



1 April 2022

Digital Platform Services Inquiry
Australian Competition and Consumer Commission

Via email: digitalmonitoring@accc.gov.au

Dear DPSI team

1. Introduction

Epic Games, Inc. (Epic) appreciates the opportunity to provide this public submission to outline a number of key issues including how Apple and Google's position as 'gatekeepers' has resulted in consumers experiencing less choice and paying more for apps and services, while Australian developers are prevented from innovating and benefiting from a competitive marketplace.

Epic filed proceedings against Apple and Google in the Federal Court of Australia in late 2020 and early 2021, respectively, for alleged contraventions of the *Competition and Consumer Act 2010* (Cth) (CCA), arising from restrictions they impose on app developers, including use of their respective mobile app distribution and in-app payment systems.

This submission provides background and insights informed by Epic's experience with Google and Apple in Australia on several key issues raised in the ACCC's discussion paper including:

- Harms to competition and consumers arising from digital platform services;
- The effectiveness of competition and consumer law in Australia;
- Potential regulatory options, rules and measures.

The submission is not intended to restate any legal claims that are the subject of Epic's proceedings against Apple or Google.

The *discussion paper for interim report no.5: updating competition and consumer law for digital platform services* ("Discussion Paper")¹ and the *Digital platform services inquiry interim report no.2* (March 2021 "Interim Report")² contain compelling evidence that Apple and Google have significant market power in Australia through their respective app stores and that more can be done by the two companies in this area to promote fair access and competition.

Mobile ecosystems are a critical part of the modern economy, with millions of developers and billions of consumers relying on those ecosystems to make a living and conduct important daily tasks. As some of the consultation areas fall outside of Epic's purview, this submission is confined to addressing the ACCC's questions regarding consumer competition and consumer harms, competition and consumer protections law enforcement in Australia and potential regulatory solutions relating to app marketplaces.

2. Background to Epic

Founded in 1991, Epic Games is a leading interactive entertainment company and provider of 3D engine technology. Headquartered in Cary, North Carolina, Epic has more than 50 offices worldwide, including in Australia.

Epic develops software applications (apps) for several devices. Epic is the creator of Fortnite, a massive virtual world where hundreds of millions of people from across the world connect, meet, play, talk, compete, dance, or attend concerts and cultural events. Epic also develops Unreal Engine, which powers the world's leading games and is also adopted across industries such as film and television, architecture, automotive, manufacturing, and simulation. Through Unreal Engine, Epic Games Store, and Epic Online Services, Epic provides an end-to-end digital ecosystem for developers and creators to build, distribute, and operate games and other content.

¹ Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services' (28 February 2022) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf>.

² Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – March 2021 Interim Report No.2 – app marketplaces' (28 April 2021) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>.

3. Harms to competition and consumers

Epic agrees with the ACCC's assertion that Google and Apple have significant market power in relation to a number of digital platform services and that the market power of these digital platforms is increasingly entrenched.³ The ACCC observes that Apple and Google "perform gatekeeper roles by controlling app developers' access to their respective app marketplaces" and that they can "unilaterally set, amend, interpret and enforce the terms and conditions that app developers must follow to reach consumers"⁴. The consequences of this entrenched market power include:

1. "Allows the relevant digital platform to unilaterally set the 'rules of the game' for large swathes of economic activity".
2. "Provides the opportunity to impose terms of use and access for consumers and businesses that can be unfavourable, opaque and subject to change without input or notice".
3. "Gatekeeper digital platforms who are vertically integrated may have the ability and incentive to engage in anti-competitive conduct".⁵

Apple and Google's market power and their resulting 'gatekeeper' positions has harmed competition, consumers, and developers.

3.1 Consumer harms

a. Increased costs for Australian consumers

Apple and Google's market power enables them to impose an exorbitant 30% commission on in-app purchases of digital goods and services. Consumers must bear some or all of that commission in the form of higher in-app content prices and/or reduced quantity or quality of in-app content. The Discussion Paper expresses concern about Apple and Google's ability to set and enforce terms and conditions for access to app marketplaces including the mandatory and exclusive use of proprietary billing systems for in-app payments and the imposition of a

³ Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services' (28 February 2022) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf>, page 16.

⁴ Ibid. p.24.

⁵ Ibid. p24.

15% or 30% commission on in-app payments⁶. Further, the March 2021 Interim Report concluded that “it is highly likely that the commission rates charged by Apple and Google are inflated by the market power they have in their dealings with app developers. It is also highly likely that this market power enables Apple and Google to unilaterally set and enforce the rules that app developers must satisfy, including the requirement that prevents them using alternative payment systems in-app”⁷.

Requiring Apple and Google to allow alternative app stores on mobile devices would result in a more open ecosystem that gives consumers and developers better choice and value. For example, Epic Games charges a substantially lower commission (12%) for games distributed via the Epic Games Store (available on PCs, Macs, and Chromebooks) than the 30% charged by Apple’s App Store and Google’s Play Store and also permits alternative payment processing.

b. The lack of interoperability between digital platform services raises consumer switching costs and hampers competition

The Discussion Paper raises concern about the lack of interoperability between digital platform services, referencing statements from Apple executives which acknowledge the costs that users face in switching between services inside and outside of Apple’s ecosystem⁸. In relation to Apple’s media and app stores Apple executives admitted that:

“The more people use our stores the more likely they are to buy additional Apple products and upgrade to the latest versions. Who’s going to buy a Samsung phone if they have apps, movies, etc. already purchased? They now need to spend hundreds more to get to where they are today”⁹.

⁶ Australian Competition and Consumer Commission, ‘Digital Platform Services Inquiry – Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services’ (28 February 2022) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf>, page 42. The report references statements released in Epic Games v. Apple case in the Northern District of California.

⁷ Australian Competition and Consumer Commission, ‘Digital Platform Services Inquiry – March 2021 Interim Report No.2 – app marketplaces’ (28 April 2021) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>, page 63.

⁸ Australian Competition and Consumer Commission, ‘Digital Platform Services Inquiry – Discussion Paper for Interim Report No. 5: Updating Competition and Consumer Law for Digital Platform Services’ (28 February 2022) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf>, page 53.

⁹ United States District Court, Epic Games Inc v Apple Inc, [Findings of fact and conclusions of law proposed by Epic Games, Inc.](#), p 19.

Apple and Google have argued that a closed ecosystem, which limits or bans direct downloads or competing App Stores while limiting interoperability, is the only guarantee of safety and privacy. Contrary to Apple and Google's claims, the choice between competition and security is not binary. Rather, greater competition in the distribution of applications on mobile devices will not only open the market to greater price competition, it will also spur innovation and improvements in security and privacy offerings. Many competition authorities around the world are grappling with these issues, including how to encourage meaningful competition in mobile ecosystems.

- c. Consumers are denied innovation and choices which could be provided by would-be competing in-app payment processors.

To have an app in the App Store, app developers must agree to a 30% fee to Apple for every in-app purchase of digital in-app content. Consumers may not access any other payment protocols. Apple gags developers from telling consumers about other options outside of the In-App Purchase (IAP) system. This limits user choice and locks them into a set fee structure. As a smartphone user, you should have the choice to use a different payment system where it is available.

The ACCC observed that "significant market power can also be leveraged across different services, leaving consumers with less choice, higher process and/or lower quality products and services across many interrelated markets. Ultimately, this can lead to reduced productivity and innovation, while increasing costs in the supply of digital platform and related services."¹⁰

Epic's own experience bears-out this out. In 2020, for the first time, Epic added a direct payment processing option for in-app purchases made by users of Fortnite on iOS and Android devices. This alternative avoided Apple and Google's standard 30% levy for in-app purchases of digital goods. As a consequence, Epic was able process payments in a more cost-effective way and was able to pass an ~18% price reduction to consumers opting for Epic's payment option. Unfortunately for developers and consumers, offering alternative payment options breaches Apple's and Google's app store policies, and Fortnite was removed from the App and Play Stores.

¹⁰ Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – Discussion Paper for Interim Report No.5: Updating Competition and Consumer Law for Digital Platform Services' (28 February 2022) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf>, page 5.

- d. App Store Gatekeepers pretextual security justifications undermine user choice, competition, and innovation that could lead to better consumer outcomes for privacy and security.

Apple and Google claim that they make decisions on behalf of consumers to protect them from bad actors or harmful consequences online. It is far from clear if these choices are made fully in the interests of consumers or merely as a pretext to justify decisions that harm competition and limit consumer choice.

For example, Apple argues that “if third-party app stores were able to operate on iOS devices, the level of protection against malware would move from Apple’s high standard of review to the lowest standard offered by a third-party app store, creating a risk for the individual device and the overall ecosystem.”¹¹ Apple self-servingly mischaracterises the risk and the function of the App Store app review process and its impact on device security. It also makes the baseless assertion that competition in app distribution would be a security “race to the bottom,” rather than a “race to the top” where rivals with more innovative and secure app stores challenge Apple to do better. To the contrary, Apple’s app review protections could be replicated—and even improved—by third parties. Anticompetitive app store policies should not get a free pass from scrutiny just because Apple or Google invoke privacy and security justifications.

As the Electronic Frontier Foundation explains in its brief in support of Epic in the U.S. Court of Appeals for the Ninth Circuit, “Apple’s security rationale is weak and does not overcome the harm its policies cause to innovation, including innovation that would enhance consumers’ security and privacy....Apple’s policies actively thwart developers’ attempts to meet other user needs relating to privacy, security, trustworthiness, and access to information.”¹² The choice between promoting competition and promoting security is not a binary one. Competition is likely to drive innovation and improvement in security and consumer privacy.

¹¹ Competitions & Markets Authority, ‘Mobile ecosystems – Market Study Interim Report’ (14 December 2021) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048746/MobileEcosystems_InterimReport.pdf, para. 7.56.

¹² See Brief of The Electronic Frontier Foundation as Amicus Curiae Supporting Appellant, Cross-Appellee Epic Games and Reversal at 12, 17, Epic Games, Inc. v. Apple, Inc., (Nos. 21-16506 and 21-26695), (9th Cir. Jan. 27, 2022).

3.2 Developer harms

- a. Apple and Google's anti-competitive conduct denies app developers the choice of how best to distribute their apps.

Developers are barred from reaching billions of iOS and Android users unless they go through the Apple and Google app stores and submit to whatever terms they impose. Opening mobile devices to alternate means of downloading applications and software is foundational to the creation of a more open ecosystem, whether it be alternative app stores or direct downloading of applications from the web. These solutions already exist and are regularly and safely used by consumers every day when they use their laptop or desktop computers, including PCs, macs and Chromebooks. It is only when consumers shift from the computer on their desk to the computer in their pocket that they are limited to software installation through the App Store and Play Store. These limits are the product of commercial decisions by Apple and Google – not of safety or technical necessity.

Consumers are not the only ones who would benefit from competition-induced price discipline. In *Epic v. Apple*, a U.S. district court found that “Apple’s restrictions on iOS game distribution have increased prices for developers. In light of Apple’s high profit margins on the App Store, a third-party store could likely provide game distribution at a lower commission and thereby either drive down prices or increase developer profits.”¹³

The foreclosure of meaningful competition in respect of iOS and Android app distribution reduces the competitive pressure for Apple and Google to innovate and improve their own app stores. Price is not the only element that would be improved by app store competition. That same U.S. district court determined that “a third-party app store could put pressure on Apple to innovate by providing features that Apple has neglected.”¹⁴ The court specifically found that:

“The parties agree that the App Store provides features besides distribution, including search and discoverability to help users discover games, in-app payment processing, developer tools, and security. Competition could improve each of these features: a

¹³ *Epic Games, Inc. v. Apple Inc.*, 4:20-cv-05640-YGR (N.D. Cal.), Rule 52 Order after Trial on the Merits (Dkt. No. 812), at 99.

¹⁴ *Ibid.* at 102.

third-party app store could provide better “matchmaking” between users and developers, could have simpler in-app payments, and could impose a higher standard for app review to create more security. . . . Notably, Apple conducted developer surveys in 2010 and 2017. Comparing the two indicates that Apple is not moving quickly to address developer concerns or dedicating sufficient resources to their issues. Innovators do not rest on laurels. . . . Apple’s slow innovation stems in part from its low investment in the App Store.”¹⁵

- b. The restrictions prevent developers from experimenting with alternative app distribution models.

There are several alternative, effective and safe ways of avoiding dominant app store gatekeepers’ anticompetitive terms and rates. For example, “sideloading” should be allowed on iOS and made easier on Android OS. Indeed, “side loading” is just direct downloading of applications on mobile devices outside of the Apple App Store or Google Play Store. Contrary to Apple and Google’s claims, there is nothing illicit or risky about it. Application “sideloading” is identical to the application “downloading” that consumers safely perform every day on their macs, Chromebooks and PCs.

While Apple outright forbids direct downloading on iOS devices (but not macOS devices), Google highlights that it allows direct downloading on Android devices. Google technically does not prohibit direct downloads, but it restricts the distribution of Android apps by configuring the Android OS to make it unreasonably difficult to download apps via an alternative app store or a web browser. In sum, Google erects unnecessary barriers that make “technically possible” downloading practically impossible for most consumers.

- c. Apple and Google’s conduct increases developers’ costs.

Apple and Google extract an exorbitant 30% commission on in-app purchases of digital content. Developers require a reasonable return on their investment to dedicate the substantial time and financial resources it takes to develop an app. By imposing a 30% commission, Apple and Google necessarily force developers to (i) suffer lower profits

¹⁵ Ibid. at 100-102.

(rendering some apps financially unviable altogether), (ii) reduce the quantity or quality of their apps, (iii) raise prices for consumers, or some combination of the three.

The role of apps is already of essential importance to many millions of Australians and will become even more so in the years ahead. While Epic Games has taken the initiative in bringing legal action against Apple and Google, it is not just Epic or game developers that are impacted by Apple and Google's exorbitant fees. Apps provide a host of capabilities beyond gaming including banking, health and fitness, social interactions, video chatting and movie/television streaming.

Mobile gatekeepers' ability to set terms and prices, as well as control the availability of mobile apps to consumers, is shaping the development of products and services, companies, emerging business models and industries. Opening the mobile ecosystem to the same level of competition and openness that consumers and developers experience on desktop computers will help ensure that self-determination and market forces – rather than the unilateral preferences of two companies – set the terms by which these products, services and industries evolve to meet consumer needs and demands.

4. Competition and consumer protections law enforcement in Australia

Epic Games considers that, in line with overseas jurisdictions, regulatory reform should be implemented to complement existing competition and consumer laws. This is discussed further in Section 5.

5. Potential Regulatory Solutions

The ACCC should prioritise remedies that would generate competition within existing ecosystems to alleviate the most severe impacts that consumers and developers currently suffer. Opening mobile devices to alternative app distribution would have a meaningful and expeditious impact on opening the mobile ecosystem to competition. Prohibiting the tying of proprietary in-app payment systems to app distribution would be a significant *complementary* remedy. Implemented together, these solutions would open-up existing mobile app distribution ecosystems, unlocking competition and innovation from additional entrants and expand choice for consumers.

Opening mobile devices to alternate means of downloading applications and software is foundational to the creation of a more open ecosystem, whether it be alternative app stores or direct downloading of applications from the web. These solutions already exist and are regularly and safely used by consumers every day when they use their laptop or desktop computers, including PCs, macs and Chromebooks, and as discussed above it is only when consumers shift from the computer to phone, they are limited to software installation through the App Store and Play Store.

The ACCC has expressed the view in the Interim Report that Apple and Google face limited competitive constraints in mobile app distribution and have market power in their dealings with app developers, which is likely to be significant¹⁶. App developers wishing to access iOS and Android have few, if any, viable alternatives for app distribution. This market power enables them to unilaterally set and enforce the rules that app developers must satisfy, including requirements that prevent app developers from distributing their apps on competing or alternative distribution platforms and from offering alternative payment systems for in-app purchases of digital content. Given this power, and lack of meaningful competitive alternatives, it is highly likely that commission rates associated with the in-app payment systems offered by Apple and Google for the purchase of digital in-app content are inflated.

The contractual restrictions imposed by Apple and Google prevent app developers from distributing their apps on other distribution platforms and choosing among competitively priced alternative in-app payment systems, such as those from FinTechs. Notably, the 30% charge imposed by Apple and Google on purchases for in-app content is around 10 times higher than fees charged by analogous electronic payment processors in competitive contexts, such as PayPal, Stripe, Square or Braintree, which typically charge payment processing rates of around 3%. Such restrictions also mean that developers cannot either offer or even alert consumers to cheaper alternative payment methods outside an app (e.g. on a developer's website).

The contractual restrictions imposed by each of Apple and Google prevent would-be competing app distributors from developing viable and compatible app marketplaces that provide consumers and app developers with choice beyond the Apple App Store and Google

¹⁶ Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – March 2021 Interim Report No.2 – app marketplaces' (28 April 2021) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>, page 78.

Play Store. These restrictions have also resulted in ‘super profits’ being collected by each company at the expense of Australian consumers and prevented the establishment of otherwise viable in-app payment systems that could compete with each of the payment processors offered by Apple and Google. Notably, the systems offered by Apple and Google do not provide any unique benefits over other in-app payment services or existing alternative (and lower-cost) options that offer similar functionality. They are arbitrarily applied to what Apple and Google deem to be ‘digital apps’, while other apps offering similar (physical) services to consumers are exempted. There are no legitimate security concerns or justifications for the imposition of these restrictions.

5.1 Direct Prohibitions and a Mandatory Code of Conduct

The ACCC recognised the competition, consumer and developer harms discussed above in its March 2021 interim report and the discussion paper indicating that Apple’s and Google’s control over their respective app marketplaces enables each of them to bundle developer access to the app marketplace with a requirement to use their respective in-app payment systems, and to take commissions on transactions using those systems¹⁷. The ACCC went on to further state:

Apple and Google’s respective terms which prevent app developers from using alternative payment systems for payments made in-app affects the ability of alternative payment systems to operate in the app marketplaces. This in turn leads to a loss of consumer choice, as consumers are unable to use any other payment option when making payments in-app...deters developers from offering products to consumers or charging customers more to cover the commission.

...

Removing these requirements would allow app developers to offer consumers alternative methods to pay for goods and services, including potentially cheaper prices.

...

¹⁷ Australian Competition and Consumer Commission, ‘Digital Platform Services Inquiry – Discussion Paper for Interim Report No.5: Updating Competition and Consumer Law for Digital Platform Services’ (28 February 2022) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf>.

It is highly likely that the commission rates are inflated by the market power that Apple and Google have¹⁸.

These restrictions effectively remove all choice and competition in respect of in-app payment services, enable the charging of anticompetitive commissions and, ultimately, precipitate higher prices for consumers.

The ACCC is considering in the discussion paper whether a new regulatory framework is needed to supplement the CCA and the ACL with respect to digital platform services. Apple and Google's restrictions (and the subsequent concerns raised in respect of) present clear competition and consumer harms that can be addressed through legislative and regulatory intervention without the need to await the outcome of private or ACCC legal proceedings instated against each of Apple and Google, with direct benefit to consumers.

The discussion paper proposes several regulatory options which Epic supports. Notably, the most effective and appropriate regulatory outcome would be to amend the CCA providing for the introduction of a suite of prohibitions and obligations addressing the multiple harms discussed above. This is in line with the Code of Conduct proposed by the ACCC in the discussion paper. The legislative amendment to the CCA would insert:

- (a) a direct prohibition against requiring the use of a specific app store or distribution platform as the exclusive mode of distribution for an app used on any platform, device, or operating system owned or sold by the owner of the app store or distribution platform; and
- (b) a direct prohibition against app marketplaces requiring the use of a particular in-app payment system; and/or
- (c) a code of conduct which includes prohibitions against app marketplaces requiring a particular in-app payment system be used by app developers (as a condition of access to the app marketplace), forcing app developers to agree to a "most favoured nations" clause preventing app developers from engaging in price competition, and requiring app developers to pay revenue

¹⁸ Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – March 2021 Interim Report No.2 – app marketplaces' (28 April 2021) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf>, page 79.

proportionate fees to the store provider for revenue earned using an In-App Payment System into the CCA; and

- (d) an obligation on marketplaces to allow developers to provide users with information about alternative payment options.

In order to bring about effective outcomes for Australian businesses and consumers, any regulatory solution will need to unbundle developer access to app marketplaces from a developer's exclusive use of in-app payment systems, which would allow other businesses to offer users and developers alternative payment processing options.

There is precedent for such intervention in South Korea and other jurisdictions, which is discussed in greater detail in section 5.3. Such regulatory reform would also be consistent with the type of regulatory form introduced by the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*, which amended the CCA to establish a mandatory code of conduct that applies to news media businesses and digital platforms when bargaining in relation to news content made available by digital platform services.

By addressing the competition concerns identified above, the proposed regulatory solution would directly benefit Australian consumers by ensuring that Apple and Google do not:

- (a) unjustifiably increase costs to consumers. Consumers must bear some or all of the 30% commission in the form of higher in-app content prices and/or reduced quantity or quality of in-app content.
- (b) deny consumers and app developers from the benefits of increased innovation, which could be provided by would-be competing in-app payment processors and app distribution platforms / marketplaces.
- (c) deny consumers choice, as they are forced to make in-app purchases of digital content solely through Apple's In-App Purchase and through Google Play Billing for apps downloaded via the Play Store.
- (d) undermine the quality of services that consumers receive because they stand as a middleman in every in-app purchase of in-app content. Currently, developers are unable to resolve customer complaints arising from in-app purchases directly.

5.2 Collaboration with international regulators

Epic is pleased to note the ACCC's participation in the international debate about how to best approach the competition and consumer issues arising in relation to digital platform services. The ACCC recognised that, "alignment across jurisdictions will help promote regulatory certainty and reduce regulatory burden for affected digital platforms. Regulatory coherence will also assist Australian consumers and businesses to benefit from law reform implemented globally to improve competition and consumer protection"¹⁹.

The ACCC is a leading global regulator and can play a powerful role in bringing together regulators looking at the anti-competitive effects of Google and Apple's dominance of mobile ecosystems. Given the size of the companies concerned, multilateralism is important to secure lasting change in business practices and avoid Apple and Google ceding minor and narrow carve-outs one jurisdiction at a time. Epic is engaged on these issues and would be happy to offer support to the ACCC. The following jurisdictions are taking innovative approaches to competition policy; we highlight their efforts so that both their successes and challenges could provide further insight to the ACCC as it considers its own approach.

5.3.1 European Union – Digital Markets Act

In December 2020, the European Commission published a Proposal for a Digital Markets Act (the "DMA"). The European Parliament and European Council have suggested amendments to the Commission's Proposal in 2021. A final text is expected to be adopted during 2022.

The DMA complements existing competition laws and is intended to ensure that markets where gatekeepers are present are and remain contestable and fair. According to this Proposal, gatekeepers such as Apple and Google are required to comply with additional obligations set out in the DMA. While the obligations in the DMA address various types of anti-competitive conduct by gatekeepers, some are specifically aimed at addressing the concerns regarding mobile ecosystems set out above. For example, in the Commission's Proposal, one of the obligations imposed on gatekeepers is to allow the installation and effective use of third-party software applications or software application stores using, or interoperating with, operating systems of the gatekeeper²⁰.

¹⁹ Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry – Discussion Paper for Interim Report No.5: Updating Competition and Consumer Law for Digital Platform Services' (28 February 2022) available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf>, page 6.

²⁰ European Commission, Proposed Digital Markets Act (2020), Article 6(1)(c), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>.

Article 5(c), as amended by the European Parliament, provides that gatekeepers must allow business users (i) to communicate and promote offers including under different purchasing conditions to end users acquired via the core platform service or through other channels, and (ii) to conclude contracts with these end users or receive payments for services provided regardless of whether they use for that purpose the core platform services of the gatekeeper.

Article 5(e), as amended by the European Parliament, requires gatekeepers to refrain from requiring business users to use, offer or interoperate with an identification service or any other ancillary service of the gatekeeper in the context of services offered by the business users using the core platform services of that gatekeeper. Given that "in-app payment systems" are listed as an example of an ancillary service, this provision entails an obligation on behalf of gatekeepers not to require the use of their own in-app payment solutions.

The DMA also requires a gatekeeper to apply fair and non-discriminatory general conditions of access for business users to its software application store²¹. The European Parliament has suggested expanding the scope of this provision such that gatekeepers would be forced to "apply transparent, fair, reasonable and non-discriminatory general conditions of access and conditions that are not less favourable than the conditions applied to its own service" for any of the core platform services in relation to which it has been identified as a gatekeeper²².

5.3.2 United Kingdom – Competition and Markets Authority ("CMA"), Mobile ecosystems market study

On 15 June 2021, the CMA launched a market study into mobile ecosystems. It published its preliminary report on 14 December 2021.²³ Its initial findings include that "the App Store and Play Store face a lack of competition from within and outside of their respective ecosystems as a method of delivering native apps to users" and that Apple and Google are able to exercise their market power through the process of reviewing which apps can be listed on its app stores, and blocking certain types of apps, and by requiring app developers "to use their payment systems for certain in-app transactions," the commission on which affords them "substantial and growing profits (with high margins) from their app stores, consistent with market power."

²¹ Ibid. at Art.6(1)(k).

²² Ibid. at Art.6(1)(k).

²³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048746/MobileEcosystems_InterimReport.pdf.

The CMA has put forward various proposed interventions that it will consult on, including (i) requiring Apple to allow alternative app stores on iOS and direct downloading of native apps on iOS, requiring Google to make direct downloading easier on Android and to remove restrictions on accessing third-party app stores through Google's Play Store, and requiring fair and transparent App Store/Play Store app review; and (ii) allowing users to make in-app payments to their app provider directly or allow greater choice of third-party payment providers.

In addition, the CMA's preliminary view is that Apple and Google would meet the proposed conditions for designation as platforms with a strategic market status ("**SMS**"). Once designated as an SMS, Apple and Google would be required to follow a series of legally enforceable codes of conduct that promote fair trading, open choices, trust and transparency and the CMA's Digital Markets Unit should have powers to impose pro-competitive interventions that would target the sources of Apple and Google's market power.

5.3.3 U. S Open App Markets Act

The Open App Markets Act (OAMA) is proposed legislation that takes a comprehensive approach to app store competition by addressing the underlying cause of gatekeeper power (i.e. monopoly of app distribution on mobile devices) as well as some of its most pernicious symptoms (e.g., tying IAP mandates for digital goods to App Store and Play Store access on mobile devices). The OAMA specifies that:

- i. App store operators that control the operating system must allow and provide readily accessible means for users of that operating system to (i) choose third-party apps or app stores as defaults, (ii) install third-party apps or app stores through means other than its app store, and (iii) hide or delete apps or app stores provided or pre-installed by the app store owner²⁴; and,
- ii. App store operators must not (i) require app developers to use the app store operator's own in-app payment system as a condition for being distributed on the app store or accessible on the relevant operating system, or (ii) impose restrictions on communications of developers with the users of the app through an app or direct outreach to a user concerning legitimate business offers, such as pricing terms and product or service offerings²⁵.

²⁴ Open App Markets Act, S. 2710, Manager's Amendment, at Sec. 3(d)(1)(2).

²⁵ Ibid. at Sec.3(A)(1)-(3).

The OAMA has been introduced on a bi-cameral and bi-partisan basis in the U.S. Congress and recently passed with overwhelming support out of its Senate committee of jurisdiction.²⁶ The most recent version of that legislation is appended to this submission.

5.3.4 South Korea In-App Payment Law

South Korea has been on the vanguard in addressing Apple and Google's anticompetitive conduct with respect to mobile app store IAP mandates. In 2021, the Korean National Assembly passed an amendment to the Telecommunications Business Act (TBA). The TBA Amendment prohibits app stores from requiring the use of a specific payment processing system, including an app store's proprietary in-app payment solution. Compliance is overseen by the Korea Communication Commission. The TBA Amendment amends Article 50(1) of the Telecommunications Business Act, by inserting new subparagraphs 9, 10 and 11, prohibiting:

- i. in mediating a transaction for, among other things, mobile content, conduct whereby an app market business unfairly uses its bargaining position to require the use of a specific payment processing method for a business providing, among other things, mobile content;
- ii. conduct whereby an app market business unfairly delays the review of, among other things, mobile content; and
- iii. conduct whereby an app market business unfairly deletes, among other things, mobile content from the app store.

This Korean legislation is a major step towards achieving fair mobile ecosystems for developers and consumers. The KCC required Apple and Google to submit plans demonstrating how they would achieve compliance with the TBA Amendment by October 2021. Apple and Google have failed to do so, instead putting forward mechanisms that seek to perpetuate their anti-competitive conduct and violate the letter and the spirit of the TBA Amendment.

Google has stated that it would (i) allow developers to offer third party in-app payment solutions of their choice in addition to the Google Play Billing (GPB) system and (ii) let consumers choose the payment method they prefer. Google also announced that it would still

²⁶ Ashley Gold, "App store bill sails out of Senate Judiciary Committee," *Axios* (3 Feb, 2022), <https://www.axios.com/app-store-bill-sails-out-of-senate-judiciary-committee-c49c22bf-c9ae-41f4-b23e-55a3ce8caace.html>.

charge a commission on transactions processed by third-party payment solutions that would be 4% lower than the commission on transactions processed by GPB.²⁷ For example, where Google would charge a 30% commission on a transaction processed by GPB, it would charge a 26% commission if that same transaction were processed by an alternative in-app payment solution.

Apple initially claimed that it was already in compliance and did not need to change its App Store policy.²⁸ Earlier this year, Apple submitted an execution plan to the KCC purporting to allow third-party payment methods in compliance with the TBA Amendment. Specifically, the plan encompasses (i) permitting third-party payment methods other than Apple's IAP; (ii) applying a commission of less than 30% to third-party payment methods; (iii) further reviewing specific methods, timeline, and commission to be applied for the third-party payment methods, and consulting on them with the KCC; and (iv) limiting the application of the new policy to Korean App Store. While details regarding the commission Apple would charge remain unclear, if it were to adopt an approach similar to Google, Apple's plan would be deficient for the same reasons.

If Apple and Google can be forced to comply with the letter and the spirit of the TBA Amendment, it will be an effective tool to halt part of their anti-competitive conduct. However, Apple and Google's dilatory approach suggests that absent market discipline in the distribution of apps on mobile devices, they will continue to play a "shell game" with respect to commission charges for app store distribution.

5.3.5 Netherlands Authority for Consumers and Markets (ACM) decision re: dating app providers

On 24 August 2021, the Dutch ACM adopted a Decision finding that Apple had abused its dominance in the market for the distribution of dating apps on iOS. The ACM found the following restrictions imposed by Apple on dating app providers to be abusive under EU and Dutch competition rules: (i) the mandatory use of Apple's IAP system for content transactions within the app, and (ii) prohibiting referrals within the app to payment systems outside the app. The ACM thus required Apple to change its developer terms to allow dating app

²⁷ "Enabling alternative billing systems for users in South Korea" Google blog (4 November 2021) <https://developers-kkr.googleblog.com/2021/11/enabling-alternative-billing-in-korea-en.html>.

²⁸ South Korea lawmaker says Apple, Google not doing enough to comply with app store law," Reuters, (17 November 2021) <https://www.asahi.com/ajw/articles/14483307>.

developers on iOS to: (i) to freely choose their in-app payment solution; and (ii) to refer to out-of-app payment options.

In addition, the Decision prohibited Apple from: (i) disadvantaging dating app developers who chose to implement an alternative in-app payment solution or refer to out-of-app purchase options; (ii) implementing any changes to its developer terms that would undermine dating app developers' free choice of in-app payment solution or ability to refer to out-of-app payment options; and (iii) rejecting for distribution on Apple's Dutch iOS app store any newly created or updated dating apps making use of alternative in-app payment solutions, or referring to out-of-app payment options.

Apple sought a stay of the above-mentioned remedies, but the District Court of Rotterdam denied the stay application on 24 December 2021. Following this Decision and judgment, dating app providers must be allowed to use alternative in-app payment solutions in the Dutch App Store and must have the ability to refer in their apps to payment options outside the app²⁹. Apple was required to comply with this Decision by 15 January 2022, and for two years thereafter.

On 24 January 2022, the ACM concluded that Apple failed to comply with these requirements, imposing a first periodic penalty payment of 5 million Euros for non-compliance³⁰. The ACM reached this conclusion among others because Apple: (i) Apple had not yet changed its developer terms, instead merely providing dating app providers the ability to express an "interest" in making use of rival in-app payment systems, and (ii) Apple has raised several barriers for dating app providers to the use of third-party payment systems, including forcing them to make a choice between referring users to out-of-app payment options or offering alternative payment systems in-app.

On 3 February 2022, Apple made a further statement laying out how developers could now implement the alternative payment methods, reiterating a 27% commission on apps that opt out of its proprietary IAP system.³¹ On 7 February 2022, the ACM again fined Apple for non-

²⁹ Netherlands Authority for Consumers and Markets, "ACM obliges Apple to adjust unreasonable conditions for its App Store" (24 Dec 2021), <https://www.acm.nl/en/publications/acm-obliges-apple-adjust-unreasonable-conditions-its-app-store>.

³⁰ Netherlands Authority for Consumers and Markets, "Apple fails to satisfy requirements set by ACM," (24 January 2022), <https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm>.

³¹ Apple Developer Support, "Distributing dating apps in the Netherlands" <https://developer.apple.com/support/storekit-external-entitlement>.

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compliance³². Apple continued to fail to comply for a total of 10 weeks and the ACM has levied a 50M fine.³³

The ACM decision is confined to the complaint brought before it, re: Apple's abuse of its gatekeeper power with respect to dating apps. But, like South Korea's IAP law, it appears that Apple (and Google) will likely continue to exploit and delay compliance with any IAP-only focused remedies.

Epic is hopeful that the EU and US proposals, which target competition at the app distribution level, not just in-app payment, may succeed in creating a competitive mobile ecosystem. Ultimately, the goal is a fair and open mobile app market that governs the dominant mobile app store gatekeepers – rather than the other way around.

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

Yours sincerely,

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³² "Dutch watchdog fines Apple \$5.7 million again in App Store dispute," *Reuters* (7 Feb 2022), <https://www.reuters.com/technology/dutch-antitrust-watchdog-studying-whether-apple-has-now-complie-d-with-order-2022-02-07/>.

³³ Netherlands Authority for Consumers and Markets, "ACM to assess adjusted proposal of Apple regarding its conditions for dating apps," <https://www.acm.nl/en/publications/acm-assess-adjusted-proposal-apple-regarding-its-conditions-dating-apps> (28 Mar 2022).