June 2023

Digital Markets, Competition and Consumers Bill Public Bill Committee

Written evidence from Epic Games, Inc

Executive Summary

1. Epic Games, Inc ('Epic') welcomes the Digital Markets, Competition and Consumers Bill ('the Bill'). It is a significant step forward in opening digital markets to help innovative companies grow and to benefit UK consumers with better (and better-priced) goods and services. The Bill is about ensuring everyone, not just the dominant mobile gatekeepers, has a stake in the future of the digital economy. It aims to level the playing field, and ensure that competition law can keep up with the pace of innovation. Implemented correctly, it will lead to far greater innovation, choice and savings for consumers.

2. Epic supports the Bill's overall framework, including the legal test for identifying firms with Strategic Market Status ('SMS'), as well as the ability of the Digital Markets Unit ('DMU') within the Competition and Markets Authority ('CMA') to designate specific SMS activities within firms and then impose tailored conduct requirements on them. We support the proposal to introduce pro-competitive interventions and the enhanced merger review process for SMS firms. We also support the adoption of the Judicial Review standard for appeals. It is vital for the continued effectiveness of the CMA and the digital markets regime that these portions of the Bill are maintained.

3. The UK has been a thought leader in competition law reform in relation to digital markets However, it has now been over four years since the Digital Competition Expert Panel delivered the 'Furman Report' which recommended a new regulatory framework, and two and a half years since the CMA's Digital Markets Taskforce proposed the detailed framework that is reflected in the Bill. Even with swift passage through Parliament, it is possible that the new regime will not be in full force until mid-2025. Below, we: (1) propose improvements to the Bill that would shorten the timeline for the regime coming into full force; (2) outline how transparency for smaller developers and consumers could be improved; and (3) propose targeted improvements to the leveraging principle to ensure that enforcement cannot be sidestepped by gatekeepers.

4. This submission focuses on sections of the Bill relevant to the proposed digital markets regime. It does not discuss the revisions to the competition and consumer law regimes.

Introduction to Epic Games

5. Founded by CEO Tim Sweeney in 1991, Epic Games is an American company headquartered in Cary, North Carolina. It has more than 40 offices worldwide. In the UK, Epic employs over 900 people, with offices in London, Manchester, Leamington Spa, Newcastle, Guildford and Edinburgh.

6. Epic is a leading interactive entertainment company and provider of 3D engine technology. Epic operates Fortnite, one of the world's largest interactive experiences with over 500 million accounts. Millions of consumers in the UK enjoy Epic's titles, where they can meet, talk, compete, dance, and even attend concerts and other cultural events. Epic also develops Unreal Engine, a complete suite of creation tools for game development, architectural and automotive

visualisation, linear film and television content creation, event production, training and simulation, and other real-time applications. These powerful tools are used across multiple sectors in the UK.

7. Apple and Google impose anti-competitive restrictions on the distribution of applications on mobile devices that impede consumer choice and innovation by mobile app developers. Unlike other general computing devices, including Macs and PCs, Apple and Google force developers for iOS and Android phones and tablets to offer software through Apple's and Google's ecosystems. For consumers it means that their ability to experience the internet on a mobile device is largely circumscribed by what Apple and Google allow it to be. For app developers it means that how they design a business model and whether they can reach consumers is limited by whether they adhere to whatever terms Apple and Google impose via their respective mobile app stores. These terms include arbitrary and exorbitant fees that are not disciplined by consumer choice or competitive market forces. In August 2020, Epic enabled the use of Epic's own payment system on Fortnite apps downloaded from the App Store and the Play Store, to provide Fortnite users with a discount of up to 20% on in-app purchases. Apple and Google retaliated by blocking Fortnite players from installing and updating the game through the App Store and Google Play Store. To this day, UK consumers cannot access Fortnite through Google's Play Store on Android devices and are completely prevented from accessing Fortnite on iOS.

8. Apple's and Google's mobile and app store practices harm UK innovation and growth. The powers conferred by this Bill are necessary to eliminate these harmful anti-competitive restrictions on mobile app developers and to ensure that two companies do not perpetuate and leverage their existing gatekeeper control over the mobile ecosystem to dominate future iterations of consumer experiences. In particular, the Bill will give the CMA powers to deliver on the recommendations contained in its 2022 Mobile Ecosystems Report, which are discussed in more detail below. That report recognized the super-dominance of Apple and Google in the mobile ecosystem, and identified that the consequence of Apple's and Google's unlawful tying practices and restrictions is that consumers experience less choice and pay more for apps and services while developers are prevented from innovating and benefitting from a competitive marketplace.[1] By enhancing the CMA's ability to break illegal ties on mobile app distribution and in-app payments through *ex ante* regulation, the CMA would be able to introduce measures enabling UK consumers to install apps on mobile devices from sources of their choosing. Mobile app developers, including Epic, will gain the right to compete in a fair marketplace and offer consumers competitive pricing options.

The Bill should maximise effective and efficient implementation of the digital markets regime

9. Epic supports the Bill's establishment of a digital markets regime. However, we emphasise three areas that are critical to ensuring timely and effective enforcement: (1) Providing the CMA with sufficient discretion and deference to develop and enforce remedies to promote an open and competitive mobile ecosystem; (2) Maintaining the Bill's current Judicial Review standard to promote efficient and effective enforcement of CMA remedies and to prevent dilatory, procedural gamesmanship by mobile gatekeepers; and (3) Ensuring that the Bill's "Countervailing Benefits Exemption" remains robust and is not weakened into an exception that swallows the rule.

CMA must be granted sufficient discretion to effectively and efficiently enforce remedies

10. Rather than prescribing specific SMS conduct requirements in the Bill itself, the Bill's digital markets regime grants the CMA authority and flexibility to develop solutions tailored to specific SMS activities. The regime's flexibility is one of its strengths. The CMA can target specific practices rather than entire firms. Remedies can be tested and revised over time as markets develop.

11. The Bill empowers the CMA with new *ex ante* powers to intervene in dysfunctional digital markets, including the authority to impose and enforce conduct requirements outlined in the CMA's Mobile

[1]The Competition and Markets Authority, '[Mobile ecosystems: Market study final report]', June 2022.

Ecosystems Final Report. There the CMA found that "Apple and Google have substantial and entrenched market power in native app distribution, with limited constraints on either the App Store or the Play Store."[2] It further found that "Apple's and Google's control over their respective mobile ecosystems allows them to set the 'rules of the game' for app developers, who rely on their app stores to reach customers and have little or no ability to negotiate over terms."[3]

12. The CMA's proposed remedies include compelling mobile gatekeepers to allow consumers to install alternative app stores and to permit streamlined, reasonable sideloading processes for individual applications on mobile devices. The CMA reasoned that these measures benefit mobile ecosystems through downward pressure of commission rates, reduced advertising, greater specialisation, as well as to "incentivise innovation and improve outcomes on privacy and security features."[4]

13. Epic supports the level of discretion the Bill allows the CMA to undertake its work. The CMA is internationally respected and staffed by leading experts from different fields, including behavioural economists and data science specialists versed in understanding the issues related to digital technologies and competition. It is well-placed as the expert agency to undertake its role under the Bill and it should be given sufficient discretion to execute its responsibilities without undue delay or excessive processes that can be exploited by SMS firms with the resources to do so.

Judicial Review is the appropriate appeals standard

14. The Bill aims to promote growth, dynamism and productivity in the digital economy. The new regime must avoid an overly burdensome system of appeals that could prevent the CMA from discharging its responsibility to implement pro-consumer policy measures and cause the UK to fall behind its EU counterparts in implementing changes that would level the playing field in digital markets. To that end, the Judicial Review appeal standard proposed in the Bill is appropriate for the digital markets regime and consistent with the wider regulatory landscape in the UK.

15. Judicial Review appeals balance the goals of ensuring efficient and effective enforcement with oversight and accountability should the CMA over- or under-step its mark. Traditional UK law principles under the "Judicial Review" standard allow for thorough judicial oversight of the CMA. The CMA must explain its decisions in detailed written reports and it must disclose underlying data to interested parties to allow them to identify errors. Decisions taken irrationally, unlawfully or without a fair process can be quashed and parties can challenge decisions that impact them. Both sides benefit from a prompt resolution of issues.

16. Judicial Review is the standard approach for expert regulators that are conducting forward-looking assessments of the sort the CMA will be conducting under the digital markets regime. For example, Judicial review is employed in analogous regimes such as the CMA's market investigation regime (which shares an identical legal test to the pro-competitive intervention process under the Bill), as well as in the CMA's mergers regime and Ofcom's price control and substantial market power regimes.

17. Conversely, a "Merits Appeal" standard could mire the CMA in unwieldy trials where the SMS firm could game the system by re-running arguments that previously failed.This would result in unnecessary delay – indeed, in CMA's experience Merits Appeals take more than twice as long as Judicial Review appeals. This is particularly a concern in a wide-ranging regulatory regime such as the DMCC, which will operate in dynamic and fast-moving markets where lengthy appeal processes re-litigating the same issues repeatedly could render the outcome of the process moot.

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[2] *Id*. at 4.184
[3] *Id.* at 6.
[4] *Id*. at 8.72-8.84.

Merits Review could also result in judicial decisions with unintended adverse impacts on innovation and the economy. Courts are well-positioned to evaluate the law, but they do not usually have the breadth of economic, technical and policy expertise as does an expert agency such as the CMA. Substituting a court's judgement for that of an expert agency is ill-suited to proceedings that rely heavily on complex economic, technical and policy analyses. In contrast, application of the Judicial Review standard ensures that courts review the legal elements of a challenge, while affording appropriate deference to the factual and policy findings of the expert agency.

The Countervailing Benefits Exemption must not swallow the rule

18. Epic supports the current drafting of the Countervailing Benefits Exemption in section 29 of the Bill, which gives SMS firms the opportunity to prove that otherwise proscribed activities have benefits that outweigh competitive harms. We support an exemption of that nature so that businesses have the opportunity to justify activities that may have pro-consumer benefits, but that would otherwise be considered a breach of the rules because of their anti-competitive impact. However, it is essential that the burden to prove the exemption rest on the businesses seeking to rely on it, and that any exemptions are truly justified because the conduct is "indispensable and proportionate" to the benefits claimed.

19. It is imperative that the exemption proposed in the Bill is not amended in ways that dilute the obligation of the SMS firm to prove that the conduct at issue is necessary and commensurate to purported benefits, and moreover is not a pretext to impose anti-competitive terms on developers and consumers. For example, mobile app store gatekeepers consistently advance security and privacy objectives as a guise to justify protecting their market-power. The CMA's mobile ecosystems report found these security and privacy justifications to be overstated. Ensuring that pretextual arguments such as these cannot be used as a scare-tactic or trump card to justify arbitrary and anti-competitive conduct is a key element to ensuring the success of the Bill's digital markets regime.

Proposed amendments to the Bill

Timelines

20. As it stands, it is possible that the first set of conduct requirements will not be fully implemented until mid-2025. The Bill includes some helpful measures seeking to minimise delays to the timeline, for example by including statutory deadlines for SMS designation investigations, conduct investigations and pro-competitive interventions. It also allows the CMA to work on the conduct requirements in parallel with undertaking the SMS designation investigation (section 13(2)). However, further provisions, as detailed below, will help ensure the Bill achieves its aims within a reasonable timeframe.

21. The CMA Mobile Ecosystems Report was subject to extensive public consultation and has been widely praised internationally.[5] It sets out a detailed understanding of the tech sector and clear next steps for the DMU to take once it is given statutory footing by the Bill. To ensure it is able to address its findings, the CMA should be explicitly given the ability to rely on its existing knowledge rather than being forced to duplicate work it has already done. It is likely that one delay tactic by SMS firms will be to seek to delay implementation by making the CMA revisit its prior work unnecessarily. Failure to permit the CMA to rely on its past work would allow SMS firms to delay implementation of the market study's findings, further frustrating the growth and innovation that competition generates.

[5] CMA, *Mobile ecosystems, Market study final report*, 10 June 2022. [link]

22. There is precedent for enabling an expert agency to rely on existing, timely market studies. For example, s2(4) of the Domestic Gas and Electricity (Tariff Cap) Act 2018 states: "Consultation undertaken before this Act is passed is as effective for the purposes of subsection (3) as consultation undertaken after it is passed."[6] By formally giving effect to past consultation work to which affected parties had the opportunity to contribute, the Act allowed the regulator to avoid unnecessary duplication of work before and after the Act came into force.

Section	Proposed amendment	Notes
13 Consultation on proposed decision	Add a new section 13(3): "Consultation on matters relevant to a decision under section 14(1) undertaken before this Act is passed is as effective for the purposes of subsection (1) as consultation undertaken after it is passed, unless the CMA considers that there has been a material change of circumstances."	The phrase "material change of circumstances" is used in the Enterprise Act 2002 for other CMA processes.
47 Consultation on proposed PCI decision	Add a new section 47(3): "Consultation on matters relevant to a decision under subsection (1) undertaken before this Act is passed is as effective for the purposes of subsection (1) as consultation undertaken after it is passed, unless the CMA considers that there has been a material change of circumstances."	

23. Unlike the SMS designation process, there is currently no deadline for the first conduct requirements that are imposed on an SMS firm. Parliament could help the new regime to come into force efficiently by setting a deadline.

Section	Proposed amendment	Notes
19 Power to impose conduct requirements	Insert clause 19, page 11, line 17, at end insert ", and (b) where the designated undertaking has been given an SMS decision notice under section 14(2), a conduct requirement must come into force no later than three months of the SMS decision notice being given"	This deadline would apply only to the first set of conduct requirements because the regime aims to allow the CMA to update them as time goes on. The flexibility to add further requirements at timing of the CMA's choosing should be maintained.

[6] Domestic Gas and Electricity (Tariff Cap) Act 2018 s.2(4) [link]

Leveraging principle

24. The regime created by the Bill will only apply to certain activities within an SMS firm, rather than the whole SMS firm.[7] However, the Bill states that conduct requirements may prevent the SMS firm from "carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking's market power materially, or bolster the strategic significance of its position, in relation to the relevant digital activity". This 'Leveraging Principle', allows the CMA to intervene in relation to certain non-SMS activities to prevent a firm from doing an "end-run" around rules by leveraging an adjacent activity to the one subject to conduct requirements. It is critical to the successful implementation of the digital markets regime.

25. Without a robust leveraging principle, the CMA may find itself unable to address harmful conduct and will meet appeal arguments about "where" (i.e., in which activity) a piece of conduct occurs, because the CMA will be unable to touch conduct that occurs outside the SMS activity even if it is closely related to the SMS activity. Furthermore, a too narrow leveraging principle could incentivise the CMA to draw over-broad definitions of the SMS activity, which is inconsistent with the intention for the Bill to be targeted, and could inadvertently lead to regulatory overreach.

26. We therefore propose a strengthening of the leveraging principle which would prevent Apple or Google simply moving its 30% fee from one location in its ecosystem to another - e.g. from app store 'service fee' to a new location like an 'operating system licence'. This will prevent a 'whack-a-mole' situation in which the regulator is always having to define new activities to catch up, losing valuable time to remedy anticompetitive conduct.

27. Section 20(3)(c) currently enables the CMA to impose conduct requirements that affect the SMS firm's conduct in non-SMS activities, but it is narrowly drafted. The CMA should be restricted to how much it can control non-SMS activities, however, the current wording is subject to abuse by SMS firms. We therefore think an amendment strengthening section 20 should be laid.

Section	Proposed amendment	Notes
20 Permitted types of conduct requirement	Amend section 20(3)(c) as follows: "carrying on activities other than the relevant digital activity in a way that is likely to increase the undertaking's market power materially, or bolster the strategic significance of its position, ~~in relation to the relevant digital activity~~ provided its ability to carry on in that way is related to the relevant digital activity."	The amendment would remove the requirement for the conduct to strengthen the SMS firm's market power in the SMS activity, and would therefore allow the DMU to tackle conduct that happens in the non-SMS activity that only has effects in that non-SMS activity. However, the text would retain a connection with the SMS activity.

Consultation and transparency

28. Epic welcomes the Bill's granting of significant consultation rights. However, there are situations where SMS firms receive access to greater levels of data and other information than non-SMS

[7] This is the approach taken by the European Union's Digital Markets Act, which designates whole firms as 'gatekeepers'.

firms, and at an earlier stage. This is true even for those non-SMS firms which are directly affected by the issues investigated by the DMU.

29. For example, at the beginning of an SMS investigation, the potential SMS firm receives a notice giving the details of the CMA's investigation (section 11(1)-(2)), but the firms which are directly affected by the firm's market power only receive the same "summary" as the general public (section 11(5)). This may not give the affected firms the information they need to effectively contribute to the CMA's investigation. It is too late in the process for the businesses which rely on the potential SMS firms to conduct their business to wait until the public consultation under section 13 because, by that time, the CMA's provisional decision has been made and the CMA very rarely changes its mind between its provisional decision and its final decision.

30. Similarly, at the end of an SMS investigation, the SMS firm receives a full account of the CMA's reasoning (section 12(3) or section 14(2), depending on the outcome), but the firms who are directly affected by the investigated firm's market power only receive the same "summary" as the general public (section 12(5) or section 14(5)).

31. Similar points apply in relation to conduct investigations and pro-competitive interventions, where non-SMS firms are potentially disadvantaged. We have included some suggested drafting that would address this problem below.

Section	Proposed amendment	Notes
11 Procedure relating to SMS investigations	Insert clause 11, page 6, line 36, at end insert— "(6) The CMA must provide a copy of the SMS investigation notice to any person who requests a copy."	Businesses which are directly affected by the potential SMS firm's market power can request a copy of the notice so that they can contribute to the CMA's work. There is minimal administrative burden on the CMA because it merely requires them to disclose a document that already exists. The published summary will serve to alert other businesses that the investigation has started, so that they can request the notice.
12 Closing an initial SMS investigation	Insert clause 12, page 7, line 9, at end insert— "(5) The CMA must provide a copy of the notice under subsection (2) to any person who requests a copy."	In this situation, it is important for other businesses to receive the details of the CMA's decision because the CMA has decided not to designate the potential SMS firm and that decision may adversely affect them.
14 Outcome of SMS investigations	Insert clause 14, page 7, line 36, at end insert— "(5A) The CMA must provide a copy of the SMS decision	

	notice to any person who requests a copy.”	
26 Power to begin a conduct investigation	Insert clause 26, page 14, line 19, at end insert— “(3A) The CMA must provide a copy of the SMS decision notice to any person who requests a copy.”	
28 Closing a conduct investigation without making a finding	Insert clause 28, page 15, line 20, at end insert— “(5) The CMA must provide a copy of the notice to any person who requests a copy.”	
30 Notice of findings	Insert clause 30, page 16, line 13, at end insert— “(4A) The CMA must provide a copy of the notice to any person who requests a copy.”	
46 Procedure relating to PCI investigations	Insert clause 46, page 25, line 38, at end insert— “(5) The CMA must provide a copy of the PCI investigation notice to any person who requests a copy.”	

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