Competitor Welfare:

Why the 'Open App Markets Act' (S. 2710) Benefits the App Store One-Percenters - and Perhaps No One Else

Policy Analysis

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Summary

We analyzed the Open App Markets Act (S. 2710) from the point of view of small app publishers (small businesses typically with less than 20 employees) whose products make up the broad majority of available smartphone apps across both major app stores.

- Across Apple- and Google-powered smartphone app stores, there are about 4.5M apps available to download. Despite the array of options, the average person keeps less than 100 apps on their phone, many of which are rarely used. And yet, there are thousands of new apps published and roughly 200 million app downloads each year. It's apparent for both app publishers and consumers alike that competition and choice are alive and well in app stores.

- "Populist Antitrust"-inspired legislation such as the Open App Markets Act (S. 2710) dispenses with the objective concept of consumer welfare in favor of subjective "competitor welfare." This theoretically seeks "an even playing field" by taking into consideration not economic harm to consumers, but economic harm to competitors or parties in business arrangements with each other - like app publishers and app stores.

- The top one percent of app publishers, with millions of users and multi-billion dollar company valuations, drive the discussion on antitrust controversy surrounding app stores – subduing the voices of hundreds of thousands of "working class" ones. Accounting for the other 99 percent, these working class app publishers make an average app-driven revenue of $40,000 per company per year, finding themselves at the mercy of the one percent of very large app publishers in the antitrust debate.

- Our preliminary research on the disconnect between working class app developers or publishers and national policymakers suggests that most developers do not adequately follow legal and policy debates about tech platforms and app stores, and a majority is not willing at all to engage with policymakers.

- Congress should not pass the Open App Markets Act (S. 2710) or similar legislation related to large technology platforms and services without adequately considering the voices of small app publishers (i.e., small businesses) and the broader software developer community to understand the possible economic and other effects on them. At the least, open hearings that include a spectrum of different kinds of app publishers - large and small, B2C and B2B, in various industries - should be held.

Background

S. 2710, the Open App Markets Act (OAMA) was introduced by U.S. Senators Richard Blumenthal (D-CT), Marsha Blackburn (R-TN), and Amy Klobuchar (D-MN) in August 2021, with a great deal of hyperbole. Their nearly 1,900 word press release asserts coercion, bullying, roadblocks, "squashing," stifling, strangleholds, rigging the game, David vs. Goliath, and no less than challenges to human rights.

The reader could be forgiven for thinking that these lawmakers were describing the HBO show Succession or perhaps the 2000 film Gladiator - but believe it or not, this is about legislating smartphone app stores. It is a bold statement from Congress about purported anticompetitive behavior on behalf of the two tech companies - Apple and Google - that power most U.S. smartphones. It is also part of a broader, trendy "Populist Antitrust" approach to intervening in interactions between private businesses that ordinarily would be handled through formal negotiations between the parties involved in a dispute, or the courts.

Importantly, the OAMA throws the long-held economically objective government standard of "consumer welfare" (i.e., do the actions of a company hurt consumers with, say, higher prices) out the window, in favor of something quite different: "competitor welfare." In essence, competitor welfare takes into account harm to competing companies or business interests, remarkably even if there is a net benefit to consumers (something the broad majority of U.S. voters reject, according to new polling from the Antitrust Education Project). Here, the voice of an app company such as Spotify - a 6,500-person Swedish corporation with $9 billion in annual revenue - carries much more weight than that of a typical smartphone user or app developer.

Meet the App Store One-Percenters

The OAMA has its origins in an April 2021 Senate Judiciary Committee (Subcommittee on Competition Policy, Antitrust, and Consumer Rights, chaired by Sen. Klobuchar) hearing titled, "Antitrust Applied: Examining Competition in App Stores." This hearing primarily pitted representatives from Apple and Google against three companies that make very popular apps and have complaints about the app stores - namely, Spotify, Match Group (which makes dating apps such as Match and Tinder), and Tile (which makes bluetooth-powered trackers). (At the time of writing, S. 2710 is slated to be marked up and voted on by the Judiciary Committee on February 3, 2022.)

There are complex regulations and law concerning whether or not the app stores are anticompetitive, and related to that, arguments about the fees that Apple and Google collect (up to 30% of revenue flowing through the stores, depending on the size of the app publisher) and

about how consumers should be able to pay for goods and services from the app publishers (directly or indirectly). Such arguments have also been a part of the Epic Games vs. Apple lawsuit and trial that has gained international attention. We are not lawyers, or antitrust experts; the purpose of this piece is not to say that there is nothing legitimate to debate, nor to examine every aspect of the proposed legislation or complaints in detail, which has been done plenty elsewhere by experts and interested parties on both sides of the issues at stake.

However, we do note here that this Judiciary Committee hearing effectively hosted a forum for the 1% complaining about the 0.1%. Apple and Google are two of the most valuable companies in the world. But Spotify is a publicly-traded company with a market capitalization of about $43 billion, and Match Group similarly is worth roughly $35 billion. Epic Games (which makes the popular Fortnite, among other games) is a $29 billion company, and even the smaller Tile was acquired earlier this year for $205 million. This conflict is primarily about money, and popular app makers naturally want to keep more of it while maintaining and increasing their own market share. This isn't "David vs. Goliath," as the press release announcing S. 2710 referred to it; this is a den of Velociraptors taking on a pair of Tyrannosaurus Rexes.

No reasonable person would deny that large software companies such as Spotify and Match Group should use every method at their disposal to make their case, just as Apple and Google do. But what this spat between the 1% and the 0.1% of the app world obscures is the actual playing field - the ordinary software developers organized into small businesses that make, publish, and operate hundreds of thousands of apps dealing with everything from trivial games to serious medical applications. Most of these developers and company leaders are not trying to make the next Tinder; they are just trying to earn a living.

The Playing Field For Working Class App Developers

Let's look at some facts about the 99% - the "working class," if you will - of app developers and publishers who have not yet been adequately heard in this debate. To put things in perspective, there are about 27 million software developers in the world. These are the laborers who write the code for everything digital that you use. A subset of them work on smartphone apps that are made available by companies (i.e., "publishers" of apps).

How many apps are there? The numbers are constantly changing, but across the Apple and Google app stores there are roughly 800,000 different publishers. The best estimates put the number of iPhone apps at a little under 2 million (Apple's app store launched in 2008 with 500 apps - that's 400,000% growth in a bit over a decade), and users of Android phones have even more apps - about 2.5 million. Right now, with app stores as they are, there is considerable

choice available to consumers, particularly in Google's store which has roughly 500,000 more apps available to choose from.

How does one make money from apps? Interestingly enough, almost every app is free, and 98% of app revenue worldwide comes from free apps. But those free apps have paid features such as subscriptions, additional services, in-app products, and more. In 2021, apps drove about $693 billion in total revenue.

These are big numbers, but this is where we see the disparity between the 1% and the working class of app developers. Data from Sensor Tower shows that the top 1% of app publishers capture 93 percent of app-driven revenue (and 80 percent of downloads, too). What's left of that revenue split across all the 99% of working class app publishers amounts to about $40,000 a year, per publisher (small business). This general pattern has held true over several years. The voice of a typical app developer or publisher - perhaps a Chief Technology Officer at a 10-person company just beginning to get paying customers and bringing in $40,000/year - has not been adequately heard in this debate.

Engaging the Average App Developer Is Hard

Why isn't the typical app developer engaged in this discussion? For one, they're busy coding, and often work unconventional hours in unconventional ways. And while technical, they are also creators and artists who want to build something new and wonderful, no matter exactly what problem they are trying to solve. They don't tend to want to conduct thought leadership in a policy debate (with rare exceptions), or interact with a DC-based trade group.

We conducted preliminary research to understand the apparent disconnect between developers and policy debates better. The following findings come from a survey with a total sample of 144 and should be viewed more as directional than representative. That said, what we discovered is worth sharing. While 69% find regulatory compliance (i.e., obeying laws) to be important, when asked how closely they follow the legal and policy fights over the future of tech platforms and app stores, only 7% reported that they were "obsessed" while about 80% said that they were "aware" or "sort of follow" them. And when asked if they would be interested in speaking to policymakers about the future of tech platforms and app stores, only 7% were very interested, with a majority of 56% bluntly saying "No."

There is some hope, though. When we cross-tabbed how closely developers tracked news about legal and policy debates with whether they were at least somewhat interested in directly engaging with lawmakers, we found a positive correlation. In other words, there is a modest

subset of developers who both pay some attention to the policy debates that are happening, and would be willing to directly engage, given the chance. And generally, developers who don't follow these debates are also likely to not want to engage policymakers.

To capture these developer and publisher voices and begin to close this gap, the Data Catalyst Institute recently hosted a series of informal working groups in January 2022 with exactly these types of app developers and publishers; a read-out from these working groups is available here.

Conclusions and the Way Forward

As Sen. Klobuchar urges her colleagues to push forward and pass antitrust legislation in the first part of 2022 (on January 20, 2022 a companion bill she sponsored, S. 2992, passed out of the Judiciary Committee), she should first consider an open hearing in her antitrust subcommittee - which she chairs - that includes a spectrum of different kinds of app publishers - large and small, B2C and B2B, working in diverse industries.

Developers and app publishers exist in many shapes and sizes, not all of which are represented by those in very popular categories such as music, gaming, or dating. Small app publishers that help medical professionals assess the probability of disease, or educate and entertain children in a unique way, are likely to have dramatically different stories of both success and failure, and a range of business models and revenue numbers, adding context to what has already been heard from the 1 percenters of the app world.

It is also unclear to us why large gaming platform stores, like those for Microsoft's Xbox and Sony's Playstation, which are organized in and operate in much the same way as phone-related stores, are not under identical scrutiny by Congress for the same reasons stated for S. 2710. After all, Microsoft and Sony are very large tech companies that operate platforms for publishers (a video game is fundamentally just a very complicated app) and typically take a 30% cut of revenue earned from a game on the platform, just like the Apple- and Google-owned phone stores.

Considering that technology is currently America's most successful and innovative industry, there is far too much at stake to not think through these issues carefully before passing broad legislation whose far-flung ramifications are poorly understood. We recommend that Congress not pass the OAMA (S. 2710) or similar legislation like S. 2992 related to antitrust and/or large technology platforms and services without adequately considering the voices of small app publishers (i.e., small businesses) the broader software developer community, and examining adjacent marketplaces like video game consoles, to understand the possible and probable effects of the pending legislation on competition, choice, and the economics of the technology industry, especially its smallest participants.

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