For the public register

9 March 2021

Public submission

Digital Platform Services Inquiry
Australian Competition and Consumer Commission

Via email: digitalmonitoring@accc.gov.au

Dear DPSI team

1. Introduction and purpose of submission

Epic Games, Inc. (**Epic**) appreciates the opportunity to provide this public submission to the Australian Competition and Consumer Commission (**ACCC**) to outline a number of key issues regarding the conduct of Google LLC (and other Google entities) (collectively referred to herein as "**Google**") in Australia that are relevant to a number of issues raised by the Digital Platform Services Inquiry on competition in app marketplaces (**Inquiry**). Epic believes that it is important make a public submission in respect of these issues to ensure that regulators such as the ACCC are able to shine a light on the need for open platforms and competition policy changes that benefit all developers and consumers.

As the ACCC would be aware, Epic recently filed proceedings against Google in the Federal Court of Australia for alleged contraventions of the *Competition and Consumer Act 2010* (Cth) (**CCA**), arising from restrictions imposed by Google on app developers and Original Equipment Manufacturers (**OEMs**) relating to Android mobile app distribution and in-app payment processing. Epic is conscious that the ACCC's report on the Inquiry is due to be provided to the Australian Treasurer at the end of March 2021 and therefore wished to provide this submission to explain the nature of Epic's competition concerns.

This submission seeks to provide relevant background and general insights informed by Epic's experience with Google in Australia to the extent that such experience is relevant to responding to a number of key issues raised in the ACCC's Issues Paper released on 8 September 2020 (**Issues Paper**), including:

- Intensity of competition in respect of relevant app marketplaces
- App marketplace conduct that raise competition law concerns
- Relationships between app marketplaces and app developers and providers
- Relationships between app marketplaces and consumers (and the resulting harm from anticompetitive conduct)

This submission is not intended to restate any legal case Epic has commenced against Google but to identify those aspects that are relevant to the matters noted above.

Amongst other things, Epic develops software applications (**apps**) for a number of devices, including smart mobile devices using Google's Android operating system (**Android OS**) (**Android devices**). The most popular game that Epic currently makes is *Fortnite*. In October 2018, the Android OS version of *Fortnite* was launched on the Google Play Store in Australia. Since its launch, there have been over 470,000 *Fortnite* user accounts on Android devices in Australia. However, as at February 2021, only ~26,000 *Fortnite* user accounts remained active following Google's removal of *Fortnite* from the Google Play Store in response to Epic adding a direct payment processing option for users of *Fortnite* on Android devices. This direct payment option enabled users to save 20% on the price of in-app content compared to the price charged if Google Play Billing was selected as the payment processor.

For further general information and background regarding Epic, *Fortnite*, the Epic Games Store and *Unreal Engine,* please refer to our submission to the Inquiry in respect of Apple dated 4 February 2021.

2. Background and Overview of Epic's concerns regarding Google's conduct in Australia

Epic has recently initiated proceedings against Google in the United States and the United Kingdom:

- The United States claim principally alleges that Google dominates the merchant market for mobile operating systems; unlawfully maintains a monopoly in the Android mobile app distribution market and unlawfully acquired and maintains a monopoly in the Android in-app payment processing market.[1]

- The United Kingdom claim principally alleges that Google has unfairly restricted competition from alternative channels for the distribution of software applications to consumers who use Android mobile devices; unlawfully ties the distribution of Android apps through the Google Play Store to the use of Google's proprietary payment processing tool for purchases of in-app digital content consumed within Android apps; and/or imposes an unfair fee on the purchase of apps and in-app digital content consumed within the app through the Google Play Store /within apps distributed through the Google Play Store.[2]

Technical and contractual restrictions giving rise to the concerns that are the subject of the proceedings above have also been imposed by Google on app developers and OEMs in Australia. Epic believes that its experiences of Google's conduct is symptomatic of unrestrained market power that results in significant harm to Australian consumers and the competitive process in Australia.

In the absence of Google's anti-competitive contractual and technical restraints (that are addressed in more detail below), app developers would have a greater ability to distribute their apps, in turn leading to increased competition and innovation to the benefit of Australian consumers. If Google did not have its current near-monopoly in the market for the distribution of apps compatible with Android OS to Android devices, as it currently does through the technical and contractual restrictions stated above and its control of the Google Play Store, Epic believes Australian consumers would not be paying

[1] See Epic Games, Inc. v. Google LLC (3:20-cv-05671), Complaint for Injunctive Relief filed 13 August 2020 available at https://www.courtlistener.com/recap/gov.uscourts.cand.364325/gov.uscourts.cand.364325.1.0.pdf.
[2] See 1378/5/7/20 Epic Games, Inc. and Others v Alphabet Inc., Google LLC and Others available at https://www.catribunal.org.uk/cases/13785720-epic-games-inc-and-others.

the 30% commission Google imposes on the purchase of in-app content, but rather significantly lower fees available in a competitive environment.

As Google's Android OS is present on over 40% of mobile devices in Australia (with Apple's iOS operating system having approximately 55% of mobile devices)[3], Epic's concerns in relation to Google's conduct have broader implications and raise significant consumer and public interest issues that extend substantially beyond gaming and the use of Epic's services. As apps available through mobile devices provide important everyday services to millions of Australians across numerous sectors and to essential services, the concerns raised by Epic have significant implications for Australian consumers and for the viability and competitiveness of the Australian app marketplace.

3. Google's significant market power in the relevant markets

More than 90% of all apps on Android mobile devices have been downloaded via the Google Play Store in the Android app distribution market

There is a relevant market for the distribution of apps compatible with the Android OS to users of Android devices (the "**Android App Distribution Market**"). This market is comprised of all the channels by which mobile apps may be distributed to the many millions of users of Android devices. This primarily includes Google's dominant Google Play Store, with smaller stores, such as Samsung's Galaxy Store and Aptoide, trailing far behind in terms of the number of apps these stores offer to consumers. Nominally only, the direct downloading of apps without using an app store (which Google pejoratively describes as "sideloading") is also within this market. In fact, as discussed below, direct downloading on Android OS requires an arduous process and poor consumer experience.

App stores are operating system (**OS**)-specific, meaning they distribute only apps that are compatible with the specific mobile OS on which the app store is used. A consumer who has an Android device cannot use apps created for a different mobile operating system. An owner of an Android OS device will use an Android compatible app store, and such app stores distribute only Android-compatible mobile apps. That consumer may not substitute an Android app store with, for example, Apple's App Store, as that app store is not available on Android devices, is not compatible with the Android OS, and does not offer apps that are compatible with the Android OS. Non-Android mobile app distribution platforms—such as the Windows Mobile Store used on Microsoft's Windows Mobile OS or the Apple App Store used on Apple iOS devices—cannot substitute for Android-specific app distribution platforms.

There are a number of different app stores designed for use on Android mobile devices apart from the Google Play Store (such as Amazon's Appstore and Samsung's Galaxy Store). However, these trail Google Play Store significantly in terms of users and content. Further, due to Google's contractual and technical restrictions, since 2011 the Google Play Store has been pre-installed on, and displayed on the home screen of, more than 90% of Android devices globally (excluding China). Two alternate technical routes which are available have significant practical limitations and therefore do not impact Google's significant market power in the Android App Distribution Market:

a. *Direct downloading* – involves manually downloading an app from a third-party website on the internet, subject to numerous steps accompanied by unnecessary and misleading security warnings imposed by Google, affecting the willingness and comfort of consumers to download apps via this alternate method to the Google Play Store. Google effectively limits the viability

[3] Australian Competition and Consumer Commission, 'Digital Platforms Inquiry – final report' (26 July 2019) available at https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report, page 10.

of this alternative through imposing multiple steps and numerous security warnings that unnecessarily complicate the process. For example, there are 16 individual steps that a user must navigate from the Epic Games website to the Fortnite Play screen during which a user must accept "type of file [that] can harm [their] device" (initial install), accept storage requirements, grant access to photos, media & files, and accounts, recorded audio and contents within USB storage, and update settings to accept "unknown apps from this source," and grant additional access to accounts, recorded audio and contents within USB storage. These warnings adversely affect the willingness of consumers to download apps this way and the technical barriers affect their ability to do so, thereby rendering direct downloading an unsatisfactory distribution channel.

b. *Alternative app stores* – For app developers, no app store other than the Google Play Store is able to provide the same consumer reach for the distribution of apps. From a consumer perspective, no app store other than the Google Play Store offers an equivalent range of apps from which to choose.

Because of Google's success in maintaining its monopoly in Android app distribution, there is no viable substitute to distributing Android apps through the Google Play Store. As a result, the Google Play Store offers over 3 million apps, including all of the most popular Android apps, compared to just 700,000 apps offered by Aptoide, the Android app store with the next largest listing. The Google Play Store thereby benefits from ongoing network effects based on the large number of participating app developers and users. The large number of apps attracts large numbers of users, who value access to a broad range of apps, and the large number of users attract app developers who wish to access more Android users. Android OEMs too find it commercially unreasonable to make and sell phones without the Google Play Store, and they view other app stores as poor substitutes for the Google Play Store because of the lower number of apps they offer.

It is also important to note that third party app developers require a means of distributing updates to their apps (i.e. to add functions; address technical issues; ensure compatibility with updates to the operating system). Because updates can only be obtained in the same way as the original app download, effecting updates can prove to be unreasonably difficult to obtain via any way other than through the Google Play Store (or an OEM app store). This is due to the same technical limitations currently imposed by Google (e.g. numerous safety warnings) when using the available alternate methods for app distribution and downloads (as detailed further in section 4 below).

The contractual and technical barriers imposed by Google eliminate, or at least significantly restrict, the ability of other app developers to compete in the market for the distribution of Android apps on the merits of their alternative product offerings. This is most clearly demonstrated by the fact that Google is able to charge a supra-competitive commission of 30% for the sale of all paid-for apps and in-app digital content consumed within the app through the Google Play Store, even though alternative app stores may offer app developers better revenue distribution arrangements (and lower rates).

Google's substantial market power in relation to its operating system creates and reinforces significant barriers to entry and impose substantial switching costs in respect of Android App Distribution

In contrast to Apple, Google's business model relies on the license of the Android OS to third-party companies that design and sell smart mobile devices, such as OEMs like Samsung. This is a source of significant leverage for Google due to the entrenched position of the Android OS relative to other licensable OSs. Google's Android OS provides Android devices on which it is installed with basic functionality and is the most ubiquitous operating system used in smart mobile devices. Globally,

there are around 2.5 billion active Android devices and in 2019 around 1.4 billion new Android devices were sold around the world. Over 40% of the approximately 20 million smartphones used in Australia operate Android OS.

Google also owns and licences a range of proprietary apps (including the Google Play Store, Google Search, Google Chrome, Google Maps, Gmail and YouTube), known as Google Mobile Services, to OEMs; and owns and operates an in-app payment processor (**Google Play Billing**) for the purchase of in-app digital content that is consumed within the app. Google's practices amount to an "all or nothing" for an OEM: if the OEM refuses to take the Google Play Store, it does not receive access to these other "must have" apps.

Google's substantial market power in app distribution is not constrained by competition at the smart mobile device level because Android device users face significant switching costs and lock-in to the Android ecosystem that serve to protect Google's monopoly power, and consumers are unable to account for Google's anti-competitive conduct when they purchase a smart mobile device:

- *Google's market power in Android OS, mobile app distribution and in-app payment processing (as explained below)* ***create and reinforce significant barriers to entry:*** Consumers are deterred from leaving the Android ecosystem due to the difficulty and costs of switching. Consumers choose a smartphone based in part on the OS that comes pre-installed on that device and the ecosystem in which the device participates (in addition to a bundle of other features, such as price, battery life, design, storage space, and the range of available apps and accessories). Once a consumer has selected a smartphone, the consumer cannot replace the mobile OS that comes pre-installed on it with an alternative mobile OS. Rather, a consumer who wishes to change the OS must purchase a new smartphone entirely. In addition, mobile OSs have different designs, controls, and functions that consumers must learn to navigate. Over time, consumers who use Android devices learn to operate efficiently on the Android OS. For example, the Android OS layout differs from iOS in a wide range of functions, including key features such as searching and installing "widgets" on the phone, organising and searching the phone's digital content, configuring control centre settings, and organizing photos. The cost of learning to use a different mobile OS is part of consumers' switching costs.

- *Google's market power in Android OS, mobile app distribution and in-app payment processing (as explained below) is enhanced by* ***substantial switching costs imposed by Google on users:*** The threat of users switching from a Google Android OS device (i.e. to an iOS device) does not constrain Google as both OEMs and mobile device customers face switching costs which cement Google's substantial Android market power across relevant downstream markets, being mobile app distribution and in-app payment processing:

    - For *OEM*s – the process of implementing a mobile OS requires significant time and investment, making switching to another mobile OS difficult, expensive and time-consuming.

    - For *mobile device customers* – as noted above, once a consumer has selected a smartphone, the consumer cannot replace the mobile OS that comes pre-installed on it with an alternative mobile OS. A consumer who wishes to change the OS must purchase a new smartphone. The cost of learning to use a different mobile OS is also part of consumers' switching costs. Switching from Android devices may also result in a significant loss of personal and financial investment that consumers have placed in the Android ecosystem. Apps, in-app content and many other products are designed for or are only compatible with a particular mobile OS. Switching to a new mobile OS

may mean losing access to such products or to data. Even if versions of such apps and products are available within the new ecosystem chosen by the consumer, the consumer would have to go through the process of downloading them again onto the new devices or may have to purchase them anew. The consumer may be forced to abandon his or her investment in at least some of those apps, as well as with any purchased in-app content and consumer-generated data on such apps.

As a result of these considerations, there is no meaningful substitution between Google and Apple (and the iOS and Android OS mobile operating ecosystems). Resultantly, there are no other suppliers of app marketplaces that are capable of providing viable alternatives for use on Android OS or iOS for app developers and mobile device users in Australia. This stems from the sheer network effects that alternative app distribution platforms would need to overcome to entice a sufficient volume of users away from either iOS or Android OS to remain viable. Therefore, from a developer's perspective, due to the respective market power of each of Google (in respect of the Android OS) and Apple (in respect of iOS), it is critical for app developers to have an app both on Android OS and Apple iOS in order to successfully monetise an app.

Google has substantial market power in respect of Android In-App Payment Processing

Many app developers generate revenue by making in-app digital content, including in-game content, available to users for a fee. Epic's Fortnite – which is available to players for free – is an example of an app that offers in-app content for a fee. Such content is not, however, necessary for gameplay. In Fortnite, in-app purchase opportunities include digital outfits, dance moves and other cosmetic enhancements within the game.

App developers selling in-app content require an in-app payment processing system that enables users to complete the purchase within the app itself. The demand for in-app payment processing for app developers is met by a number of payment processors (eg Braintree, PayPal, Square and Stripe). Some developers, like Epic, have developed their own payment processing systems. Except as proscribed by Google's restrictions, app developers can select the payment processor to incorporate into the design of their app.

Google does not face any material, competitive constraint in the Android In-App Payment Processing Market because other payment processing solutions are not viable alternatives in light of the terms of the Google Play Developer Distribution Agreement (**DDA**); app developers and consumers have no material bargaining power in the Android In-App Payment Processing Market; and consumers cannot constrain Google's conduct.

4. Google's app marketplace conduct

In the context of the Inquiry, Epic believes that it is important to draw the ACCC's attention to the series of contractual restrictions that Google imposes on OEMs and app developers and the technical barriers imposed on consumers that render any method for distributing apps, other than through the Google Play Store, commercially and practically unviable. Through these restrictions, Google reserves for itself a near-monopoly position in the Android App Distribution Market, including in Australia, effectively forcing OEMs and app developers into contracts of adhesion for services for which they are unable to find reasonable alternatives.

Contractual restrictions on OEMs

To obtain any of the apps which form part of Google Mobile Services, Google requires OEMs to enter into a Mobile Application Distribution Agreement (**MADA**), which is a standard form, non-negotiable contract. If OEMs are to meet consumer demand to offer access to any of the apps which form part of Google Mobile Services, they do not have a choice but to enter into the MADA.

Under the MADA, Google requires that:

a. If an OEM pre-installs one or more of the proprietary Google apps on its devices, it must pre-install all of up to 30 proprietary Google apps, including the Google Play Store;

b. OEMs must place the icon which gives access to the Google Play Store on the device's home screen (that is must be prominently placed on the device).

Google also interferes with OEMs' ability to make third-party app stores or apps available on the Android devices they make.

The result of these restrictions and interference is that the Google Play Store is often the first (or only) app store consumers will see when they start using their Android device. This is commercially valuable to Google as many consumers are unlikely to look for, or use, an alternative app store.

Contractual restrictions on app developers

In order to distribute their Android OS apps through Google Play Store, app developers must enter into the DDA, which is a standard form, non-negotiable contract. The DDA requires every app to be distributed through the Google Play Store to first be submitted to Google for review and approval, permitting Google to unilaterally refuse to carry (or delist) apps which violate the DDA.

Under the terms of the DDA:

a. App developers must agree to not use the Google Play Store to distribute or make available any product that '*has a purpose that facilitates the distribution of software applications and games for use on Android devices outside of the Google Play Store*';

b. App developers must agree, in respect of apps distributed through the Google Play Store, to exclusively use Google Play Billing, for the processing of payments for purchases of in-app digital content consumed within those apps purchased by Android device users. This effectively ties Google Play Billing to the Google Play Store such that for apps distributed through the Google Play Store, app developers and Android device users must use Google Play Billing for the purchase of in-app digital content for consumption within apps;

c. App developers must agree that Google or its relevant subsidiary, will deduct a 30% commission for the sale of all paid-for apps through the Google Play Store and for in-app purchases of digital content consumed within such apps (other than in relation to certain subscription users);

Google reserves the right to remove and disable any app that Google determines violates the above provisions.

Under the DDA, app developers are also required to enter into the 'Google Payments – Terms of Service – Seller Agreement' in order to receive payment for apps distributed (or purchased) through the Google Play Store and for purchases of in-app digital content made within those apps. The DDA also requires app developers to comply with the Google Developer Program Policies. Among other things, this requires app developers offering products within an app downloaded from the Google Play Store or providing access to in-app content to use Google Play Billing as the only method of payment (except for the payment of physical/digital product that may be consumed outside the app).

Technical restrictions on Android users

Google also imposes technical restrictions which may inhibit Android device users from downloading apps other than through the Google Play Store. For example, in order to directly download the Epic Games app from Epic's website onto an Android device, a user is typically required to take multiple steps and is confronted with numerous warnings throughout the process such as:

> "*This type of file can harm your device. Do you want to keep EpicGamesApp,apk anyway?"*
>
> *"For your own security, your phone is not allowed to install unknown apps from this source."*
>
> *"Your phone and personal data are more vulnerable to attack by unknown apps. By installing apps from this source, you agree that you are responsible for any damage to your phone or loss of data that may result from their use."*

Screenshots of these steps are annexed to these submissions at **Annexure A**.

Additionally, Google has configured the Android OS to deny directly downloaded apps the permissions necessary to be seamlessly updated in the background, meaning that a consumer must manually approve every update of the directly downloaded app. Some versions of the Android OS require consumers to repeat some or all steps of the initial download, impacting the continued functionality and commercial viability and user experience of apps downloaded directly from app developers such as Epic, rather than via the Google Play Store.

5. Relationships between app marketplaces and app developers and providers

Google's control over the Android OS and through the contractual and technical restrictions imposed on app developers strongly disincentivises Android OS users from downloading apps from any source other than Google Play Store and funnels in-app purchases of digital content consumed within the app through Google's own in-app payment processing – Google Play Billing. Google's conduct forecloses actual and potential competition to the detriment of app distributors, payment processors and app developers.

Of particular concern are the following effects in relation to Android app distribution that arise from the restrictions Google is able to impose due to its market power and the lack of competitive constraints that affect app developers (including Epic):

a. App developers are denied the choice of how best to distribute their apps. Distributing apps through competing app stores or via a developer's own website could increase visibility or offer better or cheaper marketing.

b. Competitive pressure for Google to innovate and improve its own Google Play Store is reduced. If competition were to drive further innovation and development in the market, developers could have the benefit of superior distribution outlets.

c. Experimentation with alternative app distribution models is prevented. Without Google's restrictions, developers could more readily provide apps to consumers such as via curated app stores and app bundles.

d. Increased costs for developers. Understandably, developers require a reasonable return on their investment as justification for dedicating substantial time and financial resources needed to develop an app. In imposing its 30% commission, Google often puts developers in a position where they must forego substantial revenue, reduce the quality or quantity of their apps, and/or raise prices for consumers or otherwise render apps financially unviable.

In addition to the above applicable points made in relation to hindered innovation and increased costs, competitive harm to app developers (including Epic) also arises as a result of the restrictions imposed by Google in respect of Android in-app payment processing:

a. Denies developers choice, coercing them to use Google's in-app payment processing: Developers are contractually obligated to use Google Play Billing. If developers were not so obligated, they could offer their own payment processing service, as developers including Epic presently can for their games on personal computers.

b. Customer service and relationships: Epic is not able to provide users with comprehensive customer service relating to in-app payments without Google's involvement. Google does not have the same incentive as Epic and other developers to compete through improved customer service and problematically under the status quo Google is able to obtain information pertaining to Epic's transactions with its own customers – even in circumstances where Epic and Epic's customer would prefer not to share information with Google.

6. Relationship between app marketplaces and consumers

The restrictions imposed by Google result in significant detriment to Australian consumers. With respect to Android OS app distribution, customers are denied the opportunity to find and access apps by ways of new, innovative distribution methods such as specialised app stores catering to customer specific interests and preferences. Customers also must bear at least some, of the costs of the 30% commission imposed by Google on developers such as Epic.

With respect to Android OS in-app payments, Google's conduct denies consumers innovation which could be provided by would-be competing in-app payment processors (such as Braintree, PayPal, Square and Stripe, or developers such as Epic who have developed their own payment processing systems). Google's in-app commission does not bear any rational relationship to any benefits app developers or consumers receive from its services. Google In-App Billing does not provide any unique benefits over other in-app payment processing services and alternative, lower-cost options exist that offer similar functionality.

Consumers are also denied choice by Google's conduct, since Google ties the use of the Google Play Store to Google Play Billing whenever consumers purchase in-app digital content consumed within apps on their Android devices. Developers such as Epic are unable to resolve customer complaints directly, impeding an ability to offer high quality customer service. With no competing in-app payment

processors, Google has no incentive to provide the same type or level of customer service in relation to its in-app payment processing. Customers therefore suffer from lower quality customer service.

7. Conclusion

As stated previously, Epic believes this Inquiry by the ACCC into app marketplaces is both timely and critically important. Mobile app stores, such as Google Play Store, are already operating as gateways to essential consumer services through digital platforms. The explosive growth in mobile app downloads means there is every reason to believe that these app stores will play an even greater role in the future. For this reason, Epic contends that app store operators, such as Google, must operate in a manner that does not restrict competition, and facilitates fair access and choice, consumer value for money and innovation. Currently it is clear that Australian consumers are being deprived of innovation and pricing competition that would otherwise be present in a competitive market.

Please contact the undersigned if you would like any further information on this submission.

Yours sincerely

SIGNED

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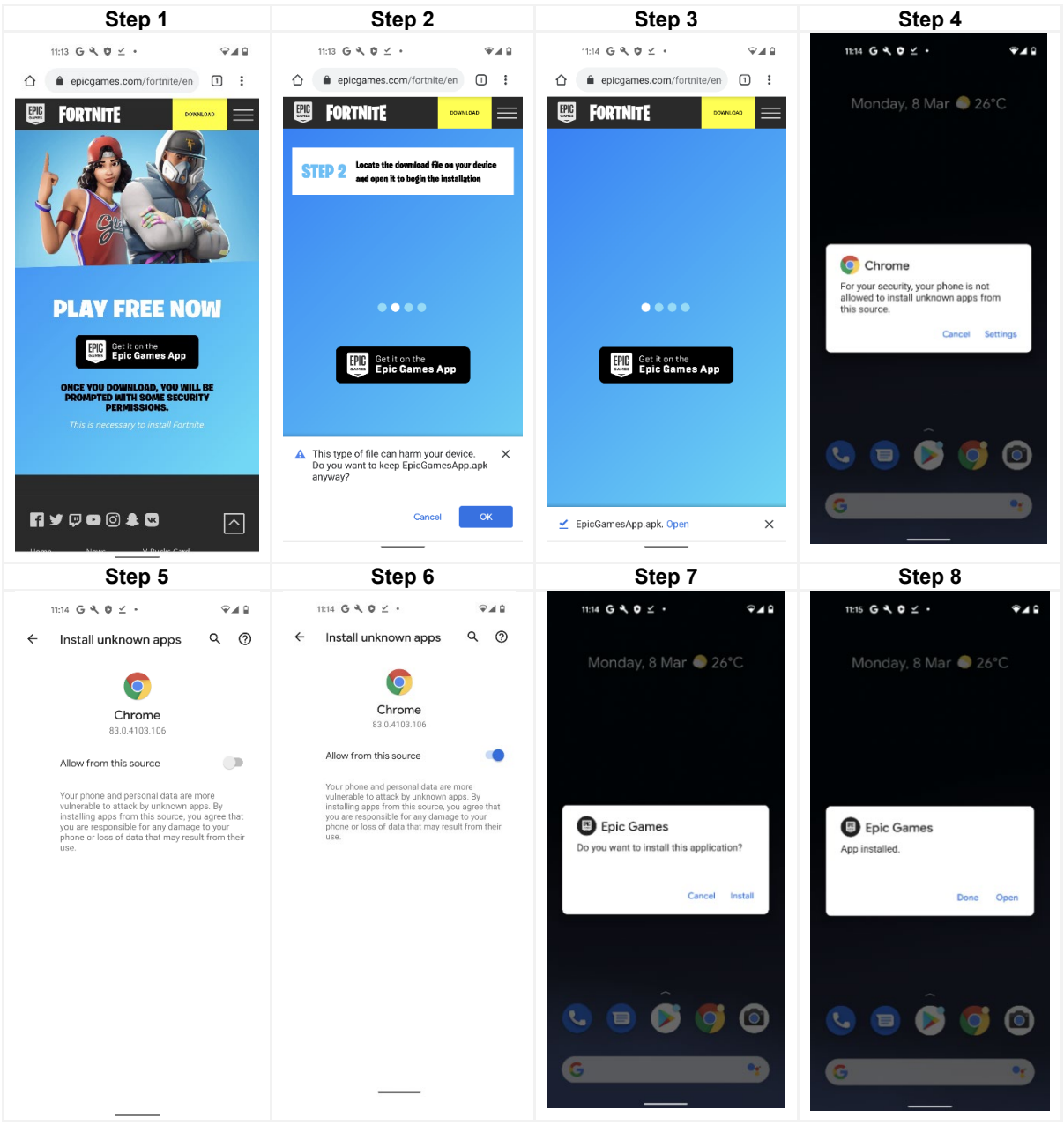
For the public register

Annexure A



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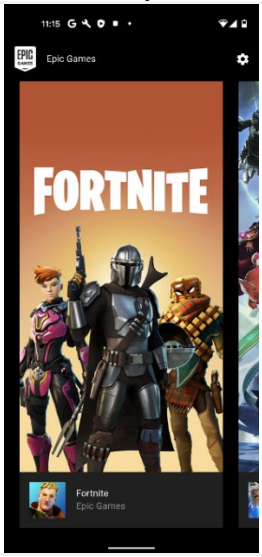	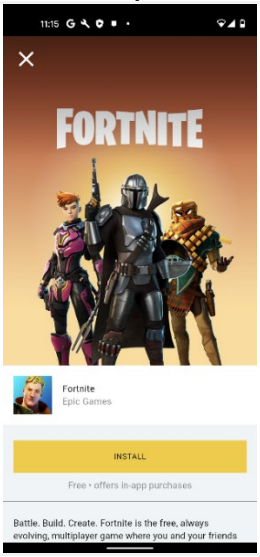	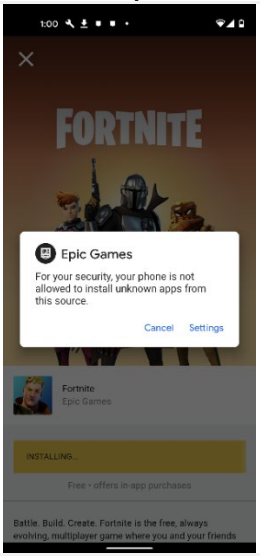	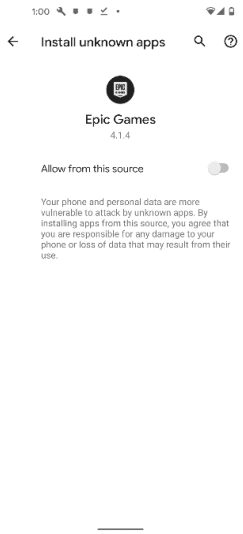
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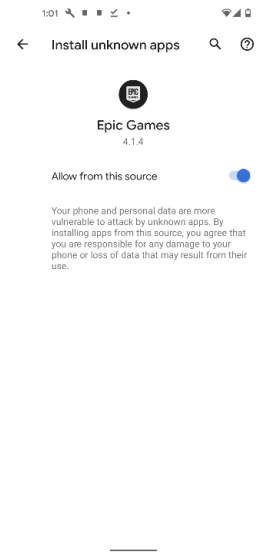	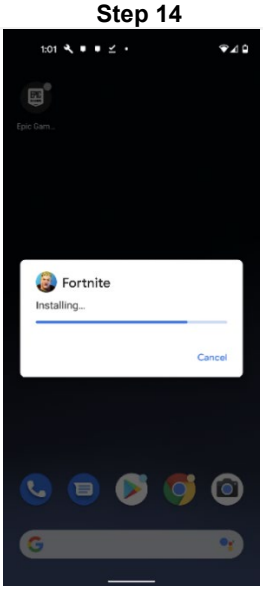	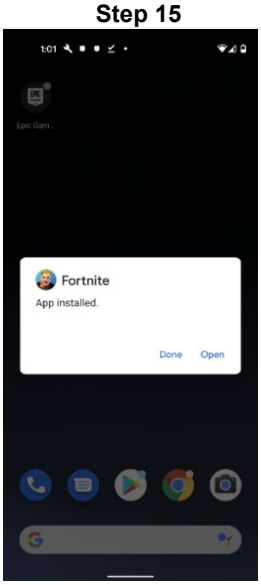	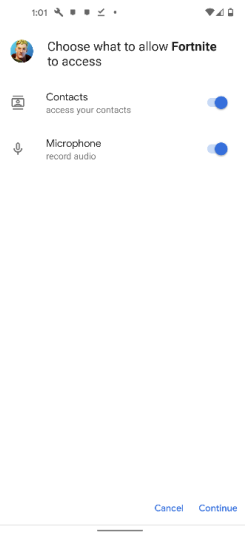
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