

Department of Commerce Calls for Change to Mobile App Stores

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The U.S. Department of Commerce (DOC) recently added to the pressure on Apple and Google to modify their app store practices. The DOC's National Telecommunications and Information Administration (NTIA) released a 50-page [report](#) on February 1, 2023, criticizing the mobile app store model as harmful to developers and consumers and recommending policy changes to reform it.¹

The NTIA report is a response to President Biden's July 2021 Executive Order on Competition, in which he instructed the Secretary of Commerce to, among other things, issue findings and recommendations "for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the [mobile-app] ecosystem." NTIA Report at 2. (See our prior post about the Executive Order's recommendations and directives impacting the tech sector [here](#).) The NTIA report is based on a review of public reports and literature; consultations with diverse stakeholders from various sectors of the industry, academia, and civil society; and more than 150 comments submitted in response to an April 2022 public request for comment.

The NTIA made three key findings:

- 1. "Means of distributing apps other than the Apple and Google mobile app stores are possible, but significant barriers remain to fully implementing those alternatives and attaining meaningful competition in the mobile app ecosystem."**

The report describes three mechanisms of app distribution—(i) preinstallation of apps, (ii) downloading of apps via a mobile app store, and (iii) downloading apps outside a mobile app store (i.e., "sideloading")—and describes artificial barriers with each that impede meaningful competition.

With respect to preinstallation, "preloaded and preinstalled default apps have a competitive advantage, particularly in terms of gaining app users and recognition." *Id.* at 16. Yet "[a]ccess to preinstallation as a means of distribution is limited for most app developers" because "Apple determines which apps will be preloaded or set as defaults on iOS devices" and "Google works with a variety of device manufacturers to negotiate which apps will be preinstalled or presented as defaults on Android devices," often mandating that device manufacturers preload specific Google apps (e.g., Google Play, Chrome) to access Google's APIs and open source Android code. *Id.* at 15–16.

With respect to mobile app stores, “Apple and Google are the primary gatekeepers for apps.” *Id.* at 18. However, alternative app stores—which are summarily barred by Apple on iOS and are impeded by Google’s restrictions on Android—could “offer[] better curation for quality, better security, or perhaps better privacy” or “advertise lower prices by charging a smaller commission to developers.” *Id.* at 20.

Finally, with respect to sideloading, which Apple forbids and Google “actively discourages . . . with warnings and other obstacles,” there is a need to “harmoniz[e] measures for both openness and security.” *Id.* at 22–23.

Aside from the three main distribution means, commenters also contend that Google and Apple “have acted to stifle implementation and distribution of web apps,” which could operate as an alternative to native-app distribution on the Play Store or the App Store. *Id.* at 26.

2. “Within the app marketplaces, Apple and Google place multiple restrictions on apps that create barriers to developers.”

The Report highlights a number of “policy choices made by Apple and Google” that “are described by some commenters as creating significant barriers to competition,” focusing on the tech giants’ app-review processes and in-app purchasing policies. See *id.* at 28.

The report highlights a number of issues with app-review processes, including (i) the lack of transparency in the approval and rejection of apps; (ii) security vulnerabilities (e.g., malware attacks on consumers and fraud affecting legitimate app developers, in spite of app review); (iii) the companies’ ability “to obtain sensitive commercial information of [] potential competitor[s]” through their app-review processes that they can then use to the benefit of their own app offerings; and (iv) delays in pushing out app updates, which “can leave users exposed to potential vulnerabilities despite developers’ best efforts to correct known issues” and can limit app functionality. See *id.* at 30–34.

On the in-app purchasing policies, the report highlights Apple’s and Google’s anti-steering restrictions and commission structures, which commenters characterized “as arbitrary and discriminatory, unpredictable, capricious, and bearing no relation to the cost or value of the services the mobile app store operators provide to developers.” *Id.* at 36. With respect to commissions specifically, the NTIA—rebutting Apple’s and Google’s contention that “most third-party developers pay far less than a 30 percent fee for user transactions”—cites a UK CMA study, which found that “Apple’s and Google’s ‘average effective rates of commission remain’ between 25 and 30 percent in the UK.” *Id.* at 35. The report also references the self-preferencing consequences of the payment policies, which allow Apple and Google to exempt their own offerings from the commission structures they impose on other developers. See *id.* at 36–37.

Aside from these two primary barriers, the report addresses Apple’s App Tracking Transparency (ATT) feature, which requires “users’ consent ‘before tracking users across other companies’ apps and websites.” *Id.* at 40. Meta criticizes ATT for “impairing developers’ ability to personalize ads and to measure ads’ effectiveness,” all the while exempting “Apple’s own apps and services from its requirements.” *Id.* at 40–41.


3. “As the Administration considers taking action to increase competition and innovation in the mobile app ecosystem, it should carefully assess trade-offs and risks associated with different options.”

The NTIA offered a number of recommendations to “level [the] playing field for companies to compete,” while also “maintaining acceptable levels of security on mobile devices operating systems” (*id.* at 43):

1. give the DOJ Antitrust Division and FTC an “adequate increase in resources on an ongoing basis to support their work” in their own “high-profile lawsuits concerning app distribution practices” and “in the support of private litigation related to competition in the mobile app ecosystem” (at 43–44);
2. encourage Congress and relevant agencies to enact laws or implement measures “designed to limit or prohibit discrimination and anticompetitive conduct as a complement to, and clarification of, existing antitrust authority.” These measures should (i) allow users to control which apps are set as defaults and to delete preinstalled apps, (ii) prevent platforms from using confidential business data acquired from third-party apps to support their own competing apps, and (iii) prevent platforms from “self-preferencing” their own apps (at 44);

3. encourage Congress and relevant agencies to enact laws or implement measures “designed to open up distribution of lawful apps, by prohibiting anticompetitive restrictions or barriers to the direct downloading of applications” (e.g., opening platforms to third-party app stores) (at 45);
4. “develop[] measures that would explicitly bar platform owners” from “[r]equir[ing] the use of Apple or Google’s payment services” by, for example, barring the platforms from (i) conditioning access to app stores or operating systems on the use of the platforms’ in-app payment services; (ii) prohibiting platforms from imposing anti-steering restrictions; and (iii) more generally, “conditioning access to the platform or preferred status on the purchase or use of other products or services that are not part of or intrinsic to the platform itself” (at 45–46);
5. encourage Congress to “enact comprehensive federal privacy protections . . . to provide basic, across-the-board protections” and “require the app review process[es] . . . provide greater transparency and accountability for developers and other stakeholders” (at 46); and
6. “consider actions that encourage tools and standards that reduce [interoperability] burdens” among and between the Apple and Google ecosystems.

With rumors swirling that the Department of Justice is considering a lawsuit against Apple for its App Store practices, it will be interesting to see whether this additional support from within the executive branch drives that effort forward.

 U.S. Dep’t of Com., Nat’l Telecomms & Info. Admin., *Competition in the Mobile Application Ecosystem* (Feb. 2023).

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