Coalition for APP FAIRNESS

Request for Comments on "The Future of Competition Policy in Canada" Consultation Paper

Response of the Coalition for App Fairness

I. Introduction

The Coalition for App Fairness (CAF) respectfully submits these comments in response to the consultation paper "The Future of Competition Policy in Canada" (the "Consultation Paper") published by the Government of Canada (the "Government") in November 2022. CAF commends the Government for undertaking this review and appreciates the opportunity to provide its input on the important and urgent task of updating the law in response to the digitization of the global economy.[1]

CAF is an independent non-profit organization, comprising more than seventy members of all sizes, founded to advocate for freedom of choice and fair competition across the app ecosystem.[2] CAF represents app developers around the world, including Canada. These developers serve consumers on every continent, and they benefit from competition in the markets they serve. CAF's vision is to ensure a level playing field for businesses relying on platforms like the Apple App Store and the Google Play Store to reach consumers and a consistent standard of conduct across the app ecosystem. In this context, CAF has published ten "App Store Principles," enshrining a series of rights that should be afforded to every app developer, regardless of their size or the nature of their business.[3]

CAF agrees with the Government's observation that, the "groundswell of international interest in the role of competition law and policy in making a better marketplace suggests that a critical examination is timely."[4] As the Consultation Paper notes, numerous jurisdictions have already updated their laws to address the unprecedented market power of just a handful of dominant platforms, or are well on their way to doing so.[5] CAF strongly agrees that Canada has a

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[1] As the consultation paper notes, "[T]he [Competition] Act has not, for the most part, been updated in any fundamental respect in response to the digitization of the global economy." *See* Government of Canada, The Future of Competition Policy in Canada (Nov. 22, 2022), https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/future-competition-policy-canada. [hereinafter Consultation Paper]

[2] Coalition for App Fairness, https://appfairness.org (last visited Apr. 27, 2022).

[3] Coalition for App Fairness, *Our Vision For The Future*, https://appfairness.org/our-vision/ (last visited Apr. 27, 2022).

[4] Consultation Paper, *supra* note 1, at 11.

[5] *See, e.g.*, Hamza Shaban & Cristiano Lima, *U.S. legislators hail South Korea's move to curb Apple and Google's App-store Dominance*, The Washington Post (Aug. 31, 2021), https://www.washingtonpost.com/business/2021/08/31/apple-google-app-store-south-korea/; Eur. Comm'n, Digital Markets Act: Ensuring Fair And Open Digital Markets, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-

critical role to play to promote and secure the benefits of competition for Canadian consumers and businesses that are based, or do business, in Canada. As the Consultation Paper states, "Canada must also do its part to ensure that [its] rules facilitate not only a dynamic, competitive economy at home, but also equip [Canada] to continue as a capable partner in the global push for fairness, inclusion and prosperity in the world's new marketplace."[6]

As the Government considers its options to address competition concerns in digital markets, in particular, we would like to emphasize three important considerations. First, CAF notes that a factor that should be considered in deciding on the regulatory approach to follow is the speed in which the relevant reforms can be adopted and operational. Given the significant harms to businesses and consumers that have already been caused by the conduct of digital gatekeepers, it is imperative that any regulatory intervention is timely. As the Canadian Competition Bureau noted in their submission:

> Canadians deserve open and competitive markets, where firms are able to succeed or fail on their own merits. Unfortunately, at present, there are significant substantive challenges with the application of the abuse of dominance provisions under the Act, giving powerful firms undue ability to shape how competition evolves.[7]

Second, CAF notes that, regardless of the approach to be ultimately followed, particular weight should be given to enforcement. If gatekeepers are able to escape the rules, then the harms arising from their conduct will only persist. Therefore, the Government should pay particular attention to the issue of enforcement: any approach chosen should be accompanied by an effective implementation and enforcement regime, which will encompass strong sanctions, effective in constraining the gatekeepers' harmful conduct. In this regard, it is of the utmost importance that the enforcer be granted sufficient (human and financial) resources to monitor, implement and enforce the rules.

Third, Canada should seek to ensure convergence (at least at the substantive level) with EU rules, as well as rules in other jurisdictions with respect to addressing digital gatekeepers' abuse of monopoly power to facilitate the capacity of major economies to tackle these global challenges together. Importantly, as several members of Congress recently explained, "It is not 'trade discrimination' for the U.S. government or any of our trading partners to regulate Google,

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age/digital-markets-act-ensuring-fair-and-open-digital-markets_en (last visited Apr. 28, 2023); *see also* Rick VanMeter, *Competition Comes to the App Store*, RealClearPolicy (May 10, 2022) https://www.realclearpolicy.com/articles/2022/05/10/competition_comes_to_the_app_store_831388.html; Press Release, UK Dep't for Bus. & Trade, Dep't for Sci., Innovation & Tech, Kevin Hollinrake MP, & Paul Scully MP, New Bill to Crack Down on Rip-offs, Protect Consumer Cash Online and Boost Competition in Digital Markets, Apr. 25, 2023, https://www.gov.uk/government/news/new-bill-to-crack-down-on-rip-offs-protect-consumer-cash-onlineand-boost-competition-in-digital-markets.

[6] Consultation Paper, *supra* note 1, at 12.

[7] Competition Bureau Canada, The Future of Competition Policy in Canada (Mar. 15, 2023), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/future-competition-policy-canada.

Meta, Apple, Microsoft, and Amazon to protect online competition, as tech industry groups have claimed—it is common sense, and trade-pact terms should in no way inhibit it."[8]

In this submission, CAF will provide observations in response to the questions posed in the Consultation Paper that are most relevant for its members' activities. In doing so, CAF will focus its comments on proposed changes to Canada's federal Competition Act (the "Act") that would promote competition in the mobile app economy. Notably, this sector is particularly concentrated, where Apple and Google – having parallel monopolies over their respective mobile ecosystems – are able to dictate the rules of the game, harming app developers and their users.

Based on CAF's experience, including communications with its own members, we believe it is vital to recognize the very real fear of economic retaliation that many businesses, of all sizes, have when it comes to Apple and Google.[9] For this reason, many market participants who are gravely concerned with the gatekeeper platforms' conduct in this space may nonetheless choose not to respond to the Request for Comments out of fear. CAF is in a unique position to fight for developers who are understandably afraid to speak as individuals, on their own behalf. As such, a simple tally of comments in support of, versus criticizing, Apple and Google's conduct with respect to the mobile ecosystem would be highly misleading.

II. Competition Concerns in the Mobile App Ecosystem

To better inform the Government's efforts, in this section, CAF provides an overview of the Mobile App Ecosystem. Further, we describe Apple's and Google's actions in this space that CAF's membership identifies as particularly harmful to competition and the competitive process. The harms arising from Apple's and Google's unilateral conduct in relation to their app stores (and operating systems) are well-documented by competition authorities around the world, researchers, and think tanks.[10] Thus, in this submission, CAF will not go into detail in explaining such harms, instead providing an overview.

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[8] Letter from U.S. Senators Elizabeth Warren, Amy Klobuchar, Sherrod Brown & Richard Blumenthal and U.S. Representatives Jan Schakowsky, David Cicilline & Rosa DeLauro to Katherine Tai, Ambassador, United States Trade Representative, and Gina Raimondo, Secretary, U.S. Dep't of Com. (Apr. 21, 2023), https://www.washingtonpost.com/documents/1c8ae425-392a-49bf-afe1-d3d0ff0e8601.pdf.

[9] The House Judiciary Digital Markets Report described this fear of retaliation as follows: "Unfortunately, some market participants did not respond to substantive inquiries due to fear of economic retaliation. These market participants explained that their business and livelihoods rely on one or more of the digital platforms. One response stated, 'Unfortunately, [the CEO] is not able to be more public at this time out of concern for retribution to his business,' adding, 'I am pretty certain we are not the only ones that are afraid of going public.'" Another business that ultimately declined to participate in the investigation expressed similar concerns, stating, 'We really appreciate you reaching out to us and are certainly considering going on the record with our story. . . . Given how powerful Google is and their past actions, we are also quite frankly worried about retaliation.'" *See* Staff of Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary, 117th Cong., 2d Session, Investigation of Competition in Digital Markets (published July 2022), at 27 [hereinafter House Judiciary Digital Markets Report].

[10] *See, e.g.*, Japan Fair Trade Commission, Market Study Report on Mobile OS and Mobile App Distribution, Feb. 9, 2023, https://www.jftc.go.jp/en/pressreleases/yearly-2023/February/230209.html; Dep't of Com., Competition in the Mobile Application Ecosystem (Feb. 2023), https://www.ntia.gov/sites/default/files/publications/mobileappecosystemreport.pdf?_ga=2.85047065.1099696990.1675189097-484633385.1674156880; Australian Competition & Consumer Commission, Digital Platform Services

The harms can be categorized broadly as follows: (1) harms arising from the imposition of unfair and abusive terms on app developers; (2) harms arising from the collection and use of commercially sensitive information; (3) harms arising from the erratic app review process; (4) harms arising from Apple's and Google's self-preferencing practices; (5) harms arising from the limitations placed on access to technology and functionalities; and (6) harms arising from user lock-in to a single app store and the effective elimination of app store competition and consumer choice. Notably, as detailed below, consumers suffer immensely from all of these harms.

A. Overview of the Mobile App Ecosystem

The vast majority of smartphone users purchase devices that run on Apple (iOS) or Android (Google) operating systems, with about 28% of global smartphone users operating an iOS-run device and over 70% operating an Android-run device as of March 2023.[11] For Canada, over 60% of smartphone users operate an iOS-run device and about 38% operate an Android-run device.[12] Apple keeps iOS proprietary (i.e., it can only be run on Apple hardware), while Google licenses the Android operating system to smartphone manufacturers like Samsung or Motorola.

Apple and Google control the sale of third-party apps on these devices through their "app stores" – the Apple App Store and the Google Play Store, respectively. Very few consumers own both Android and iOS devices; this is, in part, because users incur high costs to switch from one ecosystem to the other. These switching costs include: the cost of buying a new smartphone and peripheral hardware, the challenge of learning a different operating system, the time to transfer data, and the costs of obtaining new apps because iOS apps do not work on Android, and vice versa. Consistent with this, only about 2% of iPhone users switch to Android each year.[13]

It is important to consider Apple's App Store within the context of the company's broader business model. Apple is one of the most profitable companies in the world. As of April 2022, Apple hit record annual sales of $378.7 billion, profits of $100.6 billion, and a market capitalization of $2.6 trillion.[14] Apple initially built its reputation on the sale of iconic products, such as the iPhone, the iPad, or the Apple Mac. However, as growth in sales of hardware devices

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Inquiry: Interim report No. 2 – App marketplaces, Mar. 2021, https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf [hereinafter ACCC Digital Platform Interim Report No. 2]; House Judiciary Digital Markets Report, *supra* note 9; UK Competition & Markets Authority, Mobile Ecosystems: Market Study Final Report, June 10, 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1138104/Mobile_Ecosystems_Final_Report_amended_2.pdf [hereinafter UK CMA Mobile Ecosystems Final Report].

[11] StatCounter Global Stats, Mobile Operating System Market Share: March 2022 – March 2023, https://gs.statcounter.com/os-market-share/mobile/worldwide (last visited Apr. 27, 2023).

[12] StatCounter Global Stats, Mobile Operating System Market Share Canada: March 2022 – March 2023, https://gs.statcounter.com/os-market-share/mobile/canada (last visited Apr. 27, 2023).

[13] Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 960 (N.D. Cal. Sept. 10, 2021).

[14] Andrea Murphy & Isabel Contreras, *2022: The Global 2000*, Forbes (May 12, 2022), https://www.forbes.com/lists/global2000/?sh=400ed5a55ac0.

slowed, Apple leveraged its position, and it is now capitalizing on its iOS mobile ecosystem as an important source of revenue. For instance, in 2020, developers generated $72.3 billion in revenue through their apps distributed on the App Store, out of which Apple typically kept a 30% cut (reduced to 15% in some circumstances).[15] In a competitive market, Apple's inflated fees would dissipate, but for app developers the App Store represents the only way to distribute their apps to iOS users. While Apple may be subject to limited competition from Android device makers at the product level, once users have acquired an iPhone, the App Store is the only conduit between users and app developers. It is this situation that gives Apple its gatekeeper power.

Similarly, Google Play should be viewed within the context of Google's broader business model. Google (Alphabet) is also one of the most profitable companies in the world with annual sales of $257.5 billion, profits of $76.03 billion, and a market capitalization of $1.6 trillion as of April 22, 2022.[16] Since capturing the market for online search, Google has expanded into adjacent markets. Google acquired the Android mobile operating system in 2005 and has consistently promised that it would be the basis for an "open" ecosystem.[17] The Google Play Store is the default and dominant app store on Android devices. Although Google does, technically, permit users to install alternative app stores, it imposes restrictions and actively discourages consumers from downloading apps outside of the Google Play Store with warnings and other obstacles.

In 2020, developers generated $38.6 billion in revenue through their apps distributed on the Google Play Store.[18] Google previously kept up to a 30% cut of revenue from developers, but, under intense regulatory and public scrutiny, it agreed to lower its commission to 15% in certain circumstances.[19] While this represents an improvement, this does not change the fact that Google's control over Android and the Google Play Store allows it to impose terms and conditions on developers that it would not otherwise be able to extract in a competitive market. While Google may be subject to limited competition from Apple at the product level, once users have acquired an Android device, the Play Store is still the only practicable conduit between users and app developers. It is this situation that gives Google its gatekeeper power.

In sum, Apple and Google effectively have monopoly power over their respective mobile ecosystems: they control the supply of the two main mobile operating systems (iOS and Android, respectively), as well as mobile app distribution (through their operation of the App Store and the Play Store). Competition within and between Apple's and Google's mobile ecosystems is

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[15] Stephanie Chan, *U.S. iPhone Users Spent An Average of $138 on Apps in 2020, 38% More Than the Year Before*, Sensor Tower: Store Intelligence (April 2021), https://sensortower.com/blog/revenue-per-iphone-2020.

[16] Murphy & Conteras, *supra* note 14.

[17] *See, e.g.*, *Andy Rubin's Email to Android Partners*, The Wall Street Journal (Mar. 13, 2013), https://www.wsj.com/articles/BL-DGB-26394.

[18] Chan, *supra* note 15.

[19] Daisuke Wakabayashi, *Google Plans to Lower the Cut it Takes in its App Store to 15 Percent*, N.Y. Times (Oct. 21, 2021), https://www.nytimes.com/2021/10/21/technology/google-app-store-developer-fees.html.

extremely limited.[20] As a result, Apple and Google act as digital gatekeepers for businesses trying to reach American consumers. This gatekeeper role allows the platforms to control businesses' access to end consumers, giving the platforms substantial power over businesses, as well as end users.

B. Harms Arising from the Imposition of Unfair and Abusive Terms on App Developers

The gatekeeper role Apple and Google have over app distribution allows them to unilaterally set, modify, interpret, and enforce the terms and conditions that app developers must accept as a condition of reaching their user base. App developers have no other choice but to accept Apple's and Google's terms, no matter how unfair or harmful they may be – or else they will lose access to their mobile user base. In this section, we refer to the harms arising from (i) the mandatory use of Apple's proprietary in-app payment system, In-App Purchase ("IAP"), and (ii) the anti-steering rules Apple imposes on app developers whose apps offer "digital" goods or services. As stated above, while CAF focuses on Apple, the following observations would also apply to Google, to the extent that its practices are similar to those of Apple.[21]

1. Mandatory Use of IAP

For app developers whose apps are deemed to offer "digital" goods or services (with Apple being the sole arbiter of deciding when this is the case),[22] Apple has tied access to the App Store to the use of IAP. The obligation to exclusively use IAP results in a variety of harms to competition and consumers.

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[20] Recent studies of the app store ecosystem have reached the same or a similar conclusion. *See, e.g.*, UK CMA Mobile Ecosystems Final Report, *supra* note 10, at 28; House Judiciary Committee Digital Markets Report, *supra* note 10, at 84-85; Australian Competition & Consumer Commission, Digital Platform Services Inquiry: Interim report No. 5 – Regulatory reform, Sept. 2021, at 38, https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20September%202022%20interim%20report.pdf [hereinafter ACCC Digital Platform Interim Report No. 5].

[21] While Google had historically been more lenient about mandating the exclusive use of its proprietary in-app payment system, Google Play's billing system ("GPB"), as explained below, developments over the last several years have shown a move towards in-app payment policies that are increasingly restrictive.

[22] Apple has discretion in deciding whether an app enables the purchase of "digital" goods or services and should thus use IAP or whether it enables the purchase of "physical" goods or services and thus should not use IAP. The distinction it draws is not always objective or logically founded, and it is difficult to understand why it considers some services as being consumed "within the app" while similar services are considered to be consumed "outside of the app." Note that within the category of apps deemed to offer "digital" goods or services, Apple has made over the years various exceptions to the obligation to use IAP (some of which were applied ad hoc, without being included in the App Store Review Guidelines).

a) App developers cannot choose the payment processor of their choice.

App developers, whose apps sell "digital" goods or services, are prohibited from choosing an alternative service provider to process in-app payments, having to use the "one-size-fits-all" IAP. Users are ultimately the losers, as app developers cannot offer flexible payment options and features valued by users (e.g., carrier billing, subscriptions with different billing cycles, targeted discounts, ability to pay in installments). In addition, the obligation to use IAP limits competition among and innovation from payment service providers, which would otherwise have a strong incentive to innovate in payment solutions specifically designed for in-app payments.[23]

Google has, historically, been more lenient than Apple about the use of its proprietary in-app payment system, Google Play's billing system ("GPB"). In September 2020, however, Google announced that all developers selling digital goods or services in their apps will be required to exclusively use GPB by September 30, 2021.[24] Google later announced that app developers could apply for an extension to the deadline for compliance with the GPB obligation until March 31, 2022.[25] According to Google's current Payments policy, "Starting June 1, 2022, any app that is still not compliant will be removed from Google Play."[26] As a recent report by the UK Competition and Markets Authority noted, "[i]n some respects, Google's rules have become more closely aligned with Apple over time."[27]

b) App developers are disintermediated from their users.

When IAP is used, Apple confiscates the customer relationship and forcibly interposes itself between the app developer and its users.[28] The app developer cannot provide customer

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[23] For additional detail regarding the harmful effects of the mandatory use of IAP on innovation, *see* Damien Geradin, *How Apple's App Store Practices are Stifling Innovation*, Coalition for App Fairness, at 3 (May 2021), https://appfairness.org/wpcontent/uploads/2021/05/caf-stifling-innovation.pdf.

[24] *See* Sameer Samat, *Listening to Developer Feedback to Improve Google Play*, Android Developers Blog (Sept. 28, 2020), https://android-developers.googleblog.com/2020/09/listening-to-developer-feedback-to.html.

[25] Purnima Kochikar, *Allowing Developers to Apply for More Time to Comply with Play Payments Policy*, Android Developers Blog (July 16, 2021), https://android-developers.googleblog.com/2021/07/apply-more-time-play-payments-policy.html. .

[26] *Understanding Google Play's Payments Policy*, Google, https://support.google.com/googleplay/android-developer/answer/10281818?hl=en (last visited Dec. 7, 2022). *See also* Kate Park, *South Korean Content Providers Raise Service Fees in the Wake of Google's In-app Payment Policy*, TechCrunch (June 2, 2022), https://techcrunch.com/2022/06/02/south-korean-content-providers-raise-service-fees-in-the-wake-of-googles-in-app-payment-policy/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAAIeOtvb4c5LetdmOorEUAKW0Sx4jI0KNZIiLvIw9KdmyIx6XNqT8LWTFEctpFzP7PhdSuXqPcS0vfrcv015jixyyunrI9LU0ak69F5IwFAiZ30DPqkftVZ1GJX2ZWi6DoUq_jhrKrNQc2ZzVCTScZuE7Gf8y-f35lduV_zNlEG4R.

[27] UK CMA Mobile Ecosystems Final Report, *supra* note 10.

[28] For additional detail on how Apple disintermediates app developers from their users when IAP is used, as well as the harmful effects of this, *see* Damien Geradin, *Apple's In-App Purchase ("IAP") as a Disintermediation Tool*,

support on crucial billing issues such as cancellations and refunds, which must be handled by Apple. This artificial separation between the provision of the service (which is the app developer's responsibility) and the provision of customer care services (which are handled by Apple) leads to unnecessary frictions in customer service processes (e.g., the handling of cancellations of subscriptions or refund requests). Not only are users harmed (as they are confronted with a chaotic, inefficient, and sub-par customer service), but also app developers' reputations are harmed, as consumers inevitably associate the poor user experience they receive with the developer's brand.[29]

In addition, through the use of IAP, Apple obtains access to commercially sensitive information about subscribers of third-party app developers (e.g., the user's full name, email, age, IP address, location, as well as credit card details and billing information), which it does not share with the app developer providing the service.[30] Consequently, app developers are deprived of access to valuable user data, which they could use to improve their services, personalize their offering and protect their users (e.g., from fraud) – while Apple collects unparalleled market intelligence.[31]

(1) IAP raises the costs of app developers offering "digital" goods or services.

For transactions made through IAP, app developers have to pay (up to) a 30% commission on the transaction value. In fact, the (up to) 30% commission does not reflect the value of the App Store; it is a supra-competitive commission that can only be imposed by Apple because of the market power it has over app distribution. In this regard, after an exhaustive trial on the merits in Epic Games' suit against Apple, U.S. District Court Judge Gonzalez Rogers concluded that Apple set its commission at 30% in an arbitrary manner, without regard to operational costs or benefits for users or developers.[32] Judge Gonzalez Rogers further determined that the amount of the (up to) 30% commission bears no relationship to the costs of running the App Store or the value offered to app developers; rather, it was a historic gamble that allowed Apple to reap supra-competitive margins.[33]

Coalition for App Fairness (May 2021), at 3, https://appfairness.org/wp-content/uploads/2021/05/CAF-IAP-as-DisintermediationTool.pdf.

[29] *See id.* at 3-5.

[30] Apple only shares limited information with app developers: when a transaction is made through IAP, the app developer receives a real-time notification that a purchase has been made for a specific product offered by the app developer. While the notification provides information about the purchased product, it does not contain information that would enable the app developer to identify the user with certainty, or information such as the amount paid or the currency used. *Id.* at 2.

[31] *Id.* at 3.

[32] Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1010 (N.D. Cal. Sept. 10, 2021).

[33] *Id.* at 992, 1054.

Apple's own apps do not incur such charges – nor do app developers whose apps are deemed to offer "physical" goods or services, which are not subject to the IAP obligation. The commission is therefore structured in an unfair and discriminatory manner.[34] The commission eats into the margins of app developers and raises the costs for Apple's rival apps, thus distorting downstream competition. In the long term, this can have significant negative effects for consumers, either because downstream markets are foreclosed or because app developers have a reduced ability and less incentive to invest in their apps or develop new, innovative apps, having handed a significant part of their (potential) income to Apple.[35]

(2) IAP raises switching costs and contributes to consumer lock-in.

The mandatory use of IAP increases switching costs, making it harder for users to switch to an Android device. Apple does not allow app developers to require that users link their account with their Apple ID, meaning that users who have purchased a subscription through IAP are not able to access their purchased content after switching to an Android device (instead having to repurchase or re-subscribe). Even if users can access purchased content, they cannot manage (e.g., cancel) pre-existing subscriptions after switching to a device with a different operating system. Therefore, users have to cancel their subscriptions before switching, which may be problematic for consumers who have multiple subscriptions with different billing cycles.

In fact, Apple has long perceived the mandatory use of IAP as a way to lock customers in its ecosystem: internal emails uncovered in the context of the Apple eBook litigation in the United States confirm that, in 2010, when Apple executives became aware of an Amazon Kindle ad on TV showing that it was easy for users to switch from iPhone to Android, Steve Jobs suggested that "[t]he first step might be to say [Amazon] must use our payment system for everything."[36]

2. Anti-Steering Rules

Apple prevents app developers whose apps offer "digital" goods or services from directly communicating with their users about purchasing channels other than IAP.[37] Google also has anti-steering rules, which, among other restrictions, prevent app developers from providing users

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[34] *See also* Adi Robertson, *Tim Cook Faces Harsh Questions About the App Store from Judge in Fortnite Trial*, The Verge (May 21, 2021), https://www.theverge.com/2021/5/21/22448023/epicapple-fortnite-antitrust-lawsuit-judge-tim-cook-app-store-questions.

[35] For additional discussion on how the IAP commission may stifle innovation, *see* Geradin, *How Apple's App Store Practices Are Stifling Innovation*, *supra* note 23, at 2.

[36] Production of Apple to H. Comm. on the Judiciary, HJC-APPLE-014701 (Nov. 22, 2010), https://democrats-judiciary.house.gov/uploadedfiles/014701.pdf.

[37] *App Store Review Guidelines: Article 3.1.1*, Apple, https://developer.apple.com/app-store/review/guidelines/#payments (Oct. 24, 2022).

with a link, within an app, to a web page that offers an alternative method of payment.[38] The scope and terms of both Apple's and Google's anti-steering rules are frequently subject to change. In addition, both companies' interpretation and application of these rules have often been unpredictable. The central purpose of these rules is to reinforce the obligation to use Apple's and Google's respective payment systems and safeguard the related commission.

Apple's and Google's anti-steering rules harm users, as they limit users' ability to make informed choices between various purchasing channels, causing users to miss out on (often cheaper) out-of-app alternatives. Because Apple's and Google's primary concern is to extract fees for the use of its respective payment systems, consumers are denied information as well as an optimal experience. The anti-steering rules also harm app developers, who live in fear that Apple or Google may suddenly change the wording or interpret them in a novel manner and reject an update of their app or remove it from the App Store or Play Store. Notably, the U.S. Ninth Circuit Court of Appeals issued a ruling on April 24, 2023, in *Epic Games v. Apple*, affirming the district court's finding that Apple's anti-steering rules violated California's Unfair Competition Law because it blocked consumers from making informed purchasing decisions and getting lower prices.[39]

C. Harms Arising from the Collection and Use of Commercially Sensitive Information

Because of its position as the operator of the App Store (the only app distribution channel available on iOS) and as the provider of the iOS operating system, Apple has access to a variety of commercially sensitive information. In fact, Apple has contractually built a framework whereby, on the basis of the Apple Developer Program License Agreement (which all app developers must sign in order to distribute their apps through the App Store) and the MFi program (which companies, including developers, that want their hardware accessories to

[38] *Play Console Help: Payments*, Google, https://support.google.com/googleplay/android-developer/answer/9858738, (last visited Apr 27, 2023) ("Other than the conditions described in Section 3 and Section 8, apps may not lead users to a payment method other than Google Play's billing system"); *see also* UK CMA Mobile Ecosystems Final Report, *supra* note 10, Appendix H, https://assets.publishing.service.gov.uk/media/62a0d1b68fa8f5039b2078e5/Appendix_H_-_In-app_purchase_rules_in_Apples_and_Googles_app_stores.pdf.

[39] Press Release, Rob Bonta, Attorney General of California, Attorney General Bonta: *Epic v. Apple* Decision is a Win for California Law Protecting Consumers and Competition (Apr. 24, 2023), https://oag.ca.gov/news/press-releases/attorney-general-bonta-epic-v-apple-decision-win-california-law-protecting (citing Epic Games, Inc. v. Apple, Inc., 2023 WL 3050076, (9th Cir. 2023)).

connect electronically to Apple devices must sign),[40] Apple can obtain and use sensitive information collected from app developers.[41]

In addition, Apple obtains sensitive commercial data from all apps obliged to use IAP, such as their customer lists, the purchasing activity of individual users and the success of subscriptions. Apple gains market intelligence, which it can use to scan the horizon and identify app categories with revenue growth opportunities. Apple can then swiftly develop its own apps and enter the services market, competing with app developers whose data played an instrumental role in Apple's ability to do so. While Apple may claim that its app development team does not have access to data collected from other lines of business, former Apple executive Philip Shoemaker has explained that Apple executives would frequently use insights based on App Store data to inform product development.[42]

CAF members Tile and Masimo have explained that Apple mandates that developers share commercially sensitive information, which Apple uses to develop competing products.[43] Masimo and Tile both make products that are compatible with Apple devices and also iOS apps to interact with those products, and as such have had no other choice but to agree to Apple's MFi agreement. Both of these companies expressed serious concerns with the non-negotiable and one-sided nature of Apple's MFi agreement. The agreement includes terms that permit Apple to (i) use any information submitted by licensees to develop its own competing products; and (ii) terminate the agreement if the licensee brings intellectual property or patent infringement proceedings against Apple.[44] This means that if a licensee seeks to enforce its statutory rights in court, Apple will retaliate by unilaterally ending the MFi agreement, effectively, forcing the licensee to stop selling any products that incorporate Apple-licensed technology.

Tile's experience with Apple provides an instructive example of the harms to competition that arise from Apple's collection and use of commercially sensitive information.[45] For many

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[40] CAF member Masimo has explained that many companies have essentially no choice but to sign the MFi Agreement because "[f]or companies whose devices need to rely on the Apple ecosystem to reach users, a refusal to sign the MFi Agreement entails severe consequences." *See* Masimo, Observations of Masimo on the Statement of Scope of the CMA's Mobile Ecosystems Market Study, at 4, https://assets.publishing.service.gov.uk/media/617aa5f48fa8f52986e61df1/Masimo.pdf.

[41] ACCC Digital Platform Interim Report No. 2, *supra* note 10, at 141.

[42] Reed Albergotti, *How Apple uses its App Store to Copy the Best Ideas*, The Washington Post (Sept. 5, 2019), https://www.washingtonpost.com/technology/2019/09/05/how-apple-usesits-app-store-copy-best-ideas/.

[43] *See, e.g.*, Tile, Observations of Tile on the Statement of Scope of the CMA's Mobile Ecosystems Market Study, at 4, https://assets.publishing.service.gov.uk/media/61a8a6ae8fa8f503780c1c8b/Tile_Inc_.pdf (explaining how "Apple can – and does – use [commercially-sensitive] information to develop its own competing products, services or features, which, when launched, will automatically gain huge scale"); Masimo, *supra* note 40, at 4 ("Apple uses its control over the various components of its ecosystem to adopt policies and/or engage in conduct that harms other companies by taking advantage of their innovations (e.g., by obtaining and freely using commercially-sensitive information of third parties), consequently depriving consumers of valuable, innovative products.").

[44] For additional discussion of the MFi agreement, see UK CMA Mobile Ecosystems Interim Report, *supra* note 20, at 288, 290, 429.

[45] Tile, *supra* note 43, at 2.

years, Apple and Tile had a highly collaborative relationship. That relationship soured, however, when Apple copied Tile's "finding network," by launching the "Find My Network," in 2019, and Tile's hardware, by launching the "AirTag" in 2021. Prior to Apple's launch of these competing products, Apple had access to a trove of sensitive information on Tile's products, through the App Store, as well as from previous partnerships such as a collaboration between Apple and Tile on a Siri voice assistant integration for Tile.[46]

As General Counsel for Tile Kirsten Daru testified at a Senate Judiciary hearing last year, "Apple owns and controls the entire commercial iOS ecosystem. They own the hardware, the operating system, the retail stores and the app store marketplace."[47] She continued, "This gives Apple access to competitively sensitive information, including identity of our iOS customers, subscription take rate, retail margins and more. And Apple's control over the ecosystem generally enables it to identify any successful app category and take it over by manipulating the ecosystem to give itself a sharp competitive edge."[48]

Masimo's experience also serves as an example of Apple's misappropriation of commercially sensitive information from a developer to advantage itself in its development of a competing product. As a recent Wall Street Journal article, featuring Masimo's and several similar instances, described, "It sounded like a dream partnership when Apple Inc. reached out to Joe Kiani, the founder of [Masimo,] a company that makes blood-oxygen measurement devices. He figured his technology was a perfect fit for the Apple Watch."[49] The article adds, however, that soon after:

> Apple began hiring employees from his company . . . including engineers and its chief medical officer. Apple offered to double their salaries, Mr. Kiani said. In 2019, Apple published patents under the name of a former Masimo engineer for sensors similar to Masimo's, documents show. The following year, Apple launched a watch that could measure blood oxygen levels.[50]

Apple is not alone in its desire to access its current or future competitors' commercially sensitive data. But its gatekeeper power over developers means that many developers have no choice but to grant Apple access to their data, which they never would agree to in an otherwise competitive marketplace. This fact is critical to understanding why conduct by a dominant

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[46] *Id.*

[47] *Antitrust Applied: Examining Competition in App Stores: Hearing Before the S. Comm. on the Judiciary Subcomm. on Competition Policy, Antitrust, and Consumer Rights*, 117th Cong. (Apr. 21, 2021) (statement of Kristen Daru, Gen. Counsel and Chief Privacy Officer, Tile, Inc., https://www.judiciary.senate.gov/imo/media/doc/04.21.21%20Kirsten%20Daru%20Senate%20Judiciary%20Testimony%20Final.pdf.)

[48] *Id.*

[49] Aaron Tilley, *When Apple Comes Calling, 'It's the Kiss of Death'*, The Wall Street Journal (Apr. 20, 2023), https://www.wsj.com/articles/apple-watch-patents-5b52cda0; *see also* Masimo, *supra* note 40.

[50] *Id.*

platform – as compared to similar conduct by a market participant that lacks gatekeeper power – has a markedly different impact and is, therefore, deserving of different treatment under the law.

The fear of Apple using commercially sensitive information about third-party apps, services and/or products for its own purposes, reduces the incentives of app developers to innovate, since they know that if they are successful, Apple may appropriate their intellectual property and then target them through exclusionary practices.

D. Harms Arising from the Erratic App Review Process

In order for an app (and each subsequent update of the app) to be available on the App Store, it must first be approved by Apple during the app review process. The app review process (during which Apple assesses compliance of the app or update with its unilaterally imposed App Store Review Guidelines),[51] affords Apple unique power over app developers wishing to reach mobile users. Furthermore, Apple has unfettered discretion in interpreting and applying its rules and carrying out the app review process. As Apple's App Store Review Guidelines put it: "We will reject apps for any content or behavior that we believe is over the line. What line, you ask? Well, as a Supreme Court Justice once said, 'I'll know it when I see it.' And we think that you will also know it when you cross it."[52]

Apple is the judge, jury, and executioner, meaning that it has the ability to apply its rules in an arbitrary and capricious manner. App developers cannot know in advance how Apple will interpret the rules each time, having to operate their business in uncertainty. At the same time, Apple often only provides cryptic feedback to app developers about the reasons for the rejection of their apps or updates, leaving them wondering what they need to do for their apps to be compliant with Apple's rules.

CAF's members have suffered harm to their businesses due to Apple's capricious and inconsistent application of its rules. For example, as CAF explained in one of its fact sheets, Apple suddenly changed its approach towards screen time and parental control apps, removing or restricting leading apps from the App Store, exposing millions of children and undermining millions of parents who had relied on these third-party apps and tools to limit the time they and their children spend on the iPhone. This unilateral action coincided with the announcement of the launch of "Screen Time," Apple's own screen limiting tool.[53] FlickType faced a similar issue when Apple unexpectedly rejected an update of its app, even though previous versions of it were approved, and so were other apps offering a similar service. Following the launch of its HEY

[51] *App Store Review Guidelines*, Apple, https://developer.apple.com/app-store/review/guidelines/ (Oct. 24, 2022).

[52] *Id.*

[53] Geradin, *How Apple's App Store Practices Are Stifling Innovation*, *supra* note 23, at 4-5.

email app, Basecamp also experienced harm to its business as a result of Apple's arbitrary and unpredictable app review process.[54]

Former Apple executives have acknowledged that Apple applies its rules in an arbitrary and inconsistent manner, as explained in the report of the U.S. House Judiciary Antitrust Subcommittee: "Mr. Shoemaker responded that Apple 'was not being honest' when it claims it treats every developer the same. Mr. Shoemaker has also written that the App Store rules were often 'arbitrary' and 'arguable,' and that 'Apple has struggled with using the App Store as a weapon against competitors.'"[55]

The arbitrary application of rules without adequate explanation causes considerable uncertainty, costs, and delays for app developers. Ultimately, it is consumers who suffer, as app developers are delayed in rolling out new features that improve the quality and security of their services or are even discouraged from innovating in the first place.[56]

Worse, app developers who disagree with Apple's decisions have no effective redress. In practice, the only recourse they have is to file an appeal before the App Review Board. Even in this case, however, it is Apple employees (typically just more experienced reviewers) who will decide the final outcome and, as will be explained further below, the appeal process in itself also lacks transparency.[57]

E. Harms Arising from Apple's and Google's Self-Preferencing Practices

Apple is vertically integrated, meaning that it not only controls the iOS operating system and the App Store, it also competes downstream with app developers that make their apps available through the App Store. It is well-established that vertical integration may create conflicts of interest where a vertically integrated firm has both the ability and incentive to advantage its own businesses over those of its customers, who may also be its rivals.[58] Apple is

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[54] *See* David Pierce, *A New Email Startup Says Apple's Shaking it Down For a Cut of its Subscriptions*, Protocol, (June 16, 2020), https://www.protocol.com/hey-email-app-store-rejection.

[55] House Judiciary Digital Markets Report, *supra* note 9, at 371.

[56] *See generally* Geradin, *How Apple's App Store Practices Are Stifling Innovation, supra* note 23, at 5; Tilley, *supra* note 49.

[57] *See App Store Review Guidelines: After You Submit*, Apple, https://developer.apple.com/app-store/review/guidelines/#after-you-submit (Oct. 24, 2022) ("Rejections: Our goal is to apply these guidelines fairly and consistently, but nobody's perfect. If your app has been rejected and you have questions or would like to provide additional information, please use App Store Connect to communicate directly with the App Review team. This may help get your app on the store, and it can help us improve the App Review process or identify a need for clarity in our policies. If you still disagree with the outcome, or would like to suggest a change to the guideline itself, please submit an appeal"); *App Review*, Apple, https://developer.apple.com/app-store/review/ (last visited Apr 27, 2023).

[58] *See, e.g.*, House Judiciary Digital Markets Report, *supra* note 9, at 398 ("The Subcommittee's investigation uncovered several instances in which a dominant platform used the design of its platform or service to privilege its own services or to disfavor competitors."); UK CMA Mobile Ecosystems Interim Report, *supra* note 20, at 255 ("Apple's and Google's control over their respective mobile ecosystems allows them to set the 'rules of the game' for app developers who seek to use their app stores. We have found that in many cases, Apple and Google have the ability and incentive to provide their own apps with a competitive advantage"); *see also* U.S. Dep't of Justice & Fed.

therefore in a position to engage in anticompetitive self-preferencing in favor of its own apps over rival third-party apps, preventing competition on the merits and harming third-party app developers which are reliant on the App Store to reach their user base.

For example, Apple can (and does) provide greater discoverability to its own apps in its App Store, implement and enforce favorable default settings, and block or limit third-party access to device functionality.[59] Among the app developers that have felt the impact of Apple's self-preferencing practices are those offering digital well-being and parental control apps. For instance, Apple has restricted parental control app developers from accessing the full suite of controls available within its operating system and app marketplace, hindering parents' efforts to monitor and protect their children and putting children's well-being at risk.

In addition, Apple has the ability to design privacy permissions in a way that disadvantages third-party apps, while not affecting its own apps. For example, following a change to its operating system, Apple made it difficult for third-party apps to ask for and obtain users' permission to track their location when the app is not being used (functionality that is necessary for the operation of certain apps).[60] When it comes to its own products and services, however, Apple tracks, by default, users' location at all times and users cannot opt out unless they go deep into Apple's settings.[61]

This type of conduct undermines the ability of app developers to compete, innovate and address issues of concern to consumers.

F. Harms Arising from Limitations Placed on Access to Technology and Functionalities

Apple has used its control over iOS to delay or deny access to certain functionality for third-party apps. For instance, Apple limits access to the ultra-wideband short-range proximity tracking and data transfer technology present in iPhones, which may reduce future innovation and limit the future products made available to consumers.[62] By delaying or restricting third-

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Trade Comm'n, Joint Vertical Merger Guidelines (June 30, 2020), at 4, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf ("[A] [vertical] merger may increase the vertically integrated firm's incentive or ability to raise its rivals' costs by increasing the price or lowering the quality of the related product. The merged firm could also refuse to supply rivals with the related products altogether.").

[59] Recent studies of the app store ecosystem have reached the same or a similar conclusion. *See, e.g.*, ACCC Digital Platform Interim Report No. 2, *supra* note 10, at 40.

[60] *See, e.g.*, Daru, *supra* note 47, at 5-6; Patience Haggen, *iPhone Update Reminds Users – Again and Again – of Being Tracked*, The Wall Street Journal (Dec. 31, 2019), https://www.wsj.com/articles/iphone-update-reminds-usersagain-and-againof-being-tracked-11577799336.

[61] *See, e.g.*, Reed Albergotti, *Apple Says Recent Changes to Operating System Improve User Privacy, But Some Lawmakers See Them As An Effort To Edge Out Its Rivals*, The Washington Post (Nov. 26, 2019), https://www.washingtonpost.com/technology/2019/11/26/apple-emphasizes-user-privacylawmakers-see-it-an-effort-edge-out-its-rivals/.

[62] *See e.g.*, ACCC Digital Platform Interim Report No. 2, *supra* note 10, at 59.

party access to useful hardware or software features, such as APIs or chips (like the near-field communication ("NFC") chip or the ultra-wideband ("UWB") chip), Apple can give itself a competitive advantage over rivals, harming competition and restricting consumer choice.[63]

In another example of this type of conduct, Apple limits access to features within its Mobile Device Management ("MDM") technology, a technology which allows the remote control and configuration of devices. For example, with MDM, an app developer can push settings to a device that can apply content filters, determine what features and apps can be accessed, and limit access to networks and VPNs. On the Apple platform, the full suite of MDM features is available through a configuration called "Supervision." Apple does not allow consumer app developers to access Supervision. As a result, consumer app developers are not able to access measures such as (i) ensuring that the end user cannot remove or subvert the MDM settings, (ii) restricting end users from accessing risky messaging services such as iMessage and explicit iTunes content, or (iii) restricting end users from accessing risky device features such as the camera or screen capture. This undermines the ability of consumer app developers to compete and innovate, harming children as a result.

G. Harms Arising from User Lock-In to a Single App Store and the Effective Elimination of App Store Competition

As explained earlier in this section, Apple and Google have parallel monopolies: the App Store is the only channel through which app developers can distribute their apps to iOS users and iOS users can download apps on their devices; and the Google Play Store is, practically speaking, the only channel through which app developers can distribute their apps to Android users and Android users can download apps on their devices. This situation is not an accident. Apple and Google have devoted significant resources and attention to eliminating competition from third-party app stores. Importantly, the elimination of competition does not result in greater protections for consumers – as Apple and Google claim; rather, it primarily serves to stifle innovation and deprive users and consumers of the numerous benefits that healthy competition undoubtedly brings.

By eliminating competition, Google and Apple have destroyed the incentives for both the dominant platforms, as well as third parties, to truly invest in privacy, security, and safety– particularly, when it comes to app store review and curation. As a result, the App Store is rife with scams and fraud. *The Washington Post* uncovered significant evidence of this in an article titled, "Apple's tightly controlled App Store is teeming with scams."[64] According to the report,

[63] *See, e.g.*, Daru, *supra* note 47, at 6.

[64] Reed Albergotti & Chris Alcantara, *Apple's Tightly Controlled App Store is Teeming With Scams*, The Washington Post (June 6, 2021), https://www.washingtonpost.com/technology/2021/06/06/apple-app-store-scams-fraud/.

"Nearly 2 percent of Apple's top-grossing apps on one day were scams — and they have cost people $48 million."[65]

Recently, former U.S. Secretary of Homeland Security Tom Ridge, joined by a renowned group of cybersecurity experts, security professionals, and former government officials and advisers, explained how competition would enhance security for users, in a letter to the U.S. Congress: "Enacting policies to provide developers and consumers greater freedom and choice will neither reduce security on mobile devices nor increase harm to users. In fact, we believe that competition and accountability will incentivize platforms, payment processors, and app developers to better prioritize security."[66]

Ultimately, in the absence of competition, consumers lose because there is little to no incentive for Apple, Google, and third-party app stores to make investments that would result in better products and increase consumer security.

III. Potential Reforms To Address Competition Concerns in the Mobile App Ecosystem

The Consultation Paper sets forth numerous options to update and modernize Canadian competition policy. CAF strongly supports changes that have the potential to unlock competition and choice, particularly in digital markets. The mobile app ecosystem is a key sector of the digital economy which has long been under the grip of two companies, to the detriment of consumers and developers. Unsurprisingly, Apple, Google, and the trade associations for which they are large funders prophesize that any intervention to address the dominant platforms' continued abuse of their respective monopoly power will have devastating consequences for device security, user privacy, and consumer trust. On closer inspection, however, these self-serving arguments collapse. Contrary to what Apple and Google suggest, it is perfectly feasible to drive greater competition and choice in digital markets while at the same time protecting privacy and security and fostering consumer trust. We urge regulators across the world, including Canada, to take decisive action to harness the power of digital gatekeepers, in order to unlock competition and increase choice for consumers.

CAF considers that regulatory reform, as pursued for example in the European Union (EU) with the Digital Markets Act (DMA), is required to ensure that business users of gatekeeping digital platforms, including app developers which rely on the App Store and the Play Store to reach end users, as well as consumers, are not harmed by the gatekeepers' anticompetitive conduct. CAF also believes that proposed legislation in the U.S., the Open App Markets Act (OAMA),[67] would make substantial strides toward fixing a broken app marketplace. OAMA would do so by barring app stores from requiring apps to use their in-app payment systems, through which they charge exorbitant fees and block communications between

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[65] *Id.*

[66] Letter from Ridge Policy Group to U.S. Congress (Mar. 28, 2022), https://ridgepolicygroup.com/ridge-napolitano-others-send-letter-to-congress-supporting-open-app-markets-act/; *see also* Tom Ridge, *App Store Owners Push Security Claims to Stifle Competition*, The Philadelphia Inquirer (May 4, 2022), https://www.inquirer.com/opinion/commentary/app-store-download-security-apple-google-20220504.html.

[67] Open App Markets Act, S. 2710, 117th Cong. (2021).

developers and their own customers, among other important prohibitions. OAMA was explicitly endorsed by U.S. Department of Justice Assistant Attorney General Jonathan Kanter at a 2022 Senate hearing[68] and enjoyed widespread bipartisan support throughout the 117th Congress.[69]

A. Support for a Broad Regulatory Framework

While there is merit in each approach (and different approaches have been followed in various jurisdictions), CAF believes that the adoption of a broader regulatory framework would be preferable to the adoption of tailored rules because many of the issues and harms faced by business users of digital platforms as well as consumers are systemic in nature. It is, therefore, preferable to put in place a comprehensive regulatory framework dealing with the conduct of platforms that have become indispensable gateways between businesses and consumers.

CAF notes, however, that the adoption of a broader framework does not prevent from the outset the adoption of tailored rules. It would be possible to allow for the tailoring of the regulatory framework to a specific digital platform, to the extent necessary and appropriate, to ensure that interventions are targeted and flexible.

B. Support for Creating Bright Line Ex Ante Rules for the Dominant Platforms

1. Ex Ante Rules would Provide Clear Rules of the Road for Market Participants

CAF strongly supports legislative reforms that would create bright line, ex ante rules for dominant platforms. The Consultation Paper notes that the Government is considering the following possible reform, which CAF strongly supports to more effectively address competition concerns in the mobile app ecosystem:

> Creating bright line rules or presumptions for dominant firms or platforms, with respect to behaviour or acquisitions, as potentially a more effective or necessary approach, particularly if aligned with international counterparts and tailored to avoid over-correction.[70]

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[68] *Oversight of Federal Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Competition Policy, Antitrust and Consumer Rights of the S. Comm. On the Judiciary*, 117th Cong. (Sept. 20, 2022) (statement of Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Justice, Antitrust Div.), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Kanter%20-%202022-09-20.pdf ("The [Open App Markets] Act identifies and prohibits some of the most egregious anticompetitive practices which are currently prevalent in the mobile app ecosystem.").

[69] OAMA was approved by the Senate Judiciary Committee with a bipartisan vote of 20-2 in February 2021. *See* Ryan Tracy, *App-Store Bill Targeting Apple, Google Is Approved by Senate Panel*, The Wall Street Journal (Feb. 3, 2022), https://www.wsj.com/articles/app-store-bill-targeting-apple-google-is-approved-by-senate-panel-11643910888.

[70] Consultation Paper, *supra* note 1, at 39.

This approach would be consistent with the DMA, which takes the form of an *ex ante* regulatory regime for digital platforms acting as gatekeepers.[71] One of the main advantages of this approach is that the rules will be clear: once the law is in place, the platforms falling under its scope will have to comply with a predefined list of "dos and don'ts."

The relevant legislative update could contain obligations and prohibitions that would apply to all digital platforms falling under its scope and/or could include obligations that would apply to certain sub-categories of digital platforms (e.g., app stores), or even prescribe different rules to different business models. To the extent new practices or business models are not captured by the adopted legislation, nothing would prevent the adoption of additional rules or the combination of an *ex ante* regulatory instrument with another regulatory approach that would be more future-proof (e.g., giving the power to the regulator to adapt the rules to new developments).

CAF believes that any legislative instrument should contain at least the following obligations and prohibitions that are necessary to address the competition and consumer harms arising from the practices of Apple and Google as operators of their respective app stores and providers of the iOS and Android operating systems. These obligations and prohibitions reflect CAF's "App Store Principles," which aim to ensure that app developers can compete in a fair environment:[72]

- ***Obligation to allow the use of alternative app distribution channels.*** App developers should be free to decide how to distribute their apps to users, be it through any app store they prefer and/or through direct downloads from their websites. This obligation would entail that Apple should allow third-party app stores to its devices. In addition to enhancing consumer choice and freedom, it would open mobile app distribution to competition from other sources, including alternative app stores and direct downloads. This would inject market-driven discipline into the terms and fees that Apple and Google themselves charge app developers for distribution in the App and Play Stores, reinforcing the benefits of the additional solutions listed below. CAF notes that Apple has argued against such an obligation by invoking the "security" defense – as it has already done time and again. As CAF has, however, already explained in one of its papers,[73] Apple's security claims are largely overblown. The security and integrity of an iPhone device can be ensured even if the App Store is not the exclusive app distribution channel, as device security comes from security measures (e.g., encryption of data, firewall, antivirus) and sandboxing (which restricts apps from accessing content on other apps or the system) which are not dependent on the app distribution method – instead, they are built into the

[71] *See also* Open App Markets Act, S. 2710, 117th Congress, United States (2021) (clearly setting forth prohibited conduct for covered platforms).

[72] Coalition for App Fairness, *Our Vision For The Future*, *supra* note 3.

[73] *See* Damien Geradin, *Should iOS Users be Allowed to Download Apps Through Direct Downloads or Third-Party App Stores?*, Coalition for App Fairness (Dec. 2021), https://appfairness.org/wp-content/uploads/2021/12/iOS_Users_and_Third_Party_App-Stores.pdf; *see also Reality Check: Debunking Apple's False Security Claims*, Coalition for App Fairness (July 2021), https://appfairness.org/wp-content/uploads/2021/07/Apples-False-Security-Claims-1.pdf.

hardware or the operating system. If such features are not deemed to be sufficient, an additional security layer (e.g., human review) could be used.

- ***Prohibition of mandating the use of ancillary services (e.g., in-app payment systems) offered by Apple or Google.*** Apple and Google should not be allowed to impose the mandatory use of IAP and GPB on (certain categories of) app developers. All app developers should be free to choose the ancillary services they wish to offer to their users. This will address the harms suffered by app developers subject to the mandatory use of IAP and GPB and will lead to greater consumer choice and greater competition among ancillary service providers.

- ***Obligation to allow app developers to communicate directly with their users for legitimate business purposes.*** As explained above, the restrictions placed on app developers' communications with their users prevent them from informing users about (perhaps cheaper) out-of-app purchasing possibilities. This is detrimental for consumers. It would thus be a clear consumer benefit if app developers could engage freely in in-app and out-of-app communications with their users.

- ***Obligation to provide timely access to the same interoperability interfaces and technical information made available to Apple's and Google's own apps.*** For example, legislation could require Apple and Google to give third-party apps comparable and timely access to device hardware or operating system features (e.g., the NFC or UWB chip) as the digital platform's own first-party apps.

- ***Prohibition of the use of app developers' data by app store providers to compete with the app developer.*** This obligation could also more broadly prohibit app store operators from unreasonably sharing information from one part of their business to their app development business.

- ***Obligation to allow access to the app store and operating system features on fair, objective, reasonable and non-discriminatory terms.*** This obligation would level the playing field between all app developers, preventing Apple from applying different rules on different categories of app developers or cutting special deals with certain very large app developers.[74]

- ***Prohibition placed on app store and/or operating system providers from engaging in self-preferencing of their own apps or services or interfering with users' choice of preferences or defaults.*** This should comprise an obligation to allow users to choose the default settings, e.g., through the surfacing of choice screens.

- ***Obligation to allow the uninstallation of any pre-installed apps.*** The pre-installation of Apple's and Google's apps on iOS and Android devices gives them a competitive advantage over rival apps, given that consumers tend to stick to the pre-installed apps,

[74] For example, it has been reported that Apple cut a deal with Amazon in 2016 on the basis of which Apple would only charge a 15% fee on subscriptions purchased through the app, compared to the standard 30% fee that most developers must pay for IAP transactions. *See* Kim Lyons, *Documents show Apple gave Amazon special treatment to get Prime Video into App Store*, The Verge (July 30, 2020), https://www.theverge.com/2020/7/30/21348108/apple-amazon-prime-video-app-store-special-treatment-fee-subscriptions.

rather than search for and install a similar third-party app. Worse, Apple does not allow the uninstallation of certain apps that come pre-installed on its iPhone. Such practices have harmful effects on competition and consumers and should therefore be prohibited by law. Given that Apple has opposed such a rule, invoking user "security" or "integrity" of the device, it is crucial that any limitations to such an obligation are strictly necessary, objective, proportional and duly justified.

- ***Obligation to implement a fair, transparent and non-discriminatory app review process.*** Such an obligation is important for both third-party apps that compete with Apple's and Google's own apps and in general for all app developers that distribute apps through the App Store and the Play Store.
- ***Obligation to be transparent about the rules and policies applicable to the app stores.*** Currently, the opacity of when and how app store policies are enforced, as well as what fees apply and for what purpose mean that mobile app stores operators can engage in shell games, shifting fees and terms arbitrarily. App store providers should, for example, provide advance notice of changes and make available a quick and fair dispute resolution process.

2. Scope of Ex Ante Rules: Which Platforms Should Be Subject to New Rules

As to the question of which platforms should fall under the scope of a regulatory regime, CAF believes that ex ante regulation should apply to those digital platforms that have a gatekeeper role, acting as indispensable gateways between businesses and consumers. In the case of mobile app distribution there are two such gatekeepers: Apple and Google. It is this gatekeeper role that allows such platforms to engage in conduct that harms mobile app developers and consumers. In addition, from an enforcement perspective, it is better to focus on a few companies whose practices harm competition and consumers rather than seek to regulate a large number of companies. As enforcement resources will inevitably be limited, it should be ensured that they are sufficient to address the practices of the companies whose conducts have the largest impact on the market. Gatekeeper platforms could be designated on the basis of quantitative or qualitative criteria or, ideally, a combination of both.

CAF believes that it is necessary to cover app marketplaces in any legislative reforms aimed at addressing dominant platforms' anticompetitive conduct. Apple and Google have gatekeeper power over app distribution on iOS and Android, respectively, which allows them to impose unfair terms and conditions on app developers and adopt abusive conducts. In addition, any ex ante rules should address practices adopted by Apple and Google as the providers of the iOS and Android operating systems, which, alongside app store-related anticompetitive policies and conducts, further harm app developers and their users. After all, it is the effective duopoly Apple and Google have over mobile ecosystems that allows them to engage in a variety of conducts that harm consumers, competition and innovation.

C. Other Comments on Specific Proposals

1. Support for Updating Abuse of Dominance Standard

CAF supports updating the abuse of dominance standard to remedy substantive challenges with its application. The Consultation Paper notes that the Government is considering the following possible reform: "Better defining dominance or joint dominance to address situations of de facto dominant behaviour, such as through the actions of firms that may not be unmistakably dominant on their own, but which together exert substantial anti-competitive influence on the market."[75]

CAF largely agrees with the Canadian Competition Bureau's observations that the bar for establishing an abuse of dominant position is too high to properly protect competition, and out of line with other jurisdictions.[76] As the Bureau stated in its submission to the Government, "[A]t present, there are significant substantive challenges with the application of the abuse of dominance provisions under the Act, giving powerful firms undue ability to shape how competition evolves." We also agree with the Bureau's identification of the three principal challenges with the current approach being as follows:

- Requirement to show both anticompetitive purpose and effects is a high bar and out of step with other many other jurisdictions;
- Regarding the analysis of anticompetitive purpose, case law has given an undue level of deference to justifications put forth by dominant firms; and
- Regarding the analysis of competitive effects, it "has come to focus too much on how conduct affects particular indicators of competitive intensity, rather than focusing on harm to the competitive process," which is the more significant inquiry.[77]

CAF supports updating the current approach to address these substantive challenges with the application of the abuse of dominance provisions under the Act, particularly with respect to the dominant platforms' unchecked and rampant anticompetitive conduct.

IV. Conclusion

CAF strongly encourages the Government to recommend and move forward expediently with legislative reforms to eliminate barriers to competition and bring the dominant platforms' abuses to a halt so that businesses – regardless of which country they are based in – can compete on a level playing field across the global economy.

We appreciate this opportunity to submit a response to the Consultation Paper. As the Government moves forward with this important and urgent work, we encourage the Government to continue to engage with app developers and groups that genuinely represent app developers' interests. Afterall, without app developers, there is no app ecosystem. Consistent with this, CAF

[75] Consultation Paper, *supra* note 1, at 39.

[76] Competition Bureau Canada, *supra* note 7, §2.

[77] *Id.*

remains at the disposal of the Government for any information required to inform its much-needed efforts to update and modernize Canadian competition law and policy to address the unique challenges posed by the digital gatekeeper platforms.