



Response of Epic Games¹

Competition and Markets Authority (CMA) Interim Report on Mobile Ecosystems

Introduction

The CMA has undertaken a comprehensive market study of mobile ecosystems, a critical part of the modern economy. Millions of developers and billions of consumers rely on mobile ecosystems to make a living and conduct important daily tasks. The Interim Report contains compelling evidence of how Apple and Google's grip over mobile ecosystems results in British consumers experiencing less choice and paying more for apps and services while British developers are prevented from innovating and benefitting from a competitive marketplace. The Interim Report touches on multiple aspects of competition and fairness in mobile ecosystems, and seeks comment across five consultation topics, as well as four specific "Remedy Areas" designed to curb anticompetitive behaviour stemming from Apple and Google's dominance in mobile operating system and app stores.²³

Epic Games welcomes the opportunity to comment on these important issues. Because some of the consultation areas fall outside of Epic's purview, it will confine its response to address the CMA topics regarding the gatekeeper power that Apple and Google leverage over mobile operating systems and app stores to undermine free and fair competition in the mobile app economy.

¹ Epic Games, maker of the popular game Fortnite, is headquartered in Cary, North Carolina, U.S. and operates more than 40 offices worldwide, including offices in London, Manchester, Leamington Spa, Newcastle, Guildford and Edinburgh. Epic develops software applications ("apps"). These apps allow millions of consumers in the UK to play Epic Games' video games on their mobile devices, where they can meet, talk, compete, dance, and even attend concerts and other cultural events. Epic Games' widely used "Unreal Engine" software is a key development tool for several sectors across the UK - including in engineering, medicine, architecture, as well as the creative industries and app development.

² Interim report at Box 10.1, Question 3.

³*Id.* at Box 10.1.

Specifically, Epic responds to three of the consultation topics in the Interim Report:

- **Question 3** - The merits and challenges of the range of potential interventions that the CMA has identified in this interim report;
- **Question 4** - The potential application of the CMA's findings to the framework of the DMU; and
- **Question 5** - The additional work the CMA proposes to conduct over the second half of the study.

First, in response to Question 3 Epic supports the CMA's proposed remedies to address the lack of competition in app distribution and in-app payments. The CMA's interim findings contain many excellent proposals for remedies that would improve competition and unlock benefits for consumers. In particular, Epic believes that competition in app distribution systemically addresses gatekeepers' abuse of market power and should be prioritised. This will loosen Apple and Google's "vice-like grip" over the ecosystem and unlock competition in other areas—including in-app payments.

Second, in response to Question 4 Epic supports the opinion of the regulator that Google and Apple should be designated as Strategic Market Status ("SMS") firms. Epic agrees with the CMA that the optimal long run framework is to ensure gatekeepers such as Apple and Google are forced to play by fair rules that limit their ability to behave anti-competitively. Epic also agrees that the DMU is the proper entity to task with implementing the remedies in the Interim Report. However, Epic believes the CMA should keep its decision to not issue a market investigation under close review. If, for example, the statutory framework for the DMU is not in place in 2022 then the CMA should retain the option to issue an investigation to avoid unnecessary delay in setting forth the remedies necessary to promote competition in the mobile app market.

Third, in response to Question 5 Epic supports the next steps proposed by the CMA and offers its assistance in the areas that the CMA has outlined it wishes to gather further evidence. Given the historic size and dominance of Apple and Google, Epic agrees that collaborative enforcement will be critical and that the CMA should continue to work with competition authorities in the UK and internationally.

I. Epic Supports the CMA's Proposed Remedies and Urges Prompt Action to Open Mobile Devices to Alternative App Distribution and In-App Payment (IAP) Solutions.

The CMA observes that Apple and Google “control the key gateways through which users access content on mobile devices and through which content providers can access potential customers.”⁴ The CMA should prioritise remedies that would generate competition *within* existing ecosystems to alleviate the most severe impacts that consumers and developers currently suffer. Of the CMA’s proposed remedies, opening mobile devices to alternative app distribution would have the most significant and expeditious impact on opening the mobile ecosystem to competition.⁵ Also, prohibiting the tying of proprietary in-app payment systems to app distribution would be a significant *complementary* remedy; however, IAP reform alone will be insufficient to discipline Apple and Google’s control over the mobile economy. Implemented together, these solutions would open-up existing mobile app distribution ecosystems, unlocking competition and innovation from additional entrants and expand choice for consumers.

A. The CMA Should Pursue Remedies that Open Mobile Devices to Alternative Means of App Distribution

The CMA seeks comment on “[i]nterventions relating to competition in the distribution of native apps” and “interventions to make it easier for third parties to compete directly with Apple’s and Google’s app stores” (“**Remedy Area Two**”).⁶ The CMA suggests that: “Alternative app stores could be made available through sideloading from the web, or Apple could be required to allow app stores to be available for download from its App Store.”⁷

⁴ *Id.* at para 6.

⁵ Other remedies proposed by the CMA include incentivising greater openness and fluidity between mobile operating systems and ending lock-in (**Remedy Area 1**). Epic agrees that these are important components of giving consumers greater choice overall. However, stimulating competition between Android and iOS still leaves consumers and developers with limited choice over how applications are available via their mobile devices. That is why, while Epic supports the CMA’s Remedy Area 1 proposals, we urge the CMA to prioritise solutions enabling new entrants to compete with Apple and Google’s app stores as these will have more immediate and dramatic salutary effects on the mobile ecosystem.

⁶ *Id.* at para 7.9.

⁷ *Id.* at para 7.52

The CMA notes that “the potential benefits from promoting alternative sources of competition in the distribution of apps are significant. Creating new mechanisms through which users can discover and engage with apps would improve choice for users and could have the effect of reducing the extent of Apple’s and Google’s market power in app distribution.”⁸

Epic agrees. 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.

1. Alternative App Stores Would Inject Price Competition, Innovation and Consumer Choice into the Mobile Ecosystem

The CMA’s proposed remedy to require Apple and Google to make alternative app stores available 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, than the 30% charged by Apple’s App Store and Google’s Play Store and also permits alternative payment processing.

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.”⁹

Price is not the only element that would be improved by app store competition. That same U.S.

⁸ *Id.* at para 7.49.

⁹ *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.

district court determined that “a third-party app store could put pressure on Apple to innovate by providing features that Apple has neglected.”¹⁰ 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 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.¹¹

2. Direct Downloading of Applications from the Web is a Safe and Effective Way of Avoiding Dominant App Store Gatekeepers Anticompetitive Terms and Rates

Epic Games supports the CMA’s suggestion that “sideloading” should be allowed on iOS and made easier on Android OS.¹² As a threshold matter, Epic stresses that “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. In fact, application “sideloading” is identical to the application “downloading” that consumers safely perform everyday 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. While Google technically does not prohibit direct downloads, 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. As a consequence, the CMA observed that “sideloading as a proportion of all

¹⁰ *Id.* at 102.

¹¹ *Id.* at 100-102.

¹² Interim Report at para 7.52.

downloads on Android devices was very low.”¹³

Google’s response to the CMA Statement of Scope prominently features images of the Epic Games App and Fortnite in its section on sideloading. However, Epic Games has firsthand experience of the harm caused by Google’s restrictions.¹⁴ Users have to go through as many as 16 steps to download Fortnite and change their default settings, while navigating multiple intimidating warnings. Once downloaded, users also need to update apps manually as this process does not allow apps to use the automatic update functionality of the Google Play Store. Epic Games updates Fortnite every other week (with smaller updates being available as frequently as daily) and a user can only play if they are operating the most recent version, making Google’s restrictive process burdensome and time-consuming.

3. Apple’s Security Arguments Against Alternative App Distribution are Pretextual

The CMA observes that, “[i]n many cases they [Apple and Google] opt to make decisions on behalf of consumers, in order to protect them from bad actors or harmful consequences online. However, it is not always clear if these numerous choices are made fully in the interests of consumers in all cases, for example where users’ security and privacy are the justification for decisions that also serve to harm competition or limit consumer choice.”¹⁵ Epic agrees that anticompetitive app store policies should not get a free pass from scrutiny just because Apple or Google invoke privacy and security justifications. Often these justifications are pretextual or exaggerated.

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.”¹⁶ 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

¹³ *Id.* at para 4.103.

¹⁴ Google, Mobile Ecosystem Market Study – Statement of Scope, Google’s perspective, p. 6 (2 August 2021)

¹⁵ Interim Report at Introduction, para 11

¹⁶ *Id.* at para 7.56.

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.

As the Electronic Frontier Foundation explains in its brief in support of Epic in the U.S. Court of Appeals, “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.”¹⁷ 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.

a. The operating system – not the app store – provides critical security functions on a device

Security is ensured first and foremost by the operating system (“OS”) and hardware. The OS is the entity that controls how applications interact with each other, a device’s hardware, and the OS itself. Regardless of the mechanism by which an application arrives on a phone, and regardless of whether the application was reviewed for security risks or other problems ahead of time by either human app review or automated mechanisms, the OS is ultimately the entity that determines what the application is or is not allowed to do.

iOS is based on the same kernel¹⁸ as the macOS. Consumers who use macs are able to download third-party software from a variety of digital stores or directly from a developer’s website, with a choice of payment methods. Apple uses a notarisation system on macOS software that “gives users more confidence that the Developer ID-signed software you distribute has been checked by Apple for malicious components.”¹⁹ Per Apple, the notary service “is an

¹⁷ 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).

¹⁸ A “kernel” is the computer program at the core of an operating system, providing basic services for all other parts of the OS, and generally has complete control over all functions in the system.

¹⁹ “Notarizing macOS Software Before Distribution,” Apple Article, https://developer.apple.com/documentation/security/notarizing_macos_software_before_distribution.

automated system that scans software for malicious content, [and] checks for code-signing issues.”²⁰

There is no technical reason that the iPhone requires different or higher security standards than the mac. Indeed, macs can access any sensitive content present on iPhone by syncing via iCloud, so any vulnerability differences between iOS and macOS would be exploited by the iCloud function. However, Apple has consistently represented the mac as secure and safe from malware, and there are no credible arguments to suggest that alternative app distribution would be less safe on an iPhone than it is on a mac.

Similarly, there is no technical reason why app review needs to be linked to app distribution. Apple and Google both have the ability to review apps for security vulnerabilities and then allow those vetted apps to be distributed on their platform through distribution channels *other* than their own app stores.

b. Apple app review provides marginal – if any – additional protections against malicious apps

Apple’s arguments are even more disingenuous when accounting for the multiple analyses that have found that Apple allows malware and fraudulent apps to proliferate throughout the App Store, bilking consumers out of their money and displacing legitimate independent developer apps.

In 2021, *The Washington Post* reported that, of the 1,000 top-grossing apps in the App Store, 2% were fraudulent and had conned consumers out of roughly \$48M USD – of which Apple took a 30% commission.²¹ Quoting multiple authorities on the issue, *The Post* noted that “Apple’s

²⁰ *Id.* For greater discussion on the arbitrary policies controlling direct downloading on iOS vs. macOS, see Coalition for App Fairness, *Should iOS users be allowed to download apps via direct downloads or third-party app stores? An Analysis of Apple’s recent claims* (2021), https://appfairness.org/wp-content/uploads/2021/12/iOS_Users_and_Third_Party_App-Stores.pdf.

²¹ Reed Albergotti and Chris Alcantara, “Apple’s tightly controlled App Store is teeming with scams,” *The Washington Post* (6 June, 2021), <https://www.washingtonpost.com/technology/2021/06/06/apple-app-store-scams-fraud/>. See also, Reed Albergotti, “He believed Apple’s App Store was safe. Then a fake app stole his life savings in bitcoin,” *The*

monopoly over how consumers access apps on iPhones can actually create an environment that gives customers a false sense of safety, according to experts. Because Apple doesn't face any major competition and so many consumers are locked into using the App Store on iPhones, there's little incentive for Apple to spend money on improving it."²²

In another analysis, an iOS developer, Kosta Eleftheriou, undertook an extensive review of the App Store apps and found many fraudulent apps submitted by scam artists – none of which were caught by Apple's purported "high standard of review." Eleftheriou attributed the abundance of scam apps to "inconsistently enforced App Store rules and lazy moderation."²³

The district court in *Epic v. Apple* was likewise unpersuaded by Apple's pretextual security justifications, finding, "Apple argues that its policies protect consumers against fraudulent attacks. The data is far from clear. What is certain is Apple's decision prohibits information from flowing directly to the customer so that customers can make these choices themselves."²⁴

4. Apple's "Free-riding" Rhetoric is Pure Bombast

Apple frequently raises the spectre of app developers "free-riding" on its ecosystem in an attempt to ward off regulatory intervention into its unilateral control over the App Store.²⁵ This is pure bombast. No one denies that the App Store ecosystem provides value to developers. However, that value is not a one way street. While developers benefit from App Store distribution, an App Store without apps is like a store with empty shelves. The CMA observes that developers add a significant amount of value to iOS and the App Store, contributing to the success and popularity of the iPhone.²⁶ Indeed, Apple and Google originally introduced the App Store and Play Store because apps were necessary to make their operating systems attractive and competitive. In other words, the App Store was designed to sell phones. Once Apple gained

Washington Post (30 Mar, 2021),

<https://www.washingtonpost.com/technology/2021/03/30/trezor-scam-bitcoin-1-million/>.

²² *Id.*

²³ Nick Stat, "Apple's App Store is hosting multimillion-dollar scams, says this iOS developer," *The Verge* (8 Feb, 2021),

<https://www.theverge.com/2021/2/8/22272849/apple-app-store-scams-ios-fraud-reviews-ratings-flicktype>.

²⁴ *Epic Games v. Apple Inc.*, Rule 52 Order at 41.

²⁵ Interim report at para 7.59.

²⁶ *Id.* at para. 7.60.

market share and other mobile competitors fell away, Apple was able to use its dominance to shift the App Store to a revenue generating model.

No one is arguing that Apple is not entitled to monetise its App Store. The core issue is whether Apple's unilateral control over mobile app distribution on iOS devices allows it to limit competition and charge supracompetitive rents. The CMA's analysis points to the App Store's gross profit margin and how Apple's return on capital "exceeds any reasonable benchmark."²⁷ The CMA's analysis is supported by other jurisdictions. While Apple has argued that its "30% rate is commensurate with the value developers get from the App Store,"²⁸ the district court in *Epic v. Apple* found to the contrary:

"[A]bsent competition, however, it is impossible to say that Apple's 30% commission reflects the fair market value of its services. Indeed, at least a few developers testified that they considered Apple's rate to be too high for the services provided....Apple has provided no evidence that the rate it charges bears any quantifiable relation to the services provided. To the contrary, Apple started with a proposition, that proposition revealed itself to be incredibly profitable and there appears to be no market forces to test the proposition or motivate a change."²⁹

The district court further concluded that:

"[L]ooking at the combination of the challenged restrictions and Apple's justifications, and lack thereof, the Court finds that common threads run through Apple's practices which unreasonably restrain competition and harm consumers, namely the lack of information and transparency about policies which effect [sic] consumers' ability to find cheaper prices, increased customer service, and options regarding their purchases. Apple employs these policies so that it can extract supracompetitive commissions."³⁰

In sum, fair competition can only be achieved through fundamental changes to the distribution

²⁷ Interim Report at Appendix D, para 37.

²⁸ *Epic Games v. Apple*, Rule 52 Order at 98.

²⁹ *Id.* at 99-100.

³⁰ *Id.* at 118.

of apps on mobile devices. Without competition from directly downloaded apps, including app stores, Apple and Google will continue to use their respective bottlenecks to first resist and then nullify the effects of potential remedies. Epic Games welcomes the remedies outlined in Remedy Area 2 and sees them as fundamental to creating a more fair and competitive ecosystem that benefits both consumers and developers.

B. The CMA Should Pursue Remedies that Open App Stores to Alternative In-App Payment Providers

The CMA seeks comment on “whether there would be benefits in interventions that would prevent Apple and Google from unreasonably restricting the choice of in-app payment services available to developers and users” and “measures which restrict the potential for self-preferencing of Apple’s and Google’s own apps through requiring the payment of commissions from their-party apps active in sectors where Apple and Google also have their own first-party apps.”³¹ The CMA suggests that users could be offered a “choice between use of Apple and Google’s payment systems and alternative payment systems chosen by app developers”³² and that Apple and Google could be required “to allow developers to refer users within an app to alternative ways to pay [for] content and subscriptions outside of the app...”³³

The CMA suggests that these interventions to promote alternative payment systems are likely to benefit developers “who place significant value on the flexibility of being able to use alternative payment systems” and also users who “may value being able to transact with Apple and Google via their payment systems from all their payments on their mobile devices so they are able to use a single set of payment details and deal with a single trusted point of contact.”³⁴

Epic agrees. Consumers and app developers should be able to choose which payment system providers process in-app payments for digital goods on their mobile devices – just as they are able to do now on their macs, Chromebooks and PCs. This choice is not available to users of mobile devices because the Apple App Store and Google Play Store prohibit it by tying payment

³¹ Interim Report at para 7.97-7.106.

³² *Id.* at para 7.100.

³³ *Id.* at para 7.102

³⁴ *Id.* at para 6.223 and 7.99.

processing to distribution in their respective app stores.³⁵ Without this choice – and the attendant competition for payment processing – there is no market discipline on Apple and Google’s ability to unilaterally set rates for payment processing, nor is there any competitive pressure for Apple or Google to innovate including around improving the security and privacy of their payment processing services.

When Epic Games offered a direct payment option on iOS and Android for its popular game Fortnite, it did so with reduced pricing to users that chose Epic Games’ direct payment option, due to the lower costs. As a result, Epic Games was able to pass an approximate 20% price saving to consumers for in-app purchases, including iOS and Android devices. Unfortunately for developers and consumers, offering alternative payment options violates Apple’s and Google’s app store policies. Epic’s Fortnite was removed from the App and Play Stores for offering consumers choice in payment options.

1. Alternative IAP Alone is Insufficient to Discipline Apple and Google. Alternative App Distribution Is Essential To Create a Functioning Market

Epic agrees with the CMA that, despite these interventions, Apple and Google “could seek alternative ways to collect a commission for use of their app stores.”³⁶ The CMA also notes the “risks of this intervention is therefore that Apple and Google find ways to introduce charges for use of their app stores that are less efficient or result in harmful unintended consequences.” This risk is not theoretical. These worst case scenarios are currently playing out in other jurisdictions and highlight the fact that IAP reform is a necessary but insufficient condition for restoring competition to the mobile app ecosystem—alternative app store distribution will be required in concert with IAP reform.

For example, in recent months, Apple and Google have developed underhanded workarounds in attempts to superficially “comply” with South Korea’s Telecommunications Business Act ³⁷ and a

³⁵ Also notable is that mobile applications selling “physical goods” rather than “digital goods” are not subject to Apple’s IAP mandate – those developers are able to use payment processors of their choice. This further highlights Apple’s arbitrary application of its App Store policies and undercuts Apple’s argument that it must control payments for safety and security reasons.

³⁶ Interim Report at para 7.101.

³⁷ Reuters, [Apple submits plans to allow alternative payment systems in S.Korea](#) (11 Jan 2022)

recent order by the Dutch Authority for Consumers & Markets (ACM).³⁸ While it is important to establish clear rules that make Apple and Google offer third party payment services, payments are just one part of a broader pattern of Apple and Google’s monopolist behaviour. Their ability to leverage supracompetitive ‘rents’, whether levied through API access, App Store dominance or payment rules, are an indication of their respective monopolies, and require comprehensive action to prevent them from simply finding new ways to charge or allocate commissions in response to enforcement measures. Apple’s notion of “compliance” with the Dutch mandate to open up alternative IAP processes on dating apps is to require a 27% commission payment on in-app purchases made using non-Apple payment systems.³⁹ Apple is also implementing stark warnings and withholding App Store features from users of apps who choose an alternative in app payment provider.⁴⁰ This is proof that—as the CMA contemplated—Apple and Google could ensure that “these alternatives would be prohibitively costly or challenging to implement”⁴¹ and makes plain that alternative app distribution is required to sufficiently discipline monopolist behaviour. We encourage the CMA to take strong action on the root causes of the market dominance enabling this behaviour.

In sum, Epic Games supports measures to allow choice in payment processors and urges the CMA to ensure that consumers and developers enjoy the same level of choice and competition on the computers in their pocket as they do with the computer on their desktops.

II. Epic Supports the CMA’s Suggested Application of The Remedies to the Proposed New Competition Regulatory Regime.

The CMA seeks comments on “the potential application of our preliminary findings to the framework of the proposed new pro-competition regulatory regime for digital markets” outlined in Chapter 8 of the Interim Report.⁴²

³⁸ ACM, Apple fails to satisfy requirements set by ACM (24 Jan 2022)

³⁹ Apple, Distributing Dating Apps In The Netherlands.

⁴⁰ Natasha Lomas, “Apple fined again over Dutch app payments order,” *TechCrunch* (7 Feb, 2022), <https://techcrunch.com/2022/02/07/apple-third-dutch-antitrust-fine/>

⁴¹ Interim Report at para 7.101.

⁴² *Id.* at at Box 10.1 Question 4.

Epic supports the CMA's preliminary classification of Google and Apple as Strategic Market Status firms. It also supports the CMA's decision to task the Digital Markets Unit (DMU) with implementing the remedies proposed in the Interim Report. This *ex-ante* approach will establish rules of the road for fair competition. It will also provide guidance and guardrails to ensure the future economic growth of *all players* in the mobile app ecosystem – not just a couple of dominant firms with gatekeeper power.

Epic also supports the CMA's decision “to keep under review the potential use of all its available tools during and following the second half of the study.”⁴³ In the event that the statute setting-up the DMU is not laid before Parliament this year, the CMA may want to revisit its decision to not issue a market investigation and avoid further delay in implementing remedies that are indispensable to promoting the equitable growth of the mobile app ecosystem.

A. Apple and Google Should be Designated as Strategic Market Status Firms

The CMA conducted an analysis of Apple's and Google's market power and leverage, concluding that the following portions of Google's and Apple's operations should be designated as Strategic Market Status (SMS) firms: (i) mobile operating systems and (for Apple, the devices on which they are installed); (ii) native app distribution; and (iii) mobile browsers and browser engines.⁴⁴

For example, the CMA determined that the “App Store also does not face a material competitive constraint from alternative non-mobile devices such as desktops or games consoles. These devices are primarily used for different purposes and are mainly viewed by users as complements rather than substitutes.”⁴⁵ The CMA also found that the App Store and Play Store do not impose “material competitive constraint[s]” on one another and that it is not a viable option for developers to forgo being available on either.⁴⁶

Epic agrees with the CMA's proposal to scope SMS designation to the broadest range of functionalities controlled and owned by Apple and Google. From device to OS, to app store, to

⁴³ *Id.* at para 9.12.

⁴⁴ *Id.* at paras 8.64 and 8.119.

⁴⁵ *Id.* at para 8.39.

⁴⁶ *Id.* at paras 8.38 and 8.39.

payments, these functions are all interlinked and subject to Apple and Google's unilateral control. A competitive advantage in one function creates the means to leverage competitive advantage in another. As the CMA observed, and Epic has experienced first hand, Apple "can use its control over its own mobile devices and iOS to extend its market power in mobile devices and iOS into other markets by preferencing, preventing sideloading, restricting developer access to core functionalities etc."⁴⁷

B. Codes of Conduct Will Allow For Quicker Enforcement and Should be Determined At the Discretion of the DMU

Epic welcomes the proposed use of both Pro-Competitive Interventions (PCIs) and Codes of Conduct as means of delivering the remedies the CMA proposes in its report. However, it is vital that (1) as many of the remedies set out in the CMA's report are covered by codes of conduct; the details of which are (2) determined at the discretion of the Digital Markets Unit. The reason for this is practical speed to set the regime up, and start addressing the remedies the CMA outlines. We therefore endorse the decision that the CMA has made to push ahead in drafting principles for the codes.⁴⁸

In considering the role of PCIs vs the code, PCIs should only be used to cover the 'gaps' that the CMA sees the codes as being insufficient to solve for (e.g. major technical interventions like interoperability between Android and iOS). As the report itself comments "A code of conduct could likely take effect soon after the formal commencement of the DMU's powers; whereas PCIs may take longer to establish and implement; but that if successful in making the markets more contestable, they could result in a code of conduct, or parts of it, being removed over time."⁴⁹ We agree with this approach. Finally, we call for the illustrative codes, and the findings of the report be converted into 'code guidance' that is binding to specific practices of each firm.⁵⁰

As an initial focus, we believe that their respective codes of conduct should mandate both Google and Apple to allow direct download of apps, and third party app stores. As set out in our

⁴⁷*Id.* at para 8.29.

⁴⁸ *Id.* at para 8.122.

⁴⁹ *Id.* at para 8.5.

⁵⁰ *Id.* at para 8.122.

comments above, this will inject immediate competition into the functioning of mobile ecosystems, while larger more wholesale changes such as those conceived by Remedy Area one are pursued in making whole ecosystems interoperable. We support the approach taken by the EU's Digital Markets Act in this regard, to compel both these activities.⁵¹

More broadly, Epic supports the principles set out by the CMA that govern the codes of conduct - "fair trading", "open choices", and "trust and transparency."⁵² However, we call for each to be extended to developers, and not just users, to reflect the unique nuance of two or three sided digital marketplaces. Too often (as with the privacy and security vs. competition argument deployed by Apple) pretextual trust and transparency benefits for users have been traded against open choices for developers.

III. Epic Supports The Next Steps Proposed By the CMA and Offers Its Support In the Areas That The CMA Has Outlined It Wishes To Gather Further Evidence

Epic is encouraged by the CMA's desire to gather more evidence to test and refine its thinking as it proceeds to complete the second half of the study over the next six months. The CMA concluded that delivery of the Interim Report's findings should align with the work of other UK regulators and those facing shared challenges around the world. Epic agrees cooperation will remain critical for the duration of the study and encourages the CMA to collaborate: 1) within the Digital Regulation Cooperation Forum (DRCF); and 2) with international regulators. These collaborations will be particularly important if and when Apple and Google make changes to their policies, and as the global regulatory landscape shifts with the introduction of new competition enforcement measures.

A. Close Working With The Digital Regulation Cooperation Forum

The UK has led the world in constructing the DRCF and taking a holistic perspective to solve some of the challenges preventing a more open mobile ecosystem. Apple and Google have argued that a closed ecosystem, which limits or bans direct downloads or competing App

⁵¹ Proposed Digital Markets Act (2020), Art. (6)(1)(c)
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>

⁵² *Id.*

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. The DRCF provides an important forum to consider issues like this in the round, and Epic would welcome the chance to contribute to that discussion. As observers, we encourage the type of joint working taken by the DRCF as a part of the CMA's investigation into Google's Privacy Sandbox to tackle this challenge.⁵³

B. Collaboration With International Regulators Worldwide

We were pleased to note the CMA's intention to work with other competition regulators around the world, and to see the UK spearhead the G7 Digital Competition Enforcers Summit.⁵⁴ The CMA 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. We believe that given the size of the companies concerned, multilateralism will be required to force lasting change in business practices, and avoid Apple and Google ceding minor and narrow carve-outs one jurisdiction at a time. Epic is actively engaged on these issues and would be happy to offer support to the CMA. 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 CMA as it considers its own approach.

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 the course of 2022.

⁵³ CMA, Notice of intention to accept commitments offered by Google in relation to its Privacy Sandbox Proposals, para 3.1 (26 November 2021)

⁵⁴ UK Government, CMA hosts first two-day digital summit of G7 competition heads (29 November 2021)

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 nefarious 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 gatekeeper.⁵⁵

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 store.⁵⁶ 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 gatekeeper.⁵⁷

⁵⁵ 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>

⁵⁶ *Id.* at Art. 6(1)(k)

⁵⁷ *Id.* at Art. 6(1)(c)

2. 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 owner;⁵⁸ 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 offerings.⁵⁹

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.⁶⁰ The most recent version of that legislation is appended to this submission.

3. 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

⁵⁸ Open App Markets Act, S. 2710, Manager's Amendment, at Sec. 3(d)(1)(2).

⁵⁹ *Id.* at Sec. 3(A)(1)-(3)

⁶⁰ 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>.

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 announced on 4 November 2021 that it would (i) allow developers to offer third party in-app payment solutions of their choice in addition to Google Play Billing (GPB) system and (ii) let consumers choose the payment method they prefer. On the same day, however, Google announced that it would still charge a commission on transactions processed by third-party payment solutions that would be 4% lower than the commission on transactions processed by GPB.⁶¹ 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.

⁶¹ "Enabling alternative billing systems for users in South Korea" Google blog (4 Nov, 2021) <https://developers-kkr.googleblog.com/2021/11/enabling-alternative-billing-in-korea-en.html>.

Apple initially claimed that it was already in compliance and did not need to change its App Store policy.⁶² On 11 January 2022, 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.

The KCC is finalising the Guidelines and Enforcement Decree accompanying the new law with a view to avoiding Apple's and Google's circumvention tactics. 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.

4. 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 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

⁶² South Korea lawmaker says Apple, Google not doing enough to comply with app store law," Reuters, (17 Nov, 2021) <https://www.asahi.com/ajw/articles/14483307>.

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 able 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 app.⁶³ Apple is required to comply with this Decision as of 15 January 2022, and for two years.

On 24 January 2022, the ACM concluded that Apple had failed to comply with these requirements, imposing a first periodic penalty payment of 5 million Euros for non-compliance.⁶⁴ 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 Feb, 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.⁶⁵ On 7 February 2022, the ACM again fined Apple for non-compliance.⁶⁶

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

⁶³ 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>.

⁶⁴ Netherlands Authority for Consumers and Markets, "Apple fails to satisfy requirements set by ACM," (24 Jan 2022), <https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm>.

⁶⁵ Apple Developer Support, "Distributing dating apps in the Netherlands"

<https://developer.apple.com/support/storekit-external-entitlement>.

⁶⁶ "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-complied-with-order-2022-02-07/>.

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.

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—117th Cong., 2d Sess.

S. 2710

To promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by Mr. BLUMENTHAL

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Open App Markets
5 Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

8 (1) APP.—The term “app” means a software
9 application or electronic service that may be run or
10 directed by a user on a computer, a mobile device,
11 or any other general purpose computing device.

1 (2) APP STORE.—The term “app store” means
2 a publicly available website, software application, or
3 other electronic service that distributes apps from
4 third-party developers to users of a computer, a mo-
5 bile device, or any other general purpose computing
6 device.

7 (3) COVERED COMPANY.—The term “covered
8 company” means any person that owns or controls
9 an app store for which users in the United States
10 exceed 50,000,000.

11 (4) DEVELOPER.—The term “developer” means
12 a person that owns or controls an app or an app
13 store.

14 (5) IN-APP PAYMENT SYSTEM.—The term “in-
15 app payment system” means an application, service,
16 or user interface to manage billing or process the
17 payments from users of an app.

18 (6) NONPUBLIC BUSINESS INFORMATION.—The
19 term “nonpublic business information” means non-
20 public data that is—

21 (A) derived from a developer or an app or
22 app store owned or controlled by a developer,
23 including interactions between users and the
24 app or app store of the developer; and

1 (B) collected by a covered company in the
2 course of operating an app store or providing
3 an operating system.

4 **SEC. 3. PROTECTING A COMPETITIVE APP MARKET.**

5 (a) EXCLUSIVITY AND TYING.—A covered company
6 shall not—

7 (1) require developers to use or enable an in-
8 app payment system owned or controlled by the cov-
9 ered company or any of its business partners as a
10 condition of the distribution of an app on an app
11 store or accessible on an operating system;

12 (2) require as a term of distribution on an app
13 store that pricing terms or conditions of sale be
14 equal to or more favorable on its app store than the
15 terms or conditions under another app store; or

16 (3) take punitive action or otherwise impose
17 less favorable terms and conditions against a devel-
18 oper for using or offering different pricing terms or
19 conditions of sale through another in-app payment
20 system or on another app store.

21 (b) INTERFERENCE WITH LEGITIMATE BUSINESS
22 COMMUNICATIONS.—A covered company shall not impose
23 restrictions on communications of developers with the
24 users of the app through an app or direct outreach to a
25 user concerning legitimate business offers, such as pricing

1 terms and product or service offerings. Nothing in this
2 subsection shall prohibit a covered company from pro-
3 viding a user the option to offer consent prior to the collec-
4 tion and sharing of the data of the user by an app.

5 (c) NONPUBLIC BUSINESS INFORMATION.—A cov-
6 ered company shall not use nonpublic business information
7 derived from a third-party app for the purpose of com-
8 peting with that app.

9 (d) INTEROPERABILITY.—A covered company that
10 controls the operating system or operating system configu-
11 ration on which its app store operates shall allow and pro-
12 vide readily accessible means for users of that operating
13 system to—

14 (1) choose third-party apps or app stores as de-
15 faults for categories appropriate to the app or app
16 store;

17 (2) install third-party apps or app stores
18 through means other than its app store; and

19 (3) hide or delete apps or app stores provided
20 or preinstalled by the app store owner or any of its
21 business partners.

22 (e) SELF-PREFERENCING IN SEARCH.—

23 (1) IN GENERAL.—A covered company shall not
24 provide unequal treatment of apps in an app store
25 through unreasonably preferencing or ranking the

1 apps of the covered company or any of its business
2 partners over those of other apps in organic search
3 results.

4 (2) CONSIDERATIONS.—Unreasonably
5 preferencing—

6 (A) includes applying ranking schemes or
7 algorithms that prioritize apps based on a cri-
8 terion of ownership interest by the covered com-
9 pany or its business partners; and

10 (B) does not include clearly disclosed ad-
11 vertising.

12 (f) OPEN APP DEVELOPMENT.—A covered company
13 shall provide access to operating system interfaces, devel-
14 opment information, and hardware and software features
15 to developers on a timely basis and on terms that are
16 equivalent or functionally equivalent to the terms for ac-
17 cess by similar apps or functions provided by the covered
18 company or to its business partners.

19 **SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF**
20 **USERS.**

21 (a) IN GENERAL.—

22 (1) NO VIOLATION.—Subject to section (b), a
23 covered company shall not be in violation of section
24 3 for an action that is—

1 (A) necessary to achieve user privacy, secu-
2 rity, or digital safety;

3 (B) taken to prevent spam or fraud;

4 (C) necessary to prevent unlawful infringe-
5 ment of preexisting intellectual property; or

6 (D) taken to prevent a violation of, or
7 comply with, Federal or State law.

8 (2) PRIVACY AND SECURITY PROTECTIONS.—In
9 paragraph (1), the term “necessary to achieve user
10 privacy, security, or digital safety” includes—

11 (A) allowing an end user to opt in, and
12 providing information regarding the reasonable
13 risks, prior to enabling installation of the third-
14 party apps or app stores;

15 (B) removing malicious or fraudulent apps
16 or app stores from an end user device;

17 (C) providing an end user with the tech-
18 nical means to verify the authenticity and origin
19 of a third-party apps or app stores; and

20 (D) providing an end user with option to
21 limit the collection sharing of the data of the
22 user with third-party apps or app stores.

23 (b) REQUIREMENTS.—Subsection (a) shall only apply
24 if the covered company establishes by a preponderance of

1 the evidence that the action described in that subsection
2 is—

3 (1) applied on a demonstrably consistent basis
4 to—

5 (A) apps of the covered company or its
6 business partners; and

7 (B) other apps;

8 (2) not used as a pretext to exclude, or impose
9 unnecessary or discriminatory terms on, third-party
10 apps, in-app payment systems, or app stores; and

11 (3) narrowly tailored and could not be achieved
12 through a less discriminatory and technically pos-
13 sible means.

14 **SEC. 5. ENFORCEMENT.**

15 (a) ENFORCEMENT.—

16 (1) IN GENERAL.—The Federal Trade Commis-
17 sion, the Attorney General, and any attorney general
18 of a State subject to the requirements in paragraph
19 (4) shall enforce this Act in the same manner, by
20 the same means, and with the same jurisdiction,
21 powers, and duties as though all applicable terms
22 and provisions of the Federal Trade Commission Act
23 (15 U.S.C. 41 et seq.), the Sherman Act (15 U.S.C.
24 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.),
25 and Antitrust Civil Process Act (15 U.S.C. 1311 et

1 seq.), as appropriate, were incorporated into and
2 made a part of this Act.

3 (2) FEDERAL TRADE COMMISSION INDE-
4 PENDENT LITIGATION AUTHORITY.—If the Federal
5 Trade Commission has reason to believe that a cov-
6 ered company violated this Act, the Federal Trade
7 Commission may commence a civil action, in its own
8 name by any of its attorneys designated by it for
9 such purpose, to recover a civil penalty and seek
10 other appropriate relief in a district court of the
11 United States against the covered company.

12 (3) PARENS PATRIAE.—Any attorney general of
13 a State may bring a civil action in the name of such
14 State for a violation of this Act as parens patriae on
15 behalf of natural persons residing in such State, in
16 any district court of the United States having juris-
17 diction of the defendant, and may secure any form
18 of relief provided for in this section.

19 (b) SUITS BY DEVELOPERS INJURED.—

20 (1) IN GENERAL.—Except as provided in para-
21 graph (3), any developer injured by reason of any-
22 thing forbidden in this Act may sue therefor in any
23 district court of the United States in the district in
24 which the defendant resides or is found or has an
25 agent, without respect to the amount in controversy,

1 and shall recover threefold the damages by the devel-
2 oper sustained and the cost of suit, including a rea-
3 sonable attorney's fee. The court may award under
4 this subsection, pursuant to a motion by such devel-
5 oper promptly made, simple interest on actual dam-
6 ages for the period beginning on the date of service
7 of the pleading of the developer setting forth a claim
8 under this Act and ending on the date of judgment,
9 or for any shorter period therein, if the court finds
10 that the award of such interest for such period is
11 just in the circumstances. In determining whether
12 an award of interest under this subsection for any
13 period is just in the circumstances, the court shall
14 consider only—

15 (A) whether the developer or the opposing
16 party, or either party's representative, made
17 motions or asserted claims or defenses so lack-
18 ing in merit as to show that such party or rep-
19 resentative acted intentionally for delay or oth-
20 erwise acted in bad faith;

21 (B) whether, in the course of the action in-
22 volved, the developer or the opposing party, or
23 either party's representative, violated any appli-
24 cable rule, statute, or court order providing for

1 sanctions for dilatory behavior or otherwise pro-
2 viding for expeditious proceedings; and

3 (C) whether the developer or the opposing
4 party, or either party's representative, engaged
5 in conduct primarily for the purpose of delaying
6 the litigation or increasing the cost thereof.

7 (2) INJUNCTIVE RELIEF.—Except as provided
8 in paragraph (3), any developer shall be entitled to
9 sue for and have injunctive relief, in any court of the
10 United States having jurisdiction over the parties,
11 against threatened loss or damage by a violation of
12 this Act, when and under the same conditions and
13 principles as injunctive relief against threatened con-
14 duct that will cause loss or damage is granted by
15 courts of equity, under the rules governing such pro-
16 ceedings, and upon the execution of proper bond
17 against damages for an injunction improvidently
18 granted and a showing that the danger of irrep-
19 arable loss or damage is immediate, a preliminary
20 injunction may issue. In any action under this para-
21 graph in which the plaintiff substantially prevails,
22 the court shall award the cost of suit, including a
23 reasonable attorney's fee, to such plaintiff.

24 (3) FOREIGN STATE-OWNED ENTERPRISES.—A
25 developer of an app that is owned by, or under the

1 control of, a foreign state may not bring an action
2 under this subsection.

3 **SEC. 6. RULE OF CONSTRUCTION.**

4 Nothing in this Act may be construed—

5 (1) to limit—

6 (A) any authority of the Attorney General
7 or the Federal Trade Commission under the
8 antitrust laws (as defined in the first section of
9 the Clayton Act (15 U.S.C. 12), the Federal
10 Trade Commission Act (15 U.S.C. 41 et seq.),
11 or any other provision of law; or

12 (B) the application of any law;

13 (2) to require—

14 (A) a covered company to provide service
15 under a hardware or software warranty for
16 damage caused by third-party apps or app
17 stores installed through means other than the
18 app store of the covered company; or

19 (B) customer service for the installation or
20 operation of third-party apps or app stores de-
21 scribed in subparagraph (A);

22 (3) to prevent an action taken by a covered
23 company that is reasonably tailored to protect the
24 rights of third parties under section 106, 1101,
25 1201, or 1401 of title 17, United States Code, or

1 rights actionable under sections 32 or 43 of the Act
2 entitled “An Act to provide for the registration and
3 protection of trademarks used in commerce, to carry
4 out the provisions of certain international conven-
5 tions, and for other purposes”, approved July 5,
6 1946 (commonly known as the “Lanham Act” or the
7 “Trademark Act of 1946”) (15 U.S.C. 1114, 1125),
8 or corollary State law;

9 (4) to require a covered company to license any
10 intellectual property, including any trade secrets,
11 owned by or licensed to the covered company;

12 (5) to prevent a covered company from assert-
13 ing preexisting rights of the covered company under
14 intellectual property law to prevent the unlawful un-
15 authorized use of any intellectual property owned by
16 or duly licensed to the covered company; or

17 (6) to require a covered company to inter-
18 operate or share data with persons or business users
19 that—

20 (A) are on any list maintained by the Fed-
21 eral Government by which entities are identified
22 as limited or prohibited from engaging in eco-
23 nomic transactions as part of United States
24 sanctions or export control regimes; or

1 (B) have been identified as national secu-
2 rity, intelligence, or law enforcement risks.

3 **SEC. 7. SEVERABILITY.**

4 If any provision of this Act, or the application of such
5 a provision to any person or circumstance, is held to be
6 unconstitutional, the remaining provisions of this Act, and
7 the application of such provisions to any person or cir-
8 cumstance shall not be affected thereby.

9 **SEC. 8. EFFECTIVE DATE.**

10 This Act shall take effect on the date that is 180 days
11 after the date of enactment of this Act.