8 October 2020

Manager
Digital Platform Services Inquiry –App Marketplaces
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Submitted via Email: digitalmonitoring@accc.gov.au

Dear Sir/Madam,

Digital Services Platforms Inquiry into App Marketplaces

The Australian Investment Council welcomes the opportunity to contribute to the Australian Competition and Consumer Commission's **(ACCC)** *Digital Platform Services Inquiry – App Marketplaces.*

At this critical juncture in our national response to the COVID-19 pandemic, it is vitally important for our economic recovery, and Australian jobs, that businesses are able to effectively and confidently develop and invest into new ideas and new processes. This includes mobile apps which play an increasingly important role in the mobile technology ecosystem alongside the rise in consumer demand for constant interconnectivity.

App usage currently comprises 57% of mobile technology utilisation in the USA for example, and is increasing commensurately with the level of consumer reliance on mobile technology.[1] This is demonstrated through the global usage of apps which has grown year-on-year with 204 billion apps downloaded worldwide in 2019 compared to 140 billion in 2016.[2]

App developers are an important part of the digital technology ecosystem. They typically fall into two categories of developing apps for companies for a specific purpose such as banking or language apps, or they are the start-up and early stage businesses who develop new ideas for the consumer marketplace. These are the businesses that are vital for Australia's future growth through employment and economic contribution.

Access to market efficiencies is a vitally important ingredient for allowing investment capital to flow into the Australian app development sector. To this extent, the Australian Investment Council is supportive of a transparent marketplace for app development and sales that provides open market competition and access to sales and consumer data on a level and transparent playing field.

The private capital industry's key recommendations on the ACCC's *Issues Paper* of September 2020 are set out below. Key concerns include:

- Lack of platform choice for App developers
- Inequitable commission structures
- Privacy protection practices that diminish the consumer experience and market competition, and
- In store app promotion that favours the market duopoly ahead of superior options.

The Council would be pleased to provide further context on the points outlined in this submission and looks forward to participating in future discussions about the *Digital Platform Services Inquiry into App Marketplaces*. If you have any questions regarding this submission, please do not hesitate to contact me or Brendon Harper, the Australian Investment Council's Head of Policy and Research, on [redacted].

Yours sincerely

[redacted]

Yasser El-Ansary
Chief Executive

---

[1] Comscore: The 2017 U.S. Mobile App Report

[2] Statistica 2020: Number of apps downloads worldwide 2016-19

Level 12, Aurora Place
88 Phil ip Street
Sydney NSW 2000
+61 2 8243 7000
mail@aic.co
aic.co

Overview

The Australian Investment Council is the voice of private capital in Australia. Private capital investment has played a central role in the growth and expansion of thousands of businesses and represents a multi-billion-dollar contribution to the Australian economy. Our members are the standard-bearers of professional investment and include private equity, venture capital and private credit funds, alongside institutional investors such as superannuation and sovereign wealth funds, as well as leading financial, legal and operational advisers.

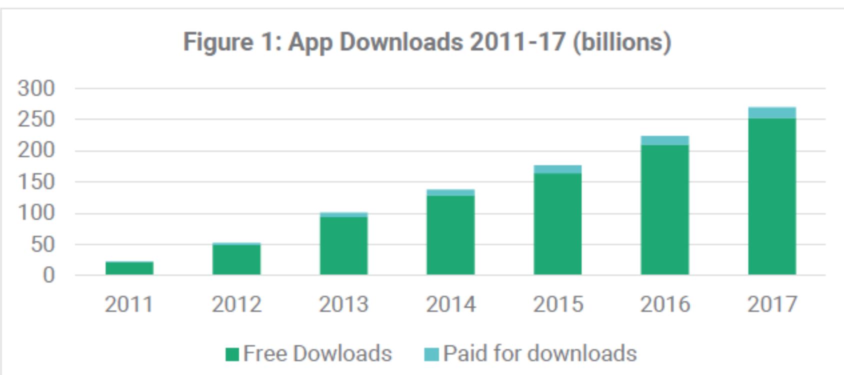
Private capital fund managers invest billions of dollars into Australian companies every year. Funds under management of Australian-based private capital funds exceeded $33 billion in 2019, testament to the growth in available capital to support investment into businesses across every industry sector of the economy. Private capital investment offers smart, patient capital to privately backed companies along with expert guidance and strategic support.

More and more businesses are choosing to raise capital from private investors, rather than through public markets, because of the benefits of partnering with venture, private equity and private credit firms. Private capital investors can help unlock the growth and expansion opportunities of businesses through active asset management in a way that public markets simply cannot. This is evidenced by the fact that private capital-backed Australian businesses generate 1 in 9 new Australian jobs and contribute 2.6 per cent of Australia's GDP.[3]

Tomorrow's new successful Australian companies are today's start-ups and early stage businesses. These companies are often innovative, nimble and forward looking. Some of today's largest companies have grown through private capital support. These include local success stories, such as Afterpay, Airwallex, Atlassian, Canva and Vaxxas, along with international successes such as Alibaba, Apple, Facebook, Google, Netflix, Spotify and Twitter.

App developers are an important part of the digital technology ecosystem. They typically fall into two categories of developing apps for companies for a specific purpose such as banking or language apps, or they are the start-up and early stage businesses who develop new ideas for the consumer marketplace. Access to market efficiencies is a vitally important ingredient for allowing investment capital to flow into Australian start-up and early stage businesses. These are the businesses that are critical for Australia's future growth through employment and economic contribution.

App usage currently comprises 57% of mobile technology utilisation and is increasing commensurately with the level of consumer reliance on mobile technology. This is demonstrated through the global usage of apps which has grown year-on-year with 205 billion apps downloaded worldwide in 2019 compared to 140 billion in 2016.[4]



Source: Space Technologies

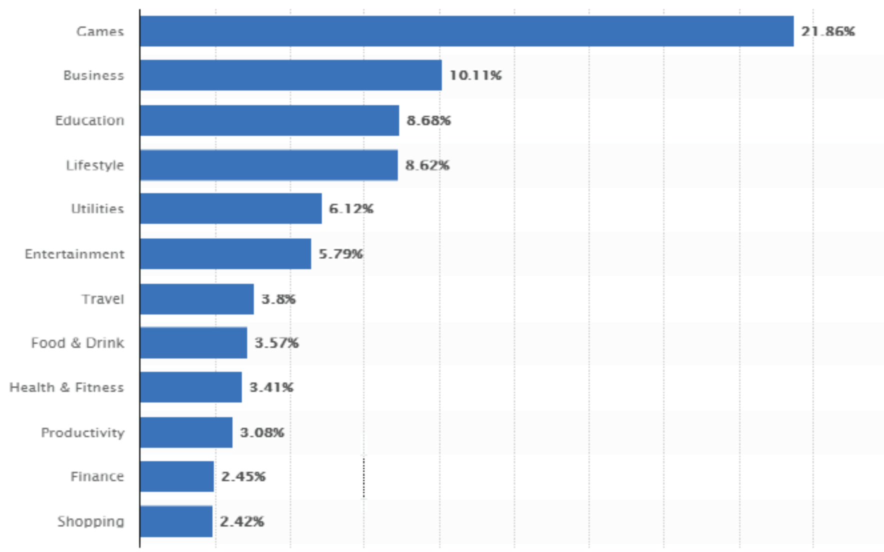
[3] Deloitte Access Economics (April 2018) *Private Equity: Growth and innovation*
[4] Statistica 2020: Number of apps downloads worldwide 2016-19

Paid or unpaid apps can be accessed from the Apple App Store or Google Play Store which are the dominant app marketplaces worldwide. These markets are owned by companies that have adopted vertically integrated business models as producers of mobile devices, owners of the app platforms and app marketplaces and as app developers. Independent app developers are limited to using either the Apple App Store or Google Play Store to sell and distribute their apps.

While some free apps do not generate revenue, others generate funds from the collection and use of user data and through advertisements. Some free apps include in-app purchases which are required to access additional features. Paid apps can be either one-off payments or by subscription. It is important to note that while paid for downloads are a small proportion of the overall downloaded apps, they are most relevant to developers in the entrepreneur and early stage business categories. In this context, the Council has concerns that a subset of app developers is bearing the cost of the entire range of apps available on the Apple App Store and Google Play Store.

This is particularly relevant for developers working in the mobile gaming category which is gaining the most traction amongst consumers and is the dominant source of paid apps as depicted in *Figure 2* below.

Figure 2: Most popular Apple App Store categories in August 2020



Source: *Statistica 2020*

A number of recommendations relating to specific aspects of the *Digital Platform Services Inquiry – App Marketplaces Issues Paper* are set-out in the submission below. These recommendations have been developed in consultation with the Australian Investment Council's members and are largely aimed at creating an open and transparent market for app developers. Key concerns raised include:

- Lack of platform choice for App developers
- Inequitable commission structures
- Privacy protection practices that diminish the consumer experience and market competition, and
- In store app promotion that favours the market duopoly ahead of superior options.

1. Lack of choice in the market place

In 2019, worldwide app revenue totalled US$462 billion.[5] This revenue was largely derived from sales by the dominant market players of Apple and Google.

App developers are essentially limited to using Apple and Google platforms for development of their products. While there are other options, they are seldom used due to inefficiencies for developers and the use of tools and mechanisms that are ineffective for consumers. To this extent, the Apple/Google duopoly ties developers to the business models of these companies for development, sales and distribution. As in any market where there is dominance by one or two companies, commissions, ownership rights and distribution models are controlled by those companies, leaving little choice for suppliers and consumers.

Recommendation 1: *Review market duopoly*
The Council recommends the commission and distribution models for Apple and Google are assessed for any detrimental impact for app developers and consumers.

2. Commission on in-app payments

Market dominance manifests in a number of ways for app developers. A core concern relates to Apple's 15% / 30% commission structure. This commission is not levied on all app developers, but is limited to apps which provide the ability for consumers to purchase 'digital goods and/or services', as opposed to 'physical goods and/or services'.

For example, this considerably impacts game developers such as *Fortnite* but does not apply to Uber or Spotify. The arbitrariness of definitions of where Apple applies exceptions or inclusions for commissions is highlighted in an article by Geradin and Katsifis titled *The Antitrust Case Against the Apple App Store*.[6] The authors note that 'App developers and consumers alike have taken issue with Apple's 30% commission, complaining it is excessive and/or applied in a discriminatory fashion'.[7] They also state that the 30% commission is 'patently exorbitant' as a fee for payment processing, and 'still problematic' and possibly 'exorbitant' as a distribution fee.[8]

The rules which are detailed in the Apple Developer Program License Agreement,[9] considerably impact the ability of early stage developers to generate a return and to reinvest in their businesses for future growth at a critical growth stage when they need it most. This was highlighted by Donald Cameron and Pure Sweat Basketball who took legal action against Apple. They claimed Apple's 'exorbitant' and 'overly expensive' fee structure has 'cut unlawfully into what would have been developers' 'earnings in a competitive landscape' and 'depressed output of paid app and in-app-product transactions'.

The consumer apps marketplace, which gives rise to the sale of Apple's distribution or retail-sales services to iOS developers, favours low-priced or free apps. Developers and would-be developers can only earn 70% on each dollar paid for an app or product. This is in addition to paying an annual fee of $99 for access to the App Store. In this context, early stage app developers need to consider whether it would be viable to spend the effort, time, and energy that is required to design and program an app or related product, bring it to market in the single store available, while hoping to recoup costs and make a reasonable profit. For many, the calculus makes no economic sense. This process, which is ongoing, leads to less output in sales, and *ergo*, distribution transactions.

Evidence that Google is on the same trajectory as Apple is evident in a 28 September 2020 announcement in an Android Developer blog on changes to Google's policies and terms.[10] These include changes to the ease of user

[5] Statistica: *Mobile app usage: Statistics and facts*
[6] *The Antitrust Case Against the Apple App Store*, Damien Geradin and Dimitrios Katsifis, May 2020
[7] Geradin and Katsifis Ibid, page 18
[8] Geradin and Katsifis Ibid, pages 23-24
[9] *Apple Terms and Conditions*
[10] Android Developers' Blog: *Listening to developer feedback to improve Google Play*, Sameer Samat, 28 September, 2020

installation and use of other app stores on Android devices and payment-related changes to its Developer Program Policy, effective from 20 January 2021.

Google states that for payment changes it has always required certain apps supplying 'digital goods/services' to use Google's in-app purchase billing system and that they pay Google a 15/30% 'service fee'. However, these conditions have not been applied to app developers indicating that Google is now moving towards an approach similar to Apple.

It is important to note that while paid for downloads are a small proportion of the overall downloaded apps, they are most relevant to developers in the entrepreneur and early stage business categories. In this context, the Council has concerns that a subset of app developers is bearing the cost of the entire range of apps available on the Apple App Store and Google Play Store.

Recommendation 2: *Review the commission structure on in-app payments*
The Council recommends commission structures used by Apple and Google for app developers are reviewed in the context of competition and fair market practice.

Current practices deter new market entrants

The obligation to use Apple's In-App Purchase **(IAP)** technology and the 30% commission means that the cost may prohibit some early stage app developers from the market. This may be due to not having an established cashflow, small margins which cannot withstand the 30% commission or a concern that Apple may enter their market and dominate due to its cost and scale advantage.

Geradin's and Katsifis' initial article prompted a detailed response from Sven Völcker and Daniel Baker who advised Apple on competition law issues. Geradin and Katsifis responded with a second article[11] which defended their arguments that (a) Apple's excessive pricing is not self-correcting due to the lack of viable competitors to the App Store, (b) capping Apple's profits would not remove Apple's incentive to innovate, and (c) in the present case, excessive pricing can readily be identified and remedied by competition regulators.

Two further examples of where Apple’s practices are deterring new market entrants are:

Apple v. Pepper

This is an ongoing US case against Apple first filed in 2011. Mr Pepper alleges Apple's 30% commission is the result of its unlawful monopoly position, and that app developers are passing on this fee to consumers.[12] He claims 'Apple would be under considerable pressure to substantially lower its 30% profit margin' if other app platforms were allowed to compete with the App Store.[13]

The 2019 Netherlands competition authority (ACM) *Market study into mobile app stores*

The ACM report describes app developers' concerns in interviews with the regulator that the 30% commission is too high given the mandatory use of Apple's IAP technology, particularly when compared to fees of 2-3% found in the banking sector.[14]

Recommendation 3: *Review barriers of entry to the Australian app market*
The Council recommends In-App purchase costs and commissions are reviewed to determine if they are barries to entry and expansion in app marketplaces.

---

[11] *Bringing an end to Apple’s anti-competitive practices on the App Store: A response to Völcker & Baker*, Damien Geradin and Dimitrios Katsifis, September 2020
[12] CNBC:*Apple failed to close off a big antitrust threat, but it probably won’t feel the harm for years*
[13] Gerard and Katsifis Ibid (p. 24)
[14] ACM: *Market study into mobile app stores*, 2019 (p. 91)

3. Removal of access to sensors limits quality of competitor service offering

There are market examples where Apple has limited or obstructed consumer access to competitors' apps using the justification of privacy protections for app users.

One case study relates to Apple's alleged suppression of the Tile app which uses a device's location services to assist a user to track down lost items which have a physical Tile attached. The *Washington Post* reported that US lawmakers were concerned that Apple was making changes to its policies in the name of privacy and that was impacting competitors such as Tile. This prompted Chairman of the US House Judiciary Antitrust Subcommittee David Cicilline to note: "I'm increasingly concerned about the use of privacy as a shield for anti-competitive conduct … There is a growing risk that without a strong privacy law in the United States, platforms will exploit their role as de facto private regulators by placing a thumb on the scale in their own favor".[15]

In relation to the Tile case study, Geradin and Katsifis emphasised that 'in order for it to function properly, the Tile app needs constant access to the user's location. For years, Tile enjoyed a symbiotic relationship with Apple, with Apple selling Tile devices in its retail stores and integrating it with Siri functionalities.[16] However, following Apple's launch of a similar app, Find My, Apple's new iOS made 'it harder for users to enable their Tile devices, as the user needed to go through several steps to give the Tile app the required permission to always access the user's location. Further, when permission was enabled, Apple would then serve regular pop-up notifications asking the user whether the user wished to continue to share her data with Tile. These frequent prompts led to user frustration and confusion, and suggested that Tile was not trustworthy. However, for Find My, which comes pre-installed on iPhone devices, permissions are activated by default as part of Express Settings during iOS installation, and Apple does not serve repeated notifications reminding users that they share their data with it.[17]

In a submission to the US House Judiciary Antitrust Subcommittee, Tile estimated that Apple's changes had led to a more than 40% decline in 'proper settings enablement' for Tile customers.

The Australian Investment Council has noted there are instances in the app development ecosystem in the Australian market where removal of access to sensors has been applied to apps that have not been developed by Apple or Google. This has been done under the guise of privacy and has resulted in limiting the quality of service the developer can provide, therefore giving consumers the impression that the product is inferior.

An Australian app developer's experience with removal of sensors

In simple terms, the IP for which we have patents and a valuation of more than $10million is effectively reduced to $0 in terms of value. We have had to retire this part of our business and pivot to a new domain.

Recommendation 4: *Introduce measures to prohibit app market monopolisation by Apple and Google*
The Council recommends instances where market competition has been obstructed due to monopolisation are rectified and compensation is paid to the impacted app developers.

4. Opaque promotion of apps in the App Store

There is compelling evidence to suggest that ranking in the App Store's search results 'is a quintessential part of achieving success with an app'. [18]

Geradin and Katsifis describe the results of a report from app-industry research firm Sensor Tower stating "… Apple's own apps routinely capture the first position in the App Store search results, suggesting that Apple may hold

---

[15] *Washington Post:* Calls grow for European regulators to investigate Apple, accused of bullying smaller rivals

[16] Ibid: Geradin and Katsifis (p. 57)

[17] Ibid: Geradin and Katsifis (p. 58)

[18] Ibid: Geradin and Katsifis (pp. 61-63)

its own apps to a different standard. After conducting more than 600 searches over two days, Sensor Tower found Apple's apps such as maps ranked first in more than 60% of basic searches while Apple's apps relying on subscriptions such as Apple Music or Apple Books captured the top position in 95% of related searches.

An example of the importance of ranking is the app Audiobooks.com which held the number one spot in search results for nearly two years, until it was replaced in September 2018 by Apple Books resulting in a 25% decline in its daily app downloads.

Favourable rankings for Apple apps continued despite ratings of 2.7 stars for Apple Books and 1.7 stars for Podcasts.[19]

Similarly, Geradin and Katsifis cite a *New York Times* investigation that reached the same conclusion. They note (at page 62):

A New York Times analysis of six years of search results compiled by Sensor Tower reached similar conclusions. It found that Apple's apps had recently ranked first for at least 700 search terms in the App Store, including the terms: books, music, news, magazines, podcasts, video, TV, movies, sports, card, gift, money, credit, debit, fitness, people, friends, time, notes, docs, files, cloud, storage, message, home, store, mail, maps, traffic, stocks and weather. According to the journal, a user searching in May 2018 for the term "podcast" would have needed to first scroll past 14 Apple-developed apps before finally finding an app provided by another developer.

An Australian app developer's experience with rankings

*For **App Store promotion** there is no public logic as to how an app is featured. You have to engage with Apple, be judged against criteria you are not aware of, and as a result, may or may not be featured. I guess it's the play with most directories, very few (perhaps only reddit) are entirely audience driven. The reality is if there's no fair and transparent ranking system there's nothing to aim at. How some apps make it to the recommended list is anyone's guess. Does it impact awareness, downloads and ultimately monetisation – absolutely! As they say in Google rankings – after the top 3 adds the drop off in clicks is more than 90%...but at least you know with ads that those that are willing to bid more rise to the top. Tragically, for startups this means you have no chance of winning in the paid world. You hope that directories are more transparently fair. But they are not.*

Recommendation 5: *Ensure app rankings are based on merit, not ownership*
The Council recommends that measures are implemented to prevent Google and Apple dominance of the app marketplace through artificially ranked apps.

Anti-competitive behaviour

Further evidence of anticompetitive behaviour is evident in the Android App Store Market which is a separate and distinct market where Google has monopoly power. This is highlighted in a legal case of *Peekya v Google*.

Peekya has developed a matching/dating app which focuses on matching people who are intending to travel with those travelling to the same destinations and within the same date range. Peekya has filed a class action in the US on behalf of all impacted developers. Peekya's key claims include:

1) The Android App Store market is a separate and distinct market in which Google has monopoly power due to:
   a) **Google Play Store Dominance**
      Google Play Store is dominant, with its share of this market exceeding 90% through devices sold with the Play Store pre-installed or by the number of apps downloaded from app stores on Android devices. This power is reinforced by Google's bundling of the Play Store with Google Play Services (the proprietary software that runs on Android that enables apps to integrate with other apps and with Google services,

[19] Wall Street Journal: *Apple Dominates App Store Search Results: Thwarting Competitors,* June 23, 2019

many of which are critical to app functioning – para 44). Google's dominance enables it to extract a 30% commission.

b) **Absence of competitive constraints**
Google's power is not constrained by other app stores on Android. For example, Samsung's Galaxy Play Store is the only app store that comes pre-installed on more than 10% of smart mobile devices outside of China and Samsung has commented that it would not be feasible to ship an Android device without the Play Store pre-installed (para 41). Peekya cites Amazon, whose app store 'lags behind the Play Store... It has become increasingly difficult over time to obtain and retain a competitive selection of apps because, as the Play Store continues to grow by virtue of being pre-installed on all licensed Android devices, more and more app developers have focused their development efforts on developing apps that use [Google Play Services].' (para 42). Google's power is not constrained by Apple's iOS devices and Apple's App Store – these are separate markets.

c) **Barriers to entry are high**
Costs of commercialising an app store are high. Peekya cites Sony, which commented that it is 'prohibitive' (para 54), and also Amazon, which has spent years and millions of dollars without success. Customers are sticky and do not often switch from the pre-installed Google Play Store. Google has also created barriers through its restrictive contracts with mobile device manufacturers and app developers.

5. Requirement of Apple ID sign-in functionality is a misuse of market power to maintain centrality of Apple service within the ecosystem

As noted earlier, Apple's mandatory use of IAP technology effectively forces developers to pay Apple the 30% commission due to the technology being backed by a system of anti-circumvention rules.[20] While the mandatory use of IAP gives Apple the additional benefit of protecting its commission payments, the mandatory use of IAP, like the mandatory use of Apple ID, also reinforces Apple technology at the centre of the user's experience.

An Australian app developer's experience with misuse of market power

*In the recent **ioS 14 release** Apple made all developers aware that if they provided third party authentication services it would be mandatory to include an Apple login. There were exceptions (utilities as an example), but any monetizable app that sold digital goods was forced to introduce an Apple login. We therefore had to remove functionality (Facebook and Google login) so we didn't need to go to the considerable effort to introduce an Apple login. This is all designed to force their service into the app ecosystem, to ultimately pull users away from the competitors (Facebook and Google). They actually were willing to pass our app this time but would not commit to doing so in the future. We knew this was simply because they are under significant pressure from app developers pushing back on what is effectively a trojan horse requirement under the guise of security, to capture more of the capability in the Apple ecosystem.*

Recommendation 6: *Ensure app developers are not excluded from the market due to anti-competitive practices*
The Council recommends enforcements are implemented to prevent anti-competitive practices that may block the introduction of apps from independent app developers from the market.

6. Google maintains a monopoly in the Android App Stores market

The *Peekya v Google* case also claims that Google unlawfully acquired and unlawfully maintains its monopoly in the Android App Stores Market via contractual restrictions and consumer warnings which restrain competition:

[20] Ibid: Geradin and Katsifis (pp 12-17)

a) **Contracts with device manufacturers using the Android operating system require OEMs to** i) accept a bundle of apps/services (eg, Google Search, YouTube, Maps, Gmail, etc) including the Play Store; and ii) give preferential location to the Play Store and other Google apps on the device's home screen (para 57 onwards).

b) **Contracts with app developers:** i) Google prohibits developers from distributing a competing app store on the Google Play Store via clause 4.5 *of its Developer Distribution Agreement* (DDA); and ii) Developers who do not list apps on the Play Store do not have access to Google's app advertising program including placement on must-have spaces like Google Search and YouTube.

c) **Restraints on consumers**: i) Google's restriction on the download of rival app stores via Google Play itself and its conduct in making pre-installation of competing app stores unlikely, means that direct downloading of app stores is the only avenue available for competition in this space – Google discourages direct downloads by making the process difficult and giving users misleading warnings about the dangers of direct installation; ii) for those that do download rival app stores direct, this is an inferior process because Google blocks apps via such stores from automatically updating in the background; and iii) Google blocks rival app stores it deems as 'harmful'.

d) This conduct harms competition and in a competitive market the transaction fee would be lower than the current supracompetitive 30%. More competition in the market would benefit consumers and app developers.

7. Similar practices by Google

It has been documented[21] that Google engages in a number of the same or similar practices as those used by Apple. While the Council understands Google is less punitive and slower to implement equivalent problematic policies than Apple, there is nonetheless evidence that the company is engaging in anti-competitive practices that are negatively impacting developers and consumers.

Recommendation 7: *Review Google for anti-competitive practices*
The Council recommends anti-competitive practices from Google are reviewed alongside issues identified with Apple's anti-competitive practices.

[21] Ibid: Geradin and Katsifis (p. 4)