29 January 2026

Mr. Matthew Boswell
Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau QC K1A 096

RE: ***Comments of ACT | The App Association to the Competition Bureau on Proposed Anti-Competitive Conduct and Agreements Enforcement Guidelines***

ACT | The App Association appreciates the opportunity to support the Canadian Competition Bureau (CCB) on its proposed Anti-Competitive Conduct and Agreements Enforcement Guidelines.[1]

ACT represents the small business technology developer community located both within Canada and across the globe. These companies drive a global app economy worth more than CAD $2.1 trillion, and this economy continues to grow.[2] ACT members leverage the connectivity of smart devices to create innovative solutions that introduce new efficiencies across consumer and enterprise use cases and rely on a predictable and fair approach to platform regulation to grow their businesses and create new jobs; therefore, the Canadian government's inquiry into the future of competition policy is directly relevant to us, and we urge for the careful consideration of our views.

Generally, ACT encourages flexible, industry-agnostic approach to competition policy and enforcement. ACT appreciates the initiative to modernize the Competition Act and to ensure sound Canadian competition law that fits with the growing Canadian economy. We applaud the Canadian government's recognition of emerging digital markets and share the common goal to advance consumer choice and market participation. To continue advancing the interests of Canadian developers in improving competition and technical or economic progress, the CCB should provide harmonized and predictable legal and business environments, which will enable Canada's governance approach to keep pace with changes to the marketplace brought on by rapid technological advancements that cannot be anticipated.

As CCB modernizes Canada's competition framework to address the realities of digital markets, we urge for CCB's focus on sectors that matter to Canadians and its recognition that effective competition enforcement must balance the interests of all market participants, including the SMEs that drive innovation in the digital economy. The app economy, powered by mobile and cloud technologies, generates immense value to Canada every year. Small businesses within this ecosystem depend on fair, predictable, and balanced competition rules that enable them to

[1] https://competition-bureau.canada.ca/en/how-we-foster-competition/consultations/public-consultation-new-anti-competitive-conduct-and-agreements-guidelines.
[2] See https://actonline.org/global-appcon22-competition-and-privacy/.

compete on the merits of their innovations rather than be subject to anti-competitive conduct by larger market participants.

Below, ACT provides general views on the state of, and how to improve, competition in digitally-driven markets. Notably, ACT explains that:

- Small businesses within the digital ecosystem rely on a flexible, industry-agnostic approach to competition policy and enforcement. A predictable legal and business environment allows for innovators to better navigate changes to the marketplace brought on by technological advancements that cannot be anticipated.
- Rigorous economic analysis is a cornerstone of any review or enforcement and must be continued in the Canadian review process as it provides a transparent and objective method of evaluation in enforcement and allows businesses to predict when their actions may or may not create antitrust enforcement concerns. Reducing the role of or removing economic analysis from Canadian competition decision-making processes (i.e consumer v. supplier surplus) would create uncertainty for businesses, disrupting legal and business certainties and limiting the ability of the innovative companies we represent to succeed.
- Objective data-driven evidence should be used to inform any changes made to competition reviews/enforcements of acquisitions/mergers rather than edge-use cases and hypotheticals. *"Per se"* enforcement without further inquiry into their effects on the market or the existence of an objective competitive justification would create fewer incentives for new innovators to join the emerging market.
- The benefits of bundled/variety of digital software distribution platforms should be appropriately acknowledged within the November 2022 consultation report. Otherwise, the Canadian government risks biasing later policy decisions made in the policy development process. Crafting simpler tests to determine *de facto* dominant power would infer costly harm downstream.

ACT also provide views on unique competition issues that arise in standard essential patent (SEP) licensing scenarios. We discuss how fair, reasonable, and non-discriminatory (FRAND) licensing commitments, transparency in SEP licensing, and the need for balanced and predictable frameworks that enable small businesses to use technologies essential to technical standards without facing disproportionate barriers or unfair licensing demands require CCB's attention and action.

ACT shares the Canadian government's goals of advancing competition and innovation. We offer the perspectives and recommendations below per CCB's consultation, and appreciate the opportunity to assist the Canadian government in its efforts moving forward.

DIGITAL PLATFORMS AND COMPETITION

I. The Impact of Platforms on Software Distribution: What Makes an Ecosystem Work?

In just over a decade, the app ecosystem has grown exponentially alongside the rise of the smartphone. Valued at over C$2.1 trillion, the app economy is driven by app developers and innovators who rely on software platforms to reach consumers around the globe. In 2020, the total number of app downloads was 247 billion (up from 194 billion in 2018)[3], and the reach of software applications continues to grow. However, the app economy's trajectory encapsulates several factors that have contributed to its success.

The single most important factor in the app ecosystem's dynamic growth and unrivalled success is the presence of curated platforms, or app stores. Trusted app stores serve as a vital foundation for the growing uses of apps across industries and enterprises. Three key attributes led to the revolution in software distribution:

1. The provision of a bundle of services that reduces overhead costs;
2. Instantaneous and cost-effective consumer trust mechanisms; and
3. Cost-effective access to a global market.

Today, every successful platform for mobile, desktop, gaming, and even cloud computing must provide these features or risk failing in the marketplace. This niche ecosystem of developers and platform owners plays a dynamic role in promoting a healthy competitive marketplace for users to thrive and connect.

II. How Developers Distributed Software Before "Large" Platforms

Much has changed for consumers and developers since the early days of software applications. In the early 1990s, consumers were tasked with the challenge of locating and then traveling to a brick-and-mortar store that happened to sell software. Once internet connectivity became a standard feature in most private residences, consumers began to download applications from the comfort of their homes without having to step foot in a physical store. Despite the changes brought by internet connectivity, the golden age of personal computer (PC) software pales in comparison to the size and scale of the mobile app revolution during which software developers evolved into app developers. During this transition to online distribution, consumers were often unable to trust software downloaded from the internet because the vetting function of platforms had not yet been introduced.

Before the ubiquity of mobile platforms, the software ecosystem ran on PCs, and software companies had to cobble together a distribution plan, including the creation of consumer trust from the ground up. This forced early app companies, often with teams of one to two developers, to wear many hats to develop, market, and benefit from the sale of their products. App companies

[3] L. Ceci, *Number of Mobile App Downloads Worldwide from 2018 to 2023*, Statista, https://www.statista.com/statistics/241587/number-of-free-mobile-app-downloads-worldwide/ (showing consistent growth in app downloads from 2018-2020 with further growth projected through 2023).

were not only required to write code for their products, but they were also responsible for:

1. Managing their public websites;
2. Hiring third parties to handle financial transactions;
3. Employing legal teams to protect their intellectual property; and
4. Contracting with distributors to promote and secure consumer trust in their product.

The skillsets required to manage the overhead of online software distribution were often not "core competencies" of small development companies, and the additional steps cost app developers valuable time and money, with little tangible benefit.

In the internet economy, immediate consumer trust is almost impossible without a substantial online reputation, and not attaining it spells death for any app company. However, what does "trust" mean? In this context, trust refers to an established relationship between the app company and consumer where the consumer demonstrates confidence to install the app and disclose otherwise personal information to an app company. Prior to platforms, software developers often had to hand over their products to companies with a significant reputation to break through the trust barrier.

Developers in a pre-app store world experienced difficult and oppressive distributor requirements placed on software developers that predated the platform ecosystem. When dealing with retail distributors, these small businesses were required to guarantee a competitive price, pay 3-6 percent of sales as a marketing fee in addition to C$218,000 for product launch marketing, shipping to deliver their products to distributors, and buying back unsold products. Once contracts were negotiated, software developers were often required to spend additional money so that in-store catalogues would feature their product or retail stores would place their product on an endcap display, all before consumers even saw the products.

However, with the advent of the smartphone and app stores, the experience of these innovative small businesses became a relic of the past. The smartphone, in its brief history, revolutionized the economy at large and established a symbiotic relationship between software platforms and developers. The fact that developers have a choice in which platform to use to reach their consumers and clients underscores that platforms compete not only as app marketplaces but as developer service providers. When developers distribute an app through an internet browser, and not through a platform's app store, the developer still benefits from the trust consumers have that the web browser running on their phone is safe to use. In this way, developers can choose not to make use of a platform's developer services and instead use other service providers for functions like distribution and marketing while still reaching the same consumer base.

III. The Applicability of Antitrust Law to Software Platforms: Two-Sided Market Analysis

a. Software Platforms and Market Definitions

A market definition should precede a determination of market power and abuse. While a market definition should consider antitrust foundations such as the existence of substitutes, such an

analysis must be fact-specific and traditional antitrust analysis is not easily applied to platforms that often are multi-sided markets.

Multi-sided platforms differ from traditional markets in important ways because the platform creator's practices and pricing on one side of the market affect the other side. For example, investments that increase participation or quality on one side of the market create the value that is sought by the other side. The value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A platform firm must therefore be concerned not only with its own quality and advertising, but also that of the vendors who operate over its network.[4]

Traditionally, antitrust analyses on two-sided markets (e.g. newspapers) have focused on only one side of the market because of the limited impact of network effects. Where platforms experience more indirect network effects with linked demands and pricing—such as in the case of software app distribution platforms—including both sides in the relevant antitrust market is appropriate. Mobile platform markets likely require consideration of at least three distinct markets (possibly four if one considers wireless carriers) to perform one transaction. But even where multi-sided platforms have demonstrable competition on both sides of a transaction, using traditional constructs such as the "small but significant non-transitory increase in price test" (SSNIP) on one side of the transaction would lead to the misapplication of antitrust law.

The Canadian government should provide flexibility for case-by-case market definitions, and a full understanding of a market is required to appropriately apply antitrust law to multi-sided digital platforms. Both legacy and novel economic and legal approaches can and should address the complexities of multi-sided platforms.

Notably, Innovation, Science and Economic Development Canada (ISED) has previously acknowledged the existence of several prominent digital platforms in existence today labeling them as "large digital platforms" that are "gatekeepers" of our digital era;[5] however, ACT believes that such considerations of digital markets should be supplemented by further discussing the broad range and diversity of digital platforms that serve countless consumer and enterprise use cases and explore the ways in which they compete with one another for developers and customers. While there is a persistent tendency to include only two platform providers, Apple and Google, in a list of "app stores," for developers the market is much wider, with different choices being most desirable based on the use case and potential customer base. Certainly, the Apple and Google app stores offer immense value that developers realize through lower overhead and compliance costs, built-in customer trust, increased speed to market, and wider distribution and market access, as discussed elsewhere in this comment. These platforms provide a centralized framework for app developers to engage and secure visibility with the 3.4 billion app users worldwide. With lower costs and barriers to entry, both fledgling and established app developers can find success. In addition to the Apple and Google app stores, ACT members leverage many further options for developers. A game developer can choose platforms like Epic or Steam, and enterprise developers can look to hundreds of proprietary, custom platforms or could create their own. Moreover, for

[4] Mark Rysman, *The Economics of Two-Sided Markets*, 23 J. Econ. Persp. 125, 136 (2009).
[5] ISED, *The Future of Competition Policy in Canada* (2022) at p. 30-31, available at https://CCB-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf.

developers looking to reach a general audience, using the web is an alternative, especially for companies that are looking for different kinds of distribution or search services than those available on platforms. Additionally, software developers could choose to advertise on Facebook or distribute their products through Amazon, or one of the Chinese platforms. It is worth noting, however, that there are some important distinctions between software platforms—like the App Store or Google Play which provide a marketplace for software apps—and social media platforms or "aggregators" that connect people with information and are fueled by data. Aggregators like Facebook and Twitter, for example, connect people with information and other people (and generate valuable data in the process), while the Google Play store and the App Store provide a marketplace for consumers and app developers to transact directly. These differences illustrate the diversity in the market for distribution methods, as developers may prefer one model over another.

And although developers can choose from multiple platforms, there is no such thing as a perfect platform. Many app developers pay a fee to platforms for developer services, and they expect those services to meet their needs. Just as online companies must clearly communicate their data practices to consumers, so must platforms clearly define the requirements and details of their terms of service to developers. For example, when platforms change their developer guidelines, they must communicate clearly and ensure developers understand what the changes mean for them and their customer relationships.

b. Software Distribution Platforms, Market Power, and Monopoly Power

Once a market has been appropriately defined, an antitrust analysis would turn to a determination of market and monopoly power. Market power and monopoly power are related concepts but are not the same. Market power is the seller's ability to raise prices above those that would be charged in a competitive market, while monopoly power occurs when a firm has the power to control prices and exclude competition. CCB should distinguish the two concepts as a matter of degree, with monopoly power being higher. However, a firm's mere possession of either market power or monopoly power is not enough to find competitive harm; it must be demonstrated that the firm unfairly values its products resulting in harm to consumers and competitors. Demonstration of such abuse is critical to properly determining whether antitrust remedies are appropriate, and if so, to what degree. ACT urges for its analysis to be further considered along market power/share as recent amendments allude to policies that could further protect competitors from one another while imposing higher costs to consumers.

Platforms play an important role in tech-driven markets as well as across a variety of economic sectors, bundling sets of services together for sellers and connecting those sellers with specific categories of buyers. Canadian antitrust policy should reflect that market power assessments should be more holistic and rely on factors past market share alone, and that new digital platforms illustrate that the application of traditional antitrust fact patterns to complex software platforms is ill-advised. Over-reliance on basic market share (e.g. the relative size of a user base) breakdowns wrongly equates *share* with *power*, ignoring unique attributes of multi-sided platforms such as the ability to benefit from multiple services on the same platform, a low barrier to substitution, and ease of market entry by new competitors. Such characteristics minimize the lock-in effect on users. Further, a proper antitrust analysis should also demonstrate that the monopoly power at issue is not short-lived. Such a determination will, again, be highly fact-dependent and should be comprehensive, based on rigorous and objective economic analysis.

We also strongly caution the Canadian government to avoid relying on unproven allegations made by outlier opportunist companies seeking to upend the harmonious app ecosystem for their own company's gain. As noted by the Canadian Competition Bureau in its 2017 investigation of Apple Inc. which alleged the conduct of Apple using its "market power" to dictate their terms with wireless providers/OEMs on the sale/marketing of iPhones, which resulted in a finding that "did not find evidence to suggest that the Apple Terms resulted in a significant effect on competition". We strongly urge the Canadian government to consider the viewpoints of the small business developer community as it did in its 2017 investigation. The indicated amendments to employ a second part of a unilateral conduct test would prescribe any conduct done by larger firms that are: "act(s) intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition".[6] We warn language that seeks to protect competitors over consumers could have grave affects to consumers, but also the dynamic competition within the market.

IV. The Software Side of the Market

Turning to the different sides of the software platform market, the most visible side for the general public is the one characterized by software sellers (app developers) selling to software consumers (businesses and individual consumers). One of the most often-cited alleged competitive deficiencies on this side of the market is the practice of self-preferencing by "dominating" platforms. Considering the unique nature of software distribution platforms, self-preferencing is in most cases pro-competitive because it is an example of vertical integration. We urge the Canadian government to conclude that lessening the standards of "anti-competitive" harm will only reduce efficiency and raise costs for smaller developers as lessening requirements to show harm will cause an increase in litigation. The Bureau should resist the temptation to call for short-term fixes to an emerging, long-term market. There are minimal antitrust issues in the digital market because users can easily switch to another platform.

Considering that smartphones are music players, cameras, and multimodal communications devices, a narrowly focused view of one of these features without recognizing the integration of the same into the devices is incompatible with the way consumers experience them. Moreover, the Canadian government should expect competition to discipline examples where self-preferencing by a dominant firm is bad for consumers because those consumers can leave the platform due to demonstrably low switching costs. Just like other categories of market activity, an antitrust inquiry into self-preferencing is generally only appropriate where the company at issue has market power and where it is using that market power to harm competition and consumers. Unfortunately, in other jurisdictions such as the European Union (EU), policymakers have proposed flipping the burden onto platforms to show that self-preferencing has no long-run exclusionary effects and either the absence of adverse effects on competition or an overriding efficiency rationale. ACT discourages such an approach in Canada because it would chill market activity that is likely to benefit consumers. Canada should continue to support its Canadian developers and policies with sound academic and economic analysis of how it may impact innovation long term.

V. The Developer Services Side of the Market

[6] *Id.* At 33

Aside from the antitrust attacks on platform activity in the software half of the two-sided market, critics also allege competition abuses in the developer services side of the market. The Canadian government should be especially wary of populist calls for the overapplication of antitrust law to digital platform activity on this side of the market. Some are seeking to leverage this trend to use the antitrust laws to punish their competitors and tend to overstate the problems they identify. For example, advocates for antitrust intervention point to the cost of the services software platforms provide to developers as evidence that policymakers should expand antitrust law. To show that paying for developer services is unfair, they compare the cost of software distribution to the cost of payment processing. Similarly, payment processing is just one element of the array of services you get on a software platform, which includes: immediate availability through hundreds of millions of people's devices; marketing through the app store; privacy features embedded in the platform; assistance with intellectual property protection; and security features built into the platform. Complaints about the costs of developer services paid to platforms are overstated because such costs are being compared to a much less substantial service and do not warrant an expansion of antitrust law or the creation of a new regulatory regime to reduce the price of developer services.

The other evidence advocates offer to show harm to competition occurs in making software available on the open internet free when it is not; software distribution on a platform generally costs money. As discussed above, selling software on the open internet requires the seller to take on several tasks the software platform bundles together (including marketing, intellectual property policing, privacy controls, security features, and payment processing). And even taking it at face value, the premise has the inconvenient characteristic of proving the opposite point—that is, selling software on the open internet can be a substitute for selling software on a platform. Not only that, detractors of software platforms say they have no choice but to submit to software platform demands and then openly admit that they need not submit to software platform demands because they sell their software on the open internet instead. It is hard to imagine that this internal inconsistency goes unnoticed, and observers likely cannot help but discern from this that software sellers have options. Indeed, many other developers have made the transition off platforms without claims of anticompetitive conduct. Substitutes, even when they are not identical, are common in market economies and tend to signal healthy competition.

The other conclusion the Canadian government should draw from these arguments is that policymakers should be wary of opportunistic behavior by well-resourced competitors disguised as antitrust concerns. Those that are most vocal often imply they are speaking for the app economy as a whole, but in reality, they tend to be larger companies seeking to use antitrust law or other policy levers to undermine competitors. Right now, the largest software platforms generally charge the same (as a percentage of revenue) for developer services regardless of the company's size or political clout, or in some cases less for smaller developers. Smaller developers have the advantage in either of these arrangements because they do not have the leverage to negotiate better terms on their own, as larger companies do. Overtures to have the Canadian government involve themselves in developer-platform relations, therefore, may benefit the largest software companies on the platforms while leaving small developers like ACT members worse off. If large software companies convince the Canadian government to require software platforms to give them a better one-off deal, ACT members and their clients and customers are forced to subsidize the resulting discount for these larger companies. Adding insult to injury, many ACT member companies compete with these larger firms, so the benefit handed to the larger companies could directly disadvantage ACT members. ACT appreciates the Canadian government's extensive attention to refusal to deal cases with its Section 75 enforcement, however, we want to make a

point that not all refusal-to-deal situations are anti-competitive, as when elements of a competitor "free-riding" are present they should justify firms' refusal to deal with that party.

Even as the antitrust concerns expressed in this area are often overstated, a competition analysis of these dynamics is not always the final say, and antitrust concerns may conflict with countervailing policy priorities. For example, policymakers have raised alarms over measures software platforms use to protect consumer privacy. In one instance, a software platform faced antitrust concerns after a decision to curtail apps' ability to track a consumer's location even when the app is not running unless the consumer clearly consents. Advocates exert a steady stream of pressure on software companies and platforms to improve their privacy practices, especially with respect to location data, often pointing to how companies collect such sensitive personal information. In reality, privacy controls at the platform level ameliorate this perceived problem by making it easier to set collection rules for all or specific apps.

Policymakers have long made it clear that companies should embed privacy into the design of their products and services. Accordingly, the purpose of a privacy prompt from the platform's operating system should not be to confuse a consumer into selecting an option that gives away more data than they intended. It follows that requiring platforms to make it easier to provide location data, even when an app is not running than it is to protect that data—because doing so would help a specific app developer—runs headlong into the policy imperative of privacy by design. Looking at the issue solely from a competition lens is, therefore, an incomplete view. Moreover, the more privacy-protective approach of one software platform differentiates it competitively from other platforms which arguably make it easier for developers to collect sensitive data. In resolving these policy tangles, the focus should be on what works best for consumers. Antitrust law by itself rightfully addresses consumer welfare — it does not seek to benefit competitors. So, if a platform has an offering that a consumer prefers over the offering of an independent developer, the Canadian government should ask whether the complaints of powerful competitors necessitate legislating away that choice.

ACT members are selective about the markets they enter, but they compete aggressively. And the presence of a powerful and well-resourced competitor is not always enough to totally discourage entry. Having plentiful resources is an undeniable advantage as a competitor (whether it is a platform or not), but our member companies exist because they fill a niche with a differentiated product, they can compete on price, or they can simply outmaneuver the larger competitors. The continued existence and success of camera apps on app stores is an example of companies competing directly with a platform.

But that is not to say a company with a competing offering should never be purchased by a larger company. There are three main definitions of success for a small company: passing the company along to the next generation; being purchased by a larger company; or (much less often) an initial public offering (IPO). Being purchased is often the best of these three options for the business owner and consumers — after all, IPOs are expensive and fraught with risk. A purchase that helps produce better products or services for consumers is both a natural and beneficial end for some companies and healthy from a competition perspective. We urge the Canadian government to recognize the importance of acquisitions as a viable exit strategy for many small companies. An acquisition should by a larger firm should not always be viewed with criticism, but rather with sound economic analysis.

VI. The Developer Services Market

At first, developers were reluctant to join platforms, worried that the model might not accommodate their ability to launch fast and iterate their apps, but successful platforms changed the app ecosystem by providing app developers with ubiquitous access to a broader swath of consumers. Platforms provide a centralized framework for app developers to engage and secure visibility with 5 billion app users worldwide. With lower costs and barriers to entry, both fledgling and established app developers can find success.

One of the central markets at issue is the market for developer services, where a developer pays a platform for assorted services including distribution, marketing, etc. This market also experiences vigorous competition. There is a tendency to include only a few platforms in this category of competitors, but for developers, the market is much wider. For example, game developers can choose additional platforms just for games, and enterprise developers can look to hundreds of proprietary, custom platforms or could create their own.

a. How Software Developers Established Consumer Trust Before Platforms

Before the introduction of the smartphone, software developers built consumer trust slowly and at great expense, and that trust was and remains essential for a software developer to bring a product to market. Most did not have a widely recognizable brand to endorse the software. Prior to mobile platforms, software developers often had to break through the trust barrier by handing over their products to companies with a significant reputation.

Even shareware products that could be digitally distributed would end up partnering with reputable brands to gain consumer trust. Today, consumers can download games for free on platforms. These platforms not only lower cost by taking care of the significant overhead involved in selling their product, but they can also reach consumers much more easily.

But the trust mechanism provided by the platforms is not merely an aspect of size. Consumer trust requires constant maintenance and vigilance because the loss of trust hurts both the platforms and the developers who rely on them. The immediate consumer trust embedded into platform brands worth billions of dollars allows developers to clear the critical hurdle of achieving trust from consumer adoption.

VII. Signs of Competitive Health: Platforms Unlock New Markets

As successful as the past decade-plus has been for the app economy, the next decade could be even better. In just the third quarter of 2019, the major app stores generated more than C$27.7 million in revenue, a robust 23 percent year-over-year increase from the third quarter of 2018. This growth suggests the developer-platform model is still succeeding. We appreciate the Canadian government's highlight of the importance of the digital ecosystem, especially during the COVID-19 pandemic. Moreover, app economy growth is likely to endure because developers are continuing to create new products, services, and markets that did not exist prior to platforms.

Perhaps most importantly, the universe of platforms is continuing to evolve and expand as diverse kinds of hardware connect to the network. For example, new platforms are cropping up for wearables. Connected home devices and cars drive cross-platform interoperability so that voice-

assisted capabilities can communicate with other devices — further weighing against conceptions of platform markets where a single player wields market power and indicating that developer services will continue to improve and evolve along with demand.

Another area where platforms enable developers to reach new audiences is through accessibility tools. Mobile operating systems are built with powerful accessibility tools for developers to use in creating apps that enhance the lives of the disabled. Whether it is voice directions in a mapping app for the visually impaired or text-to-speech tools for those with a speech-language disorder, offering these tools as part of a developer tool kit assists any app in reaching a wider audience.

The nature of digital markets and platforms is only continuing to proliferate innovative and competitive applications. ACT members and other developers are constantly updating their services and user experiences to be discovered by new users. On the App Store, building an innovative app that stands out and letting the App Store editorial team know about it (through https://developer.apple.com/contact/app-store/promote/) is the best way to get featured. The Google Play store is more algorithm-driven (rather than editorial-driven); on Google platforms, it is more important to get discovered by users and start trending to be noticed. The app title, number of downloads, good ratings, and price are the main factors that determine search rank. ACT supports allowing the platforms to have enough flexibility to continue optimizing search and ranking algorithms while preserving competition and innovation. The Canadian government's interest in algorithmic systems is a worthy note, however, regulators and policymakers must understand the competitive nature behind the optimization of these algorithms. As the consultation notes, algorithmic decisions are often made without human conduct, and reducing standards for interference by the government will only stagnate research and development of AI and other technical software that many developers utilize.

VIII. Concluding ACT Views on Various Proposed Frameworks and the Path Forward on Competition Law

The extraordinary rise of the app economy happened in tandem with the development of the smartphone and software platforms. The presence of established, centralized platforms helps to drive the app ecosystem's dynamic growth and unrivaled success. Platforms serve as vital foundations and databases for the growing uses of apps across industries and enterprises. Software platforms do three things for app developers:

1. Reduce overhead costs across the board;
2. Provide instantaneous consumer trust mechanisms; and
3. Enable cost-effective access to a global market.

Today every successful platform for mobile, desktop, gaming, and even mainframe computing must provide those features, or they fail in the marketplace. Apps serve as the driving force in both the popularity and development of the smartphone and in turn, platforms offer lower barriers to entry for software developers into markets worldwide. As we have appreciated Canada's long-standing evidence-based and light-touch approach to new emerging markets, we urge Canada to continue enforcement via the rule of reason by courts. As other countries slowly shift to a *per-se* approach to conduct, they struggle to incent and sustain a growing digital economy.

Building on the views and recommendations above, we offer the following general suggestions, followed by reactions to the various conclusions and proposed approaches put forward by the Canadian government:

- ACT generally urges CCB to ensure that it appropriately considers the demonstrated benefits of digital platforms. CCB ensure that it does not alienate the purposes of antitrust enforcement. Consumer harm should be a considered metric in anti-competitive conduct. Without sufficient credit being given to smaller developers by larger digital players in its consultation report, the Competition Bureau risks biasing later Canadian government policy decisions made in this report.
- The CCB is strongly encouraged to avoid developing industry or sector-specific competition approaches as there would be substantial risks and unintended consequences associated with the disparate treatment among industries if the Canadian government were to pick winners and losers. The concept of "digital platforms" and "digital markets" are ever-changing terminologies. A static use of industry-specific merger guidelines and postures will only reduce incentives to enter by developers. Upending efficiencies as a potential defense avenue for litigation will only burden small developers while larger digital platforms can settle. A sweeping restriction on these guidelines will only shroud innovation. Canada should continue valuing the "welfare standard".
- If Canadian competition policy is revisited in Canada, we urge for careful and targeted improvements to be made to existing law, consistent with the above. Further, any changes in Canadian competition policy and enforcement must retain rigorous economic analysis as a cornerstone of any review or enforcement. Economic analysis provides a transparent and objective method of evaluation in enforcement and allows businesses to predict when their actions will and will not create antitrust enforcement concerns. Reducing the role of or removing economic analysis from Canadian competition decision-making processes would create uncertainty for businesses, disrupting legal and business certainties and limiting the ability of the innovative companies we represent to attain success.
- The Canadian government should be wary of proposals for "substantial lessening or prevention of competition" (SLPC) doctrines within its Competition Act. Legitimate concerns persist about the potential adoption of a *per-se* approach to alleged anti-competitive conduct. The approach of stating conduct that may be potentially "capable" of causing any potential effect on competition would upend many years of antitrust law and would create negative effects on consumers. We urge the Canadian government to undertake a strict economic analysis of how a *per-se* approach may impact innovation domestically and abroad. The Canadian government should be mindful to avoid framing innovative and business-friendly conduct as anti-competitive. SLPC factors should be concise to the welfare standard and legal precedence in Canadian antitrust suits.
- Altered or new recordkeeping obligations imposed on companies covered by future rules should be tailored and imposed with a priority for minimizing compliance burdens.

STANDARDS, STANDARD ESSENTIAL PATENTS, AND COMPETITION

I. General Views of ACT | ACT on Standard-Essential Patents Licensing

ACT strongly supports efforts to provide clarity about the SEP licensing ecosystem for all stakeholders. The rise of the internet of things (IoT) is poised to expose new markets and verticals to SEP licensing, and we strongly urge policymakers to build upon existing, global-consensus guidance providing clarity on what fair, reasonable, and non-discriminatory (FRAND) commitments made on SEPs mean, and the effects of FRAND abuse on competition and innovation.

From Europe to Asia to North America, a variety of market regulators have provided significant guidance regarding SEPs and FRAND licensing commitments. Further, leading standards development organizations (SDOs) have, after much effort, successfully revised their intellectual property rights (IPR) policies to clarify technology contributors' FRAND commitments in ways that are consistent with such guidance. These government policies, as well as the patent policies developed by SDOs, will affect the way citizens work, live, and play for decades to come.

We believe that guidance on the anti-competitive implications of breaches of FRAND commitments can increase competition by reducing IP abuse and deterring unnecessary and burdensome litigation, supporting ingenuity in the market. Specifically, ACT believes clarifications on the meaning of FRAND commitments are beneficial to both SEP holders and standard implementers as well as the consumers of technology. The negative effects of abusive licensing of SEPs can be particularly harmful to ACT's members, which include thousands of SMEs that both hold SEPs and implement standards in their products. These SMEs often do not have the resources to deal with larger enterprises holding numerous SEPs. As a result, they face potential financially debilitating litigation with no predictable outcome or are forced to accept excessive royalty demands made by the SEP holders. In the worst case, the SME may be forced to change their product, or abandon their business plan altogether, if they cannot afford the litigation or the supra-FRAND SEP licenses. Patent licensing abuses pose a major threat to any industry that relies on standards in its innovation cycle.

The convergence of computing and communication technologies will continue as a diverse array of industries come together to build IoT. IoT's seamless interconnectivity will be made possible by technological standards like Wi-Fi, LTE/5G, and Bluetooth, which bring an expanding value to consumers by promoting interoperability while enabling healthy competition between innovators.

Unfortunately, as some FRAND-committed SEP owners are reneging on their commitment to license in a fair, reasonable, and non-discriminatory manner. These practices are anticompetitive and jeopardize the potential of nascent markets like IoT.

SDOs vary widely according to their membership, the industries they cover, and the procedures for establishing standards.[7] Each SDO needs the ability to tailor its intellectual property policy to its

[7] U.S. Fed. Trade Comm'n & U.S. Dep't of Justice, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 33-34, footnote 5 (2007), *available at* https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-propertyrights-promoting-innovation-and-competition-report.s.department-justice-and-federal-tradecommission/p040101promotinginnovationandcompetitionrpt0704.pdf.

particular needs and membership. We do not believe that governments should prescribe detailed requirements for all SDOs. However, basic principles underlie the FRAND commitment which ensure standard-setting is pro-competitive and SEP licensing terms are indeed FRAND. SDO IPR policies that provide for SEP owners to make FRAND commitments should include all of the following principles to prevent patent "hold up" and anti-competitive conduct.[8] These principles are also endorsed by industry practitioners as set out in *CWA 95000* "Core Principle and Approaches for the licensing of standard essential patents".[9]

- **The FRAND Commitment Means All Can License –** A holder of a FRAND-committed SEP must license that SEP to all companies, organizations, and individuals who use or wish to use the standard on FRAND terms.
- **Prohibitive Orders on FRAND-Committed SEPs Should Only Be Allowed in Rare Circumstances –** Prohibitive orders (injunctions exclusion orders) should not be sought by SEP holders or allowed for FRAND-committed SEPs except in rare circumstances where monetary remedies are not available.
- **FRAND Royalties –** A reasonable rate for a valid, infringed, and enforceable FRAND-committed SEP should be based on the value of the actual patented invention itself, which is separate from purported value due to its inclusion in the standard, hypothetical uses downstream from the smallest saleable patent practicing unit, or other factors unrelated to invention's value.
- **FRAND-committed SEPs Should Respect Patent Territoriality** – Patents are creatures of domestic law, and national courts should respect the jurisdiction of foreign patent laws to avoid overreach with respect to SEP remedies. Absent agreement by both parties, no court should impose global licensing terms on pain of a national injunction.
- **The FRAND Commitment Prohibits Harmful Tying Practices –** While some licensees may wish to get broader licenses, a SEP holder that has made a FRAND commitment cannot require licensees to take or grant licenses to other patents not essential to the standard, invalid, unenforceable, and/or not infringed.
- **The FRAND Commitment Follows the Transfer of a SEP –** As many jurisdictions have recognized, if a FRAND-committed SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.

We also note that for a number of SDOs, IPR policies require SDO participants to disclose patents or patent applications that are, may be, or may become, essential to a standard under development. Reasonable disclosure policies can help SDO participants evaluate whether technologies being considered for standardization are covered by patents. Disclosure policies should not, however, require participants to search their patent portfolios. These requirements can be overly burdensome and expensive, effectively deterring participation in an SDO. In addition, FRAND policies that are "participation" or "contribution" based, where the FRAND commitment attaches based on a patent holder's participation in and/or contribution to a technical standard

[8] "Principles for Standard Essential Patents" About AllThingsFRAND.com (explaining the FRAND commitment requirements.) http://www.allthingsfrand.com/about/about-allthingsfrand.com/

[9] "Core Principles and Approaches for Licensing of Standard Essential Patents" (industry-led agreement on principles pertaining to standard essential patent licensing). ftp://ftp.cencenelec.eu/EN/News/WS/2019/CWA_SEP/CWA95000.pdf

can accomplish many, if not all, of the goals of a disclosure-based FRAND regime.

II. The Global Consensus on SEPs and FRAND Licensing Behavior

We strongly encourage an acknowledgment of the inherent link between standard setting, competition and innovation, and the role of competition law in ensuring a balanced and fair SEP licensing ecosystem. Standard setting naturally gives rise to competition issues.

Consistent with a growing number of enforcement actions by competition regulators and courts across key jurisdictions, a refusal to license, or bringing an injunction against, a party who is willing to take a license based on FRAND terms should be considered exclusionary conduct under antitrust laws. Further, a prospective licensee's challenge to the validity, essentiality, or infringement of the SEP(s) should not be grounds for labeling a licensee as unwilling, as long as that licensee undertakes negotiations in good faith in light of standard business practices.

Clear, coordinated rules for SEP licensing will allow for informed participation and enable participants to make knowledgeable decisions about the implementation of the standard. For many years, market regulators have taken numerous steps to provide this clarity in the SEP context. FRAND licensing-related enforcement actions and guidance have developed across key jurisdictions, and are detailed in an appendix to this position paper.

Although different jurisdictions' guidance varies in detail, they do exhibit common licensing principles for FRAND-committed SEPs. In particular, one commonly shared guidance indicates that the following conduct can be a breach of the FRAND commitment, or even an abuse of competition law: refusing to license SEPs to standard implementers; coercing the licensee to accept a license of a non-SEP as a condition for the licensing of a SEP; requesting discriminatory terms for an SEP license; imposing an unreasonable level of royalties or other non-FRAND conditions; seeking or using injunctive relief against willing licensees that are able to pay a reasonable royalty; or imposing licensing conditions that unreasonably restrict the licensee's exercise of related patents it owns. This guidance does not, however, prescribe specific royalty rates for SEPs because of the highly fact-specific nature of SEP licensing.

III. Reasonable Royalty Level Calculation Methodologies and Factors

As representatives of small business innovators that rely on FRAND access to SEPs, we seek to avoid two well-established, and deleterious effects - royalty stacking, when the cumulative demands for SEP licenses cascade to make accepting them economically unviable; and patent holdup, where a SEP holder demands supra-FRAND royalties or (other unreasonable requirements) from potential user of the standard, preventing licensing.[10]

As we have noted, guidance on the general meaning of FRAND commitments can be beneficial. ACT recommends that guidelines fill in the details left unaddressed by existing legal framework. This guidance would provide SDOs, courts, SEP holders, and implementers with more clarity on how the law will be applied. We note that the guidelines offered by key market regulators do not

[10] http://bit.ly/1QTIDYv.

establish royalty rates specific to FRAND commitments. Instead, they establish general principles to determine whether a proposed royalty or other licensing term is reasonable.

There is no need to prescribe royalty methodologies or establish an independent expert body to determine the details of FRAND licensing terms. Together, guidance can help courts understand the difference between legitimate exercises of patent rights in the standardization context and contractual breaches of FRAND commitments, including instances where the breaches constitute abuses of unearned market power and harm to competition.

Regarding the "royalty base," we urge policymaker guidance to avoid exclusive mandates regarding calculation of a royalty base, even though the "smallest saleable unit" (SSU) approach and others have emerged as a reliable basis for calculation.[11] We believe it may be helpful to support the SSU pricing methodology as one—but not the only—approach to determining a reasonable royalty base.

When addressing royalty calculations, ACT recommends that a reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on a variety of holistic factors, including the value of the actual patented invention, apart from its inclusion in the standard. This value cannot be assessed in a vacuum that ignores the portion of a product, e.g. a component of a larger device or even a sub-component of a component, in which the SEP is substantially practiced, or royalty rates from other SEPs to implement the standard. Such factors may include those noted (royalty rates of patent pools or other licenses, relative values of SEPs under negotiation to other SEPs, cumulative royalty rates, total numbers of SEPs, patent portfolio strength, and negotiation histories), as well as other factors used in precedent-setting case law.

IV. Conclusion

ACT recommends the advancement of guidance by CCB consistent with the above to protect and support Canadian SMEs and to secure Canada's global leadership in competition policy. Such guidance will guide standardization activities; ensure SEP licensing on FRAND terms; prevent, and effectively resolve, disputes over the meaning of FRAND; and encourage the enforcement of FRAND commitments. The future of standardization, and the ability of small business innovators to drive new IoT developments across consumer and enterprise use cases, is at stake.

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[11] *E.g.*, *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1201, 1227 (Fed. Cir. 2014).

ACT appreciates the opportunity to provide its views to CCB. We urge careful consideration of our members' interests. We are committed to working with the commission, ICED, and the Bureau abroad to bring the benefits of a dynamic and competitive app ecosystem to all Canadian consumers and businesses through the development of balanced consumer protection and competition policies.

Sincerely,

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