears well-designed and potentially flexible to find resolutions more quickly than the allotted statutory time limits. But these processes will still be resource intensive and require substantial administration and due process, and as a result surpassing 20 investigations concluded per year would be challenging.

This could leave a shortfall of many hundreds of complaints going unresolved each year. The only way for the DMU to rise to this challenge effectively will be a participative, open approach that involves a combination of formal and informal dialogue, with investigation and enforcement seen as a backstop rather than the primary tool. This was the vision as set out by the Digital Competition Expert Panel (the 'Furman Review'), and we are concerned it has been lost in the final iteration of the regime design.

While there are rightly references to consultations at certain key milestones, this is standard practice for any regulator or policy maker, and certainly not representative of a fresh new approach that will move the dial. What is needed when the DMU receives a complaint from an app developer or online retailer, is for the DMU to quickly review the available facts of the case, and then if there appears to

be a breach of the conduct requirements, the DMU should contact the SMS firm and set out some initial concerns. At this stage they could signal a likelihood of more formal proceedings and give the SMS firm the chance to look into the case and review whether they want to take voluntary action to resolve it. Alternatively, as Gener8 would have found useful on a number of occasions in recent months, the DMU could convene a discussion between the parties involved and support more effective communication.

While this will not always resolve the complainant's concerns, this approach at least has the possibility of solving very many issues in multiples of weeks rather than nine months, and potentially increase the number of issues addressed by an order of magnitude each year. In order for the CMA to take such an approach, it will need to feel empowered, or even compelled to do so. Otherwise it will be concerned about being criticised or challenged for not following due process.

While conduct investigations can be shortened when the facts are plain or a resolution is quickly agreed upon, the formality and legal basis of these interactions will not support the kind of agile, swift, and participative vision for the new regime set out by the Furman Review. We therefore propose an amendment to the Bill that sets a clear legal expectation on the CMA to first consider whether conduct concerns could be swiftly resolved through direct engagement with the parties involved. If that process is not effective or not deemed appropriate, only then should the CMA take forward more formal investigation and enforcement proceedings.

Gener8 currently faces multiple issues each month that we believe will be relevant to the newly created conduct requirements. As the Bill is drafted, we are not confident that the new regime will have the capacity to resolve these for us in a timely manner. On this basis, we propose the following amendment in the interest of creating a more participative and fast-moving regime:

- **Proposed amendment 2:** In Chapter 3, Clause 26, insert at the end ", and where the CMA concludes that a satisfactory resolution cannot be achieved more quickly or effectively through alternative means, such as dialogue between the undertaking and a third party."

Prioritisation of PCIs can drive compliance

Pro-competition interventions (PCIs) will be an essential tool for opening up digital markets where competition is restricted, either by natural market features or by decisions made by incumbent SMS firms. In addition, with appropriate signals set out within the framework of the regime, the mere existence of the PCI tool could also incentivise improvements in SMS firms' conduct. We suggest that some clearer prioritisation factors for use of the PCI tool could have substantial positive benefits for the regime.

In support of the above-mentioned vision for a more participative regime, we believe it is essential that the Bill sets into law a clear expectation – both for the CMA and SMS firms alike – that cooperation and compliance with the regime will be a key factor that informs the CMA's PCI prioritisation exercise.

The strongest motivator for an SMS firm will not be a slap on the wrist or even a large fine. It will be the threat of a PCI that could undermine their competitive advantage and market share. With an explicit expectation that compliance will be a prioritisation factor for PCI selection, SMS firms will be more likely to proactively comply with the conduct requirements in the first place, and more open to cooperating with the CMA where it raises concerns.

To this end, we propose the following amendment in Chapter 4, Clause 44:

- **Proposed amendment 3:** At the end of paragraph (2), insert "The CMA may also have regard to the degree of compliance with relevant conduct requirements by an undertaking designated as having SMS."

Further evidence

We look forward to providing oral evidence to your committee on 15 June.

In the meantime, if you would like further information in relation to the issues or proposed amendments discussed in this submission, please do not hesitate to get in touch:

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