

Bipartisan Group of Senators Scrutinize Competition in App Stores

APRIL 28, 2021

On April 21, 2021, the Senate Subcommittee on Competition Policy, Antitrust, and Consumer Rights held a hearing to explore competition in Apple's App Store and Google Play. Representatives from Apple Inc., Google Inc., Spotify, the Consumer Federation of America, Tile, Inc., and Match Group, Inc. testified about competition within the two app stores. Chair Klobuchar (D-MN), Ranking Member Lee (R-UT), and Members Blumenthal (D-CT), Hawley (R-MO), Ossoff (D-GA), and Blackburn (R-TN) expressed a willingness to take further action in this space and to explore new legislation aimed at promoting competition in the app stores. The Senators' concerns focused on three main areas:

1. The platforms as gatekeepers and competitors;
2. Alleged arbitrary treatment, removal, rejection, and potential retaliation against developers; and
3. Security and privacy as proffered justifications by Apple and Google for the restrictions on app store competition.

Platforms as Gatekeepers and Competitors

Spotify and Tile, both app developers, accused Apple of practices intended to disadvantage them when Apple began offering apps in competition with each of Spotify's and Tile's apps. For instance, Spotify testified that Apple required it to implement Apple's proprietary in-app payment ("IAP") and pay a 30% commission, which, due to the narrow margins in music streaming services, forced Spotify to pass on the full commission to users in the form of increased prices. Spotify testified that Apple, in turn, launched Apple Music—not subject to IAP—at the price Spotify originally charged. Spotify claimed that, when it opted to remove Apple's IAP, Apple used its policies as a "gag order," preventing Spotify from communicating to its own users that they could subscribe to Spotify's premium service for less outside of the app. Tile similarly testified that when Apple introduced an app in competition with Tile, it reversed its prior symbiotic relationship with Tile and erected obstacles to Tile's offering that were not applicable to Apple's competing product.

While neither Apple nor Google confirmed that it has a formal firewall between its app store team and its proprietary business strategy teams, Apple strongly denied any strategy of copying functionality from popular apps and distribution platforms into Apple's proprietary products (termed "Sherlocking") and explained that Apple's offerings provide something new or unique not otherwise present in the market.

Alleged Arbitrary Treatment, Removal, Rejection, and Retaliation

Ranking Member Lee and Senators Hawley and Blackburn questioned whether Apple has treated app developers differently based on their size, economic power, or political viewpoints. Spotify testified that Apple punished Spotify in multiple ways for resisting IAP, including by delaying deployment of minor bug fix updates and refusing to promote Spotify when it was the most popular app on the App Store. Match testified that Apple and Google provide only limited guidance on how to remedy any alleged violations. Match explained that it submitted an LGBT-safety measure that was held back for two months for allegedly “violating the spirit” of an Apple policy and then required escalation before resolution.

Senator Klobuchar also noted that various developers have been reluctant to speak out publicly as a result of intimidation or fear of retaliation. Match testified that the night before the hearing, a Google representative contacted a Match representative to inquire why Match’s testimony differed from public statements Match had made on an earnings call.

Security and Privacy

Both Apple and Google testified that exclusivity in distribution and IAP commission were necessary to enable their app stores to preserve privacy and security, which both companies testified are their foremost priorities. Apple and Google also explained that they assess their IAP commission only for digital products because Apple and Google can only verify security for such products and not for physical products or services, such as ride sharing.

Match, however, testified that Apple and Google’s security concerns were merely a pretext for controlling their app stores and IAP and explained that Apple and Google have failed to work with Match on issues such as registered sex offender background checks and preventing access to dating apps by users who are underage on their Apple and Google accounts. Match further testified that Apple rejected efforts to implement multifactor identify verification requirements to minimize the risk of impersonation.

Nearly every senator also questioned the premise that the closed app store platforms and IAP commissions were necessary to preserve privacy and security. Senator Hawley challenged Apple to commit to spending all its income from commissions on security. Senator Ossoff noted that both app stores contain obvious scams and deceptive apps that harm consumers. Senator Blackburn questioned whether Apple and Google accept financial responsibility for any security and privacy breaches on their platforms. And Chair Klobuchar remarked that recent accounts suggest that Apple earns between \$15-18 billion a year from the App Store but spends only \$100 million to run it. Apple challenged these figures, however, stating it has spent billions on security and other measures.

Conclusion

Chair Klobuchar summarized the various competitive issues raised at the hearing in connection with the app stores, including:

1. The high IAP commission rate;
2. Apple’s and Google’s alleged self-preferencing of proprietary offerings and harming competitors; and
3. Apple’s and Google’s effective “gag order” to prevent circumvention of IAP.

Senator Klobuchar also recapped the justifications proffered for the app stores’ policies (as well as her concerns regarding the same), namely:

1. The majority (~85%) of developers on the Apple and Google platforms pay nothing (but Chair Klobuchar noted that this does not immunize anticompetitive conduct);
2. Privacy and security within the app stores (but Chair Klobuchar suggested there is a better way to accomplish this besides compulsory adoption of proprietary IAP and an effective “gag order”);

3. Apple and Google should be permitted to pursue any business model and policies as the creators of their app stores (but Chair Klobuchar noted that these were likely the same defenses asserted by historical monopolies and trusts); and
4. The app stores create jobs and opportunities for small developers (but Chair Klobuchar again noted that this does not immunize anticompetitive conduct).

The lengthy and tense hearing highlights how antitrust scrutiny of Apple and Google continues to ramp up—with both companies facing increasing attention from lawmakers alongside a litany of private antitrust suits challenging their mobile app practices. (See *our prior Competition Corner posts about Congressional investigations and hearings targeting big tech.*)

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