

Written evidence submitted by Spotify (DMCCB33)

Executive Summary

Spotify is pleased to submit the following comments and evidence regarding the Digital Markets, Competition and Consumers Bill (“DMCC”) currently being considered in Parliament. In this testimony, we focus only on the digital markets elements of the Bill, reserving the possibility of commenting on other elements at a later date.

Spotify supports the DMCC as a necessary complement to existing competition law enforcement and as a means to constrain the abusive behaviour of dominant digital gatekeepers, to unleash innovation on mobile devices, to ensure that UK consumers fully realise the benefits of that innovation, and to ensure that the UK is a welcome place for technology businesses to flourish.

We have a handful of suggestions on amendments and improvements to the Bill as currently drafted to ensure that its goals are reached in a timely and effective manner. As described below these are in the areas of:

- SMS designation criteria
- Use of and reliance on recent existing studies by the CMA
- Standard of review on appeal
- Time for which a non-designation decision remains valid

About Spotify

Spotify is one of the world’s most popular audio streaming subscription services with more than 515 million users, including 210 million subscribers, across over 180 markets. Spotify transformed music listening when it launched in 2008. We help people discover, manage and share over 100 million tracks, including 5 million podcasts, for free, or through Spotify Premium. Spotify offers access to exclusive features for music including improved sound quality and an on-demand, offline, and ad-free music listening experience.

The UK market for audio content is vibrant and extremely important to Spotify. This is why we have made important investments in the country. Our UK office holds a wealth of talent in audio, tech, engineering, product, design, data, research, and insights. In total, over 1,000 people work at our London office, making it one of Spotify’s biggest R&D hubs globally and the company’s first major technology centre outside of Sweden and the USA.

Spotify’s Position on the DMCC

As a company that has experienced first-hand the abuses of dominant mobile device platforms, Spotify has been a leading voice around the world in support of legislation designed to complement antitrust enforcement and more effectively address abuses and unfair practices by gatekeeper digital platforms. For instance, we support and welcome the entry into force of the Digital Markets Act (DMA) in the EU and we have been vocal in our call for the passage of the Open App Markets Act in the US. Traditional competition law enforcement has proven too uncertain and too slow to effectively constrain abusive and anticompetitive conduct by digital gatekeepers, and we believe the time has come for legislation to more clearly and effectively define the rules of competition, address this abusive conduct, and unleash the next wave of digital innovation.

We similarly welcome and support the DMCC as a needed step toward promoting innovation and competitiveness and unleashing the benefits of free and fair competition for UK consumers and businesses alike. The Bill has the potential to address in an effective and timely manner the unfair and anticompetitive conduct of the dominant digital mobile platforms. Its comparatively flexible approach to defining codes of conduct for firms with Strategic Market Status (SMS) promises to deliver bespoke compliance regimes and future-proofs the statute to some degree. We believe that the DMCC will be a useful, necessary, and effective tool in constraining the abusive conduct of dominant firms like Apple that are thwarting competition and harming consumers.

We are at a place in history where two firms effectively control access to the internet through mobile devices (the means by which consumers are increasingly, and often exclusively, accessing services on the internet). Twenty-five years ago, when it was Microsoft that controlled access to the internet, regulators acted and allowed innovative companies like Apple and Google to build thriving businesses accessing their customers on PC computers without undue interference by Microsoft (ie, Apple with iTunes and the iPod). Today, those very companies who benefitted from that regulation have developed indispensable platforms for app developers and similar action is needed to make sure that innovators will not be unduly constrained by them. The DMCC is important to removing those constraints, limiting gatekeeper firms' power, and making the UK a place where independent software developers can come to build their businesses.

Within this background of our overall support for the objectives of the Bill, we provide some recommendations aimed at making the Bill more effective and less prone to unintended consequences. We will briefly outline the kinds of abuses that Spotify has been subject to at the hands of Apple, and, focusing on the digital markets aspects, describe some recommendations to strengthen the Bill.

Spotify's Experience With Apple

Spotify is both a competitor to Apple Music and dependent on Apple's iPhone and App Store to reach our customers.

For many years now, Apple has leveraged the substantial and entrenched market power that it wields with the iPhone and App Store to the detriment of consumers and competitors.

This wasn't always the case. In 2008, when Apple and many other smartphone makers were in fierce competition to capture a slice of this new consumer technology space and when Spotify was getting started on mobile devices, Apple was a welcome environment for developers. Spotify invested in our business on iPhones. However, a few years later, when the market settled around two mobile ecosystems and Apple found itself more immune from competition, the tables were turned on developers who now found themselves at the mercy of Apple. Since then, Apple has turned from a model of attraction to one of extraction.

As Apple has gained market power, its conduct has turned from encouraging developers to use the iOS platforms to make iPhones more attractive for consumers, toward extracting rents from and imposing costs on dependent businesses, limiting the functionality of competing apps, and advantaging its own services.

With respect to Spotify, Apple has left us with the very unattractive choice: offer to sell and process a user's subscription conveniently in the app, and for that privilege pay Apple 30% of our subscription revenue (a challenging proposition given that Spotify pays out nearly 70% of the revenue we generate from music back to rights holders), or, sign up those users and process their subscriptions on our website, but be unable to inform our customers of that possibility from within the app that they are using. Moreover, we know that we could improve the experience for our customers and make them aware of special offers, but we can't for the simple reason that Apple won't let us. Of course Apple Music is not subject to these restrictions.

Not only does this add complexity for our users to be able to become paying Spotify subscribers, it creates friction in our business model that has real opportunity cost (eg, lost subscribers, as well as requiring Spotify to invest more in subscriber and conversion marketing and to develop and launch products in a way that can pass the obstacle of App Store approvals).

We encourage you to review the timeline and further examples of Apple's anticompetitive behaviour as detailed on our website [Time to Play Fair](#).

Recommendations to Strengthen the DMCC

Recommendation #1 – Ensure that the focus of the legislation and its enforcement is on true digital gatekeepers (such as mobile ecosystems and app stores) by making the SMS designation criteria more stringent

It will be critical to the success of this Bill that the restraints on conduct contemplated be reserved for true gatekeeper firms. The reality is that there are less than a handful of such firms that possess the power, position, and ability to extend and entrench that power that warrant the interventions contemplated by the DMCC. These gatekeeper firms control large swaths of the digital economy, enjoy barriers to entry by would-be competitors, and importantly, have independent businesses dependent upon their platforms.

The Government has been clear that the Bill is aimed at a handful of the most powerful firms that hold gatekeeper positions in the modern economy. It is important to remember that this concept is significantly different from being a large firm or even from being a dominant firm in an industry.

Currently the Bill has both qualitative and quantitative criteria as a means of considering which firms enjoy SMS. We recommend both criteria be tightened to ensure that the Bill impacts the companies in a true position of strategic significance, while not unnecessarily creating uncertainty for non-SMS firms.

The current qualitative criteria should be strengthened to ensure that companies that are designated as SMS will truly possess the market power and the means to exploit and leverage it, which the Bill is intended to address. Specifically, we recommend that qualitative criteria consider structural characteristics that indicate substantial and entrenched market power (ie. network effects, vertical integration, data-driven advantages), as well as a firm's position of strategic significance in the digital economy.

Additionally, while the quantitative criteria establish a safe-harbour for firms below the thresholds, rather than a presumption for those above, that safe-harbour could and should be increased. Today's true gatekeeper companies are much larger than the thresholds in the current draft. Making the qualitative safe-harbour larger will avoid creating uncertainty for non-gatekeepers who may be large and successful, but not in a position to exercise market power, while easily capturing the companies that today possess SMS. We would propose increasing the safe harbour threshold for global turnover to £75 billion, and make that and the £1 billion threshold for UK turnover cumulative. Such a change would serve both to focus the resources on the DMU where they should be focused, and to ensure that non-gatekeepers have more certainty in their ability to build their businesses without worrying that size or success alone will give rise to unwarranted scrutiny.

In the light of these considerations, we recommend the following adjustments to Chapter 2 of the Bill (line edits in red, suggested deletions in ~~strikethrough~~):

2 Designation of undertaking

(1) The CMA may designate an undertaking as having strategic market status (“SMS”) in respect of a digital activity carried out by the undertaking where the CMA considers that—

(a) the digital activity is linked to the United Kingdom (see section 4), and

(b) the undertaking meets the SMS conditions in respect of the digital activity.

(2) The SMS conditions are that the undertaking has—

(a) substantial and entrenched market power *that is at least equivalent to a dominant position* (see section 5), and

(b) a position of strategic significance (see section 6), in respect of the digital activity.

(3) Subsection (1) is subject to section 7 (“the turnover condition”).

(4) The CMA may only designate an undertaking as having SMS in respect of a digital activity after carrying out an SMS investigation in accordance with this Chapter.

5 Substantial and entrenched market power

In order to assess whether an undertaking has substantial and entrenched market power *that is equivalent to a dominant position* in respect of a digital activity for the purposes of section 2(2)(a), the CMA must –

(1) carry out a forward-looking assessment of a period of at least 5 years, taking into account developments that—

(a) would be expected or foreseeable if the CMA did not designate the undertaking as having SMS in respect of the digital activity, and

(b) may affect the undertaking’s conduct in carrying out the digital activity; and

(2) Consider at least the following structural characteristics --

(a) network effects;

(b) data-driven advantages;

(c) scale and scope effects;

(d) user switching;

(e) user multi-homing; and

(f) vertical integration.

6 Position of strategic significance

(1) *To assess whether an* undertaking has a position of strategic significance in respect of a digital activity for the purposes of section 2(2)(b) *the CMA must consider that* ~~where one or more of~~ the following conditions *are* met—

(a) the undertaking has achieved a position of significant size or scale in respect of the digital activity;

(b) a significant number of other undertakings use the digital activity as carried out by the undertaking in carrying on their business;

(c) the undertaking's position in respect of the digital activity would allow it to extend its market power to a range of other activities;

(d) the undertaking's position in respect of the digital activity allows it to determine or substantially influence the ways in which other undertakings conduct themselves, in respect of the digital activity or otherwise.

(2) The Secretary of State may by regulations amend this section so as to vary the conditions in subsection (1).

(3) Regulations under subsection (2) are subject to the affirmative procedure.

7 The turnover condition

[...]

(2) The turnover condition is met in relation to an undertaking if the CMA estimates that—

(a) the total value of the global turnover of an undertaking or, where the undertaking is part of a group, the global turnover of that group in the relevant period exceeds *£75 billion, or and*

(b) the total value of the UK turnover of an undertaking or, where the undertaking is part of a group, the UK turnover of that group in the relevant period exceeds £1 billion.

[...]

Recommendation #2 – Allow reliance on existing CMA market studies

A key motivation for this legislation is to address the reality of how long traditional competition law enforcement takes to resolve. Thus, it's important to ensure that the DMU can utilise and

rely upon work already done by the CMA in this space. In the case of mobile ecosystems, the DMU can and should rely on the comprehensive 2022 Market Study¹.

We understand that the DMU intends to use its existing work to inform its actions under the DMCC Bill, but there is no explicit provision that gives it the ability to do so. Legal arguments could be made by the SMS firms to obstruct and delay the DMU by forcing the unit to re-run existing analysis. We suggest clarifying the text of the Bill to indicate that the DMU can rely upon recently completed studies.

We suggest adding two clauses to Sections 13 (consultation on proposed decision) and 47 (consultation on proposed PCI decision) so that the DMU can have clear authority to rely upon the work done in the Mobile Ecosystems Report.

Such clauses (in red) would read as follows:

a) Add a new clause 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.”

b) Add a new clause 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.”

Recommendation #3 - Appeal standard

The draft Bill provides significant discretion to the DMU during all steps of the enforcement process, namely the designation of SMS firms, the definition of the conduct requirements to be imposed on them, and the calculation of the penalties. This is coupled with a Judicial Review appeal standard which allows SMS-designated firms to appeal the DMU enforcement decisions only on the basis of process-based considerations.

While we support an appeal standard which would not allow SMS firms to unduly delay enforcement through spurious legal challenges, careful consideration should be given to aligning the appeal standard to the degree of regulatory discretion available to the DMU.

¹ CMA Mobile Ecosystems Market Study Final Report (2022) - available [here](#)

In fact, should the Bill confirm the wide discretionary powers attributed to the DMU in terms of designation of SMS companies, definition of the conduct requirements, and calculation of the penalties, we would recommend considering an appeal standard granting enough merit-based review of the DMU decisions to ensure that the implementation of the Bill remains targeted and efficient. In this respect, a standard like the so-called “Judicial Review +” (JR+), would be advisable. Properly designed, the JR+ standard would have the benefit of keeping the appeals process streamlined as intended, at the same time taking due account of the merits in case of significant decisions.

Recommendation #4 - Moratorium on designation in case of investigation leading to the conclusion that the undertaking does not have SMS status

As currently drafted, the Bill allows the DMU to begin an investigation into whether to designate an undertaking as having SMS, even if it has previously made a decision not to designate the company with respect to the same activity (Clause 9(3)). This creates significant legal uncertainty for companies and conflicts with the principle of legitimate expectations.

To make the enforcement of the DMCC more efficient, we propose introducing a moratorium whereby the DMU is not allowed to open another investigation for a two year period of time unless it can show that its previous decision was based on misleading / false information. Such a change would introduce a needed degree of certainty to the marketplace and market participants without unnecessarily allowing anticompetitive conduct to flourish. In addition, all firms in the marketplace would remain subject to existing competition law constraints on their conduct.

We recommend the following adjustments to Chapter 2, Section 9 (line edits in red, suggested deletions in strikethrough):

9 Initial SMS investigations

[...]

(3) The CMA may *not* begin an initial SMS investigation into whether to designate an undertaking as having SMS in respect of a digital activity ~~even~~ *for a period of two years from the the date of a final* ~~if it has previously made a~~ decision not to designate the undertaking as having SMS in respect of that activity.

(4) The CMA must consider the findings of previous market studies or market investigations relating to a digital activity in conducting an initial SMS investigation in respect of that activity.

20 June 2023