Coalition for APP FAIRNESS

CAF's submission to the Australian Competition and Consumer Commission's Issues Paper from 25 July 2024

The Coalition for App Fairness (CAF) welcomes the opportunity to submit its observations to the ACCC's issues paper on the future regulatory framework for digital platform services in Australia.

CAF is an independent non-profit organization, comprising more than 80 members who represent mobile app developers of all sizes. It was founded to advocate for freedom of choice and fair competition across the mobile app ecosystem. Its more than 80 members operate in many countries worldwide [1] Qoria (formerly Family Zone) and Greenheart Games were established in Australia and are members of the Coalition.

CAF urges global regulators and legislators to take action to ensure fair competition in the digital marketplace, particularly for mobile app developers. Numerous reports[2] have demonstrated existing harms and the need for regulation in this domain, including the ACCC's own 2nd interim report of their Digital Platform Services Inquiry, which focused on app marketplaces.[3]

CAF believes that Australian authorities should feel confident in taking forward measures that would promote more competition in the app ecosystem. The world's most popular online platforms and the app stores that govern access to them have become an indispensable gateway

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[1] For an overview of CAF members, please see: Members - Coalition for App Fairness

[2] Please see reports in jurisdictions such as the UK, EU, the US and Australia including the following: UK Competition and Markets Authority, online platforms and digital advertising market study report, published 1 July 2020, available at:https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study ; mobile ecosystems market study report (the "Mobile Ecosystems Report"), published 10 June 2022, available at: https://www.gov.uk/cma-cases/mobile-ecosystems-market-study#final-report ; the report of the digital markets taskforce, published 8 December 2020, available at: https://www.gov.uk/cma-cases/digital-markets-taskforce ; Report of the Digital Competition Expert Panel, Unlocking digital competition, published March 2019, available at: https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf ; Stigler Center report on digital platforms, published September 2019, available at: https://www.chicagobooth.edu/research/stigler/news-and-media/committee-on-digital-platforms-final-report ; the US House of Representatives Subcommittee on Antitrust, Investigation of Competition in Digital Markets, published October 2020, available at: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519/ ; the Cremer report, Competition Policy for the Digital Era, published April 2019, available at: https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf ; and the reports of the Australian digital platform services inquiry such as the second interim report: https://www.accc.gov.au/inquiries-and-consultations/digital-platform-services-inquiry-2020-25/march-2021-interim-report

[3] ACCC, "Digital Platform Services Inquiry: Interim report no. 2: app marketplaces", March 2021, available at Digital platform services (accc.gov.au)

for consumers to access digital products and services in Australia and worldwide. The future of Australian tech depends on an open, competitive marketplace that fosters innovation and benefits consumers with lower prices and choice.

It is encouraging that the ACCC has already recommended a new, ex-ante digital competition regime in their 5th Interim report from September 2022[4] and that the Australian government supports this[5]. With such legislation, Australia would be taking a similar path as many other countries and entities.

CAF agrees wholeheartedly with the ACCC that ex-ante digital competition legislation will offer important new tools for regulators to address the harm done by anti-competitive behavior. Numerous courts and competition authorities are currently investigating Apple and Google for their abusive app store practices. But as the ACCC notes, "enforcement under existing competition and consumer protection legislation, […] which by its nature takes a long time and is directed towards very specific issues, is insufficient to address the breadth of concerns arising in relation to rapidly changing digital platform services."[6]

An *ex ante* approach will benefit consumers and businesses alike by clearly defining the bounds of acceptable conduct and bringing an end to abuses in a much more rapid manner. Without reform, companies will continue to be pushed out of business. Those who decided it was futile to compete with the tech giants will never return. This has obvious detrimental effects for competition and innovation. An ex-ante regulatory regime would enable this harm to be avoided in the first place so that all market participants benefit from a level playing field. CAF is keen to engage in a constructive dialogue with the Australian authorities working on such legislation.

With this paper, CAF is taking the opportunity to comment on Topic 1 of the Issues Paper: international regulatory developments. As a coalition active around the world, we can provide a perspective on the global experiences we've encountered in advocating for more choice and competition in app stores. Further below, we also briefly share our perspective on Topic 2: developments in digital platform markets.

CAF has engaged constructively with policy makers on the EU Digital Markets Act (DMA), which passed in November 2022 with a compliance deadline for gatekeepers in March 2024; and the UK's Digital Markets, Competition and Consumers Act (DMCC) which recently became law. In

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[4] ACC, "Digital Platform Services Inquiry: Interim report no. 5: regulatory reform", September 2022, available at Digital platform services inquiry - September 2022 interim report.pdf (accc.gov.au)
[5] Australian government - Treasury, "Government Response to ACCC Digital Platform Services Inquiry", available at Government Response to ACCC Digital Platform Services Inquiry (treasury.gov.au)
[6] ACCC, "Digital Platform Services Inquiry: Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services" ("ACCC Discussion Paper"), February 2022, available at DPSI September 2022 Report - Discussion Paper, page 4.

addition, we have worked closely with US lawmakers on the Open App Markets Act (OAMA) which passed out of the Senate committee with a bipartisan vote of 20-2.

Enforcement is crucial to drive real change in digital competition

In Australia like anywhere else in the world, committed and focused enforcement will be key in order to make a real difference for consumers and innovators. Despite legislation, litigation and other competition measures in many markets around the globe, very little has changed yet for consumers. They are still denied the benefits of lower prices, innovation and being able to choose between services. App developers pay crippling fees and new app stores have yet to gain meaningful traction **because Apple and Google continue to erect barriers to competition.**

Unsurprisingly, the companies that control access to mobile devices are not willing to give up their power without a fight. If gatekeepers are able to escape the rules, they will do so, and the harms arising from their conduct will persist.

Ex ante regimes such as the EU DMA, the UK DMCC, the Japanese Act on Promotion of Competition for Specified Smartphone Software ("the Smartphone Act") or the future Australian regime should give regulators important tools and powers they need to rein in Apple's and Google's control. But experiences with the DMA have shown that even in the case of ex ante legislation, the challenge is to create an effective framework with rules and consequences that prevent Apple and Google - the two Big Tech companies controlling the app ecosystem - from circumventing the law and push them to change their behavior.

The EU DMA, the UK DMCC and the Japanese Smartphone Act are all structured similarly, with designated gatekeepers having to comply with a certain set of obligations. If compliance is lacking, the regulator can take measures in the form of fines or penalties subject to the role of federal courts. From previous reports, we understand that the ACCC is considering similar legislation.

Particular attention should be paid to effective and quick enforcement throughout all aspects of Australia's new ex ante legislation. Delay and circumvention tactics by gatekeepers should be avoided as much as possible. In the paragraphs below, we share our recommendations to help achieve this, building on recent experiences in other parts of the world.

Designation

There is a trade-off to be made between quantitative criteria, which may be quicker and easier to apply, and qualitative criteria, which may enable the regime to be targeted more specifically at firms who exhibit gatekeeping power. The DMA uses primarily quantitative criteria based on turnover and customer numbers, while the DMCC also allows for a more qualitative approach.

We would recommend the ACCC to consider a combination of quantitative and qualitative criteria, while keeping in mind the risk that gatekeepers dispute a potential designation on the basis of qualitative criteria. This could delay the process and make the regime grind to a halt before implementation has even started. Regardless of the method of designation, it should lead to a quick and unequivocal designation of the large companies that hold dominant positions - Apple and Google in the case of app stores.

We would also recommend a broad designation of gatekeeper services to prevent designated companies from moving anti-competitive behavior around the ecosystem or to adjacent business (as is the case with Google's relationship with OEMs). For example, narrow designation that only applies to app stores may make it easier to move harm to the operating system; or from the OS to the hardware. Regulators can avoid this game of regulatory whack-a-mole by ensuring they reserve themselves the breadth to address Apple and Google's ecosystem as a whole. .

Obligations

The DMA imposes a standardized set of "dos and don'ts" across designated services, whereas the DMCC Act allows for tailored, company-specific Conduct Requirements (CRs). The Japanese law is a fusion of the two - "dos and don'ts" with guidance underpinning their specific application.

The DMA's standard rulebook has allowed the EU regulator to create quickly a new set of rules to apply gatekeepers following the adoption of the law, without the need for extensive deliberation and appeals. However, since the DMA in Europe has gone into effect, both gatekeepers have been attempting to circumvent the new rules. Their compliance falls short in several areas, as highlighted in several instances by CAF[7] and confirmed by the European Commission, who have opened multiple non-compliance investigations.[8]

If properly drafted and implemented, the DMCC regime will allow regulators to better tailor interventions through targeted Conduct Requirements that consider the unique characteristics of each designated platform's business model or are more amenable to rapid amendment if confronted with evasive and uncooperative gatekeepers. This approach can enable regulators to quickly adapt and refine regulatory measures in response to new practices or technologies, as well as providing a more efficient enforcement and appeals process, potentially leading to faster resolution of disputes and greater regulatory certainty.

The ACCC's proposal for *service-specific* codes appears to offer a good middle ground between the EU's standardized approach across all platform types and the UK's company-specific model.

[7] See more information here : News - Coalition for App Fairness
[8] See more information in the Commission's decision: https://ec.europa.eu/competition/digital_markets_act/cases/202431/DMA_100206_50.pdf

Prescribing general obligations in legislation and specific requirements in codes enables the legislature to dictate the boundaries of the regime, while preserving the expert regulator's ability to design the complex requirements relating to each gatekeeper service. It therefore strikes a good balance between certainty and flexibility.

The ability to consider and update the rules regularly without needing to go back to Parliament to ask for the legislation to be updated is also a significant benefit of the ACCC's proposed approach.

Finally, we would recommend explicitly denoting in the legislation and/or service-specific codes where certain services or technical abilities should be offered 'free of charge'. As we have seen in Apple's non-compliance with the DMA, gatekeepers will defend revenue streams resulting from anti-competitive taxes at any costs, by simply moving fees elsewhere in their ecosystem and/or giving them a different name.

Appeals, non-compliance and circumvention

The EU DMA, the UK DMCC and the Japanese Smartphone Act all provide for significant enforcement powers, including substantial fines for non-compliance.

Given the long history of gatekeepers delaying and avoiding pro-competition regulation (more information below), we recommend the ACCC to pay particular attention to the issue of non-compliance enforcement: any approach chosen should be accompanied by an effective implementation and enforcement regime, which will encompass strong sanctions that are effective in constraining the gatekeepers' harmful conduct. In this regard, it is of utmost importance that the enforcer be granted sufficient human and financial resources to monitor, implement and enforce the rules.

We would recommend that the ACCC considers the gatekeepers' usual delay tactics when deciding on an appeals process. We have seen globally that gatekeepers will use any means available to stall litigation and delay the advent of meaningful competition. Comparing the DMCC to the DMA, we hope that the UK's Judicial Review Standard will move faster than the EU's multi-court process available for appeal under traditional competition rules. The ACCC now has the opportunity to craft an appeals standard that balances the rights of gatekeepers with the need for speedy action to introduce competition to these markets.

It is also of utmost importance that any possibility for exceptions on grounds of privacy and security (or any requirements placed on Apple and Google regarding malicious or exploitative apps) are not abused to circumvent pro-competition measures. We have observed time and again how security and privacy have been misused as justifications for anti-competitive conduct, for example to block sideloading and alternative app stores. For a full deconstruction of Apple's

arguments on these issues, please see the CMA's Mobile Ecosystems Report.[9] While CAF understands the need to include such exceptions, we recommend that the burden of proof should be on the gatekeeper seeking to rely on the exception.

Finally, we recommend that the future Australian legislation contains explicit language on anti-circumvention (e.g. DMA Article 13) to help ensure effective enforcement.

Apple and Google's past behavior shows the necessity for aggressive enforcement and explicit language on anti-circumvention. The recent circumvention attempts in the EU are just the latest development in the long history of Apple and Google avoiding pro-competition regulations and policies. For example, we've seen them feign compliance in the following jurisdictions:

- The South Korea Telecommunication Business Act: While Apple and Google claim to comply with the law intended to give developers choice in payment processing services, the companies found workarounds and introduced a new 26% fee for using third-party payment systems, which completely undermines the spirit of the law. This fee makes the economic conditions of leaving their respective app store ecosystems untenable, particularly for small businesses, and as a result they continue to stifle competition in the marketplace.
- The Dutch Authority for Consumers and Markets (ACM): Apple's proposals to comply with ACM regulations were not sufficient; the company was repeatedly fined for violating where Apple cabined proposals to dating apps and charged fees as high as 33% when using alternative billing.

App stores should be the top priority in any new digital competition regime

The ACCC has also requested input on major developments or key trends in digital platform markets (Topic 2).

When it comes to app marketplaces, Apple and Google have simply continued to operate their app stores in ways that have led to significant harm to competition and consumers.

We believe that app stores and mobile operating systems should be prioritized in any new digital competition regulations in Australia. App marketplaces are critical gateways through which consumers engage with the digital world. Creating more choice and fair competition in app marketplaces would send a ripple effect through the digital ecosystem, with positive effects for consumers and innovators in many different domains.

[9] CMA, Mobile ecosystems market study final report, available here: Final report (publishing.service.gov.uk). See, for example, para 7.76: "[t]he evidence we have gathered through the course of this study suggests that many of these risks of unintended [privacy, security and online safety] consequences highlighted to us by Apple in particular are likely to be overstated". See also paras 5.75, 6.37, 7.79 for similar points.

This is an area that has been comprehensively written about by respected regulators around the world. The harms in this area are clear and have not been successfully addressed by existing competition law. They include:

- harms arising from the mandatory use of Apple's and Google's payment systems, including an excessive commission rate of up to 30%;
- harms arising from the disintermediation of app developers from their users (including the notorious anti-steering provisions which prevent direct communication with users);
- harms arising from the collection of app developers' commercially sensitive information and using it when competing against them;
- harms arising from unpredictable app review processes whereby Apple and Google have unique power over app developers wishing to reach mobile users because they can reject their apps, sometimes for spurious reasons;
- harm arising from Apple's and Google's self-preferencing practices whereby Apple and Google's vertical integration enables them to give their own downstream apps an unfair advantage; and
- harms arising from restrictions on access to technology and functionalities such as APIs or chips (like the near-field communication chip or the ultra-wideband chip).

The ACCC now has the opportunity to address these harms. We recommend the following solutions for app marketplaces, which would have a tremendous positive effect on competition and fairness. We would recommend the ACCC to prioritize these when designing new ex ante legislation:

1. Consumers must have a free choice in where they download apps – through the gatekeeper's app store, a third-party app store or on a website. Gatekeepers must be barred from banning or otherwise impeding the use of third-party app stores and direct downloads, including through punishing fee structures..
2. Mobile app developers must be able to communicate directly with consumers about offers, discounts, and other features both within an app or through any other channel without any restrictions, including fees, by the gatekeeper.
3. Mobile app developers must be able to offer the payment options of their choice for in-app purchases, whether it's Apple or Google's payment options or a third-party payment solution. And when a third-party payment solution is used, the gatekeepers must be barred from imposing an excessive or unwarranted fee.
4. Developers shouldn't be blocked from the platform or discriminated against based on a developer's business model, how it delivers content and services, whether it competes in any way with the app store owner or as retribution.
5. All mobile app developers should have timely access to the same interoperability interfaces and technical information that the app store owner makes available to its own

developers. Gatekeepers cannot reserve special privileges for their own internal teams and cannot make gratuitous changes to interfaces and raise rivals' costs.

6. Gatekeepers must end arbitrary and unexplained exclusions or failures to approve app store content and app updates.
7. Mobile ecosystem gatekeepers should be barred from self-preferencing their own apps or services or interfering with users' choice of preferences or defaults.
8. A developer's data and other non-public business information or intellectual property should not be used by the mobile ecosystem gatekeeper to compete with the developer – a practice known as sherlocking.
9. Gatekeepers should provide app developers with timely access to data generated by end-users in the developers' app.
10. Apple and Google should provide access to their app stores at transparent, fair and non-discriminatory conditions.

Removing Apple's and Google's ability to distort competition in these ways would help innovative firms to thrive, to the benefit of Australian entrepreneurs, consumers and the growth of the economy.