matchgroup

Response to the CMA Call for Information

I. Introduction

1. Match Group is grateful to be given the opportunity to contribute to the CMA's Digital Taskforce Call for Information. Given time and resources constraints, Match Group has decided to answer the questions that most directly address its concerns about digital gatekeepers, which currently relate to the terms and conditions applied by Apple and Google with respect to their respective app stores (i.e., the Apple App Store and Google's Play Store).

2. Match Group is at the disposal of the CMA to discuss the issues raised in this submission further, as well as any other issue on which our input would assist the CMA.

II. Background information on Match Group

3. Match Group is a publicly traded Delaware corporation providing dating products available in over 40 languages across more than 190 countries through apps and websites. For the fiscal year ended 31 December 2019, Match Group generated more than $2 billion in revenue.[1] Match Group is currently active in the United Kingdom and all 27 EU Member States. As of 31 December 2019, Match Group had approximately 1,700 full-time employees.[2]

4. Match Group's portfolio of brands includes Tinder, Meetic, Match, PlentyOfFish, OkCupid, OurTime, Pairs, and Hinge, as well as other brands.[3] Match.com pioneered online dating, launching in 1995, as a dating website allowing its users to search profiles and receive algorithmic matches. Tinder was developed and launched in 2012 in app form and has since become the most popular brand in the portfolio, accounting for more than half of Match Group's total revenue in the fiscal year ended 31 December 2019.[4]

5. The vast majority of Match Group's user base has now shifted to mobile solutions, meaning that Match Group relies heavily on Apple's App Store and Google's Play Store to distribute its apps to users of iOS and Android devices, respectively. These two app stores are the only distribution channels available to Match Group, as well as other app developers, in their quest to reach mobile users.[5]

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1 Match Group Inc., Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Fiscal Year Ended December 31, 2019, available at https://s22.q4cdn.com/279430125/files/doc_financials/2019/ar/Match-Group-2019-Annual-Report.pdf ("Match Group 2019 Form 10-K"), page 45.

2 Match Group 2019 Form 10-K, page 7.

3 Tinder, Meetic, PlentyOfFish, OkCupid and Twoo are available in app and web format. Hinge is available only in app format.

4 Match Group 2019 Form 10-K, page 45.

5 As will be explained later in this response, alternative distribution channels, such as other app stores, sideloading and pre-installing are either not available (in the case of iOS devices) or are not realistic options for app developers (in the case of Android devices).

III. Responses to questions

6. Match Group will hereafter respond to questions numbers 1, 5, 6 and 8 of this Call for Information. These questions allow us to inform the CMA about our views on the appropriate criteria to use when assessing whether a firm has "Strategic Market Status" (and why Apple should have that status), as well as the anticompetitive effects that can arise from the exercise of market power by platforms (namely Google and Apple, which operate the two app stores providing access to almost all mobile users) in the context of app stores, to present the objectives and principles that should be enshrined in the code of conduct, and to reflect on the appropriate remedies.

Question 1: "What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why?"

7. A variety of criteria could be used to assess whether a given platform has SMS status. For instance, at Section 6.30 of its Interim Report, the CMA observed that "Its initial view is that the following criteria provide a useful starting point for assessing whether a digital platform should be considered to have SMS and hence be subject to the code of conduct:

   - the platform has enduring market power over a relevant market;
   - the platform acts as an important gateway for businesses to access a significant portion of consumers; and
   - businesses depend on the platform to access users on 'other' side of the market."

8. We believe that the above cumulative criteria work well, although they could be enriched by other elements. For instance, in its response to the EU consultation on the Digital Services Act package, Match Group proposed to define "digital gatekeepers" as a platform that meets the following cumulative conditions:

   (a) It has enduring market power over a relevant market across a significant part of the EU internal market;
   (b) It has bottleneck power over both businesses and consumers, in that it acts as an important gateway for businesses to access a significant portion of consumers which primarily single-home; and
   (c) It leverages, or is able to leverage, its market power over a relevant market to adjacent markets on which it competes with other businesses that need access to the platform.

9. There is no question that Google and Facebook would under any of the definition proposed above. But it is also clear that Apple should fall within these definitions and be considered as having "Strategic Market Status" at least as far as its App Store is concerned. While Match Group will elaborate on these aspects further below, it is indeed clear that when it comes to the distribution of apps to iOS users:

   - Apple has enduring market power (as there are no alternative to the App Store for an app developers to reach iOS users);

- The App Store is "an important gateway for businesses to access a significant portion of consumers" as it is the only way to reach iOS users who represent almost half of the Match Group users and the most profitable segment of such users. There is no way that apps like Tinder could limit themselves to Android device users. To be commercially viable, a dating app needs to access both the iOS and Android user base;
- iOS device users do not multi-home;
- As illustrated by the Spotify investigation of the European Commission, Apple is leveraging its control of the App Store to promote on its own apps to the detriment of competing apps; and
- Match Group shows in response to Question 5 that Apple has also used its control of the App Store to impose unfair trading terms to app developers.

10. Thus, while the CMA Market study has focused on Google and Facebook, we believe that the Digital Taskforce should pay attention to the Apple App Store. There is no question in our view that Apple has Strategic Market Status with respect to the distribution of apps to iOS users.

Question 5: "*What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?*"

11. The market power held by Apple and Google due to their pivotal role in app distribution gives rise to anticompetitive effects to the detriment of app developers, end-users and innovation.

12. Before analyzing the anti-competitive effects that can arise from the exercise of market power by Apple and Google, operating the Apple App Store and Google Play Store respectively (Sub-section 2), Match Group provides a brief presentation of the app ecosystem (Sub-section 1), explaining that Apple and Google act as gatekeepers between app developers and mobile users.

1. <u>The app ecosystem</u>

13. Google's Android and Apple's iOS are the most popular operating systems (OS) for smart mobile devices in Europe, with over 99.5% of all smartphones running one of these two OS's as of June 2020.[6] While Google licenses Android to a number of Original Equipment Manufacturers ("OEMs"), e.g. Samsung or LG, Apple's system is "closed", meaning that Apple's OS is only available on iPhone devices, which are manufactured by Apple, and Apple only allows its iPhones to operate on iOS.

14. Both Apple and Google operate app stores, i.e. virtual marketplaces where smartphone users may search for and download apps offered by app developers, namely the Apple App Store and the Google Play Store, respectively. In these app stores, both own apps and third-party apps are

6 See https://gs.statcounter.com/os-market-share/mobile/europe.

offered. At the time of writing, there are 2.2 million apps available for download on the Apple App Store, and 2.9 million apps on the Google Play Store.[7]

15. These two app stores are indispensable trading partners for app developers, as they control access to billions of mobile users, and they practically represent the only way for app developers to reach their user base. While in theory alternative distribution channels are at the disposal of app developers, namely sideloading or pre-installing, as well as other app stores, in practice these options are either unavailable (in the case of iOS devices) or of limited use due to the technical complexities and difficulties of doing so (in the case of Android devices).[8]

16. The Apple App Store is the only way for app developers to reach iOS users. It is pre-installed on every iPhone device and it is the only permitted app store for iOS – any use of an alternative app store on an Apple device is deemed a violation of Apple's terms of use. Put simply, if an app developer wants their app to be available to iOS users, they have to place it on the Apple App Store. Android devices also come pre-installed with the Google Play Store, Google's own app store. While Android users may access alternative app stores, such as Samsung Galaxy Apps, Aptoide or Amazon App Store, these app stores are rarely used by consumers.[9] Moreover, these alternative app stores suffer from limitations compared to the Google Play Store, as for example, they cannot be updated automatically.[10]

17. Not only are alternative app stores unavailable to (or unpopular with and impracticable to) mobile users, but app developers cannot avoid app stores altogether and distribute their apps through sideloading or pre-installing.

18. Pre-installing (also known as pre-loading) is the practice of pre-loading certain apps on the smartphone before it is offered for sale to consumers. Usually, this is done through deals with either the OEM or the mobile carrier. This practice does not constitute an alternative distribution channel for app developers. On iOS devices, pre-installing is limited to Apple's own apps.[11] Android devices can come pre-installed with not only Google but also third-party

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7 See Ian Blair, "Mobile App Download and Usage Statistics (2020)", *Buildfire*, available at https://buildfire.com/app-statistics/; "Number of available applications in the Google Play Store from December 2009 to June 2020), available at https://www.statista.com/statistics/266210/number-of-available-applications-in-the-google-play-store/, last accessed on 22 July 2020.

8 It must also be pointed out that browser or web-apps cannot be considered a realistic alternative to apps, thus offering an opportunity to developers to avoid the app stores altogether. Not only is their functionality and usability limited compared with native apps (i.e. apps that are developed for use on a particular operating system), but also there is no central distribution point where consumers can search for web-apps, thus creating discoverability issues. See Autoriteit Consument & Markt, "Market Study into mobile app stores", 11 April 2019, available at https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf (the "ACM Market Study"), pages 42-44.

9 ACM Market Study, page 50.

10 ACM Market Study, page 5.

11 One exception was Google Maps, that was pre-installed on iPhone devices. However, when iPhone 6 was launched in 2012, Google Maps was replaced by Apple Maps. See L. June, "Apple replaces Google Maps with its own maps, turn-by-turn navigation and traffic info", *The Verge*, 11 June 2012, available at https://www.theverge.com/2012/6/11/3076745/apple-maps-google-maps-replacement.

apps.[12] However, pre-installing on Android devices is typically reserved for "a select few" – entities with established brands (e.g. Facebook) and which are able to pay the high fee of having their app pre-installed.[13] It is also worth noting that Apple and Google can use pre-installing to grant a competitive advantage to their proprietary apps. Due to what the European Commission has identified as a "*status quo* bias", by pre-installing their proprietary apps, Apple and Google ensure that users are more likely to stick to these apps instead of downloading and using competing apps from the app stores.[14]

19. Sideloading is the practice of installing an app on a smartphone without using the official distribution channel – i.e. the app store. On iOS devices, sideloading may only be performed by "highly-skilled hackers or teams of hackers" (in the case of jailbreaking) or tech-savvy users that open first a developer account and go through a lengthy and complex technical process.[15] On Android devices, sideloading is not considered a violation of Google's terms of use, but it is nothing more than a mere theoretical possibility for the overwhelming majority of app developers, due to significant technical burdens associated with it. For example, the app developer must create its own update regimes, as well as develop its own download platform and host the app – functions that would be performed within Google Play Store if the apps were not sideloaded.[16]

20. Thus, app developers are heavily dependent on Apple's and Google's app stores to reach users and run a profitable business. In fact, developers have to be present on both these app stores to reach 99% of all smartphone users, as providing their app only to a single ecosystem – Android or iOS – would result in them missing out on an entire market given users generally single-home, only using iOS or Android.[17]

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12 Note that before the *Google Android* case, Google only granted a license for the Play Store on the condition that the hardware manufacturer would also install the Google Search app and Google Chrome. See Commission Decision of 18 July 2018, AT.40099 – *Google Android*, C(2018) 4761 final. The Commission found that this practice constituted a form of illegal tying, given that Google was dominant on the market for app stores for the Android OS.

13 See ACM Market Study, page 50.

14 See on the status quo bias due to pre-installation, Commission press release, "Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine", 18 July 2018, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581.

15 ACM Market Study, pages 45-46. Apple also allows developers to offer apps for internal use by employees of their companies under the Apple Developer Enterprise Program. Google, Facebook and developers of apps with adult content used this exception to bypass the Apple App Store and distribute their apps on iOS. When Apple found out about this practice, it banned the apps and revoked the license under the Apple Developer Enterprise Program.

16 For an analysis of the technical difficulties surrounding sideloading on Android, see ACM Market Study, pages 46-48.

17 ACM Market Study, page 52. This is because most consumers only use either an Apple device or an Android device. Thus, if app developers were to only offer their app either on Android or on iOS, they would miss out on a very important part of their potential audience. In particular, apps like Tinder, whose success relies on its ability to attract a large number of users and activate network effects, cannot afford to only be available in one app store, as doing so would significantly limit the probability of building a large user base. Put simply, if Tinder is available in both ecosystems, a dater who owns an iPhone will be equally

21. App developers that wish to distribute their apps on iOS must enter into the Apple Developer Program License Agreement and pay Apple an annual $99 fee (or $299 for an enterprise license) for participating in the Apple Developer Program.[18] Similarly, app developers that wish to make their apps available on the Google Play Store must enter into the Google Play Developer Distribution agreement and pay a one-time $25 registration fee.[19]

22. Before any app is made available (or updated) either on Apple App Store or Google Play Store, it must be reviewed and approved by Apple or Google, respectively. Both Apple and Google have guidelines with which app developers must comply in order to avoid their app being rejected or banned from the app store.[20]

2. Anticompetitive effects arising in the context of app stores

23. Apple's and Google's unique bottleneck positions allow them to decide whether an app will be available in the app store and how it can reach its public: Apple and Google set the terms and conditions for their app stores (and thus can accept or reject the publication of new apps and to remove existing apps), determine the functionalities available to app developers, determine the type of content or services app developers can offer in their apps, and decide on the way apps are ranked in their app stores. In other words, these app stores guard the selection for and presentation of apps to consumers.[21]

24. The gatekeeping role of Apple and Google as regards app distribution allows them to engage in the following conducts that can give rise to exploitative and exclusionary anticompetitive effects: (i) Apple and Google can restrict access to their respective app stores, thus ultimately deciding which apps are available to users, (ii) Apple and Google can limit interoperability, hampering the proper functioning of third-party apps, while favoring their own apps, and (iii) Apple and Google can set the rules of the game, obliging app developers to use Apple and/or Google's proprietary in-app payment solutions, namely In-App Purchase ("IAP") or Google Play Billing ("GPB"), respectively, to pay a 30% commission and to conform with Apple's and Google's guidelines and marketing restrictions.

25. As a result, Apple and Google are able to use their market power to engage in self-preferencing strategies, restrict competition and innovation and reduce consumer welfare.

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likely to match with a date who owns an Android device as a date who owns an iPhone. If Tinder was only available on iOS *or* Android, potential daters would not be able to see approximately 50% of the eligible daters. Thus, Tinder would be of limited value to users and would most likely not be successful.

18 See https://developer.apple.com/support/compare-memberships/.

19 Gary Sims, "Publishing your first app in the Play Store: what you need to know", *Android Authority*, 20 May 2014, available at https://www.androidauthority.com/publishing-first-app-play-store-need-know-383572/; see also https://play.google.com/intl/ALL_us/about/developer-distribution-agreement.html.

20 See App Store Review Guidelines, available at https://developer.apple.com/app-store/review/guidelines/; Google Developer Program Policies, available at https://support.google.com/googleplay/android-developer/answer/9904549.

21 ACM Market Study, page 15.

(i) Apple and Google can restrict access to the app store and determine the ranking and prominence of included apps

26. Apple and Google control access to their respective app stores and thus control which apps are available to over 99% of mobile users. Before apps (or app updates) are made available in the Google Play Store or the Apple App Store, they have to undergo a strict review process and be approved by Google or Apple, respectively. Google's review process is automated, while Apple uses a manual process – i.e. Apple employees are responsible for the review.[22] Through this review process Google and Apple examine whether the app or update complies with their app store guidelines, which cover a range of issues, e.g. performance requirements, permissible content, app monetization, as well as privacy and security. If Apple or Google find that an app does not comply with their guidelines, this app will not be available on the app store and thus will not be available to nearly 100% of mobile users.

27. Apple and Google are unconstrained in their power to examine whether an app complies with their (often vague) guidelines – they run the app stores, and thus they are the sole arbiters of what is allowed and what is not. Worse, the vagueness of these guidelines allows them considerable discretion in interpreting and enforcing them,[23] while app developers have no saying whatsoever in this review process – and have no choice but to put up with Apple and Google's behavior due to their indispensable role in app distribution.

28. Another problematic situation arises when an app or an update is rejected. In theory, the developer can adjust the app or update and submit it again for review.[24] In many cases, however, developers are not given sufficient feedback as to why their app or update was rejected, thus being left to wonder why their app does not comply with the app store's guidelines. In the meantime, the app developer is unable to rollout updates, including, until recently, even critical bug fixes or patches, to its apps.[25]

29. But even when an app is made available on Google Play Store or Apple App Store, Google and Apple still play an instrumental role in the success or failure that an app might have (especially

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22 ACM Market Study, page 75.

23 This is also evident from the introduction to the Apple App Store Review Guidelines, where Apple states: "We will reject Apps for any content or behavior that we believe is over the line. What line, you ask? Well, as a Supreme Court Justice once said, "I'll know it when I see it". And we think that you will also know it when you cross it." See https://developer.apple.com/app-store/review/guidelines/.

24 This is true for both the Apple App Store and the Google Play Store. See ACM Market Study, page 29. If the app developer disagrees with the outcome of the app review process, it may submit an appeal before the App Review Board, which however also comprises apple employees. See App Review, available at https://developer.apple.com/app-store/review/.

25 Apple recently changed its policy so that "for apps that are already on the App Store, bug fixes will no longer be delayed over guideline violations except for those related to legal issues. Developers will instead be able to address the issue in their next submission." See Nick Statt, "After outcry, Apple will let developers challenge App Store guidelines", *The Verge*, 22 June 2020, available at https://www.theverge.com/2020/6/22/21299814/apple-app-store-policies-ios-bug-fixes-approval-dispute-appeal.

when it comes to less well-known apps – i.e. the majority of the apps on the app stores). This is because Apple and Google control the technological architecture, the interface and algorithms, as well as the presentation of apps and the information provided to end users.[26] Thus, they determine the ranking, as well as the prominence of certain apps.

30. Given the abundance of apps on the app stores, it is hard to be noticed by a user if the app is not included in the top 50 most popular apps or is not part of the "featured apps" in the app store. Developers that have the financial resources to advertise their apps extensively (both in the app store and in other platforms) are more likely to attract downloads and thus be included in the top 50 most popular apps. Inclusion in the "featured apps" depends on a positive review from the editorial team of the app stores. Thus, Apple and Google are the ones deciding the fate of app developers – including their competitors.

31. Moreover, as Apple and Google compete with app developers whose apps are included in their app stores, they have the incentive to favor their proprietary apps to the detriment of their competitors. In fact, Apple seems to have engaged in such self-preferencing strategies, routinely granting its own apps first position in the App Store search results. According to *The Wall Street Journal*, Apple's apps ranked first in more than 60% of basic searches (e.g. "maps), while Apple's apps relying on subscriptions and sales for revenue (e.g. Apple Music or Apple Books) captured the top position in 95% of the related searches.[27] The *New York Times* also reached a similar conclusion, finding that Apple's apps had ranked first for at least 700 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.[28]

(ii) Apple and Google can limit interoperability

32. For an app to perform its functions, it must communicate with functions of the operating system (i.e. the hardware), as well as other apps (i.e. other software programs). This is possible through Application Programming Interfaces ("APIs"). APIs are technological specifications that enable app developers to gain access for their apps to the smartphone's hardware features (e.g.

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26 ACM Market Study, page 85. Note that platforms must comply with the Platform-to-Business Regulation (that entered into force in July 2020), which seeks to create a fair, transparent and predictable business environment for smaller businesses and traders on online platforms. See Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186.

27 Tripp Mickle, "Apple Dominates App Store Search Results, Thwarting Competitors", *The Wall Street Journal*, 23 July 2019, available at https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221.

28 Jack Nicas and Keith Collins, "How Apple's Apps Topped Rivals in the App Store It Controls", *The New York Times*, 9 September 2019, available at https://www.nytimes.com/interactive/2019/09/09/technology/apple-app-store-competition.html.

the camera or location services), or to particular services (e.g. Google Maps), and other apps installed on the device.

33. Apple and Google – as the iOS and Android providers – determine what APIs are available to app developers. As the CMA pointed out in its report on the commercial use of data,

> "[t]o collect data stored on devices, app developers need to interact with the Operating System (OS) of the device (such as Google's Android and Apple's iOS). These OS providers are responsible for the Application Programming Interfaces (APIs) which dictate how the software and hardware interact – including what information the app can access. APIs control the release of information according to the privacy controls in place at the OS level."[29]

34. This allows them to limit interoperability of certain third-party apps with the OS, thus making them less attractive to mobile users. At the same time, Apple and Google are favoring their own apps, as these first-party apps do not face interoperability restrictions.

35. Apple or Google can restrict or refuse altogether access to APIs necessary for the proper functioning of third-party apps.[30]

36. In particular in the iOS ecosystem, before APIs are made public – and thus for all app developers to use – they are private. Thus, they are only accessible by Apple for testing and security purposes or might be offered to selected developers that are authorized to use them. This allows Apple to grant preferential treatment to its own apps or to certain app developers, which are able to use APIs before they are released (if they are released) to all developers.[31]

37. Another problematic aspect with the use of APIs in the iOS ecosystem is that public APIs control which services are the default that the app directs to. Neither app developers nor consumers are able to change the defaults and indicate that they prefer Apple's competitors instead.[32] Thus, by controlling the app store (i.e. the gateway between app developers and

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29 Competition & Markets Authority, "The commercial use of consumer data. Report on the CMA's call for information", 27 January 2015, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf, page 42.

30 Interoperability limitations can either be built into the app store development kit or the OS. See ACM Market Study, pages 81-82.

31 ACM Market Study, page 59.

32 However, there have been some third-party efforts to allow iOS users to select the app they want to launch for the specific redirect, by presenting them with a pop-up window with different app options. For example, if a user clicks on a website "contact us" link, a pop-up window can show up, giving the user the option to select to send an email through Gmail or Yahoo Mail, etc, instead of the user being automatically redirected to the default app chosen by Apple. Choosy is such a third-party framework trying to compensate for iOS' lack of a default app selection mechanism. However, such frameworks do not change the defaults, but only work for specific apps. See, for example, Federico Viticci, "Choosy, Open-Source Framework To Pick Default Apps In Third-Party iOS Apps", *MacStories*, 8 May 2014, available at https://www.macstories.net/news/choosy-open-source-framework-to-pick-default-apps-in-third-party-

mobile users), while being also an app developer itself, Apple can favor its own apps to the detriment of its competitors and users.

(iii) Apple and Google can set the rules of the game when it comes to in-app purchases

38. Both Apple and Google oblige app developers whose apps offer what Apple and Google define as "digital goods and services", which only make up 16% of the apps in the App Store, to use the Apple or Google's proprietary payment processing solutions for in-app purchases (IAP and GPB, respectively). When apps offer physical goods or services or digital goods or services deemed to be consumed outside of the app (which make up 84% of all apps in the App Store, including internet behemoths like Amazon, Facebook, Uber and others), they do not have to use GPB (in the case of Google) or IAP (in the case of Apple).[33] For the 16% of apps required to used IAP or GPB, app developers must pay Apple or Google a 30% commission on the transaction value.[34] When app developers are allowed to use their own or third-party payment solutions to accept in-app purchases, they pay no fee to Google or Apple, other than the licensing fee of $99 or $299 a year that all other developers pay. Thus, the 30% commission is "tied" to the use of IAP or GPB.

39. Apple has moreover put in place strict marketing restrictions to ensure that app developers will not circumvent IAP (and the 30% commission). These marketing restrictions prevent app developers from informing users about out-of-app purchasing possibilities.[35] Apple's marketing restrictions are, in fact, so broad that they prohibit any general communication (e.g. through an advertising campaign on TV or the web) that may inform app users about alternative

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ios-apps/; "Choosy: Effortlessly enable your users to choose default apps for external actions like browsing, emailing, tweeting, etc.", *GitHub*, available at https://substantial.github.io/choosy/.

33 See, in the case of the Apple App Store: Guideline 3.1.1. of the App Store Review Guidelines: "If you want to unlock features or functionality within your app, (by way of example: subscriptions, ingame currencies, game levels, access to premium content, or unlocking a full version), you must use inapp purchase. Apps may not use their own mechanisms to unlock content or functionality, such as license keys, augmented reality markers, QR codes, etc. Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase."; Guideline 3.1.5(a) of the App Store Review Guidelines: "If your app enables people to purchase goods or services that will be consumed outside of the app, you must use purchase methods other than in-app purchase to collect those payments, such as Apple Pay or traditional credit card entry." In the case of the Google Play Store, see Google Developer Distribution Agreement: "Developers offering products within a game downloaded on Google Play or providing access to game content must use Google Play In-app Billing as the method of payment. Developers offering products within another category of app downloaded on Google Play must use Google Play In-app Billing as the method of payment, except for the following cases: ◦Payment is solely for physical products ◦Payment is for digital content that may be consumed outside of the app itself (e.g. songs that can be played on other music players)."

34 On both the Apple App Store and Google Play Store, this commission can fall to 15% if the subscription lasts for more than a year. See Nick Statt, "Google matches Apple by reducing Play Store fee for Android app subscriptions", *The Verge*, 19 October 2017, available at https://www.theverge.com/2017/10/19/16502152/google-play-store-android-apple-app-store-subscription-revenue-cut.

35 Section 3.1.1. of App Store Review Guidelines: "Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase."

purchasing methods.[36] According to Spotify, even the phrase "Get in, Get Premium" was deemed to violate Apple's marketing restrictions.[37]

40. If Apple decides that an app violates its marketing restrictions, any submitted update will be rejected. Thus, Apple is able to use its monopoly position in app distribution to force app developers to comply with whatever Apple requires. Apple may go even further and threaten the app developer with removing the app from the App Store.

41. The following anticompetitive effects can arise related to Apple and Google's practices regarding in-app payments: (a) app developers are subject to unfair trading practices, (b) app developers are disintermediated, (c) consumer welfare is reduced, (d) innovation is reduced, (e) competition between business models is distorted, and (f) these practices can have exclusionary effects.

(a) App developers are subject to unfair trading practices

42. Apple and Google make an arbitrary distinction between apps that are subject to the obligation to use IAP or GPB and pay the 30% commission (i.e. apps that offer digital goods or services consumed in the app) and those that are not (i.e. apps that offer physical goods or services or digital goods and services consumed outside the app). The distinction between physical or digital goods is not clear-cut, emphasizing the unfairness and artificiality of the distinction Apple and Google have created. For example, Tinder is considered to offer digital goods or services (and thus be subject to the IAP or GPB obligation and the 30% commission), while Uber or Lyft (which provide similar "matchmaking functions" – i.e. they match a driver with a rider while Tinder matches to users for a date) are considered to offer physical goods or services.

43. Moreover, the 30% commission in itself is unfair, not only because it is imposed on a small number of the apps available on the app stores (i.e. apps offering digital goods or services), but also because it is excessive.[38]

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36 See Sections 3.1.3(a) and 3.1.3(b) of the App Store Review Guidelines, stating that app developers must not "directly or indirectly target iOS users to use a purchasing method other than in-app purchase, and your general communications about other purchasing methods must not discourage use of in-app purchase."

37 See "A Timeline: How we got here", Time to Play Fair, available at https://www.timetoplayfair.com/timeline/.

38 App developers and consumers have opposed Apple's 30% commission complaining that it is excessive and/or applied in a discriminatory manner. See the ongoing litigation in *Apple v. Pepper*; Class action complaint of Donald R. Cameron and Pure Sweat Basketball, Inc., against Apple Inc., before the US District Court for the Northern District of California, available at https://www.hbsslaw.com/uploads/case_downloads/apple-dev/2019-06-04-complaint-apple-developers.pdf; ACM Market Study, page 91.

44. For example, Epic Games, developer of popular game Fortnite which launched its own retail game platform in 2018, charges 12% on revenue, with 88% going to the game developer.[39] According to Epic Games' CEO, Tim Sweeney, this was plenty to achieve a reasonable profit:

> ""While running Fortnite we learned a lot about the cost of running a digital store on PC. The math is quite simple: we pay around 2.5 per cent to 3.5 per cent for payment processing for major payment methods, less than 1.5 per cent for CDN costs (assuming all games are updated as often as Fortnite), and between 1 and 2 per cent for variable operating and customer support costs." Sweeney told us.
>
> "Fixed costs of developing and supporting the platform become negligible at a large scale. In our analysis, stores charging 30 per cent are marking up their costs by 300 to 400 per cent," he reveals. "But with developers receiving 88 per cent of revenue and Epic receiving 12 per cent, this store will still be a profitable business for us," he explains."[40]

45. The same month Epic Games launched its platform, games communication platform Discord announced that it would lower its revenue share to 10%, leaving 90% of the revenues for game developers.[41] Similarly, the Microsoft Store recently updated its revenue share agreement with app developers, which now receive 95% of the revenue if the user downloads the apps through a direct URL, and 85% of the revenue if the user downloads the app via Microsoft Store search or Microsoft Store Collection.[42]

46. A recent Apple-sponsored study suggests that "*Apple's App Store commission rate is similar in magnitude to the commission rates charged by many other app stores and digital content marketplaces*."[43] That statement, however, ignores that the commission rates charged by marketplaces can vary considerably and in some cases are materially lower than the App Store's rate. That is for instance the case with respect to e-commerce marketplaces in the retail and travel industry (where, for instance, eBay charges a commission between 10-12% and Booking.com takes on average a 15% commission). Although this would require further analysis, it seems that commissions are lower in sectors where marketplaces face competition.

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39 Alex Calvin, "Fortnite firm Epic launches games storefront where developers keep 88 per cent of revenue", *PC Games Insider*, 4 December 2018, available at https://www.pcgamesinsider.biz/news/68194/fortnite-firm-epic-launches-games-storefront-where-developers-keep-88-per-cent-of-revenue/.

40 Seth Barton, "New Epic Games Store takes on Steam with just 12% revenue share – Tim Sweeney answers our questions", *MCV*, 4 December 2018, available at https://www.mcvuk.com/development-news/new-epic-games-store-takes-on-steam-with-just-12-revenue-share-tim-sweeney-answers-our-questions/.

41 Alex Calvin, "Discord's store will be getting more competitive with new 90/10 revenue share in 2019", *PC Games Insider*, 14 December 2018, available at https://www.pcgamesinsider.biz/news/68257/discords-store-will-be-getting-more-competitive-with-new-9010-revenue-share-in-2019/.

42 Chance Miller, "Microsoft updates Store revenue split to give developers a 95% cut, but with limitations", *9to5Mac*, 6 March 2019, available at https://9to5mac.com/2019/03/06/microsoft-store-revenue-share/.

43 Analysis Group, "Apple's App Store and Other Digital Marketplaces A Comparison of Commission Rates", July 2020, available at https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf

By contrast, the App Store faces no competition (as it is the only way for app developers to reach iOS users) and the Google Play Store faces very limited competition (as alternative app stores allowed on Android devices have very small market shares).

47. Thus, the only reason why Apple and Google are able to impose a fee which is significantly above the competitive benchmark (up to ten times the market price if compared with other firms offering payment processing services) is the market power held by these two companies, which act as gatekeepers between app developers and mobile users in the iOS and Android ecosystems, respectively.

(b) App developers are disintermediated

48. When an app developer uses IAP, Apple becomes the merchant of record and confiscates the customer relationship. Apple disintermediates app developers and, consequently, deprives them of a valuable connection to its users and data from them (e.g. the user's name, email, phone number, age, IP address or mailing address, as well as card details or billing information) which app developers could otherwise use to improve their services. Only a limited amount of transaction data are passed on from Apple to app developers, and not in a standardized format. Thus, there is no robust reporting infrastructure that app developers using IAP can use to obtain necessary data (e.g. for troubleshooting user payments).

49. In practice, this means that developers have no visibility into the process for charging users, renewing subscriptions and handling refunds, functions that are performed by Apple. Thus, app developers have no insight into when renewals occur and what logic Apple apply when a renewal attempt fails (e.g. because the user has insufficient funds), which app developers could use to understand purchasing behaviour and develop renewal strategies. Moreover, app developers are precluded from providing extra services to important customers, e.g. carrying over unused credits to subsequent months, as they are unable to identify their users.[44] Thus, in the end, users lose.

50. At the same time, Apple collects sensitive commercial data from apps using IAP, such as customer lists, the purchasing activity of individual users (which can be used to deduce their propensity to purchase subscriptions) and the success of subscriptions. Apple thus gets unparalleled market intelligence,[45] which it can use to scan the horizon and identify app categories with revenue growth opportunities. Apple can then develop its own apps and enter the services market (e.g. by launching music streaming, video, news or potentially even dating apps). According to app developers interviewed by the ACM, "it is highly unlikely that it is a coincidence that these digital services that are required to use IAP face competition from

44 ACM Market Study, page 94.

45 See also response of Tile to questions for the record by the House Committee on the Judiciary Subcommittee on Antitrust, Commercial and Administrative Law following the Field Hearing on Online Platforms and Market Power, Part 5: Competitors in the Digital Economy, 30 March 2020, available at https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-20200117-QFR005.pdf, noting that "Tile also offers its customers a subscription offering to complement its basic services via the App Store. Apple therefore knows the subscription take rate and success of Tile's subscription model."

Apple's own apps, or possibly will do so in the future."[46] Apple needs these app developers to use IAP, if it wants to gain valuable and anticompetitive insights into and advantages over its potential competitors, as it has done in areas like e-books, music streaming, video streaming and now gaming.

(c) Consumer welfare is reduced

51. The use of IAP results in a worse customer experience, as Apple or Google take over the customer relationship. This is particularly problematic as the app developer is prevented from offering customer support services or a smooth payment, subscription or refund process. In fact, any technical issue that emerges must be dealt with by Apple or Google and not directly by the app developer. While app developers would have an incentive to deal quickly with such problems in order to keep their customers satisfied, Apple and Google do not have such an incentive. Each developer must open a ticket and wait for the time to come that Apple or Google will attend to their issue.

52. When it comes to managing subscriptions, similar inefficiencies arise resulting in a bad user experience. App developers are unable to turn off or cancel auto-renewable subscriptions, and the user has to contact Apple. Furthermore, any billing inquiries have to be addressed to Apple. On top of that, if a user wants to upgrade their subscription, they have to go through a complex process orchestrated by Apple, whereby the user purchases the upgraded subscription and pays the full price and then receives a refund of its basic subscription (on a *pro rata temporis* basis to correspond to the period between the date of purchasing the basic subscription and the date of upgrading).[47] This is much more complicated than the industry standard approach, whereby the user wishing to upgrade pays only a prorated amount for the upgraded subscription, which corresponds to the period between the date of upgrading and the renewal date of the basic subscription. At each renewal date the user is then billed the full price for the upgraded subscription.

53. In addition, IAP offers limited flexibility in designing subscription plans. For example, it only supports only recurring subscriptions of one week, one month, two months, three months, six months and one year. App developers are therefore not able to model their subscription offers differently to increase consumer choice (e.g. put in place four- or nine-month subscription plans). IAP also does not allow app developers to offer users the ability to purchase a subscription and pay in periodic instalments. Additionally, it prevents developers from making

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46 ACM Market Study, page 89.

47 See https://developer.apple.com/app-store/subscriptions/#groups, where Apple states that "Users can manage their subscriptions in their account settings on the App Store, where they see all renewal options and subscription groups, and can choose to upgrade, crossgrade, or downgrade between subscriptions as often as they like. When a user makes a change in their subscription level, the timing of the change varies depending on what has happened:

Upgrade. A user purchases a subscription that offers a higher level of service than their current subscription. They are immediately upgraded and receive a refund of the prorated amount of their original subscription. If you'd like users to immediately access more content or features, rank the subscription higher to make it an upgrade."

special offers to their users or at a particular segment of their users. For instance, developers cannot provide subscriptions at a discount price for users that have been registered for a long time but have not already bought a subscription. Or app developers cannot make different discounts to different types of users (e.g. a 30% discount to users registered less than thirty (30) days ago, and a 50% discount to users registered more than thirty (30) days ago). Both app developers and users lose out.

54. Moreover, the use of IAP for in-app purchases creates switching costs to users and locks them in iOS, as users moving to an Android device may not be able to access their subscriptions purchased through IAP. When the app developer uses its own payment solution to accept user payments, it retains "ownership" of the customer relationship. In that case, a customer switching to an Android device may simply re-download the app on their new device and they will be immediately able to access the subscription purchased on their iPhone. However, when the subscription has been purchased through IAP, they are handled by Apple, and *not* the app developer. In that case, the user must first cancel their subscription purchased or wait for it to expire before switching to the Android device, where they will have to re-download the app and purchase a new subscription. Considering that the user will have to do the same for all subscriptions purchased through IAP, the combined effect is that users face an additional switching cost dissuading them from migrating to Android.

55. This effect is not a coincidence, but instead is very much intentional and came from the top of the Apple organization back in 2011. An email exchange between the late Steve Jobs and senior Apple executive Philip Schiller (part of the public record in the *Apple eBook* litigation in the US) concerns precisely this lock-in effect of IAP. In an email dated November 22, 2010, Mr. Schiller draws the late Steve Jobs' attention to a new TV ad for the Amazon Kindle app. Mr. Schiller felt uneasy with the Kindle app ad, as it showed how easy it was for users to switch from iPhone to Android:

> "I just watched a new Amazon Kindle app ad on TV. It starts with a woman using an iPhone and buying and reading books with the Kindle app. The woman then switches to an Android phone and still can read all her books. While the primary message is that there are Kindle apps on lots of mobile devices, the secondary message that can't be missed is that it is easy to switch from iPhone to Android. Not fun to watch".[48]

56. The response of the late Steve Jobs is most interesting:

> "What do you recommend we do? The first step might be to say they must use our payment system for everything, including books (triggered by the newspapers and magazines). If they want to compare us to Android, let's force them to use our far superior payment system. Thoughts?"[49]

57. As shown from the above email, Apple's co-founder considered that imposing IAP could help reduce the risk of users switching to Android; if app developers were allowed to use their own

48 Apple internal emails.

49 Ibid.

payment system, they would enable users to switch OS and still have access to their purchased content. By imposing IAP, on the other hand, Apple "breaks the link" between the app developer and the user, making it harder for the latter to switch OS.

58. IAP also reduces consumer choice. Users cannot choose between the one-click experience offered by IAP or an alternative payment solution that could be offered by the app developer (either developed in-house or purchased by a specialized vendor).

59. The 30% commission and the associated marketing restrictions also increase costs for users, as the fee charged by Apple (or Google) may be passed on to consumers. This is what happened in the case of Spotify. While Premium only cost €9.99 per month if the subscription was purchased on the web, when the subscription was purchased through Apple's App Store, the price was set at €12.99. Spotify had to increase its price after it adopted IAP to offset Apple's 30% commission – a cost that was passed on to consumers.[50]

(d) Innovation is reduced

60. The mandatory use of IAP for apps that offer digital goods or services reduces differentiation in payment solutions, and thus reduces innovation, as app developers are prevented from offering either in-house or third-party payment solutions that are tailored to each app and its specific needs, as well as the needs of its users (or a particular segment of users). For example, consumers in Germany tend to avoid credit cards for online payments – a consumer behaviour that app developers could take into account if they were free to choose the payment method offered to consumers. Unfortunately, the obligation to use IAP in all countries results in a homogenization of payment methods that does not correspond to the needs of consumers.

(e) Competition between business models is distorted

61. App developers employ various business models, offering apps that may be (a) free with no advertising, (b) free with advertising, (c) free but with payment for physical goods or services (e.g. apps allowing users to purchase clothes, electronics, etc.), (d) "freemium" (whereby users download the app and access base functionalities for free but must pay to unlock premium features, e.g. more "lives" in the case of a game app), (e) subscription-based (whereby users download the app for free but purchase a subscription to access content, e.g. video streaming, or services) and (f) paid (whereby users have to pay in order to download the app).

62. The obligation to use IAP or GPB and the 30% commission that comes with it is only imposed on apps offering "digital goods or services" that make use of in-app purchases (payments users make "inside the app", i.e. without leaving the app environment). On the contrary, apps funded by advertising do not have to pay any fee (apart from the $99 or $299 annual fee in the case of Apple and the one-time $25 registration fee in the case of Google).

50 See "Frequently Asked Questions", *Time to Play Fair*, available at https://www.timetoplayfair.com/frequently-asked-questions/; Chris Welch, "Spotify urges iPhone customers to stop paying through Apple's App Store", *The Verge*, 8 July 2015, available at https://www.theverge.com/2015/7/8/8913105/spotify-apple-app-store-email.

63. By overcharging subscription-based apps and capturing the customer relationship between the app developer and the user of the app, while allowing ad-funded apps to escape these obligations, competition between these business models is distorted in a manner which could have consequences on the quality of services offered to end users. The reason is that, while apparently "*free*", such ad-funded apps monetize the attention of their users by serving these users targeted ads (this is, for instance, the case when Facebook provides "free" dating services in competition with Match apps). Moreover, if more apps were to adopt an ad-funded business model to avoid the burdensome obligations that follow from adopting a business model that relies on direct user payments, consumer choice would be reduced.

(f) These practices can have exclusionary effects

64. Apple and Google's dual role as operators of their respective app stores and as actual or potential competitors to app developers whose apps are included in these app stores, allows them to use the imposition of the IAP or GPB obligation and the 30% commission as an effective exclusionary mechanism, making it harder for their rivals to compete.

65. App developers offering digital goods or services must pay the excessive 30% commission to Apple or Google, a fee that raises significantly existing or potential rivals' costs and prices to consumers. At the same time, Apple and Google's practices as regards in-app purchases deter entry and decrease output, much like the predatory tactics of a dominant firm act as a deterrent signal for potential entrants.[51] Because of the 30% commission, some app developers will never make it to the market, either because their margins are too slim to sustain such a cut or because of the fear that at any point Apple may enter their market, and wipe them out due to its large cost advantage. As observed in a pending lawsuit against Apple by app developers:

> "Developers and would-be developers, who can only earn 70% on the dollar on each paid app or product, in addition to paying $99 annually to gain entry to the App Store, undoubtedly think very hard about whether 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, and hope 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."[52]

66. As a result, not only app developers are harmed, but also consumers, which will not be able to benefit from new, innovative apps due to Apple and Google's practices.

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51 See Geradin and Katsifis, "The antitrust case against the Apple App Store", page 48.

52 Class action complaint of Donald R. Cameron and Pure Sweat Basketball, Inc., against Apple Inc., supra, page 5. See also page 23: "Apple's distribution charges are so high that undoubtedly they keep developers out of the App Store; why take the financial risk and invest development time when Apple will take such as a large percentage of their app and in-app product sales?"

A. Question 6: "*In relation to the code of conduct: Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets? To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency', be able to tackle these effects? How, if at all, would they need to differ and why?*"

67. We believe that a code of conduct incorporating high-level objectives, principles and supporting guidance would be an effective way of dealing with the issues raised in digital markets dominated by digital gatekeepers. The flexibility allowed by such a code of conduct will allow the authorities to not only tackle conducts that have been identified to have anticompetitive effects, but also to tackle conducts that may arise in the future – and which might not be envisaged at this time.

68. A code of conduct based on the objectives of "fair trading", "open choices" and "trust and transparency", setting out clearly-defined principles to which Apple and Google would have to adhere, should be able to alleviate the anticompetitive effects following from the exercise of the market power held by Apple and Google as operators of the two app stores giving access to more than 99.5% of smartphone users.

69. Below, we indicate which anticompetitive effects in the context of app stores can be tackled by each of these objectives, as well as the principles that would have to be included in the code of conduct under the headings of "fair trading" (Sub-section 1), "open choices" (Sub-section 2), and "trust and transparency" (Sub-section 3).

1. Fair trading

70. As analyzed in our response to question 5 above, Apple and Google – being indispensable trading partners for app developers due to their gatekeeping position – can impose on app developers unfair trading conditions, knowing that app developers have no option but to agree, on pain of losing access to their mobile user base. In fact, Apple and Google have used their market power, *inter alia*, to impose on app developers offering digital goods or services the obligation to use IAP or GPB, to charge them the excessive 30% commission, and to confiscate their customer relationship. Moreover, Apple and Google are able to place interoperability restrictions to the detriment of competing apps and the benefit of their own apps.

71. The code of conduct, under the heading of "fair trading", should therefore promote fair competition among apps, including those developed by Apple and Google. To this end, the following principles should be enshrined in the code:

- ***Platforms having a dual role as app store operators and app developers shall not engage in self-preferencing strategies***. Apple and Google should be prevented from favoring their own apps to the detriment of their competitors. For example, they should not give prominent ranking of their own apps in the app store search results.

- ***Platforms should give equal access to the device's technical interfaces.*** This is particularly important for app developers to be able to effectively operate their business, providing app users with well-functioning and innovative products. Apple and Google should not place interoperability restrictions on third-party apps, while reserving access to the device's technical interfaces for their proprietary or selected third-party apps.

- ***Platforms should be fair in their dealings with all apps included in the app stores.*** It is particularly important that platforms do not impose burdensome and arbitrary rules on certain types of apps. As shown above, Apple and Google have engaged in such practices by imposing on certain app developers the obligation to use IAP or GPB and pay a 30% commission, while the vast majority of apps escape such obligations.

- ***Platforms should apply their rules equally to all apps.*** App store operators should refrain from interpreting their rules more leniently for certain app developers or exempt selected apps from the obligations generally imposed on apps available on the app stores. Moreover, platforms should not apply different rules to their proprietary apps and third-party apps.

- ***Platforms should receive fair compensation.*** In the app ecosystem, the app store operators should only be compensated for the services they actually provide and the value they bring to the app developer. This principle would prevent app stores from overcharging certain apps to cover the services provided to other app developers.

2. <u>Open choices</u>

72. As shown above, Apple and Google's anticompetitive conducts have the effect of restricting choices both for app developers and app users. For example, app developers offering digital goods or services have to use IAP or GPB for in-app purchases, and thus are prevented from developing their own or using third-party processing solutions. Not only does this restrict app developers, but it also limits choice for consumers, who are obliged to use IAP or GPB. Moreover, Apple and Google restrict choice as regards the business model to be used by app developers: by imposing additional obligations on subscription-based apps and confiscating customer relationship, Apple and Google may encourage and incentivize app developers to adopt ad-funded business models in an effort to avoid burdensome obligations.

73. It is therefore crucial that the code of conduct requires that app stores promote choice for app developers and users to the benefit of competition, innovation and consumer welfare.

74. In order to enhance choices for app developers, the code of conduct should include the following principles:

- ***App stores should not make access conditional to supplementary obligations.*** App developers should be free to choose whether to only make use of the app distribution

services provided by app stores (and be compensated only for this) or to also receive additional services from the app store operators (e.g. payment processing services). In light of this principle, Apple and Google would be required to remove the IAP/GPB obligation and the excessive 30% commission linked to the use of IAP/GPB to which app developers offering digital goods or services must agree if they want their apps to be available on the app stores.

- ***App developers should be able to freely choose among business models and payment systems***. Unlike the current situation, the code of conduct should ensure that app developers choosing certain business models (e.g. subscription-based) will not be placed in a worse situation than those opting for other business models (e.g. ad-funded). App developers should not be forced to adopt certain business models in order to avoid the anticompetitive effects arising from platforms' conducts. Moreover, app developers should be free to choose the payment system that they prefer for in-app purchases, and not be obliged to use Apple or Google's proprietary in-app payment solutions.

75. In order to allow "open choices" to app users, the following principles should be enshrined in the code of conduct:

- ***Alternative channels of app distribution should be permitted.*** Alternative app stores should be allowed on the iOS ecosystem, allowing app users to choose their preferred one.

- ***Users should be able to set the defaults.*** App users should be able to decide their preferred apps, and thus not be forced to use Apple's proprietary apps that are now set as defaults. For example, a user should be able to decide that Spotify is used every time they ask Siri to play a song, and not Apple Music. This would not only be to the benefit of users, but also to app developers that are now at a competitive disadvantage compared to Apple's proprietary apps.

3. Trust and transparency

76. Apple and Google's gatekeeping position in app distribution on iOS and Android devices respectively allows them to act in a non-transparent manner to the detriment of app developers competing in their app stores (even against Apple and Google's proprietary apps). For example, Apple and Google, as the operators of the app stores, are solely responsible for the approval of apps or updates, through an opaque review process, in which app developers have no meaningful role to play.

77. It is thus imperative that the code of conduct puts an end in the non-transparent way in which the app stores operate. In particular the code of conduct should ensure that there is:

- ***Transparency in the review process.*** App store operators should put in place clear rules that must be complied with in order for apps or updates to be approved. Their

decisions should be objective and consistent and should not differ according to the interpretation given to the guidelines by each app reviewer. Moreover, constructive feedback should be provided to app developers in case of rejection of their apps or updates, in order to allow the latter to understand what needs to be modified in order to obtain Apple or Google's approval. A mere reference to the text of the app store guidelines does not satisfy the need for transparency in the review process.

- ***A transparent dispute resolution process***. App store operators are responsible both for the initial decision as to the approval of apps or updates, as well as any review of this decision. Their power is therefore unfettered. The code of conduct should require app stores to put in place a transparent and fair dispute resolution process, including access to a third party decision-maker where the app store and the app developer cannot resolve their disagreement between the themselves. For example, app stores could be required to have an independent app review team that handles appeals, through a process which allows constructive participation of app developers.

B. Question 8: "*What remedies are required to address the sources of market power held by digital platforms? What are the most beneficial uses to which remedies involving data access and data interoperability could be put in digital markets? How do we ensure these remedies can effectively promote competition whilst respecting data protection and privacy rights? Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?*"

78. The exercise of market power by app store operators, as shown above, can take many forms and can lead to various anticompetitive effects to the detriment of competition, innovation and consumer welfare. It is thus imperative that a combination of appropriate remedies is available to effectively tackle the source of market power held by app stores.

79. In particular, we believe that the following remedies would be required to curtail the power held by Apple and Google as the gatekeepers between app developers and more than 99.5% of mobile users: (i) interoperability requirements, (ii) separation remedies, (iii) data access and data interoperability, and (iii) structural remedies.

80. ***Access to the device's technical interfaces.*** Lack of interoperability can prevent market entry or make it harder for apps to properly function and compete (especially with Apple or Google's proprietary apps that do not face interoperability restrictions). This has detrimental effects not only to app developers, but also to consumers which cannot benefit from better and innovative apps. An interoperability remedy would require app stores to provide the same access to technical interfaces for all apps (first-party and third-party), thus promoting competition and increasing innovation and consumer choice. Intervention should therefore be possible to ensure that Apple and Google allow app developers access to technical interfaces and to increase interoperability in case this is deemed necessary.

81. ***Separation remedies.*** Apple and Google act as gatekeepers between app developers and their user base. This allows them to impose any conditions they wish, and app developers have no

choice but to accept them or lose access to their user base. For example, Apple and Google have imposed the obligation to use IAP/GPB and the 30% commission on in-app purchases for what Apple and Google define as "digital goods and services". These conditions, at the same time, further strengthen the market power held by Apple and Google, in that they oblige app developers (and users) to use Apple or Google's services instead of developing their own or procuring them from third parties, they receive considerable compensation (and reversely, app developers are forced to hand in part of their revenue to Apple and Google) and they disintermediate app developers, confiscating customer relationship (discussed further below, as part of the data access and data interoperability remedy) and increasing stickiness on their devices.

82. It is therefore crucial that the regulator is able to step in and require "unbundling" of the provision of additional services (e.g. payment processing) from the provision of the main service (e.g. app distribution). This would of course apply not only to currently identified conducts (e.g. IAP/GPB obligation and 30% commission) but also similar behaviors that can be adopted by app store operators due to their market power and with the result of furthering this market power.

83. ***Data access and data interoperability.*** App store's market power enables them to engage in practices that result in them confiscating customer relationship. For example, as indicated above, through IAP, Apple becomes the merchant of record and gathers data such as the user's name, email, phone number, age, IP address or mailing address, as well as card details or billing information. However, Apple only passes limited data to app developers, therefore making it extremely hard for them to operate their business and provide better and innovative services to their users. At the same time, Apple gets access to sensitive commercial data from apps developers, such as customer lists, the purchasing activity of individual users and the success of subscriptions – all of which it can use to scan the horizon for the best and most profitable new businesses and enter the market with its own competing apps. The winner is clearly Apple. Considering these data imbalances that stem from Apple's position (which could also be said for Google's position), it is crucial that a data access remedy is available. This would allow existing app developers to compete effectively and would also likely facilitate market entry.

84. Competition concerns also arise due to the lack of data interoperability between the different app stores. The closed nature of both the iOS and the Android ecosystems, and the lack of interoperability between the two cause high switching barriers for consumers and make it costly for developers to offer their apps in both ecosystems. This absence of data interoperability, therefore, harms both consumers and app developers, and stagnates competition between the two app ecosystems over consumers.[53] Thus, a data interoperability remedy would introduce competition between Apple and Google (which now are the default gateway for iOS and Android users respectively), and would likely allow other app store operators to emerge and compete more effectively.

53 ACM Market Study, page 67.

85. While we understand that data protection and privacy concerns may arise in the context of data access and data interoperability remedies, we do not consider that these concerns are any different than the data protection and privacy concerns that arise in the conduct of any other business operation. As long as the existing data protection and privacy rules are complied with, the imposition of data access and data interoperability remedies will not be problematic.

86. ***Other forms of intervention.*** In addition to the above, the CMA should consider remedies that would prevent Apple and Google from using the information they acquire by operating their app stores (e.g., through the obligation imposed on app developers to use their in-app payment system, but also more generally) in order to distort competition. That information can be used at the expense of actual and potential competitors. While ordering a *structural* separation between these companies and their app store may be a giant step, which the CMA may not wish to take, some form of *functional* separation along the lines of what exists in the telecommunications sector should be considered.

IV. Conclusion

87. As this Response to the Call for Information has shown, Apple and Google are the gatekeepers controlling access to over 99.5% of mobile users. Their market power allows them to act in a way that adversely affects competition, innovation and consumer welfare. A well-defined code of conduct and a series of available remedies would be able to address these competition concerns and constrain these gatekeeping platforms to the benefit of app developers and app users.

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