

The House Judiciary Antitrust Report: App Store Competition and Nondiscrimination

There is no shortage of reactions to the House Antitrust, Commercial, and Administrative Law Subcommittee’s *Investigation of Competition in Digital Markets* report (the Report). But with much of this attention directed to the more sensational disputes around Amazon’s retail, Facebook’s social media, and Google’s search platforms, the sections dedicated to software distribution deserve some close scrutiny as well. This critique focuses on one claim in particular and the ramifications if the Subcommittee has it wrong, which I believe it does: “The App Store and the Play Store do not compete against one another.”¹ The claim is an important foundation for the Subcommittee to establish in order to justify antitrust intervention in app store markets, either in the form of enforcement of current law or the creation of new antitrust laws to address alleged harms in the app store space. However, it appears to provide a weak basis on which to justify such intervention, for a couple reasons:

First, the assertion that there is no competition apparently only applies to *one* of the relevant markets: the consumer-facing market.² Following the Subcommittee’s logic, the App Store does not compete with the Google Play store because an Apple customer can’t access the Google Play store and vice versa.³ However, the assertion ignores the fact that the Google Play store and the App Store compete vigorously in an adjacent market: the market for developers and developer services. Google benefits a great deal from attracting the next great app and so does Apple and the investments these platforms make to attract developers reflect this.⁴ Moreover, Google and Apple have a history of trying to outdo one another with respect to the offerings they provide for developers. As [“shopper’s guides” to the](#) two main app stores describe, the App Store and Google Play store respond to each other’s offerings, vying to be the platform that provides better toolkits, application programming interfaces (APIs), and of course quicker (yet rigorous) app review processes.⁵

¹ INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMIN. L. OF THE COMM. OF THE JUDICIARY 95 (Oct. 6, 2020), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (Antitrust Report).

² See *id.* at 95.

³ *Id.*

⁴ Opposition brief of Apple Inc., *Epic Games, Inc. v. Apple Inc.*, Case No. 4:20-cv-05640-YGR, at 5 (N.D. Cal. 2020), available at

<https://www.courtlistener.com/recap/gov.uscourts.cand.364265/gov.uscourts.cand.364265.73.0.pdf> (“In the interest of stoking more creativity, and to bring more apps to its users, Apple supports developers in a variety of ways, investing billions in tools that simplify the development process, across Apple’s iOS.”).

⁵ See Yana Poluliakh and Victor Osadchiy, “What to expect from the App Store and the Google Play Store When you Launch Your First App,” YALANTIS, available at <https://yalantis.com/blog/apple-app-store-and-google-play-store/>; Nikita, “Apple App Store vs. Google Play Store: A Comparison,” 21 TWELVE INTERACTIVE, Blog (Sept. 20, 2019), available at <https://www.21twelveinteractive.com/apple-app-store-vs-google-play-store-a-comparison/>; Priya Viswanathan, “iOS App Store vs. Google Play Store,” LIFEWIRE (Mar. 9, 2020), available at <https://www.lifewire.com/ios-app-store-vs-google-play-store-for-app-developers-2373130>.

Lastly, the analysis of the relevant developer-facing market does not end with whether there is competition between those two app stores, as there are other software distribution options that can serve as alternatives: HTML5, web distribution, smart TV app stores, gaming console app stores, and even video conferencing platforms⁶ (a development accelerated by the pandemic).

Second, even the assertion that the Google Play store and the App Store don't compete with each other for consumers is the product of logical gymnastics. To support the argument, the Subcommittee cites evidence that Apple users cannot (*immediately*) access the Google Play store and people with Android phones can't (again, *immediately*) access the App Store.⁷ This is analogous to concluding that Gold's Gym is not in competition with Planet Fitness in a given local market because if a consumer is a member of one, they are probably not also a member of the other. Gold's Gym members cannot *immediately* access Planet Fitness and vice versa. A membership is generally required before you can begin using the services of either gym, so there are some time and resource commitments that need to be made before you can switch. Similarly, an Apple iPhone owner can spend the time and resources to trade in their device for another smartphone that runs on Android instead, in order to access the Google Play store. These are switching costs—which are prevalent in markets where network effects are present—but these costs alone hardly justify a conclusion that the competitors in that market “do not compete against one another.”⁸ Critics cite logistical difficulties in switching, but in reality, switching is straightforward and assisted by the app store operators themselves.⁹ Not only that, it's fairly common for someone to have a tablet that runs on Android and a smartphone that runs on iOS, or vice versa. Ultimately, these consumers are likely making their choices based on a combination of the app store offerings, operating systems, device features, and native apps on smart devices. That there are switching costs involved with leaving one app marketplace for another is simply not evidence that they do not compete with each other for consumers.

Now, let's say that there is competition in both markets most relevant to app stores: the consumer-facing market and the developer-facing market. The threshold question, then, is whether there is harm to competition resulting from monopolization. The Subcommittee doesn't explore this question at all because it has asserted that the app stores don't compete with each other. As described above, however, there is plenty of evidence that the app stores do compete with each other both for consumers and for developers. So, the app stores are a) driving better services and offerings for developers, while b) competing with each other to provide the most

⁶ See Vishal Mathur, “Apple's Response Proves App Store Isn't Any More a Monopoly Than the Google Play Store,” NEWS18 (May 30, 2019), available at <https://www.news18.com/news/tech/apples-response-proves-app-store-isnt-any-more-a-monopoly-than-the-google-play-store-2164875.html>; David Pierce, “Zoom has a plan to dominate the virtual events industry,” PROTOCOL (Oct. 14, 2020), available at <https://www.protocol.com/onzoom-virtual-events> (describing Zoom's new Zapps app store).

⁷ Antitrust Report at 95; see also Antitrust Report 102, citing the European Commission's competition complaint against Google, concluding that Apple iOS cannot constrain Google Android's activities on *Android devices* and vice versa, implying a market definition limited to Apple devices and a separate market for Android devices.

⁸ See, e.g., Wing Man Wynne Lam, “Switching Costs in Two-Sided Markets,” TOULOUSE SCHOOL OF ECON., Working Paper (Aug. 2014), available at http://publications.ut-capitole.fr/16551/1/wp_tse_517.pdf (examining the characteristics of competition between app stores for consumers, including the impacts on competition and consumer benefits when app stores adjust their various offerings).

⁹ Avery Hartmans, “Here's the best and easiest way to switch from an Android device to an iPhone,” Business Insider, (May 21, 2019), available at <https://www.businessinsider.com/switching-from-android-to-iphone-how-to-2018-5#step-1-back-up-all-your-data-1>.

attractive, diverse, and safe marketplace for consumers. For consumers, the products are differentiated, as the Google Play store has more apps but there are arguably a greater variety of “lower-quality” apps available because the vetting process is in some ways less rigorous.

The other consequence that follows if there is competition in both relevant markets is that the proposals in the Report, as applied to app stores, would likely do more harm than good. They are remedies intended to produce outcomes that would otherwise result from a healthy, competitive market. For example, the proposed nondiscrimination regulations requiring “equal terms for equal services”¹⁰ are unjustified and unlikely to benefit the smallest competitors as intended. The Report cites the dispute between Tile and Apple as an example of conduct where Apple as the App Store operator was preferencing its own “Find My” functionalities over Tile’s offering.¹¹ In response to hitting a speed bump with Apple, Google not only welcomed Tile on its platform, but engaged in [a robust integration](#) with the company’s offering.¹² Meanwhile, if Apple were proscribed from objecting to the way Tile wanted to collect a user’s location information, a key competitive differentiator for Apple would be lost. The episode shows that Google responds to developments in the Apple App Store. Google gets to bet on consumers wanting to use Tile while Apple gets to preserve its competitive advantage in privacy. One of these companies may end up with a better outcome than the other, but consumers certainly benefit from having options, and this is the result of competition, not government regulation. Bright line federal prohibitions on one or the other of these approaches both dampens the competitive pressures on these companies and homogenizes the available app store options for consumers and app developers. Finally, as we pointed out in testimony before the Subcommittee, the open internet is often a fine alternative for developers and consumers to the two major app stores (especially for larger developers with an established customer base or market share).¹³ And for consumers who favor less data-intensive apps (for example, because they have limited data plans) or want to access certain apps across devices and browsers, [progressive web apps are a means](#) of accessing mobile content and services outside the major app stores.

The other effect of a regulatory framework to manage disputes like Tile-Apple is that it would likely intensify the app stores’ focus on those developers with substantial resources while marginalizing smaller developers that benefit from informal negotiations with the app stores. As a result, software platforms may end up de-prioritizing app developers’ direct, informal petitions to and negotiations with the app stores in favor of those petitions brought through the formal, federal process. In all likelihood, only companies with substantial resources could effectively pursue these outcomes through a process mediated by a federal agency. A real-life example of regulations set up to prevent harmful self-preferencing by “platforms” exists in the Federal Communications Commission’s (FCC’s) Program Carriage rules. In fact, the Antitrust Report cites these rules as such an example.¹⁴

¹⁰ Antitrust Report at 20; 384-86.

¹¹ Antitrust Report at 359-60.

¹² TILE, TILE + GOOGLE, *available at* <https://www.thetileapp.com/en-us/google>.

¹³ ONLINE PLATFORMS AND MARKET POWER, PART 2: INNOVATION AND ENTREPRENEURSHIP, Testimony of Morgan Reed, President, ACT | The App Association 7 (Jul. 17, 2019), *available at* <https://actonline.org/wp-content/uploads/Online-Platforms-and-Market-Power-Part-2-Innovation-and-Entrepreneurship-1.pdf>.

¹⁴ Antitrust Report at 384-85 (“More recently, the Cable Act of 1992 included a provision requiring the Federal Communications Commission to oversee a nondiscrimination requirement for cable operators.”).

One of the only independent channels to expend the significant resources required to make use of the Program Carriage rules was the Tennis Channel, founded by former Viacom executives and backed by Bain Capital and J.P. Morgan Partners, among others. In its complaint, the Tennis Channel alleged that Comcast was favoring its own Golf Channel and Versus by placing those two channels on a “basic tier” while only offering Tennis Channel a spot in the more expensive Sports Package.¹⁵ At the end of a two-year process in front of the FCC, the FCC ruled for the Tennis Channel and the decision was appealed. Overruling the FCC, the D.C. Circuit found no evidence of discrimination, with one concurrence noting that “[In] restricting the editorial discretion of video programming distributors, the FCC cannot continue to implement a regulatory model premised on a 1990s snapshot of the cable market.”¹⁶ We should be reluctant to resign developers to a process like Program Carriage, where petitioners must weather a multi-year administrative dispute that may conclude after the market has undergone enough changes that the market power assumptions made in the original regulation are no longer applicable.

In a recent example of the how a federal nondiscrimination regime could have perverse results, Apple announced on November 18, 2020, a new Small Business Program.¹⁷ Under the Small Business Program, app developers that generate less than \$1 million annually in digital sales, as well as developers new to the App Store, only owe a 15 percent commission on sales of digital goods and services made through their apps. The standard commission for other app developers on the App Store remains at 30 percent, which is roughly the same across platform intermediaries for digital goods and services generally.¹⁸ Larger companies that generate billions in revenue on the App Store would be excluded. Those larger companies would have every reason to challenge the Small Business Program because it could be argued that it advantages the offerings of smaller companies (and possibly Apple) over those of larger firms. Spotify challenging a program to provide a discount for smaller firms is probably not what the Subcommittee has in mind, but it illustrates clearly why larger app developers favor a federally enforced nondiscrimination regime while smaller companies like App Association members are opposed.

The D.C. Circuit’s refusal to uphold the FCC’s interpretation of its Program Carriage authority also highlights the problems with applying a federal nondiscrimination regime to a market where the evidentiary basis for market power or a lack of competition is dubious. Arguably, certain cable operators wielded market power in various geographic markets in 1992 when the Cable Act was enacted. As discussed above, even a snapshot of the app store markets does not necessarily show that a single competitor has market power anywhere. And the unpredictable market forces that helped shift the outcome of the *Tennis Channel* case—including the entry and success of well-resourced over-the-top video distribution platforms like Netflix and Amazon

¹⁵ *In the Matter of Tennis Channel Inc. v. Comcast Commc’ns, L.L.C.*, Memorandum Opinion and Order, MB Docket No. 10-204, File No. CSR-8258-P, FED. COMM’NS COMM’N (adopted Jul. 16, 2012).

¹⁶ *Comcast Cable Commc’ns v. Fed. Commc’ns Comm’n*, 717 F.3d 982 (D.C. Circ. 2013), available at [cadc.uscourts.gov/internet/opinions.nsf/EC6B700AE22F118585257B790052AFB0/\\$file/12-1337-1438011.pdf](https://www.uscourts.gov/internet/opinions.nsf/EC6B700AE22F118585257B790052AFB0/$file/12-1337-1438011.pdf).

¹⁷ Apple Inc., “Apple Announces App Store Small Business Program,” Press Release (Nov. 18, 2020), available at <https://www.apple.com/newsroom/2020/11/apple-announces-app-store-small-business-program/>.

¹⁸ Jonathan Borck Ph.D., Juliette Caminade, Ph.D., and Markus von Wartburg, Ph.D., Apple’s App Store and Other Digital Marketplaces, Analysis Group (Jul. 22, 2020, available at https://www.analysisgroup.com/globalassets/insights/publishing/apples_app_store_and_other_digital_marketplaces_a_comparison_of_commission_rates.pdf).

Prime—are likely even more dynamic in the markets for software distribution, rendering any available nondiscrimination remedies predicated on supposed market power outdated more rapidly. Such an unwieldy framework based on a snapshot of a dynamic market in 2020 is suboptimal compared to the status quo, where the kinds of disputes at issue are (although far from painless), settled relatively quickly outside governmental venues and against a backdrop of competitive pressure on the app stores.¹⁹ And the app stores are also responding to competitive pressure and negative press by creating processes by which app developers can suggest changes to guidelines, as well as updating and clarifying the processes they use to stop supporting or remove apps that violate guidelines.²⁰ Instead of solving the various problems described in the report, the Subcommittee’s proposals as applied to app stores would likely do more harm than good for smaller companies looking for developer services while helping insulate Apple and Google from unforeseen app store challenges.

¹⁹ See Nilay Patel, “Apple approves Hey email app, but the fight’s not over,” THE VERGE (Jun. 22, 2020), available at <https://www.theverge.com/2020/6/22/21298552/apple-hey-email-app-approval-rules-basecamp-launch>.

²⁰ See, e.g., Nick Statt, “Apple says App Store appeals process is now live, so developers can start challenging decisions,” The Verge (Aug. 31, 2020), available at <https://www.theverge.com/2020/8/31/21406112/apple-app-store-appeals-process-live-guidelines-challenge-antitrust-fortnite>; Apple, News and Updates, App Review process updates (Aug. 31, 2020), available at <https://developer.apple.com/news/?id=84w3e5bm&1598882503>.