Submission by Match Group, Inc. to the Treasury

Response to the Government consultation on the ACCC's regulatory reform recommendations for digital platforms

17 February 2023

A Executive Summary

1. Match Group, Inc. (***Match***) welcomes the opportunity to respond to the Treasury's paper on the ACCC's regulatory reform recommendations for digital platforms (***Consultation Paper***).

2. In this submission Match:

   - outlines why it considers that existing regulatory regimes are ineffective in addressing the specific issues caused by digital platforms in Australia;
   - considers the ACCC's findings in its report regarding consumer harms and addresses recommendations for enhanced consumer protection;
   - considers the ACCC's proposed code of conduct and sets out its views on the most appropriate regulatory regime to address competition harms;
   - sets out its views on the development, implementation and enforcement of the proposed codes of conducts and obligations; and
   - considers current and proposed international regimes.

3. Match supports the ACCC's findings of competition and consumer harms that arise out of the supply of digital platform services. The ACCC has undertaken significant work in a number of reports identifying particular harms and potential remedies. While we believe that the conduct of the dominant platforms providing app marketplace services violates existing competition law, the existing regulatory regime has not adequately addressed that conduct in time to preserve market competition and protect consumers. Therefore, we believe ex ante regulation is required to prevent these harms from occurring.

4. Match also supports the ACCC's proposal for the development of broad enabling legislation underpinned by specific codes addressing the issues arising out of various digital platforms' services as appropriate for Australia. While there are other regulatory approaches (such as that adopted by the EU, which is designed to broadly prohibit certain types of conduct), our view is that the best model for the Australian context – and one which has a proven track record of success – is the adoption of flexible codes. This approach is well established in Australia with its history of mandatory codes of conduct, notably being the approach taken with the recent adoption of the News Media Bargaining Code of Conduct. Further, the ACCC has already done extensive work reviewing different digital platform services as part of the Digital Platforms inquiry, which could be used in the development of the codes.

5. Match believes that the enabling legislation should be passed as soon as possible, ideally during the first half of this year, in order that the codes can be developed by the end of the year. Further delay will allow digital platforms that are dominant in certain markets (for example, Apple and Google in the app marketplace services market) to cement their dominance and to continue with their anti-competitive practices, leading to additional lost competition, innovation and reduction in consumer welfare in Australia. Where network effects exist (such as those enjoyed by Apple and Google in app marketplace context), the market power of a single or few dominant players will become further entrenched in the absence of a regulatory response. We therefore urge the government to move forward as quickly as possible. While somewhat different regulatory approaches may be adopted in other jurisdictions, the principles are very similar, as is the case in many other areas of law. There is no benefit in the Australian Government adopting a 'wait and see' approach to how those regulations develop, which may take many months or years. Indeed, doing so will only prolong consumer detriment. The flexibility of the code model will allow for adaptations in the future.

6. Match believes that a priority for the establishment of codes should be developing a code in the context of app marketplaces, which addresses the behaviour of two siloed monopolies—namely, Apple and Google. App stores are a discrete area where the ACCC has identified current and continued harm and addressing these harms will lead to immediate and direct consumer benefit. This is particularly the case in relation to Apple's and Google's tying app developer access to their respective app stores with the mandatory use of their respective in-app payment processing systems. In-app tying reduces consumer choice, inflates prices paid by consumers, stifles innovation, reduces the quality and volume of in-app content and services, prevents competition in apps and fintech and, by limiting the data they obtain, hinders the ability of app developers to detect and respond to scams and keep bad actors off their services.

7. Governments around the world are recognising that competition law enforcement alone is not sufficient to tackle the breadth of issues posed by large digital platforms and are taking meaningful steps to introduce new regulation to catch up with rapidly changing online and digital landscapes. There is global recognition that the only way to protect consumers from the unforeseen power of the monopolies that have arisen in digital platform markets is for governments to act. Match applauds the Australian Government for its swift action to bring this matter forward for public consultation.

B Match's role in the digital platform market

8. Match is a publicly traded corporation (NASDAQ: MTCH), with headquarters in Dallas, Texas, USA. Match provides, through its portfolio of companies, dating services available in over 40 languages to customers in more than 190 countries through apps and websites. Throughout 2021, Match portfolio brands had approximately 10.4 million subscribers globally. As of 31 December 2021, Match companies had approximately 2,500 full-time employees.[1]

9. Match's brands in Australia include Match, Tinder, OkCupid, Hinge and PlentyOfFish, among others.

10. All of Match's portfolio brands' services in Australia are available as apps distributed through Apple's and Google's app marketplaces, the App Store and Google Play Store, respectively. Many of these brands are also available on the Web. For Match's most popular portfolio brand Tinder, most users prefer to use the app version of Tinder compared to the Web version. Other Match brands such as Hinge only offer services in the form of a mobile app. Match is therefore highly dependent on the app marketplace for its business.

[1] Match Group Inc., Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Fiscal Year Ended 31 December 2021 (***Match Group 2021 Annual Report***) p 12, available at https://ir.mtch.com/financials/sec-filings/default.aspx.

C Questions and recommendations raised in the Consultation Paper

1. Do you agree with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and businesses? What are the likely benefits and risks of relying primarily on existing regulatory frameworks?

2. Can existing regulatory frameworks be improved or better utilised?

11. As outlined in Match's response to the ACCC's Discussion Paper for its fifth Interim Report of the Digital Platform Services Inquiry (***Match DPSI Submission***) (see Annexure A),[2] Match considers that the existing ex post competition regime under the *Competition and Consumer Act 2010* (Cth) (***CCA***) is not effective at addressing the specific issues caused by digital platforms in Australia. This is because enforcement of the competition provisions under the CCA is generally a very slow and lengthy process. This is evidenced by the examples that the ACCC referenced in its Digital Platform Services Inquiry Interim Report No. 5 – Regulatory Reform (***ACCC Report***), such as the proceedings against Cement Australia Pty Ltd which was commenced in 2008 and completed in 2017. This has been replicated overseas in digital platform enforcement cases, such as the action taken by the EU Commission against Google for abusing its dominance as a search engine by favouring its comparison-shopping service, which resulted in Google being issued with a €2.42 billion fine.[3] Markets for digital platforms services tend to be dynamic and fast paced, due to frequent innovations in terms of products and services offered by digital platforms. Given the length of typical enforcement cases, there is a risk that the conduct of a digital platform may result in further harm while any enforcement proceedings are on foot. Further, it would be impossible for the ACCC to take enforcement action against all the different competition issues arising in different digital platforms markets one by one, which is what would be required if digital platforms are to be held to account under the existing legislative framework. This difficulty of ex post enforcement is heightened by the need to gather evidence in a litigious action, particularly if the necessary evidence is not preserved by digital platforms. This issue has arisen in ongoing litigation in the US, where one federal judge is considering issuing sanctions against Google for not complying with its duty to preserve potentially relevant evidence (e.g., employee internal chat communications).[4] Additional challenges of ex post enforcement include digital platforms' attempts to muddy market definitions for the provision of app marketplace and in-app payment services. For example, Google refers to both its app store and its in-app billing system as simply 'Google Play', which appears to be an attempt to elide the distinction between the two services.

12. Match therefore agrees with the ACCC's conclusion that relying only on existing regulatory frameworks would lead to adverse outcomes for Australian consumers and developers. Match agrees with the ACCC's finding that:

[2] Match Group, Inc., 'Response to the ACCC's Discussion Paper for Interim Report no. 5: Updating competition and consumer law for digital platform services' (2 May 2022). https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20September%202022%20report%20-%20Submission%20-%20Match%20Group%20-%20Public.pdf.
[3] This decision was upheld by the General Court of the European Union in November 2021: General Court of the European Union, PRESS RELEASE No 197/21, 'Judgment in Case T-612/17nGoogle and Alphabet v Commission (Google Shopping)' (10 November 2021) https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf.
[4] Sarah Perez, 'Epic and Match's antitrust case against Google heads to jury trial on November 6', *TechCrunch* (20 January 2023) https://techcrunch.com/2023/01/19/epic-and-matchs-antitrust-case-against-google-heads-to-jury-trial-on-november-6/.

> While Australia has robust competition and consumer laws capable of addressing many forms of harmful conduct across the economy, they are not well-suited to addressing the range and scale of consumer and competition harms identified in digital platform markets.[5]

13. In particular, Match agrees with the ACCC's assessment that:

> By clearly establishing the types of conduct that would not be compliant and requiring platforms to modify their behaviour in advance of any breaches, ex ante regulation has greater potential than ex post enforcement to address problems before harm occurs.

3. Are there alternative regulatory or non-regulatory options that may be better suited?

14. In the Australian context, Match supports the ACCC's proposed designation and code of conduct model to apply to digital platforms (the ***Proposed Model***). The Proposed Model would be complementary to the existing ex post enforcement approach under the CCA. The Proposed Model is a form of ex ante regulation which would apply specific and well-defined obligations to address and deter specific forms of harmful conduct by digital platforms before further harm can occur.

15. The ACCC's proposal is more akin to the UK government's proposal. The UK proposes for the CMA's Digital Markets Units (***DMU***) to be granted power to oversee mandatory principles-based codes of conduct and implement pro-competition intervention that will apply to designated firms with 'Strategic Market Status' (***SMS***).[6] An alternative response might be the introduction of tailored legislation prohibiting specific conduct of certain digital platforms, such as the legislative model proposed in the EU under the Digital Markets Act (***DMA***). Match also supports the DMA approach. However, the ACCC's proposal for sector specific codes, as long as this is done expeditiously, will provide an effective response in the Australian context. Codes have proven to be an appropriate regulatory response to address industry problems arising in Australia, such as the recently implemented News Media Bargaining Code, the Franchising Code and the Food and Grocery Code of Conduct. Codes can be implemented quickly and offer an attractive means of responding to industry-wide problems promptly and effectively rather than seeking redress through litigation for separate instances of contraventions and/or conduct of concern. Further, as the ACCC has already undertaken significant work on the issues specific to different platform services, this lends itself easily to a code-based framework.

16. Delaying the adoption of the Proposed Model that will address these issues will allow detrimental conduct to continue to take a toll on Australian businesses and consumers and the economy more broadly. It will not only lead to additional lost competition and innovation, but will also perpetuate existing harms to consumers.

4. Do you see any conflicts between the recommendations?

5. Do you see any conflicts between any of the recommendations and existing Government policy?

[5] ACCC, Digital platform services inquiry, Interim report No. 5 – Regulatory reform (September 2022), 8. Available at: https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform.

[6] UK Government, 'A new pro-competition regime for digital markets' (July 2021), [23] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf.

6. What is the best way to ensure coherence between Government policies relating to digital platforms? Are any of the recommendations better addressed through other Government reforms or processes?

17. Match does not believe there are any conflicts between the ACCC's recommendations.

18. Match also believes that the ACCC's recommendations are complementary to existing Government policies including the below:

- the prohibition on unfair trading practices;
- the Consumer Data Right;
- the development of a National Anti-Scams Centre;
- the review of the *Privacy Act 1988* (Cth);
- consultation on reforming Australia's payments system; and
- anti-scams policy.

19. Match supports the recommendation that new competition and consumer measures should be developed in close consultation with all relevant government departments and agencies, as this will facilitate coherence in policy objectives and the implementation of new reform. Liaising with appropriate government departments or regulators will achieve consistency between policies. For example, measures to address scams, harmful apps and fake reviews should be developed in consultation with the eSafety Commissioner. Match does not believe that any of the ACCC's recommendations would be better addressed through other reforms or processes.

7. Do you agree with the evidence presented by the ACCC regarding the prevalence and nature of harms to consumers resulting from the conduct of digital platforms?

20. The ACCC has undertaken a significant amount of work to inform its findings. In particular, the ACCC has:

- sought feedback from stakeholders in respect of the competition and consumer harms caused by certain digital platforms and what regulation could be adopted to address these harms;
- outlined its findings in respect of these harms in the ACCC Report and in the App Store Report;
- considered regulatory approaches in overseas jurisdictions to address these harms; and
- suggested the Proposed Model as the proposed regulatory response to these harms.

21. Match is supportive of the ACCC's findings regarding risk of consumer harms arising from the lack of effective competition in the provision of certain digital platform services. Delaying action to address the problems the ACCC identified will further perpetuate consumer harms. In particular, a delayed regulatory response to address in-app payment tying will result in further harm to consumers in the app marketplace services context.

22. While Match acknowledges that harms exist across multiple types of digital platforms in Australia, Match's submission focuses on app marketplaces. As Match has highlighted in previous

submissions to the ACCC,[7] a number of competition and consumer harms are caused by the way in which Apple and Google operate their respective app marketplaces in Australia. These harms are addressed in detail in the Match DPSI Submission. The issues arising in this context are discrete and need to be addressed in the near future, such as by prohibiting Apple and Google from tying developer access to the App Store and Play Store with mandatory use of their respective in-app payment processing systems.

23. Apple and Google each hold dominant market positions in relevant markets for the supply of mobile operating systems (***Mobile OS***) and app distribution in Australia, which enables these platforms to engage in anti-competitive behaviours that are harmful to consumers and businesses.[8] As the ACCC acknowledges, market dominance allows Apple and Google to be a 'gatekeeper' or 'important intermediary' to substantial volumes of online commerce; in this position, Apple and Google are a 'must have' for a large number of businesses and consumers using these platforms' devices and app marketplace services.[9]

24. The ACCC identified that if an app store holds market power and controls access to a significant proportion of a developer's target market, the developer may have little option but to make its apps available on that app store. This can mean the app developer has little or no bargaining power and few, if any, options if it is dissatisfied with the app store provider's services.[10]

25. Match supports the ACCC's findings regarding Apple's and Google's market dominance in the provision of app marketplace services. There are no significant suppliers of mobile app marketplaces in Australia or globally other than Apple and Google. Indeed, app developers have no choice but to distribute their apps on Apple's and Google's respective app stores.

    - On **Apple** mobile devices, the App Store is the only marketplace currently available for iOS users to download apps. Further, Apple uses specific restrictions in its Developer Program License Agreement (***DPLA***) to require that iOS developers only distribute apps through the App Store and not create rival app stores (the ***iOS App Distribution Restrictions***).
    - **Google** allows third party app marketplaces to be deployed on Android devices alongside its own Google Play Store. However, the ability to distribute through the Google Play Store is a 'must-have' for Android app developers. This is because alternative Android app stores are rarely used by consumers, as Google Play is pre-installed on all Android devices. The Google Play Store accounts for 90% or more of Android-compatible mobile app downloads and so other app marketplaces do not pose a meaningful competitive restraint. Google has taken steps to quash competing app stores, including by erecting barriers to prevent users from downloading or using alternate stores, imposing restrictions on competing app stores that do not apply to the Google Play Store and by reaching anticompetitive agreements with other companies to not start alternative stores.

26. The ACCC noted in the Digital Platform Services Inquiry Second Interim Report (March 2021), released 28 April 2021 (***App Store Report***), '*[t]he duopoly in the market for mobile OS and the significant barriers to entry and expansion provide each of Google and Apple significant market power in the supply of mobile operating systems in Australia*'.[11] Further, the ACCC outlined in the App Store Report that Apple's App Store and Google's Play Store are '*effectively isolated from*

[7] See, eg, Match's response to the ACCC's Discussion Paper for Interim Report no. 5: Match Group, Inc., 'Response to the ACCC's Discussion Paper for Interim Report no. 5: Updating competition and consumer law for digital platform services' (2 May 2022) https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20September%202022%20report%20-%20Submission%20-%20Match%20Group%20-%20Public.pdf.
[8] The ACCC noted at page 143 of the ACCC Report that this position 'poses potential harms to businesses and consumers'.
[9] Ibid, p 40.
[10] Ibid.
[11] App Store Report, p 4.

competition' and only constrain one another to a very limited extent due to high user switching costs between mobile operating systems and the fact that both stores are 'must haves' for developers.[12]

27. Match considers that Apple and Google are essentially monopolists in each market for the distribution of apps on their respective operating systems. This view is supported by the European Commission (***EC***) and the CMA. In its preliminary findings, the EC found that: *'For app developers, the App Store is the sole gateway to consumers using Apple's smart mobile devices running on Apple's smart mobile operating system iOS*' and that Apple '*… has a dominant position in the market for the distribution of music streaming apps* ***through its App Store***' (emphasis added).[13] It is also supported by the EC's decision that '*Google is dominant in the worldwide market (excluding China) for app stores for the Android mobile operating system*' since 2011.[14] Similarly, in its Mobile Ecosystems Market Study Interim Report, the CMA found that Apple and Google face limited competitive constraints in relation to the distribution of apps through their app stores, meaning that they '*each have substantial and entrenched market power in the distribution of native apps within their ecosystems*'.[15] This market power enables Apple and Google to impose harmful conditions on app developers' access to the App Store and Play Store.

28. Match considers that the lack of competitive constraint in the distribution of mobile apps allows Apple and Google to interpret their respective terms and conditions in ways that may limit, eliminate, or otherwise interfere with app developers' ability to distribute their applications through Apple's and Google's respective app stores, the features that are provided in the apps, the manner in which in-app services are marketed, and the ability of app developers to access critical information about their users and subscribers that they collect through customer transactions. In this regard, Match agrees with the CMA that Apple's and Google's app review processes '*effectively dictate[s] the terms that third-party app developers must agree to in order to access their app stores*',[16] and gives '*Apple and Google a powerful position in respect of app developers seeking to bring their apps to users on the App Store and the Play Store*.'[17]

29. One of the most restrictive ways in which Apple and Google interfere with app developers' ability to distribute their apps through Apple's and Google's stores is in-app payment tying. In the App Store Report, the ACCC noted that it is highly likely that Apple's and Google's significant market power enables each of them to unilaterally set and enforce rules like in-app payment tying,[18] and that the commission rates charged by Apple and Google are inflated by the respective market power that these companies have.[19] The harms arising from in-app payment tying are also acknowledged by 37 US State Attorneys General who have commenced an action against Google asserting, among other things, that there are '*no pro-competitive efficiencies from the tie (ie, IAP Tying) that outweigh the harm to consumers. App developers and app users are each harmed by Google's forced intermediation of in-app payment processing*.'[20]

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[12] App Store Report, p 5.
[13] EC Press Release 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers' (30 April 2021) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061.
[14] EC Press Release 'Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' (18 July 2018) https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581; Full decision available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.
[15] Competition and Markets Authority, 'Mobile ecosystems: Market study interim report' (14 December 2021) (***CMA Interim Report***), p 124, available here.
[16] CMA Interim Report, paragraph 6.55.
[17] CMA Interim Report, paragraph 6.55.
[18] App Store Report, p 78.
[19] App Store Report, p 72.
[20] *Utah v. Google* (US), Case No. 3:21-cv-05227 (***Utah v Google***), paragraph 289, available here.

30. In-app payment tying, therefore, has a number of deleterious effects on consumers, which also negatively impacts competition. These consumer harms include, among others:

- Stifling consumer choice in relation to payment solutions and innovative products;
- [redacted]
- [redacted]
- Raising the prices of apps due to the commissions charged by Apple and Google.

Stifling consumer choice

31. The ACCC notes in its report that a lack of competitive constraint in some markets for digital platform services has likely hindered consumer choice and reduced the quality and innovation of services due to high costs of switching to alternative platform services, challenges of coordinating networks or lack of alternative services that are close substitutions.[21] In Match's experience, in-app payment tying exemplifies this concern of the ACCC, having the effect of stifling consumer choice in relation to payment solutions. This is because in-app payment tying effectively prevents app developers from offering customers more tailored payment solutions and innovative subscription models that may be available by using alternative payment systems. For example, Apple's and Google's respective in-app payment systems:

- do not allow developers to choose alternative payment forms;
- offer limited flexibility in the design of subscription plans;
- do not allow users to make instalment payments on a recurring basis and instead require lump sum payments;
- limit Match's portfolio brands' ability to make special offers to their users; and
- do not offer easy ways to offer groupings of products together.

32. Further, the stifling of consumer choice by in-app tying is exacerbated due the anti-steering policies of certain digital platforms. For example, Apple imposes marketing restrictions on developers which limit their ability to inform users about opportunities to make purchases outside of their iOS app. Therefore, while a Tinder user who accesses Tinder via their iOS app could technically make a payment by accessing their profile on a web page, Apple's terms prohibit Match from steering users towards these alternative payment mechanisms.

Intermediating between the relationship of the customer and the app developer

33. By mandating the use of in-app payment tying, Apple and Google insert themselves as intermediaries between app developers and their customers, effectively confiscating the customer relationship and impacting app developers' ability to service their customers. For example, when an iOS (Apple) user contacts Tinder to get a refund of their Tinder subscription, Tinder has no visibility or control over the user's purchase. Apple's process is opaque, inefficient and insufficiently staffed to keep users informed. Tinder has received negative user feedback regarding this process. [redacted]

[21] Ibid, p 42.

34. Match shares the ACCC's concerns with the rapid growth of scams on digital platform services, including investment scams which can result in substantial financial losses.[22]

35. The ACCC's report states that:

> Digital platforms that host or otherwise act as intermediaries between scammers and their victims are in a unique position to identify and stop scams and harmful apps, and are well placed to remove harmful apps. However, platforms are relatively free to choose how they deal with these issues, and the ACCC considers that platforms could do more to protect consumers. This includes providers of search, social media, online private messaging, app store, online retail marketplace and digital advertising services.

36. [redacted]

37. [redacted]

38. [redacted]

Costs of In-app Payment Tying

39. Match is also in agreement with the ACCC that Apple's and Google's dominance in the provision of app marketplace services leads to consumers paying higher prices for in-app purchases. Match shares the ACCC's concerns with the high commission rates charged by Apple and Google to app developers being passed on to consumers in the form of higher prices for in-app purchases or a reduction in the quality or volume of in-app content available.[23] Match has advocated publicly that, if Apple and Google reduced their commission rate, its portfolio brands will reduce their prices.

40. The view that excessive commission rates of in-app payment tying have high costs which harm consumers is supported by consumers in Australia. On 21 June 2022, two separate class actions were commenced in the Federal Court against Apple and Google on behalf of eligible Apple or Google device users who purchased apps and in-app content from Apple's and Google's respective app stores. The applicants in both cases allege (among other things) that Apple or

[22] ACCC Report, pp 45-46.
[23] Ibid, pp 42-43.

Google were able to charge commission rates on app or in-app purchases over and above what they would otherwise have been able to charge in a competitive market, which resulted in higher prices for users who purchased apps and in-app digital content.[24]

41. A Portuguese consumer protection group has filed similar parallel opt-out competition class action claims against Google and Apple on behalf of consumers. These actions allege that consumers overpaid for their mobile applications due to in-app payment bundling and the commissions they charge.[25] Similarly, a class action in the UK Competition Appeal Tribunal has been commenced against Apple on behalf of 19.6 million consumers. In this case, Apple is accused of abusing its dominance by requiring users to purchase many in-app services through its App Store payment system, which then allows it to charge an 'excessive mark-up'. It further claims that customers who use the App Store are the 'most obvious and direct victims' of this anti-competitive conduct.[26] A similar class action has also been brought by the Dutch Consumer Competition Claims Foundation against Apple, alleging that Apple's abuse of its dominant position in the app store market has caused EU consumers to suffer financial, as well as other types of loss.[27]

42. Moreover, Match considers that Apple's and Google's commissions do not reflect the value of the services provided to developers. Apple's 30% commission on in-app purchases is a significant fee, and it is not clear for which services it is paid for by app developers subject to the obligation to use its in-app payment. The commission fee does not reflect the actual value of payment processing services and is also much higher than the value of app distribution services, evidenced by the price paid for distribution by apps which do not process in-app payments. Further, the commission fee is not fairly imposed across app developers. The circumstances in which the commission fee is mandated are unclear and arbitrary, with only 3% of developers required to pay this fee to Google**.**[28] For example. app developers who offer 'digital goods or services' as opposed to 'physical goods or services' must use Apple's in-app payment system and are therefore charged a 30% commission on all transactions. Google's terms and conditions similarly require the use of its in-app payment system as the method of making in-app payments only for digital goods and services. This means that apps that offers physical goods and services on the Google Play Store are not required to use Google Play Billing and are therefore not subjected to the commission rate charged by Google.

43. The ACCC itself noted that:

> The ACCC considers that the commission rates are highly likely to be inflated by the market power that Apple and Google are able to exercise in their dealings with app developers. Apple and Google structure their charges and their levels in order to maximise their profits. For apps, this is about setting commission rates based on the likely ability and willingness of app developers to pay, and, to the extent possible, minimising any flow on effects to consumers. While the ACCC considers the market power of Apple and Google is highly likely to mean that

[24] Phi Finney McDonald, 'Apple App Store Class Action' https://phifinneymcdonald.com/action/apple-app-store-class-action/; Phi Finney McDonald, 'Google Play Store Class Action' <https://phifinneymcdonald.com/action/google-play-store-class-action/>; Charles McConnell, 'Apple and Google hit with twin monopolisation class actions in Australia', *Global Competition Review* (29 June 2022) https://globalcompetitionreview.com/article/apple-and-google-hit-twin-monopolisation-class-actions-in-australia.
[25] See: Olivia Rafferty, 'Parallel class actions launched against Google and Apple in Portugal', *Global Competition Review* (23 March 2022) https://globalcompetitionreview.com/collective-actions/parallel-class-actions-launched-against-google-and-apple-in-portugal?utm_source=Germany%2Bprobes%2Bcollective%2Bnegotiations%2Bfor%2Bmedical%2Bequipment&utm_medium=email&utm_campaign=GCR%2BAlerts.
[26] Ibid.
[27] See: Olivia Rafferty, 'Apple faces €5 billion class action in the Netherlands', *Global Competition Review* (4 April 2022) https://globalcompetitionreview.com/collective-actions/apple-faces-eu5-billion-class-action-in-the-netherlands?utm_source=Apple%2Bfaces%2B%25E2%2582%25AC5%2Bbillion%2Bclass%2Baction%2Bin%2Bthe%2BNetherlands&utm_medium=email&utm_campaign=GCR%2BAlerts.
[28] Google, 'Understanding Google Play's Service Fee' https://support.google.com/googleplay/android-developer/answer/111311145?hl=en#zippy=%2Cwho-is-subject-to-the-service-fee.

> the commission rates are higher than otherwise would be the case, it is difficult to know by how much.[29]

44. Match supports the ACCC's acknowledgment of the need for appropriate regulation in order to prevent the likelihood of this harmful behaviour continuing.[30] Prohibiting the mandatory and exclusive use of in-app payment systems is therefore fundamentally important in terms of competition, consumer benefit and innovation and urgently needs to be addressed. This will produce direct and immediate consumer benefits. Specific rules prohibiting this activity could be included in a mandatory code of conduct that is specific to app marketplace services providers, in line with the ACCC's recommended approach.[31]

45. As noted in the ACCC Report, despite a number of concerns raised by the ACCC in the App Store Report about the Apple App Store and the Google Play Store, it does not appear that Google or Apple have taken action to address many of those concerns in Australia. For example, the following recommendation made by the ACCC in the App Store Report has been completely ignored by Apple and Google:

> App developers should not be restricted from providing users with information about alternative payment options. This would provide greater choice and potentially lower prices to consumers and allow app developers greater scope to innovate.[32]

46. Rather than implementing any changes in response to the ACCC's recommendations, Apple and Google have continued to enforce certain terms that the ACCC has previously identified as problematic.[33]

8. Do you agree with the ACCC recommendation to introduce targeted measures on digital platforms to prevent and remove scams, harmful apps and fake reviews? Are there any other harms that should be covered by targeted consumer measures, for example, consumer harms related to the online ticket reselling market for live events?

8.1 Is the notice and action mechanism proposed by the ACCC for these consumer measures appropriate? Are there any alternative or additional mechanisms that should be considered?

9. What digital platform services should be captured in the ACCC's recommendation?

47. Match shares the ACCC's concerns with the rapid growth of scams on digital platform services, including investment scams which can result in substantial financial losses. Match is operated on the firmly held belief that user safety is a top priority. Many of our recent safety and customer responsiveness enhancements are a direct result of the feedback we have received from our Australian users, law enforcement agencies and regulators. For example, Match's portfolio brands utilise industry leading technology, advanced artificial intelligence and a variety of other factors to identify bad actors and remove and keep them off our platforms.

48. However, Match's portfolio brands' ability to monitor their platforms and enhance online safety is undermined by the restrictive requirements and conditions of Apple's and Google's respective app

[29] App Store Report, p 9.
[30] Ibid, p 41.
[31] The ACCC recommends the introduction of mandatory service-specific codes to address anti-competitive tying under Recommendations 3 and 4: ACCC Report, pp 16-17.
[32] App Store Report, p 10.
[33] ACCC Report, p 50.

marketplaces, specifically each platform mandating use of its in-app payment system and the effect this has on Match's portfolio brands' customer relationships.

49. It is a widely accepted economic principle that monopolists and duopolists lack incentives to invest in the quality of their products as compared to players in highly competitive markets. To the extent that Apple and Google hold dominant positions in the provision of in-app payment processing services, they have little incentive to develop new features to combat scams or otherwise protect consumers.

50. Match supports the proposal for introducing additional measures to promote consumer safety, such as the ACCC's proposal for a notice and takedown mechanism that would assist in the prevention and removal of scams, harmful apps and fake reviews.[34] This obligation could be included in a sector specific code addressing app marketplace services, as well as in other sector specific codes where this is appropriate.

51. Further, and as explained above, [redacted]

13. Do you agree with the designation and code of conduct model proposed by the ACCC for the new competition regime? What would be the main implementation challenges for such a regime?

14. Do you agree with the proposed framework of prescribing general obligations in legislation, and specific requirements in codes?

52. As outlined above, while there are a number of approaches being suggested internationally, Match supports the ACCC's Proposed Model in Australia. This is because:

- there is a strong track record of codes being an effective form of regulation in Australia. For example, there is the recently adopted News Media Bargaining Code, as well as Industry Codes of Conduct under the CCA including the Dairy Code of Conduct and the Electricity Retail Code; and
- the ACCC has already undertaken an extensive review of different digital platform services offered in Australia by service here in Australia such as through the App Store Report and the Interim Report on General Online Retail Market Places.[35]. Therefore, the Government already has the groundwork to develop service specific codes.

53. Further, Match also agrees with the benefits of the Proposed Model as set out in the ACCC Report. These benefits include:

- **Targeted application** – the codes of conduct will only be applied to 'Designated Digital Platforms' in respect of specific digital platform services. This will ensure that the measures appropriately target the conduct that poses the greatest competition and consumer harms. Further, the designation process of having quantitative and possibly qualitative criteria to

[34] Page 10 of the ACCC's report states: 'While the ACCC recognises the efforts of many digital platforms to address scams and harmful apps, we consider that further protections are necessary. These include…a notice-and-action mechanism allowing users to report a scam or harmful app, and requiring the platform receiving this report to act in response, communicate its actions, share information with relevant agencies, and offer redress, as appropriate'. Further detail of how this would apply is provide on page 83 of the report.
[35] ACCC, *Digital Platform Services Inquiry – Fourth Interim Report* (March 2022), released 31 March 2021.

designate a digital platform service ensures that only digital platforms that act as gatekeepers will be impacted, which reduces the risks of unintended consequences;

- **Flexibility** – implanting different codes for different services would provide the flexibility to account for material differences in the services offered by digital platforms. It would also allow for the codes to be quickly updated by the regulator, which is likely to be important given the fast-paced nature of change that occurs in relation to digital platform services; and
- **Prioritisation** – by mandating separate codes for different services, the Proposed Model will allow for sequential prioritisation by the relevant regulator, so that codes may be developed for the services that have the most pressing competition and consumer harms. As set out in further detail at 68, Match considers that app stores issues should be prioritised when the codes are being prepared, as these issues are easily defined and can quickly result in consumer benefits.

54. In addition, the Proposed Model should be relatively simple for the Government to legislate. This is because the primary legislation that underpins the codes will not have any general prohibitions itself. Rather, it will only contain a power to develop a code of conduct, legislative principles to guide the development of the codes, a designation power and consequences of contravention of a code.

55. Match is also confident that the relevant regulator (presumably the ACCC) would then be able to quickly draft appropriate and proportionate codes of conduct. This is because the ACCC has conducted extensive work in terms of the competition and consumer harms caused by certain digital platforms and has proposed a considered model to address these harms. In addition, the Proposed Model is similar to models in other jurisdictions, which have been extensively discussed and considered by the ACCC and overseas regulators.

56. While Match considers that the Proposed Model can be quickly adopted, the biggest implementation challenge is likely to be delays caused by unnecessary further consultation, or from digital platforms looking to stymie the process. The Government should ensure that these delays do not occur. This is because the ACCC has: (i) thoroughly examined the competition and consumer harms that arise from the practices of some digital platforms; (ii) sought feedback from interested parties about these harms and proposed regulation to address these harms; and (iii) concluded that the Proposed Model was the most appropriate and proportionate response. As set out above, Match supports the quick implementation of the Proposed Model. It is now time for the Government to adopt the Proposed Model to address these harms.

57. The ACCC has proposed that codes will be 'subordinate legislation' (ie, delegated legislation under the primary legislation which has the general obligations) and the relevant regulator who would prepare or update the codes.[36] It is likely to do so in consultation with Government as well as the industry. Subject to the wording of the primary legislation, the codes are likely to be 'disallowable instruments'. That is, after a code has been prepared by the relevant regulator, the Parliament would normally have 15 sitting days to veto the adoption of the code. Match considers that this is likely to be a much faster process to deal with harms arising from the practices of digital platforms, than it would be for the Parliament to prepare and amend the primary legislation. However, it would give the Parliament oversight over the terms of the codes.

[36] ACCC Report, pp 188 - 191.

15. Do you agree with the proposed principles for designating platforms for the regime?

58. In the ACCC Report, the ACCC outlines that new competition obligations under codes of conduct should only apply to 'Designated Digital Platforms' in respect of specific digital platform services. Specifically, the ACCC outlines that the designation criteria would include:[37]

- *quantitative criteria, such as the number of monthly active Australian users, and the platform's Australian and/or global revenue*
- *qualitative criteria, such as whether the digital platform holds an important intermediary position, whether it has substantial market power in the provision of the digital platform service, and whether it operates multiple digital platform services*
- *a combination of both quantitative and qualitative criteria.*

59. Match considers that the designation criteria should be based on quantitative criteria as they are clear and appropriate. For example, Match is supportive of the designation criteria in the following proposed bills in the United States to regulate digital platforms:

- **The Open App Markets Act** (***OAMA***): Under the OAMA, certain anti-tying obligations would apply to a 'covered company' which refers to any person that owns or controls an app store for which users in the US exceed 50 million;[38] and
- **The American Innovation and Choice Online Act (*AICOA***): Under the AICOA, certain obligations apply to a 'covered platform', which is defined as a publicly traded company, which during the last 12 months has at least 50 million US based monthly active users or 100,000 US based monthly active business users, and is owned or controlled by a US person with an annual sales of greater than USD550 billion.[39]

60. Match is also supportive of the designation criteria in the EU's DMA, where a digital platform is deemed to be a 'gatekeeper' and made subject to certain obligations if it meets the following criteria:[40]

> *a) … where it achieves an annual Union turnover equal to or above EUR 7,5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same core platform service in at least three Member States;*
>
> *(b) … where it provides a core platform service that in the last financial year has at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union, identified and calculated in accordance with the methodology and indicators set out in the Annex;*
>
> *(c) … where the thresholds in point (b) of this paragraph were met in each of the last three financial years.*

61. If qualitative criteria are to be used for designation, there are a number of the models in overseas jurisdictions that may be appropriate. However, qualitative criteria should not be imposed in addition to quantitative criteria. For example, the proposed regulatory regime for digital markets in

[37] ACCC Report, p 114.
[38] Open App Markets Act, S. 2710, 117th Congress (2021-2022), § 2(3).
[39] American Innovation and Choice Online Act, S. 2992, 117th Congress (2021-2022) § 2(a)(5)(B).
[40] EU Digital Markets Act, Article 3(2)(a)–(c). Based on text adopted by the European Parliament and Council published 18 July 2022.

the UK uses the qualitative criteria of whether a digital platform has SMS.[41] The qualitative criteria that the CMA will take into account in making this assessment include:

- whether the firm has achieved very significant size or scale in an activity;
- whether the firm is an important access point to consumers for a diverse range of other businesses or the activity is an important input for a diverse range of other businesses;
- whether the firm can use the activity to further entrench or protect its market power in that activity, or to extend its market power into a range of other activities; or
- whether the firm can use the activity to determine the 'rules of the game' for those users of the firm's ecosystem and set practices for those businesses in the wider market

62. Similarly, the Digital Markets Act in the EU has the following three-limb qualitative 'gatekeeper' criteria to designate a digital platform (***Gatekeeper Approach***):[42]

- it has a significant impact on the internal market;
- its service is an important gateway for business users to reach end users; and
- it enjoys (or it is foreseeable it will enjoy in the near future) an entrenched and durable position in its operations.

63. Match considers that the Gatekeeper Approach is preferable as these criteria are clear and presumed to be met if the provider meets the quantitative thresholds set out above at 60. This would ensure that the designation process is simple to apply.

64. However, if qualitative criteria are to be used for designation, Match agrees with the ACCC that the relevant regulator should provide guidance material on how these criteria will be interpreted. This will provide clarity to industry participants and would be consistent with existing regulatory regimes in Australia that use qualitative criteria. By way of example, the ACCC provides guidance on interpreting the long term interests of end users where declaring services under Part XIC of the CCA.

65. While Match agrees with the proposed principles of designating platforms under the Proposed Model, Match strongly recommends that the designation criteria should be clear and simple to apply. This is to avoid the real risk of certain digital platforms using overly vague designation criteria to stall the application of a particular code of conduct to one of their services. For example, a digital platform could stall their designation by procedurally challenging the basis of a designation decision or by requesting detailed expert reports that justify that decision.

16. Do you agree that the focus of any new regulation should be on the competition issues identified by the ACCC in Recommendation 4? Should any issues be removed or added?

17. What services should be prioritised when developing a code? What harms should they be targeted on preventing?

[41] UK Government, Government response to the consultation on a new pro-competition regime for digital markets (6 May 2022) pp 7, 15.
[42] EU Digital Markets Act, Article 1. Based on text adopted by the European Parliament and Council published 18 July 2022.

66. The focus of new regulation on digital platforms should be on the competition issues identified by the ACCC in Recommendation 4. These issues are:

- anti-competitive self-preferencing;
- anti-competitive tying;
- exclusive pre-installation and default agreements that hinder competition;
- impediments to consumer switching;
- impediments to interoperability;
- data-related barriers to entry and expansion, where privacy impacts can be managed;
- a lack of transparency;
- unfair dealings with business users; and
- exclusivity and price parity clauses in contracts with business users.

67. Match considers that all of these issues are present in the mobile app stores operated by Apple and Google, and is supportive of any app store code addressing them.

68. Harms arising from App stores should be prioritised when the codes are being developed, as this will lead to immediate consumer benefit. The ACCC and other regulators around the world have written extensively about these harms. For example, the Japan Fair Trade Commission (***JFTC***) released a Market Study Report on Mobile Operating systems and Mobile App Distribution in February 2023, in which it outlines that there is insufficient competitive pressure on Apple's App Store and Google's Play Store. Because of this, the JFTC detailed its concern that Apple and Google can engage in harmful conduct such an anti-competitive self-preferencing by treating their own apps more favourably than competitors' apps.[43] For example, Apple and Google can:

- restrict competitors' access to certain smart phone functions (eg, API connection), or share mobile operating system information with their own app development staff before its competitors;[44]
- manipulate search algorithms in their app stores to display their own apps in a more appealing way to consumers;[45] or
- disable the uninstallation of pre-installed apps (eg, Apple might disable the uninstallation of Safari) or unnecessarily complicate the settings for changing a default (eg, Google making it difficult to change Google Maps as the default on Android phones).[46]

69. In addition, as outlined in the Match DPSI Report, Apple and Google also engage in in-app payment tying through their respective app stores, which leads to a number competition harms such as:[47]

- **App developers not competing on an even playing field.** This is because apps that are subject to the in-app tying condition must pay differential rates to those which are not. This results in the former paying hundreds of millions in commission fees to Apple and Google, while their rivals pay only USD$99 per annum to Apple or USD$25 registration fee to Google;

[43] Japan Fair Trade Commission, *Press Release – Market Study Report on Mobile OS and Mobile App Distribution (Summary)* (February 2023), p 15 https://www.jftc.go.jp/en/pressreleases/yearly-2023/February/230209EN02.pdf.
[44] Ibid, p 16.
[45] Japan Fair Trade Commission, *Press Release – Market Study Report on Mobile OS and Mobile App Distribution (Summary)* (February 2023), p 17 https://www.jftc.go.jp/en/pressreleases/yearly-2023/February/230209EN02.pdf.
[46] Ibid, p 19.
[47] Match DPSI Submission, p 7-9.

- **Google and Apple having an unfair and unmeritorious advantage compared to other app developers**. This is due to Apple and Google being able to plan their own prospective entry into those developers' app categories using the sensitive customer data obtained from them via in-app payments. For example, Apple may have already done this in relation to music streaming services (Apple Music), 'e-readers' (Apple Books), video streaming services (Apple TV), news (Apple News) and gaming (Apple Arcade)**;** and
- **App developers investing less in innovation**, as certain app developers are forced to use Apple or Google's in-app payment systems which are one-size-fits-all solutions that have no regard to the particular characteristics of each app, but also to the preferences of different types of users using each app.

70. Other jurisdictions have also identified harms from app stores as a priority to fix. For example:

- **South Korea:** South Korea was the first country to enact legislation that prohibits Google and Apple from barring third-party payment providers. In 2021, the government adopted legislation that sought to promote fair competition between competitors in the app market industry.[48] The legislation prohibits app market operators from unfairly using their trading position to force providers of mobile content to use certain payment platforms or to pay certain fees associated with the app distribution platforms.[49] This provision specifically targets the significant commission taken by Apple or Google on in-app and app-store payments.
- **United States:** In the United States, there is a proposed bill which would specifically regulate app stores – the OAMA. The OAMA requires a 'Covered Company' that owns or controls an App Store with more than 50,000,000 users in the US to allow third-party apps and app stores, and prohibits such companies from collecting non-public information through their platforms to create competing apps. This is in addition to a broad framework that aims to prevent digital platforms from engaging in discriminatory conduct that is detrimental to its competitors.

71. Similarly, there are a number of actions and investigations being taken in other jurisdictions to address anti-competitive behaviour by Apple and Google in their app stores. This includes:

- **India:** The Competition Commission of India (***CCI***) fined Google $161 million last year for abusing its dominance in five markets, including licensable operating systems for smart mobile devices, the Android app store and general web search services. Two areas of concern regarding in-app purchasing requirements include: (1) Google imposing mandatory obligation to use GPBS to make in-app purchases; and (2) Google restricting the ability of app developers to inform consumers within an app of the ability to purchase in-app content elsewhere, such as on a website.[50] The CCI ordered Google to make a series of changes to its services including removing in-app payment tying from apps that are distributed through the Google Play Store and allowing developers to offer users the option to choose an alternative billing system alongside Google Play's billing system when purchasing in-app digital content.
- **United States:** The Department of Commerce's National Telecommunications and Information Administration (***NTIA***) in the US recently published a report on competition in the mobile application ecosystem. The report notes that issues with in-app purchasing is a focus of international regulatory scrutiny and recommends development of new measures

[48] National Assembly of the Republic of Korea, 'Act to Partially Amend the Telecommunications Business Act' http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_E2Z1F0E7F2Y0Q1S1N3B4Y5U2A2K2P9?.
[49] Ibid.
[50] Servada Legal, *Competition Law Jurisprudence in Platform Markets* (2023), p 8.

that would explicitly prohibit platforms from certain conduct. Examples of conduct that the NTIA recommended to be prohibited include: requirements that app developers use an in-app payment system owned or controlled by the platform and requiring fees for use as a condition of being distributed on the app store, prohibitions on developers notifying users that they can make purchasers directly from the developers on their website, and conditioning access to the platform or preferred status on the purchase or use of other products or services that are not part of the platform itself.[51]

- **France:** In France, the Paris commercial court has fined Google €2 million for unfair commercial practices in its contracts with app developers, under a law that targets unfair practices outside of competition law.[52] Apple has also recently been fined €1 million for imposing unfair conditions on app developers. Apple have also been ordered to bring its practices in line with new regulations of the EU.[53]
- **Other:** Anti-competitive actions and investigations have been taken against Apple by the Netherlands Authority for Consumers and Markets (***ACM***), Brazil's Administrative Council for Economic Defence, Mexico's Federal Economic Competition Commission and the Federal Telecommunications Institute and the Russian Federal Antimonopoly Service.[54]

72. Further, as the ACCC identifies in the ACCC Report, measures to address tying conduct are included in the EU's Digital Markets Act and the 10th Amendment to the German Competition Act. Tying conduct has also been identified as something that the UK Government's proposed pro-competition regime for digital markets would be able to address through conduct requirements.[55]

17.1 Should codes be targeted at individual companies, a specific service, or all digital platform services?

73. Codes should be targeted at specific services which would apply to all designated platforms that supply that service. Match agrees with the ACCC that this approach will ensure that the obligations in the code will be appropriately targeted to the specific competition issues that arise,[56] and would allow for a direct response to issues which lead to harm across multiple digital platforms. By way of example, a code could be targeted at app stores and could prohibit certain forms of conduct such as:

- anti-competitive tying (eg, IAP Bundling);
- anti-competitive self-preferencing (eg, the way that Apple ranks its own apps more favourably than third-party apps in its App Store search results);

[51] United States Department of Commerce, *Competition in the Mobile Application Ecosystem* (February 2023), p 45.
[52] Olivia Rafferty, 'French Court Fines Google over App Developer Restrictions', *Global Competition Review* (30 March 2022) https://globalcompetitionreview.com/digital-markets/french-court-fines-google-over-app-developer-restrictions.
[53] Le Monde, 'Applications mobiles: Apple condamné à 1 million d'eors d'amende en France' (19 December 2022) https://www.lemonde.fr/economie/article/2022/12/19/applications-mobiles-apple-condamne-a-un-million-d-euros-d-amende-en-france_6155104_3234.html
[54] Olivia Rafferty, 'Mexico faces another jurisdictional battle as agencies launch parallel probes into Apple', *Global Competition Review* (17 January 2023) https://globalcompetitionreview.com/article/mexico-faces-another-jurisdictional-battle-agencies-launch-parallel-probes-apple; Francesca McClimont, 'CADE becomes latest LatAm enforcer to probe Apple's App Store policies', *Global Competition Review* (20 January 2023) https://globalcompetitionreview.com/article/cade-becomes-latest-latam-enforcer-probe-apples-app-store-policies; Olivia Rafferty, 'Apple faces new antitrust sanctions in Russia', *Global Competition Review* (18 January 2023) https://globalcompetitionreview.com/article/apple-faces-new-antitrust-sanctions-in-russia.
[55] ACCC Report, p 132.
[56] ACCC Report, p 5.

- anti-steering provisions (eg, Apple's terms prohibit app developers from steering users towards alternative payment mechanisms within an app); and
- other issues such as transparency in mobile app stores (eg, Apple's and Google's app review and approval process).

74. Match also considers that the approach of having codes which target specific services is ideal due to its flexibility. For example, if a new app distribution platform is created and this platform engages in similar harmful conduct to Apple and Google in respect of their app stores, then there will already be a code to quickly address this harm by this new service (assuming the platform is designated).

18. Should codes be mandatory or voluntary?

75. Match agrees with the ACCC that any codes of conduct should be mandatory. As outlined in the Match DPSI Submission, the latter type of code is not enforceable and in Match's view would not be effective at regulating digital platforms' conduct. This is borne out by the actions of certain digital platforms overseas. For example (and as outlined above), despite being repeatedly fined by the Dutch Competition Authority for breaches of the Dutch competition laws, Apple continued to obstruct the implementation of the app store remedies ordered by the ACM. The same conduct cannot be allowed to happen in Australia.

76. In addition to being mandatory, the codes must have significant financial penalties for breaches. As the ACCC outlines in its report, to effectively deter harmful conduct by digital platforms, the size of available penalties should reflect the financial strength of the global digital platform firms that are likely to be subject to codes under the Proposed Model.[57] At a minimum, Match considers that the penalties for breaching a code should be the recently amended maximum penalties under the CCA. That is, the penalties should be the greater of $50 million; three times the value of the benefit obtained; or where the value of the benefit cannot be determined, 30% of the adjusted turnover during the breach turnover period for the act or omission. Match would also be supportive of the proposed approach in the UK of daily fines for continued breaches. Under this approach, the UK's Competition and Markets Authority's Digital Markets Unit will have the power to impose fines on digital platforms of up to a maximum 10% of a firm's global turnover for the most serious offences, with further daily penalties of up to 5% of daily worldwide turnover for continued breaches.[58] Further, in light of Apple seemingly accepting fines for breaches of international competition laws as part of doing business,[59] Match considers regulatory measures should be accompanied by criminal penalties.

19. Who should be responsible for the design of the proposed codes of conduct and obligations?

77. Match considers that the ACCC should be responsible for designing the codes of conduct. The ACCC has considerable expertise in these matters and the existing Digital Platforms Unit could

[57] ACCC Report, p 191.
[58] UK Government, *Government response to the consultation on a new pro-competition regime for digital markets* (6 May 2022) p 29.
[59] Charley Connor, 'Apple hit with sixth penalty in Dutch non-compliance saga', *Global Competition Review* (28 February 2022) Accessed at: https://globalcompetitionreview.com/digital-markets/.

easily transition from working on the Digital Platforms Services Inquiry to preparing the relevant codes of conduct and obligations.

78. Further, as outlined above, the proposed codes of conduct will likely be subordinate legislation and it is common for a regulator or policy agency to assist in developing subordinate legislation. For example, the Department of Agriculture, Fisheries and Forestry published the draft clauses of the dairy code and the exposure draft,[60] and the ACCC helped draft the News Media Bargaining Code and submitted recommendations to the Treasurer in respect of that code.[61]

20. Who should be responsible for selecting or designating platforms to be covered by particular regulatory requirements?

79. Match considers that the ACCC would be the most appropriate body to make the designation decision. This is because it is the ACCC that has had carriage of the Digital Platforms Services Inquiry and will have the necessary knowledge to make such a decision. Further, as the ACCC is an independent and expert regulator, it is likely to be well positioned to make an objective decision – in the same way that it does for merger control decisions.

80. However, Match considers that regardless of whether it is the ACCC or a third party making the designation decision, the designation process for determining which digital platform services should be subject to codes of conduct must be objective and transparent. In particular, the process should include: a notice being given to the relevant platform, a public consultation process to ensure procedural fairness, and the relevant platform is given the opportunity to have open dialogue with the relevant decision-maker. Match also supports appropriate rights of appeal or review.

21. Who should enforce any potential codes and obligations?

81. Match considers that the ACCC is the most appropriate regulator to enforce any potential codes and obligations. This is because the practices of digital platforms are causing significant competition and consumer harms in Australia and the ACCC is the regulator tasked with enforcing Australia's competition and consumer laws. In addition, the ACCC will have the most familiarity with these harms and potential codes / remedies to address them through its ongoing review in the Digital Platforms Services Inquiry (slated to continue until 2025), as well as its previous work on the Digital Platforms Inquiry (final report published on 26 July 2019).

22. What checks and balances should be in place on decision makers and across the various stages of the policy (e.g. code making, designation process, code enforcement)?

[60] Department of Agriculture, Fisheries and Forestry, *Exposure draft,* https://haveyoursay.agriculture.gov.au/dairy-code-conduct/widgets/265665/documents.
[61] Australian Competition and Consumer Commission, *News media bargaining code* (31 July 2020) https://www.accc.gov.au/focus-areas/digital-platforms/news-media-bargaining-code/news-media-bargaining-code/draft-legislation.

82. There should be a process of public consultation prior to a particular digital platform service being designated (further detail on this is set out above in response to question 20). Match agrees with the ACCC's conclusion that a key element of the code making process will be public consultation, including with the digital platforms to which a code will apply.[62] This will ensure that the process is transparent and will assist the regulator to develop proportionate and well-targeted obligations, while mitigating the risk of having unintended consequences. However, any public consultation should be targeted and have quick turnarounds. This will ensure that the process of developing the code will not be stalled by digital platforms which may wish to slow the implementation process.

83. In terms of code enforcement, the ACCC recommends that the relevant regulator should also be responsible for publishing guidelines to support compliance with the code.[63] Match considers that these guidelines should provide information about critical elements of the regulation and practical assistance to regulated entities on how to comply with these measures. While the Australian courts are ultimately responsible for interpreting the legislation that underpins the regulation, the regulator can describe the general approach it will take to exercising its functions.[64]

23. What avenues of dispute or review should exist with regards to designation or decisions under any potential code? How can this best be implemented to ensure timely outcomes to allow for effective regulation in a fast-changing market?

84. Match considers that there should be a right of appeal under the Proposed Model in respect of when a digital platform service is designated. However, given the risk that rights of appeal may act as an impediment to the effective regulation of digital platforms in a fast-changing market, Match submits that there should be tight time limits on such rights of appeal.

24. Do information gathering powers for the relevant regulator need to be enhanced to better facilitate information gathering from multi-national companies? What balance should a potential regime strike between compliance costs, user privacy and the regulators information needs?

85. The ACCC recommends enhanced information-gathering powers for the relevant regulator in relation to the Proposed Model. At a minimum, the ACCC considers that the relevant regulator should have the ability to obtain information as part of:

- investigations into compliance; and
- other functions and powers given to the regulator for the purposes of the framework.

86. If the ACCC is the regulator tasked with enforcing the Proposed Model, then existing information gathering powers that the ACCC has under section 155 of the CCA should be amended to allow the ACCC to investigate and / or gather necessary information to prepare and enforce codes of conduct under the Proposed Model and should include the additional information gathering powers above listed at 79.

[62] ACCC Report, p 189.
[63] Ibid.
[64] Ibid, p 189.

25. Should Australia seek to largely align with an existing or proposed international regime? If so, which is the most appropriate?

87. The Proposed Model has clear alignment with some models in overseas jurisdictions. For example, the EU's DMA regulates the conduct of digital platforms that offer one of the listed 'core platform services' and are designated as 'gatekeepers' according to qualitative and/or quantitative criteria.

88. The UK has also proposed similar legislation that aims to regulate major players in the digital space. Under this legislation, the newly established DMU will be given the power to designate certain firms as having SMS. Once a firm is found to have SMS, an enforceable code of conduct will apply to that firms' conduct and may be subjected to pro-competitive interventions by the DMU.

89. While there are some differences in approach, the principles sought to be established and the harms addressed are similar, as is the case in many areas of law. While Match is supportive of aligning Australia's regulation of digital platforms with international regulation where possible, it is more important that the competition and consumer harms are addressed expeditiously and effectively by measures that bespoke to the Australian context. Any "wait and see" approach is unnecessary and will perpetuate consumer harm in Australia.

26. What are the benefits and downsides of Australia acting in advance of other countries or waiting and seeking to align with other jurisdictions?

27. Are there any particular aspects of the ACCC's proposed regime that would benefit from quick action or specific alignment with other jurisdictions?

90. As outlined above at 11, it is clear that the existing competition regime under the CCA is not effective at addressing the specific issues caused by digital platforms in Australia. There are serious competition and consumer harms that are being caused by digital platforms, including the harms that arise from in-app payment tying.

91. Match considers that the Proposed Model is a considered and appropriate response to the harms caused by digital platforms and that Australia would not be acting in advance or moving too quickly if such a model is adopted. Although the model has similarities to other regimes such as the DMA, waiting to evaluate whether similar international measures are successful in addressing harmful conduct and promoting competition will cause undue and unnecessary delay and continue those harms against consumers in Australia.

92. In deciding whether the Proposed Model is the most appropriate choice to address the harms caused by digital platforms, Match urges the Government to consider what option will best provide direct and targeted near-term regulatory action to address the competition and consumer harms arising in digital platforms including the provision of app marketplace services. As outlined above, Match submits that a code addressing the harms arising in this context could be developed quickly under the Proposed Model.

93. Match is concerned that if action in Australia is delayed, this will lead to additional lost competition, innovation and consumer welfare in Australia compared to comparable international jurisdictions.

Annexure A – Match DPSI Submission

Submission by Match Group, Inc. to the Australian Competition and Consumer Commission

Response to Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services (as part of the Digital Platform Services Inquiry)

3 May 2022

A Executive Summary

1. Match Group, Inc (***Match***) welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (***ACCC***) Digital Platform Services Inquiry (***DPSI***) Discussion Paper for Interim Report No. 5: Updating competition and consumer law for digital platform services (***Discussion Paper***).

2. Match appreciates the opportunity to provide this submission in response to the Discussion Paper.

3. In this submission Match:

   - sets out its views on the competition and consumer harms arising from app marketplace services in Australia;
   - considers that additional legislative measures are needed to address these harms, such as the adoption of targeted legislation on app marketplaces followed by broader digital platforms legislation modelled on the European Commission's Digital Markets Act (***DMA***) and the US Open App Markets Act (***OAMA***);
   - considers data access for app developers and to limit incumbent's use of data; and
   - considers the desirability of increased transparency around search ranking and the app review processes put in place by app store providers.

4. Match supports direct and targeted near-term regulatory action followed by the introduction of a broader digital platforms regulatory regime. Delaying any Australian solutions further will lead to additional lost competition, innovation and consumer welfare in Australia.

B Match's role in the digital platform market

5. Match is a publicly traded corporation (NASDAQ: MTCH), with headquarters in Dallas, Texas, USA. Match provides, through its portfolio of companies, dating services available in over 40 languages to customers in more than 190 countries through apps and websites. Throughout 2021, Match brands had approximately 10.4 million subscribers globally. As of 31 December 2021, Match companies had approximately 2,500 full-time employees.[1]

6. Match's brands in Australia include Match™, Tinder, OkCupid, Hinge, PlentyOfFish, Twoo and Ablo.

7. All of Match's services in Australia are available as apps distributed through Apple's and Google's app marketplaces, the App Store and Google Play Store, respectively. Many of Match's services in Australia are also available on the web. However, the vast majority of Match's user base uses mobile devices to access Match's services in the form of an app.

[1] Match Group Inc., Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Fiscal Year Ended 31 December 2021 (***Match Group 2021 Annual Report***) p 12, available at https://ir.mtch.com/financials/sec-filings/default.aspx.

8. The value of the services that app developers create relies on the mobility of the device, for example, in the context of a dating app, proposed matches based on your precise location and potential dates which are located within a defined proximity to the user. The functionalities of Match's services are superior in mobile app form because certain key features of Match's services and functionalities that are fundamental to the user experience are not available on the web. When compared with native mobile apps, websites and web apps provide inferior performance, prolonged load instances and restricted access to the device's hardware (eg, camera, microphone, GPS and other sensors). Websites and web apps accessed from devices lacking touchscreen capabilities cannot support key features, particularly gesture-based features, such as the SWIPE RIGHT feature, which is a defining characteristic for Match's Tinder product.

C Consultation questions raised in the Discussion Paper

1. What competition and consumer harms, as well as key benefits, arise from digital platform services in Australia?

9. While Match acknowledges that harms exist across multiple types of digital platforms in Australia, Match's submission focuses on app marketplaces. As Match has highlighted in previous submissions to the ACCC,[2] Match agrees with the ACCC in the Digital Platform Services Inquiry, Second Interim Report (March 2021), released 28 April 2021 (***App Store Report***), and considers that a number of competition and consumer harms arise from Apple and Google operating app marketplaces in Australia.

1 Overview of Apple

a) The Apple App Store

10. Apple's 'App Store' is the only app store on Apple iOS devices. The App Store is pre-installed on all Apple devices and allows users to search, browse, download and rate apps developed specifically for Apple's iOS. The pricing models for downloading and using apps varies: some apps on the App Store are free and others require payment from users to either access the app in its entirety or 'unlock' particular features or content within the app.

11. The App Store is the only distribution channel available for developers to distribute their apps to consumers seeking iOS apps. This is because Apple does not allow any other app store to be used on Apple devices and it also does not allow direct downloads (e.g., from an app developer's website). The App Store generated global revenues of approximately USD$85 billion (around AUD$113 billion) in 2021.[3]

b) Apple's App Distribution Restrictions

12. App developers that want to develop iOS apps and supply them to consumers via the App Store must enter into the Apple Developer Program License Agreement (***DPLA***).[4] The DPLA incorporates by reference the App Store Review Guidelines (***Guidelines***).[5]

[2] See Submission by Match Group, Inc. to the Australian Competition and Consumer Commission, 'Response to app marketplaces Issues Paper (as part of the Digital Platform Services Inquiry)' dated 16 October 2020.
[3] See Statista 'Worldwide gross app revenue of the Apple App Store from 2017 to 2021' available at: https://www.statista.com/statistics/296226/annual-apple-app-store-revenue/.
[4] The Apple Developer Program was apparently launched in March 2008 (at that time called iPhone Developer Program), see J Dalrymple, 'Apple unveils iPhone SDK' in Macworld (6 March 2008) available at https://www.macworld.com/article/1132400/iphonesdk.html.
[5] Apple's App Store Review Guidelines available at https://developer.apple.com/app-store/review/guidelines/.

13. After signing the DPLA, an app developer can submit apps to Apple for review and upon approval by Apple, apps are admitted to the App Store (subject to continual adherence to the DPLA and Guidelines).

14. Apple provides its terms and conditions to app developers on a 'take it or leave it basis'. In Match's experience, even the most powerful app developers have no negotiation power with Apple. This is evident in the number of complaints lodged against Apple and disputes between Apple and app developers.

c) Apple's commission for certain apps

15. There are also specific obligations placed by Apple only on a certain subset of app developers.

16. Apple's Guidelines impose an obligation on developers of apps deemed to offer 'digital goods or services' (***digital services apps***) to exclusively **use Apple's in-app payment system (*IAP*)** to accept payment for those digital goods and services within the app (the ***IAP Condition***). The IAP Condition is set out in Apple's DPLA and Guidelines.[6] For example, Schedule 2, clause 3.11 of the DPLA provides: '*Subscription services purchased within Licensed Applications must use In-App Purchase*.' Apple has previously permitted certain exceptions to the IAP Condition, for example by allowing developers of 'reader' apps (specified as apps which 'do not offer in-app digital goods and services for purchase', such as Netflix or Spotify) to include an in-app link to their website for users to set up or manage an account and make payments outside of Apple's IAP.[7]

17. By way of example, Match portfolio brand Tinder allows consumers access and use of the basic Tinder service for free; however, consumers must buy a subscription in order to unlock Tinder's premium features (eg, subscribers of Tinder Plus and Tinder Gold enjoy unlimited use of the SWIPE RIGHT feature). Consumers can also purchase certain features on an à la carte basis. [redacted]

18. Digital services apps that are subject to the IAP Condition are then charged a 30% fee by Apple on the transaction value of user payments made within the app, including any subscriptions purchased in the app and any other in-app transactions (e.g., purchases of *à la carte* features) (the ***IAP Commission***).This means that app developers who offer 'digital goods or services' as opposed to 'physical goods or services' are subject to the IAP Condition, must use IAP and are thereby charged a 30% commission on all transactions made in the app.

19. As the ACCC noted in the App Store Report, approximately 16% of all apps on Apple's App Store are forced to use IAP.[8] However, the circumstances in which the IAP Condition is imposed, and app developers are therefore required to pay the IAP Commission, are unclear and arbitrary.

20. As of 2016, Apple lowered the IAP Commission to 15% for subscriptions exceeding more than one year. However, due to the unique nature of online dating, neither Match nor the users of its portfolio apps are able to benefit from this. [redacted] In addition, as of 1 January 2021, app developers that qualify from the App Store Small Business Program benefit from a 15% commission.[9] This program is, however,

[6] Apple's DPLA and Guidelines do not distinguish specifically between apps that offer 'physical' or 'digital' goods or services. Apple refers to apps providing 'physical goods or services' as apps that enable the purchase of 'goods or services that will be consumed outside of the app'.
[7] Apple, Press Release, 'Japan Fair Trade Commission closes App Store investigation' available at: https://www.apple.com/newsroom/2021/09/japan-fair-trade-commission-closes-app-store-investigation/;.
[8] ACCC, 'Digital Platform Services Inquiry 2020-2015: March 2021 Interim Report' (28 April 2021) (***App Store Report***), p 68.
[9] See “App Store Small Business Program”, *Apple Developer*, available at https://developer.apple.com/app-store/small-business-program/.

available only for app developers who made up to 1 million USD in proceeds in the prior calendar year for all their apps available through the App Store – meaning that the larger app developers cannot benefit from the 15% commission.

2 Overview of Google

a) The Google Play Store

21. All android devices are pre-installed with Google's app marketplace – the Google Play Store. Google allows third party app marketplaces to be deployed on Android devices alongside its own Google Play Store. For example, Samsung supplies its Galaxy Store app marketplace, which is only available on Samsung-branded Android devices.

22. Despite the existence of these other app stores, distributing through the Google Play Store is a 'must-have' for Android app developers. Alternative Android app stores are rarely used by consumers, as Google Play is pre-installed on all Android devices. The Google Play Store accounts for 90% or more of Android-compatible mobile app downloads and so other app marketplaces do not pose a meaningful competitive restraint.

b) Google's App Distribution Restrictions

23. To create and distribute apps in the Play Store, Google requires third-party app developers to sign up to the Google Play Developer Distribution Agreement (***GPBDA***),[10] and Google Developer Program policies.[11] Developers must also adhere to the Google Play Terms of Service,[12] and follow guidance on various Play Store policies.

24. Like Apple, Google provides its terms and conditions to app developers on a 'take it or leave it basis'. In Match's experience, even the most powerful app developers have little negotiation power with Google.

c) Google's commission for certain apps

25. Like Apple, Google's terms and conditions require the use of its in-app payment system (Google Play Billing (***GPB***)) as the method of making in-app payments for digital goods and services (***GPB Condition***). This means that developers are not required to use GPB when their apps offer physical goods or services.

26. In September 2020, Google announced a change to its payment policy that represented a shift by Google towards a more aggressive enforcement of IAP Bundling.[13] Google's announcement stated Google had always required that app developers use Google Play's in-app payment system, and that it was merely clarifying the language in the Payments Policy to be more explicit.[14] Google provided app developers with a deadline of 30 September 2021 to complete any necessary updates.[15] In July 2021, Google announced that developers can apply for a six month extension to this deadline.[16] If granted an extension, Developers had until 31 March 2022 to comply (except for India, where the deadline is October 2022). Developers of digital goods/services that do not comply (ie, do not permit GPB as the exclusive form of payment for in-app purchases) risk being excluded from the Google Play Store.

[10] Google, Google Play Developer Distribution Agreement, 15 April 2019.
[11] Google, Developer Program Policy, Play Console Help, 1 March 2021.
[12] Google, Google Play Terms of Service, 12 October 2020.
[13] Ibid, para 197.
[14] Google, 'Listening to Developer Feedback to Improve Google Play (28 September 2020), available here.
[15] Ibid.
[16] Google, 'Allowing developers to apply for more time to comply with Play Payments Policy' (16 July 2021), available here.

27. Google's GPB carries many of the same disadvantages as Apple's IAP from the perspective of app developers. Like Apple, Google's commission is up to 30% for in-app purchases.

3 Competition and consumer harms

a) Lack of competition for app stores

28. There are no significant suppliers of mobile app marketplaces in Australia or globally other than Apple and Google.

- On **Apple** mobile devices, the App Store is the only marketplace currently available for iOS users to download apps. Further, Apple uses specific restrictions in its DPLA to require that iOS developers only distribute apps through the App Store and not create rival app stores (the ***iOS App Distribution Restrictions***).
- As outlined above, **Google** allows third party app marketplaces to be deployed on Android devices alongside its own Google Play Store. However, the ability to distribute through the Google Play Store is a 'must-have' for Android app developers. This is because alternative Android app stores are rarely used by consumers, as Google Play is pre-installed on all Android devices. The Google Play Store accounts for 90% or more of Android-compatible mobile app downloads and so other app marketplaces do not pose a meaningful competitive restraint.

29. The ACCC noted in App Store Report, '*[t]he duopoly in the market for mobile OS and the significant barriers to entry and expansion provide each of Google and Apple significant market power in the supply of mobile operating systems in Australia*'.[17] Further, the ACCC outlined in the App Store Report that Apple's App Store and Google's Play Store are '*effectively isolated from competition*' and only constrain one another to a very limited extent due to high user switching costs between mobile operating systems and the fact that both stores are 'must haves' for developers.[18]

30. Match considers that Apple and Google are essentially monopolists in each market for the distribution of apps on their respective operating systems. This view is supported by the European Commission (***EC***), the CMA and 37 US State Attorneys General. In its preliminary findings, the EC found that: *'For app developers, the App Store is the sole gateway to consumers using Apple's smart mobile devices running on Apple's smart mobile operating system iOS*' and that Apple '*… has a dominant position in the market for the distribution of music streaming apps* ***through its App Store***' (emphasis added).[19] It is also supported by the EC's decision that '*Google is dominant in the worldwide market (excluding China) for app stores for the Android mobile operating system*' since 2011.[20] Similarly, in its Mobile Ecosystems Market Study Interim Report, the CMA found that Apple and Google face limited competitive constraints in relation to the distribution of apps through their app stores, meaning that they '*each have substantial and entrenched market power in the distribution of native apps within their ecosystems*'.[21]

31. Further, thirty-seven US State Attorneys General have commenced an action against Google asserting that there are '*no pro-competitive efficiencies from the tie (ie, IAP Bundling) that outweigh*

[17] App Store Report, p4.
[18] App Store Report, p5.
[19] EC Press Release 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers' (30 April 2021), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2061>
[20] EC Press Release 'Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine' (18 July 2018), available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581; Full decision available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.
[21] Competition and Markets Authority, 'Mobile ecosystems: Market study interim report' (14 December 2021) (***CMA Interim Report***), p124, available here.

the harm to consumers. App developers and app users are each harmed by Google's forced intermediation of in-app payment processing.'[22]

32. Match considers that the lack of competitive constraint in the distribution of mobile apps allows Apple and Google to interpret their respective terms and conditions in ways that may limit, eliminate, or otherwise interfere with app developers' ability to distribute their applications through Apple and Google's stores, the features that are provided in the apps, the manner in which in-app services are marketed, and the ability of app developers to access critical information about their users and subscribers that they collect through customer transactions. In this regard, Match agrees with the CMA that Apple's and Google's app review process '*effectively dictate[s] the terms that third-party app developers must agree to in order to access their app stores*',[23] and gives '*Apple and Google a powerful position in respect of app developers seeking to bring their apps to users on the App Store and the Play Store*.'[24]

33. One of the most restrictive ways in which Apple and Google interfere with app developers' ability to distribute their apps through Apple and Google's stores is IAP Bundling, that is, the bundling of access to the App Store and Play Store for app developers with the mandatory and exclusive use of Apple and Google's in-app payment systems. In the App Store Report, the ACCC noted that it is highly likely that Apple and Google's significant market power enables each of them to unilaterally set and enforce rules like IAP Bundling,[25] and that the commission rates charged by Apple and Google are inflated by the respective market power that these companies have.[26]

34. IAP Bundling (such as the IAP or GPB Condition) is a principal concern of many app developers because it results in a number of competition and consumers harms. Match sets these out below.

b) Competition harms

35. IAP Bundling distorts competition between app developers, which results in the following competition harms:

- App developers not competing on an even playing field;
- Google and Apple having an unfair and unmeritorious advantage compared to other app developers; and
- App developers investing less in innovation.

i. App developers not competing on an even playing field

36. IAP Bundling results in app developers not competing on an even playing field in a number of ways. Apps that are **subject to the IAP or GPB Condition must pay differential rates** to those which are not. This results in the former paying hundreds of millions in commission fees to Apple and Google, while their rivals pay only USD$99 per annum to Apple or USD$25 registration fee to Google. [redacted] In comparison, Facebook, which since September 2019 has been providing a dating service, does not have to pay Apple for any services relating to its app (ie, distribution of its app to iOS users), save for an annual USD$99 fee.

37. By differentially charging app developers competing with each other, Apple is distorting competition between Match's subscription-based business model and Facebook's ad-funded business model in

[22] *Utah v. Google* (US), Case No. 3:21-cv-05227 (***Utah v Google***), paragraph 289, available here.
[23] CMA Interim Report, paragraph 6.55.
[24] CMA Interim Report, paragraph 6.55.
[25] App Store Report, p 78.
[26] App Store Report, p 72.

relation to dating / matchmaking. The result is in an uneven playing field for app developers subject to the IAP Condition competing against developers of apps offering similar services not subject to the IAP Condition.

38. This view is shared by the European Commission in relation to Apple. On 16 June 2020 the EC announced its investigation into Apple's IAP Condition and data acquisition practices in relation to its direct competitors, Spotify and an e-book and audiobook distributor.[27] On 30 April 2021, the EC sent a Statement of Objections to Apple as part of its investigation into Apple's App Store rules (in particular, IAP Bundling and marketing / anti-steering restrictions). The EC's investigation considered the impact of these rules on music streaming app developers.[28] The EC said its preliminary view is that:

> *… Apple's rules distort competition in the market for music streaming services by raising the costs of competing music streaming app developers. This in turn leads to higher prices for consumers for their in-app music subscriptions on iOS devices. In addition, Apple becomes the intermediary for all IAP transactions and takes over the billing relationship, as well as related communications for competitors.*

39. The rules regarding the mandatory use of IAP and GPD are unclear and have the effect of distorting competition. [redacted] Therefore, this distorts the competition between the apps which fall within this definition, and those which do not. [redacted].

40. Moreover, there does not appear to be a justifiable rationale for Apple or Google to require some apps (offering digital services), and not others (offering physical services), to use their proprietary in-app purchase systems and pay a 30% commission. For example, Uber provides a similar type of service to Tinder: Uber connects a rider to a driver to meet and take a ride, while Tinder connects two people together so they can meet and go on a date. Yet, Uber is not required to use IAP because Apple considers it involves services consumed outside the Uber app. Similarly, Uber is not required to use GPB whereas Tinder is.

ii. Google and Apple have unfair and unmeritorious advantage compared to other app developers

41. Apple's and Google's conduct also gives both companies an unfair and unmeritorious competitive advantage against apps forced to use IAP. Apple and Google can plan their own prospective entry into those developers' app categories using the sensitive customer data obtained from them via IAP. For example, Apple may have already done this in relation to music streaming services (Apple Music), 'e-readers' (Apple Books), video streaming services (Apple TV), news (Apple News) and gaming (Apple Arcade).

[27] European Commission, Cases AT.40437 (Apple – App Store Practices - music streaming) and AT.40652 (Apple – App Store Practices – e-books/audiobooks).
[28] EC Press Release 'Antitrust: Commission sends Statement of Objections to Apple on App Store rules for music streaming providers' (30 April 2021), available here.

42. Similarly, even though as of today neither Apple nor Google has launched a dating app, nothing would preclude them from doing so in the future, in much the same way as Facebook leveraged its vast user base to launch a dating service. Match is not alone in expressing concerns that Apple and Google may use their market power, and potentially their privileged access to competitively sensitive information and data, to introduce apps which compete with Match portfolio apps. Apple in particular has a history of engaging in this type of conduct.[29]

43. The IAP and GPB Condition also raise rivals' costs in app categories where Apple and Google compete with other apps. For example, Apple and Google both operate their own email apps, Apple Mail and Gmail respectively. Apple and Google compete with various other email apps on iOS, such as Microsoft's Outlook. However, both Apple Mail and Gmail enjoy positions of incumbency given they come preinstalled on iOS and Android devices respectively. Many developers are unlikely to have the scale to be able to develop, manage and update a new email service for free by leveraging, for example, a data collection and advertising model. Instead, many developers in this app category would have to charge a premium fee to support continued development.

44. Finally, the possibility of Apple entering certain data reliant digital markets might explain why Apple has made an arbitrary distinction between apps offering '*physical goods or services*' and apps offering '*digital goods or services*', requiring that only apps in the latter category use IAP. These are apps with which Apple currently competes – or with which Apple is more likely to compete in the future. As app developers interviewed by the Netherlands Authority for Consumers and Markets (***ACM***) observed: '*it is highly unlikely that it is a coincidence that these digital services that are required to use IAP face competition from Apple's own apps, or possibly will do so in the future*'.[30]

iii. Less innovation

45. The IAP Condition and the GPB Condition also damage competition as they reduce innovation by app developers in relation to payment options they can offer to their users. Certain app developers are forced to use IAP or GPB which are a one-size-fits-all solutions that have no regard to the particular characteristics of each app, but also to the preferences of different types of users using each app. IAP and GPB come with disadvantages that alternative bespoke solutions – either developed in-house (as is the case for several Match Group brands) or provided by specialised vendors – do not have. This ultimately restricts app developers' ability to innovate and compete against other app developers who are less innovative and customer orientated in the transaction experience.

46. In addition, [redacted]

This unnecessary duplication of efforts obviously creates huge inefficiencies, reduces the amount of capital that Match has to spend on innovation or to develop more tailored payment solutions at lower prices.

47. Finally, the mandatory use of an app marketplace's in-app payment system limits competition between and innovation from providers of payment services, which would in other circumstances

[29] Parental control apps, **Kidslox** (https://kidslox.com/) and **Qustodio** (https://www.qustodio.com/en/), complained to the European Commission that, since the introduction of Apple's own Screen Time app on all iOS 12 devices, which is activated by default and is non-removable from devices, Apples has arbitrarily blocked, with little information or explanation (or on weak privacy and security grounds),[29] the leading parental control apps in the market from making app updates, hindering innovation and potential growth. See also: *Blix Inc., v Apple Inc., - Complaint.* Available at: https://www.scribd.com/document/428792774/Blix-v-Apple. See also P McGee, 'Blix calls for developers to revolt against Apple', in *Financial Times* (5 February 2020) available at https://www.ft.com/content/fe8a4f4e-4732-11ea-aeb3-955839e06441.

[30] Autoriteit Consument & Markt, 'Market study into mobile app stores' (11 April 2019) available at https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf, page 89.

have a strong incentive to offer innovative features in payment solutions designed for in-app purchases.

c) Consumer harms

48. IAP Bundling also has a number of deleterious effects on consumers which impact on competition. These include:

- [redacted]

- Stifling consumer choice in relation to payment solutions and innovative products; and
- Raising the prices of apps due to the commissions charged by Apple and Google.

i. [redacted]

49. [redacted]

ii. [redacted]

50. [redacted]

iii. Stifling consumer choice

51. IAP Bundling also has the effect of stifling consumer choice in relation to payment solutions. This is because IAP Bundling effectively prevents app developers from offering customers more tailored payment solutions and innovative subscription models. By way of example, [redacted]

- [redacted]
- [redacted]

[redacted]

- [redacted]

iv. Costs of IAP Bundling

52. IAP Bundling also has high costs which harm consumers. This is because the excessive commissions charged by Apple and Google increase the prices paid by consumers for their in-app purchases. This view is supported by a Portuguese consumer protection group, which has filed parallel opt-out competition class action claims against Google and Apple on behalf of consumers. These actions allege that consumers overpaid for their mobile applications due to the IAP and GPB Conditions and the commissions they charge.[31] Similarly, a class action in the UK Competition Appeal Tribunal has been commenced against Apple on behalf of 19.6 million consumers. In this case, Apple is accused of abusing its dominance by requiring users to purchase many in-app services through its App Store payment system, which then allows it to charge an 'excessive mark-up'. It further claims that customers who use the App Store are the 'most obvious and direct victims' of this anti-competitive conduct.[32] A similar class action has also been brought by the Dutch Consumer Competition Claims Foundation against Apple, alleging that Apple's abuse of its dominant position in the app store market has caused EU consumers to suffer financial, as well as other types of loss.[33] Similar claims have also been brought in the US,[34] such as the class action brought by developers against Apple for its 'improper monopolization' of the distribution of iOS apps.[35]

53. Moreover, Match considers that Apple's and Google's commissions do not reflect the value of the services provided to developers. Apple's 30% commission on in-app purchases is a significant fee, and it is not clear for which services it is paid for by app developers subject to the obligation to use IAP. The ACCC itself noted that:

> *'The ACCC considers that the commission rates are highly likely to be inflated by the market power that Apple and Google are able to exercise in their dealings with app developers. Apple and Google structure their charges and their levels in order to maximise their profits. For apps, this is about setting commission rates based on the likely ability and willingness of app developers to pay, and, to the extent possible, minimising any flow on effects to consumers. While the ACCC considers the market power of Apple and Google is*

[31] See: Olivia Rafferty, 'Parallel class actions launched against Google and Apple in Portugal', *Global Competition Review* (23 March 2022) available at: https://globalcompetitionreview.com/collective-actions/parallel-class-actions-launched-against-google-and-apple-in-portugal?utm_source=Germany%2Bprobes%2Bcollective%2Bnegotiations%2Bfor%2Bmedical%2Bequipment&utm_medium=email&utm_campaign=GCR%2BAlerts.
[32] Ibid.
[33] See: Olivia Rafferty, 'Apple faces €5 billion class action in the Netherlands' , *Global Competition Review* (4 April 2022) available at: https://globalcompetitionreview.com/collective-actions/apple-faces-eu5-billion-class-action-in-the-netherlands?utm_source=Apple%2Bfaces%2B%25E2%2582%25AC5%2Bbillion%2Bclass%2Baction%2Bin%2Bthe%2BNetherlands&utm_medium=email&utm_campaign=GCR%2BAlerts.
[34] See; Alex Wilts, 'Judge says he wants only one jury trial in Google Play Store litigation' (17 December 2021) available at: https://globalcompetitionreview.com/gcr-usa/gafa/judge-says-he-wants-only-one-jury-trial-in-google-play-store-litigation.
[35] Jay Peters, Sean Hollister, Richard Lawler 'Apple's $100 million settlement agreement 'clarifies' App Store rules for developers, but doesn't change much' *The Verge* (26 August 2021) available at: https://www.theverge.com/2021/8/26/22643807/apple-developer-class-action-lawsuit-collect-information-ios-apps-anti-steering; Jacob Kastrenakes 'Apple is getting sued by developers who say the App Store is a monopoly' *The Verge* (4 June 2019) available at: https://www.theverge.com/2019/6/4/18652460/apple-class-action-lawsuit-monopoly-app-store.

highly likely to mean that the commission rates are higher than otherwise would be the case, it is difficult to know by how much.'[36]

2. Do you consider that the CCA and ACL are sufficient to address competition and consumer harms arising from digital platform services in Australia, or do you consider regulatory reform is required?

3. Should law reform be staged to address specific harms sequentially as they are identified and assessed, or should a broader framework be adopted to address multiple potential harms across different digital platform services?

6. Noting that the ACCC has already formed a view on the need for specific rules to prevent anti-competitive conduct in the supply of ad tech services and also general search services, what are the benefits and risks of implementing some form of regulation to prevent anti-competitive conduct in the supply of the following digital platform services examined by this Inquiry, including:

a) social media services
b) online private messaging services (including text messaging, audio messaging, and visual messaging)
c) electronic marketplace services (such as app marketplaces), and
d) other digital platform services?

7. Which platforms should such regulation apply to?

54. Match notes the ACCC's 'growing concerns' in the Discussion Paper that '*enforcement under existing competition and consumer protection legislation… which by its nature takes a long time and is directed towards very specific issues, is insufficient to address the breadth of concerns arising in relation to rapidly changing digital platform services*'.

55. Match supports proposals to adopt additional regulatory measures to respond to the harms identified in Part C (3). Regardless of what regulatory framework is adopted to address the conduct of concern, Match encourages the ACCC to adopt a similar commitment to strong implementation and enforcement as other international regulators.[37] Further, for any adopted interventions to be effective and have an impact in practice, it is crucial to ensure that there would be no space for Apple or Google to avoid compliance. In light of Apple seemingly accepting fines for breaches of international competition laws as part of doing business,[38] Match considers regulatory measures should be accompanied by criminal penalties.

56. Match is of the view that ***both*** a broader framework and more targeted law reform is desirable to address the harms arising across digital platforms. As the Discussion Paper notes, a broad regime would be useful at addressing harmful behaviour across a number of different digital platforms. The

[36] App Store Report, p9.
[37] Anti-competitive actions and investigations have been taken against Apple by the Netherlands Authority for Consumers and Markets (***ACM***), the Competition Commission of India and the Russian Federal Antimonopoly Service. In France, the Paris commercial court has fined Google €2 million for unfair commercial practices in its contracts with app developers, under a law that targets law targets unfair practices outside of competition law. A similar case against Apple in France remains ongoing (see, eg: https://news.euro-24.com/business/110807.html; https://www.bloombergquint.com/onweb/google-slapped-with-french-fine-over-abusive-app-store-practices; https://globalcompetitionreview.com/digital-markets/french-court-fines-google-over-app-developer-restrictions).
[38] Charley Connor, 'Apple hit with sixth penalty in Dutch non-compliance saga', *Global Competition Review* (28 February 2022) Accessed at: https://globalcompetitionreview.com/digital-markets/

utility of such a framework is explored below (see Part C 4) a)). In addition, more bespoke regulatory tools will enable harms specific to certain digital platforms to be addressed. Match believes that app store regulation in Australia is one area where it is appropriate and necessary to supplement a broader regime with more bespoke regulatory measures due to the specific harms and market dynamics arising in this context, which could easily be targeted by regulations.

57. Match agrees with the Discussion Paper that a potential issue is flexibility of a broad regime to remain relevant and effective in response to changes in digital platforms' business models or operations and innovations in digital services. Match considers that the conduct of concern could be effectively regulated in Australia through a dual approach comprising both general and specific legislation or alternatively by enacting a regime that contains both broad obligations for digital platforms generally and specific obligations on certain platforms such as app-marketplaces. Match considers that the reform package could be informed by viable international approaches such as European Commission's proposed DMA and the OAMA proposal (both explored in detail below).

58. Match is of the view that there is a need for specific rules applying to certain digital platforms to prevent anti-competitive conduct in the supply of app marketplace services. These rules should apply to digital platforms meeting certain criteria that is reflective of their significant market power. Match has not considered rules applying to other digital platform services that the ACCC proposes but it acknowledges that specific rules may also be appropriate in other areas. One means of addressing this is to have broad legislation with the ability to make specific regulations. Another option is to enact separate legislation with targeted obligations and prohibitions which would sit alongside a broader regime. Both of these options are discussed further below.

59. Issues arising in the app marketplace context in Australia are sufficiently discrete and should be addressed on a stand-alone basis alongside or within a broader regime, such as prohibiting Apple and Google from bundling developer access to the App Store and Play Store with mandatory use of their respective IAP processing systems. IAP Bundling forecloses competition among IAP systems, leads to higher prices and reduced service levels for consumers across a wide variety of apps and disintermediates the relationship between app developers and their customers. It also provides lucrative and sensitive commercial transaction data to Apple and Google and stifles investment and innovation by developers and competing payment system providers (eg, FinTech and other digital innovators). Prohibiting the mandatory and exclusive use of IAPs is therefore fundamentally important in terms of competition, consumer benefit and innovation and urgently needs to be addressed through a stand-alone legislative requirement that is supplemented by a broader regime.

60. Match is concerned that if action is delayed until a broader framework addressing multiple harms across digital platform services is established, this will lead to additional lost competition, innovation and consumer welfare in Australia compared to comparable international jurisdictions. It is Match’s view that, while a broader framework will be useful in addressing potential harms across different digital platform services, this should supplement more specific and targeted law reform, discussed below.

4. What are the benefits, risks, costs and other considerations (such as proportionality, flexibility, adaptability, certainty, procedural fairness, and potential impact on incentives for investment and innovation) relevant to the application of the regulatory tools proposed by the Discussion Paper to competition and consumer harms from digital platform services in Australia?

5. To what extent should a new framework in Australia align with those in overseas jurisdictions to promote regulatory alignment for global digital platforms and their users (both business users and consumers)? What are the key elements that should be aligned?

4 Proposed regulatory frameworks

61. Match has considered the regulatory tools proposed by the Discussion Paper to address competition and consumer harms in relation to digital platform services in Australia. Match addresses the efficacy of each of the proposed frameworks in responding to the app marketplace harms, below.

a) Obligations and prohibitions in legislation

62. The Discussion Paper considers the introduction of '*a suite of prohibitions and obligations to be included in legislation, to address the multiple harms*', noting that '*[t]his could, for example, include prohibitions on certain conduct or obligations to require certain conduct*'. It is suggested that this framework could apply to different sub-categories of digital platforms.

63. As discussed above, Match's view is that tailored legislation obligating and prohibiting specific conduct of certain digital platforms should sit alongside legislation applying to digital platforms broadly. Match acknowledges that broader legislation may be needed to address systemic issues that manifest across digital platforms' ecosystems. Thus, Match is of the view that a broader digital platforms regime should supplement more targeted legislation.

(i) Specific legislation

64. Targeted prohibitions and obligations could be specifically legislated or take the form of regulations made under legislation. For example, given that IAP Bundling is a clear and divisible competition issue with identified harms, separating it out into a targeted reform package is appropriate. Enacting targeted legislative prohibitions of the bundling of developer access to the App Store and Play Store with mandatory use of Apple's and Google's respective IAP processing systems would effectively address this problem.

65. The approach of South Korea, and the proposed approach in the United States, are examples of direct, targeted and immediate action by a government to intervene in response to IAP Bundling. The US is also looking at broader laws in addition to the specific ones.[39]

South Korean approach

66. South Korea was the first country to enact legislation that prohibits Google and Apple from barring third-party payment providers. The South Korean parliament adopted legislation in August 2021 targeted at app market operators with established market power that sought to promote fair competition between competitors in the app market industry.[40] The amendments came into effect in

[39] Other international regulators are looking at adopting legislative proposals to regulate the conduct of Apple and Google. For example, a digital markets unit within the Japanese government has published a report suggesting that regulation be imposed to address the growing influence of Apple and Google in the smartphone operating system market, including in relation to app stores. (see, eg: https://protect-au.mimecast.com/s/QjcFCjZrjMu1p3rGiWGo07?domain=tokyo-np.co.jp; https://globalcompetitionreview.com/article/japan-weighs-regulating-apple-and-google-following-government-study?utm_source=CMA%2Bchair%2Bwill%2Bbe%2Bappointed%2Bimminently%252C%2Bsays%2BUK%2Bbusiness%2Bminister&utm_medium=email&utm_campaign=GCR%2BAlerts). The Turkish Competition Authority has requested the Turkish government to introduce specific antitrust rules targeting digital gatekeepers to sit alongside a general code of conduct for online marketplaces to address asymmetry in bargaining power (see, eg: https://globalcompetitionreview.com/digital-markets/turkey-calls-dma-style-digital-regulation?utm_source=Turkey%2Bcalls%2Bfor%2BDMA-style%2Bdigital%2Bregulation&utm_medium=email&utm_campaign=GCR%2BAlerts).

[40] http://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_E2Z1F0E7F2Y0Q1S1N3B4Y5U2A2K2P9

September 2021.[41] The Korean Communications Commission (***KCC***) announced further amendments to the Enforcement Decree of the *Telecommunications Business Act* In September, October and November 2021, with the effect that the Act now specifies types and standards for certain prohibited acts, such as app market operators forcing certain payment methods.[42] The most recent amendments came into effect on 15 March 2022.[43] An example of the specific measures implemented under these provisions is below:

Examples of South Korean prohibitions:
42(1)(8)(D): Activities that force a particular payment system by making the process for accessing and/or using an alternative payment system more difficult or inconvenient than the process to access and/or use a particular payment;
42(1)(8)(F): Activities that force a particular payment system by imposing unreasonable, discriminatory conditions or restrictions in connection with fees, exposure on Application Markets, searches, advertisements, processing of data or other economic benefits, etc. on Mobile Content Providers, Etc., who use an alternative payment system.

67. Apple has submitted to the KCC its implementation plan allowing third-party payments systems from June under the *Telecommunications Business Act*.[44]

OAMA

68. The OAMA proposal is another example of specific legislation regulating app stores, the adoption of which 'would set fair, clear, and enforceable rules to protect competition and strengthen consumer protections within the app market'.[45] As the Discussion Paper notes, the proposed OAMA requires a 'Covered Company' that owns or controls an App Store with more than 50,000,000 users in the US (a definition which both Apple and Google meet) to allow third-party apps and app stores and prohibits such companies from collecting non-public information through their platforms to create competing apps. The Senate Judiciary Committee passed the OAMA on 3 February 2022 with a bipartisan vote of 20-2.[46] A version of the same proposal has been introduced in the House of Representatives.[47]An example of the proposed provisions is below:

Examples of prohibitions in the OAMA introduced in House of Representatives[48]
SEC. 3. PROTECTING A COMPETITIVE APP MARKET. (a) EXCLUSIVITY AND TYING.—A Covered Company shall not—

[41] https://www.kcc.go.kr/user.do?mode=view&page=E04010000&dc=E04010000&boardId=1058&cp=1&boardSeq=51898
[42] Korean Communications Commission, 'KCC Drafts Amendments To Telecommunications Business Act Enforcement Decree And Enacts Notice Prohibiting Forcing Certain In-App Payments' (News Release, 2021) (available here).
[43] Charles McConnell, 'Korea finalises rules forcing Google and Apple to open up app stores', *Global Competition Review* (10 March 2022) (available here)
[44] https://www.news1.kr/articles/?4638831.
[45] Senator Richard Blumenthal 'Blumenthal, Blackburn & Klobuchar Introduce Bipartisan Antitrust Legislation to Promote App Store Competition' (8 November 2021) Available at: https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-blackburn-and-klobuchar-introduce-bipartisan-antitrust-legislation-to-promote-app-store-competition.
[46] Lauren Feiner, 'Senate committee advances bill targeting Google and Apple's app store profitability' CNBC (3 February 2022) available at: https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html.
[47] H.R. 5017 – 117th Congress: Open App Markets Act, 13 August 2021. https://www.congress.gov/117/bills/hr5017/BILLS-117hr5017ih.pdf.
[48] H.R. 5017 – 117th Congress: Open App Markets Act, 13 August 2021. https://www.congress.gov/117/bills/hr5017/BILLS-117hr5017ih.pdf.

(1) require developers to use an In-App Payment System owned or controlled by the Covered Company or any of its business partners as a condition of being distributed on an App Store or accessible on an operating system

(2) require as a term of distribution on an App Store that pricing terms or conditions of sale be equal to or more favorable on its App Store than the terms or conditions under another App Store; or

(3) take punitive action or otherwise impose less favorable terms and conditions against a developer for using or offering different pricing terms or conditions of sale through another In-App Payment System or on another App Store.

(b) INTERFERENCE WITH LEGITIMATE BUSINESS COMMUNICATIONS.—A Covered Company shall not impose restrictions on communications of developers with the users of the App through an App or direct outreach to a user concerning legitimate business offers, such as pricing terms and product or service offerings.

(c) NON-PUBLIC BUSINESS INFORMATION.—A Covered Company shall not use non-public business information derived from a third-party App for the purpose of competing with that App.

(d) INTEROPERABILITY.—A Covered Company that controls the operating system or operating system configuration on which its App Store operates shall allow and provide the readily accessible means for users of that operating system to—

(1) choose third-party Apps or App Stores as defaults for categories appropriate to the App or App Store;

(2) install third-party Apps or App Stores through means other than its App Store; and

(3) hide or delete Apps or App Stores provided or preinstalled by the App Store owner or any of its business partners.

(e) SELF-PREFERENCING IN SEARCH.—

(1) IN GENERAL.—A Covered Company shall not provide unequal treatment of Apps in an App Store through unreasonably preferencing or ranking the Apps of the Covered Company or any of its business partners over those of other Apps.

(2) CONSIDERATIONS.—Unreasonably preferencing—

(A) includes applying ranking schemes or algorithms that prioritize Apps based on a criterion of ownership interest by the Covered Company or its business partners; and

(B) does not include clearly disclosed advertising.

(f) OPEN APP DEVELOPMENT.—A covered company shall provide access to operating system interfaces, development information, and hardware and software features to developers on a timely basis and on terms that are equivalent or functionally equivalent to the terms for access by similar apps or functions provided by the covered company or to its business partners.

69. Targeted legislation could also contain similar prohibitions to those leveraged against Apple in the Netherlands to curb the conduct of concern. In August 2021, following an investigation into Apple's behaviour, the Netherlands Authority for Consumers and Markets (***ACM***) made an order requiring Apple to adjust its unreasonable conditions in its App Store that apply to dating-app providers and

to allow dating-app providers and their users to use multiple payment options for in-app purchases.[49]

70. The ACM Order:

- found that Apple has a dominant economic position, and therefore cannot impose disproportionately onerous conditions on its customers (including the mandatory use of its proprietary IAP system).
- required that Apple amend its terms and conditions to allow dating-app providers to use payment systems other than IAP in their apps and to direct their customers to payment options outside their app.

71. If Apple failed to comply with the ACM Order, a periodic penalty payment of €5,000,000 per week, up to a maximum of €50,000,000, would be imposed.

72. The decision was later upheld by the Dutch court.[50] On 24 December 2021, the District Court of Rotterdam (the ***Court***) handed down its judgment on Apple's request for an injunction against the order imposed on it by the ACM. The Court agreed with the ACM's order, including that Apple held a dominant economic position and that the conditions imposed by Apple relating to the mandatory use of IAP are disproportionate as they are not necessary for Apple's operating model. As a result, Apple was ordered to amend its terms to remove the IAP requirement for dating-app providers in the Dutch App Store by 15 January 2022. Despite the ACM levying a series of fines for non-compliance, Apple has failed to satisfy the requirements of the order by adjusting its conditions to provide for alternative payment options for dating apps in the Netherlands.[51]

73. Although the Netherlands approach is yet to lead to the desired change in Apple's behaviour, Match is supportive of a similar commitment to prohibition and enforcement of IAP Bundling being adopted in Australia. While the ACM's prohibitions on Apple were enacted by an order made under existing Dutch competition laws, Australia could replicate these targeted measures through a specific legislative enactment (similar to the US or South Korean approaches).

(ii) Broader regimes

74. Examples of broader frameworks include:

- the European Commission's proposed Digital Markets Act (***DMA***);[52]
- The US' 'American Choice and Innovation Online Act';[53]
- the UK government's proposal for 'a new pro-competition regime for digital markets' led by the CMA's Digital Markets Units (***DMU***);[54] and
- the German 'GWB Digitisation Act';[55]

[49] ACM, 'ACM obliges Apple to adjust unreasonable conditions for its App Store' (24 December 2021) available at: https://www.acm.nl/en/publications/acm-obliges-apple-adjust-unreasonable-conditions-its-app-store; ACM, 'Summary of decision on abuse of dominant position by Apple' (24 August 2021) available at: https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf.
[50] ACM, 'Apple fails to satisfy requirements set by ACM' (24 December 2021) available at: https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm; https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2021:12851&showbutton=true.
[51] ACM, 'Apple fails to satisfy requirements set by ACM' (24 December 2021) available at: https://www.acm.nl/en/publications/apple-fails-satisfy-requirements-set-acm; Natasha Lomas, 'Apple sends new offer to Dutch antitrust authority over dating apps payments, racks up 9th fine' (22 March 2022) available at: https://techcrunch.com/2022/03/21/apple-acm-nine-fines/.
[52] Available here.
[53] H. R. 3816, 117th Congress 1st Session: American Choice and Innovation Online Act, 11 June 2021. Available at: https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/American%20Innovation%20and%20Choice%20Online%20Act%20-%20Bill%20Text.pdf
[54] Available here.
[55] Legislation linked here, but it is in German.

all of which are identified in the Discussion Paper.

DMA

75. The EU will soon adopt the DMA, a Regulation aimed at regulating the conduct of digital platforms acting as 'gatekeepers'. The DMA will apply to platforms that offer one of the listed 'core platform services'[56] and that meet the qualitative and/or quantitative criteria set in the DMA. Among the listed 'core platform services' are online intermediation services (which include app stores) and operating systems.[57] According to the proposal for the DMA, a provider of a core platform service will be designated as a gatekeeper by the Commission if it satisfies the following qualitative criteria:

    - it has a significant impact on the internal market;
    - it serves as an important gateway for business users to reach end users; and
    - it enjoys (or it is foreseeable it will enjoy in the near future) an entrenched and durable position in its operations.[58]

76. These criteria are presumed to be met if the provider meets certain quantitative thresholds relating to: group annual turnover or market capitalisation, the number of active business and end users of the core platform service, the service being offered in at least three EU Member States and the thresholds having been met in each of the last three financial years.[59] Apple and Google are expected to both meet this criteria with respect to their app stores.

77. The overarching objective of the DMA is to ensure fair and contestable digital markets in the EU. To this end, Articles 5 and 6 of the DMA contain a range of prohibitions and obligations that apply to providers of 'core platform services' designated as 'gatekeepers' by the European Commission through a formal decision.[60] Some of these obligations will apply to all gatekeepers regardless of the core platform service they offer, while others are designed to apply to providers of specific core platform services (eg, to providers of app stores or to providers of operating systems).

78. Once Google and Apple are designated as gatekeepers with respect to their respective app stores (and, relatedly, their operating systems), they will each have to 'fully and effectively' comply with the corresponding obligations and prohibitions under Articles 5 and 6 within six months. Compliance with the DMA should be by design, meaning that the necessary measures to comply with the DMA obligations should be 'as much as possible and where relevant integrated into the technological design used by the gatekeepers'. The obligations imposed by the DMA on gatekeepers would improve the competition and consumer outcomes for app developers and users. In relation to app store marketplaces, the DMA will, among other things:

    - Require gatekeepers to give access to their app stores on fair and non-discriminatory terms.

[56] The core platform services which are regulated under the DMA are listed in Article 2(2) of the Proposal for a Digital Markets Act: "'Core platform service' means any of the following: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) cloud computing services; (h) advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by a provider of any of the core platform services listed in points (a) to (g)." It has been reported that web browsers and virtual assistants have also been added to the list of core platform services. See Luca Bertuzzi, "DMA: EU institutions agree on new rules for Big Tech", Euractiv, 24 March 2022, available at https://www.euractiv.com/section/digital/news/dma-eu-institutions-agree-on-new-rules-for-big-tech/.

[57] The Explanatory Memorandum of the Proposal for a Digital Markets Act states that core platform services eligible to be designated as a gatekeeper by the Commission include app stores as online intermediation services. European Commission, Explanatory Memorandum of the Proposal for a Digital Markets Act (2020) <https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf>

[58] Article 3(1) of the Proposal for a Digital Markets Act.

[59] Article 3(2) of the Proposal for a Digital Markets Act.

[60] Ibid, Art 2(1).

- Prohibit gatekeepers from mandating the use of their in-app payment systems.[61]
- Require gatekeepers to allow communications between app developers and their users.
- Require gatekeepers to allow the installation of third-party apps or app stores through channels other than the gatekeeper's app and allow them to be accessed by means other than the core platform services of the gatekeeper.
- Require gatekeepers to give access to data provided by or generated through the activity of the business users or the end users of these business users.
- Prohibit gatekeepers from using, in competition with business users, non-publicly available data provided by or generated through the activities of these business users or the end users of these business users on the gatekeeper's platform.

79. The DMA is expected to be adopted soon and to be applicable in early 2023. It will be a significant step in addressing the harmful conducts of gatekeepers to the benefit of competition and consumers.

American Choice and Innovation Online Act

80. While the OAMA (discussed above) is the primary bill targeting app marketplace regulation in the US, a broader regime covering digital platforms has also been proposed. In June 2021, the US House Judiciary Committee introduced a five-bill legislative package targeted at increasing anti-trust regulation of digital platforms nationally. The bill package is in addition to numerous state bills that have been proposed in various state legislatures. For each of the bills to apply, a digital platform operator must be designated a 'covered platform'. To be designated a 'covered platform', the platform must meet the following criteria in the 12 months preceding the designation or in the 12 months preceding the alleged violation:
    - have either:
        - 50,000,000 US based monthly active consumers on the platform; or
        - 100,000 US based monthly active businesses on the platform;
    - is owned or controlled by a person with net annual sales or market capitalisation greater than $600,000,000,000; and
    - is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.
81. Match is comfortable that both Apple and Google would likely be considered 'covered platforms' in relation to their supply of app marketplaces.
82. The American Choice and Innovation Online Act is the main bill in the US legislative package. It introduces a range of prohibitions with the aim of preventing digital platforms from engaging in discriminatory conduct that is detrimental to its competitors. The main conduct targeted by the bill is self-preferencing, with prohibitions introduced for the following conduct:
    - advantaging the covered platform operator's own products, services or lines or business over those of another business;[62]

[61] Although this obligation was not included in the Commission's Proposal for a Digital Markets Act, it was proposed by the European Parliament in its adopted amendments and it seems to have been included in the final text (although this is to be confirmed when the final text is published).
[62] Ibid, s 2(a)(1).

- excluding or disadvantaging the products, services or business lines of another business relative to the covered platform operator's own products, services or lines of business;[63] and
- discriminating among similarly situated businesses.[64]

83. Other forms of discriminatory conduct prohibited by the bill include:

- restricting or impeding the capacity of a business to access or interoperate with the same platforms, operating systems, hardware or software that are available to the covered platform operator's own products, services or lines or business;[65]
- making access to the covered platform, or preferred status or placement on the covered platform, conditional on the purchase or use of another product or service offered by the covered platform operator;[66]
- using non-public data obtained from or generated on the covered platform by the activities of a business or its customers to offer or support the offering of a covered platform operator's own product or services;[67]
- use of contractual or technical restrictions that prevent a business' access to and portability of data generated on the covered platform by the activities of the business or its customers;[68]
- restricting covered platform users from un-installing preinstalled software applications, or changing default settings that direct or steer users to products or services offered by the covered platform operator;[69]
- restricting businesses from communicating information or providing hyperlinks on the covered platform to platform users to facilitate business transactions;[70]
- self-preferencing by the covered platform operator of its own products, services or lines of business on user interfaces, including search or ranking functionality, over another business;[71]
- interfering with or restricting a business from pricing its own goods;[72]
- restricting or impeding a business, or a business' customers, from interoperating or connecting to any other product or service;[73] and
- retaliating against a business that raises concerns about actual or potential violations of the law.[74]

84. The regulatory framework established by this bill is akin to that proposed in the EU and Match considers that the proposed framework offers similar benefits for regulating anticompetitive conduct of app marketplace operators.

DMU

[63] Ibid, s 2(a)(2).
[64] Ibid, s 2(a)(3).
[65] Ibid, s 2(b)(1).
[66] Ibid, s 2(b)(2).
[67] Ibid, s 2(b)(3).
[68] Ibid, s 2(b)(4).
[69] Ibid, s 2(b)(5).
[70] Ibid, s 2(b)(6).
[71] Ibid, s 2(b)(7).
[72] Ibid, s 2(b)(8).
[73] Ibid, s 2(b)(9).
[74] Ibid, s 2(b)(10).

85. In the UK, a new regulatory regime will be put in place for the most powerful digital firms, which will be overseen by the DMU. The DMU will be granted with statutory power to designate firms with '*Strategic Market Status'* (***SMS***), oversee mandatory principles-based codes of conduct and implement pro-competition interventions (***PCIs***) that will apply to designated firms.[75] The Discussion Paper notes that designating firms with SMS is based on an assessment by the DMU of whether a firm has:

- substantial, entrenched market power in a specified digital activity (e.g. search or social media), which has particularly widespread or significant effects; and
- a strategic position in a designated activity in the market.

86. Match considers that it will likely be a high priority of the DMU to designate Apple and Google as SMS firms, given that they each would meet the contemplated prioritisation factors of an **annual revenue** of over £1 billion in the UK and over £25 billion globally and **activity** (ie, app stores). In its Mobile ecosystems market study interim report, the UK CMA found that Apple and Google would meet the proposed SMS criteria for each of the main activities within their mobile ecosystems, including their app stores.[76]

87. Once designated as SMS firms, Apple and Google would then be subject to:

- an enforceable code of conduct setting standards of behaviour specific to the activity for which they have been designated (eg, in relation to the operation of app marketplaces); and
- PCIs that seek to address the sources of market power and enable the DMU to intervene in markets to promote dynamic competition and innovation.

88. The proposed remedies that may be made available to the DMU may address app store-related issues in similar ways to the DMA, however it is unclear how bespoke these principles and PCIs would be and whether they would effectively target the conduct of concern in relation to app marketplaces. For example, the CMA's advice regarding the setup of this regime notes that:

'the DMU should be able to implement the following types of remedies through PCIs:

- *data-related interventions – including interventions to support greater consumer control over data, mandating third-party access to data and mandating data separation/data silos;*
- *interoperability and common standards – these can be important in data-related remedies, for example to support personal data mobility, but can also be used to ensure software compatibility or enable systems to work together;*
- *consumer choice and defaults interventions – these remedies can be used to better enable effective consumer choice, for example to address concerns regarding how choices are presented to customers and the defaults that are selected which influence consumer decision making;*
- *obligations to provide access on fair and reasonable terms – these remedies provide third parties with access to key facilities or networks in a non-discriminatory manner; and*

[75] Ibid, paragraph 23, available here.
[76] Competition & Markets Authority. 'Mobile Ecosystems Market Study Interim Report' (14 December 2021) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048746/MobileEcosystems_InterimReport.pdf>.

- *separation remedies – which aim to address structural features of the market that inhibit competition, for example to ensure that different units within an SMS firm are operated independently of each other.'*

89. These measures may be useful in addressing the conduct of concern, for example:

- An interoperability PCI could enable developers and third-party platform providers to run their IAP systems on each app store, though this is not entirely clear.
- In addition, the implementation of consumer choice and defaults interventions could ensure that IAP alternatives are presented to consumers fairly.
- The separation remedies could address issues to do with the leveraging of sensitive data by app stores.

90. However, the lack of clarity around the scope and operation of any potential code or PCIs to be made under the UK regime make it difficult to determine the regime's effectiveness in targeting the conduct of concern.

GWB Digitalisation Act

91. As the Discussion Paper notes, in January 2021, Germany introduced an amendment to the German Competition Act against Restraints of Competition. The new amendment, the 'GWB Digitalisation Act', introduces a new section 19a which enables the Bundeskartellamt to prohibit companies which are of paramount significance for competition across markets from engaging in anti-competitive practices.[77] Germany's legislature amended Germany's competition laws, introducing specific ex-ante competition rules for digital platforms with overwhelming importance to competition across multiple markets.[78] This was because the Bundestag considered that Germany's existing antitrust laws had not allowed regulators and courts to act quickly enough to prevent alleged abuses of market power in rapidly changing digital markets.

92. Under the German legislation, if a company has been designated as having paramount significance for competition across markets, the Federal Cartel Office is authorised to impose certain restrictions on its activities, including prohibiting the company from:

- self-preferencing behaviour such as favouring its own products/services in displays, pre-installing its products/services on devices or integrating its products/services in offers of the company;
- conduct that interferes with other companies' business that relevant for access to these markets, such as pre-installation or integration of offers, or are measures that prevent or make it more complicated for other companies to advertise or reach customers;
- leveraging market power in a way that impedes competitors in a market where the company does not have a dominant market position, in particular by automatically combining the use of one product with the use of another product which is not necessary for it, or by making the use of one product of the company dependent on the use of another product of the company;
- limiting or hindering market access noticeably or otherwise impeding other companies by processing data collected by the company that is relevant for competition or by stipulating terms and conditions that allow for such processing;

[77] Legislation linked here, but it is in German.
[78] Tenth Act Amending the Act against Restraints of Competition for Competition Law 4.0 (ARC-Digital Competition Act), approved by the German Bundestag on 14 January 2021.

- disallowing or impeding the interoperability of products and services or the portability of data and thereby distorting competition;
- providing other companies with inadequate information regarding the scope, quality, or success of provided or requested services or otherwise hindering their ability to evaluate the value of these services; or
- requesting benefits for handling offers of other companies that are disproportionate to the service provided, in particular by demanding the transfer of data or rights that are not necessary for the service or by making the quality of the presentation of the offer dependent on the transfer of data or rights that are disproportionate to the service.

93. Match acknowledges the benefits of the above international approaches and considers that developing a broad framework applying to multiple digital platforms in Australia is appropriate. However, developing such a framework in Australia may require lengthy consultation and long implementation lead times. While Match appreciates the perceived benefits of such 'catch-all' provisions in the long-term, delaying the addressal of distinct issues (such as the unbundling of IAP) to await the application of such provisions would allow detrimental conduct to continue to take a toll on Australian businesses and consumers and the economy more broadly. It is therefore Match's view that consideration should be given as to whether the conduct of concern would be more quickly addressed if, alongside a broader regime, clear and divisible competition issues with identified harms arising across digital platforms (such as IAP Bundling) were separated out into a targeted reform package.

b) Rule-making powers

94. The ACCC has also put forward another option of providing the ACCC or another authority with powers to develop and implement tailored rules specific to certain digital platforms. As the Discussion Paper notes, this framework may enable prohibitions and/or obligations to be detailed and potentially adaptable in their application.

95. Match considers that while the flexibility of this proposed framework may be attractive (especially given the constant innovation in and the dynamic nature of digital platform's business models and operations), any rule-making powers granted to a responsible authority that enable it to develop prohibitions and obligations without the need for legislative approval would need to have appropriate checks and balances in place. While this framework offers one means of curtailing the powers of digital platforms, Match is reluctant to support its implementation without clarity around the scope of any rule-making and enforcement powers. Match considers that it is important that any such powers clearly identify who would be subject to certain rules and the criteria that would be applied in determining this and include the availability of a merits based right to appeal any decisions made by the designated authority.

96. Another option might be that rather than rule-making powers being given to a regulator, the legislation referred to in (a) above might provide for regulations to be promulgated under the broad prohibitions in order to address specific issues. These regulations would be made by the government on the recommendation of a regulator. Such recommendations would need to be appropriately reviewed and assessed when taken into legislative consideration to ensure that it is the legislature and not the regulator who is setting the rules in practice. Similar to the legislative options explored above, any regulations would need to be framed with enough specificity to ensure that the conduct of concern is sufficiently prohibited.

c) Codes of practice

97. Industry codes regulate the conduct of participants in an industry towards other participants and/or consumers.[79] According to Treasury's *Industry Codes of Conduct – Policy Framework*, the Government will only impose prescribed codes where market failure is occurring.[80] Types of market failure that may lead to the establishment of prescribed industry codes include:

- ***Information asymmetry***: this occurs where market participants do not have access to the same information, which prevents parties from making informed decisions, or bargaining on a level playing field; and
- ***imperfect competition***: this occurs when there are relatively few suppliers (eg suppliers of app marketplaces) compared with the number of consumers (eg, app developers), which can result in an imbalance of bargaining power. Where this occurs, parties may be unable to negotiate a fair contract.

98. Both of these types of market failure are present in relation to digital platforms, including in relation to mobile app distribution. A lack of significant suppliers of mobile app marketplaces in Australia (or globally) other than Apple and Google has caused a state of imperfect competition, meaning that developers have no bargaining power and are forced to accept terms contrary to their interests such as the IAP Condition. Further, information asymmetries exist between Apple and Google and app developers, such as a lack of transparency around Apple's and Google's processes regarding app listing and the app review process.

99. Any new industry code should specifically address the competition and consumer issues identified in Part C (3), including the information asymmetries and power imbalance between app developers and app marketplace operators, such as Apple and Google. As the Discussion Paper identifies, mandatory industry codes have been prescribed as a means of addressing imbalances in bargaining power in a variety of industries.[81]

100. Match considers that this avenue should only be considered as an appropriate regulatory response if enacting targeted rules or legislation are not available means to address the competition and consumer harms identified in Part C (3).

101. An additional code of practice could supplement the existing and proposed codes relating to digital platforms,[82] by providing clear objectives and minimum standards for certain digital platforms. It is Match's view that such a code should bind certain designated digital platforms (as in the News Media and Digital Platforms Mandatory Bargaining Code) or platforms meeting certain criteria (similar to the how the UK's proposed code under the DMU regime would apply to firms with SMS), rather than apply to digital platforms broadly. A targeted code would enable the ACCC to formulate standards that specifically address the harms caused by Apple and Google's market behaviour.

102. While industry codes of practice do not have a standard form, some common features include standards to improve transparency and certainty in contracts, set minimum standards of conduct and provide for dispute resolution procedures.[83] By way of example, a new code regulating the conduct of gatekeeper digital platforms could prescribe specific prohibitions regarding interoperability and self-preferencing or set minimum or maximum standards relating to:

[79] CCA s 51ACA.
[80] See the Treasury 'Industry Codes of Conduct Policy Framework' at page 8.
[81] Examples include: the Dairy Code of Conduct, the Franchising Code of Conduct, the Horticulture Code of Conduct, the Telecommunications Consumer Protections Code and News Media and Digital Platforms Mandatory Bargaining Code.
[82] These are identified in Box 7.3 of the Discussion Paper.
[83] See Treasury 'Industry Codes of Conduct Policy Framework' at page 5.

- The contractual terms between app developers and app marketplace operators;[84]
- Marketing restrictions that can be placed on app-developers;
- Apple and Google allowing app developers to offer multiple in-app payment solutions;
- Dispute resolution procedures to be followed regarding the decisions of app marketplace operators to host or remove app stores on their platforms;
- The use of app developers' data and providing access to that data; and
- The processes to be followed by app marketplace operators when reviewing apps or app updates or when removing apps from their app marketplace.

103. Match supports the adoption of a mandatory rather than a voluntary code. The latter type of code is not enforceable and in Match's view would not be effective at regulating digital platforms' conduct. An additional mandatory industry code prescribed in accordance with Part IVB of the CCA or in a separate part of the CCA (such as Part IVBA which contain the News Media Bargaining Code) would be enforceable under existing mechanisms available to the ACCC. Unlike voluntary codes which only bind those who sign up to them, such as the Australian Code of Practice on Disinformation and Misinformation, an industry code is legally binding on all industry participants specified within the code and its contravention is an offence.[85] In addition to imposing a wide range of effective and enforceable remedies for breaches of a prescribed code, the ACCC has the ability to undertake compliance checks of industry participants.

104. If a mandatory code is developed, app developers could leverage the ACCC's existing complaints mechanisms to inform the ACCC about any breaches. However, Match considers that any reporting tool would need to allow for anonymous complaints to be made due to the real risk of retaliatory conduct by platforms against any app developer complainants. [redacted] In addition, the code could contain a prohibition against retaliatory conduct for reports of breaches of the code, similar to existing protections preventing coercion or intimidation.[86]

105. However, while the flexibility and enforceability of a mandatory code is desirable, Match believes that a prescribed industry code would not be effective at prohibiting anti-competitive behaviour by Apple and Google in practice unless significant penalties were attached to a breach of its provisions. Match is of the view that a $66,600 penalty (which is the maximum penalty for a contravention of the Dairy Code of Conduct prescribed under Part IVB of the CCA) would have no deterrence effect on companies the size of Apple and Google. A proposed mandatory code should be accompanied by provisions in the CCA setting a higher maximum penalty for its breach, similar to that provided for breach of the current News Media Bargaining Code. However, Match is of the view that any proposed penalties should be higher than the 6,000 penalty units (which is equivalent to $1,332,000) specified for breach of the News Media Bargaining Code to ensure compliance from Apple and Google. Apple was recently ordered to pay its tenth €5 million penalty for failing to comply with the Netherlands' Authority for Consumers and Markets order to change Apple's policy for dating-app providers in the Netherlands.[87] As the EU competition commissioner Margrethe

[84] The News Media and Digital Platforms Mandatory Bargaining Code provides an example of an industry code regulating contractual obligations of market participants.
[85] CCA s 51ACB.
[86] See, eg, CCA s162A.
[87] Natasha Lomas, 'Apple's fine over Dutch dating apps antitrust order hits €50M — but ACM welcomes revised offer' *Tech Crunch* (28 March 2022) available at: https://techcrunch.com/2022/03/28/apple-acm-dating-apps-tenth-fine.

Vestager commented: '*Apple essentially prefers paying periodic fines, rather than comply with a decision of the Dutch competition authority on the terms and conditions for third parties to access its app store*'.[88]

106. As the making of a regulation or legislative amendment prescribing a mandatory code involves a multi-stage (and likely lengthy) consultation process,[89] it is Match's view that a mandatory industry code offers an alternative (but not a more attractive or expeditious) solution to the enactment of targeted legislation with penalties tailored to the specific conduct.

d) Measures to promote competition

107. Match would want to see more detail about the criteria to apply these powers and the review or appeal rights to ensure there is procedural fairness and not regulatory over-reach.

108. The ACCC has suggested that such measures could operate in a similar way to that envisaged in the UK Government's proposed pro-competition regime for digital markets. As discussed, this regime will provide the CMA's DMU with the power to implement PCIs after the DMU finds conduct from a digital platform that has an adverse effect on competition. In the UK Government report proposing this new regime, it is anticipated that PCIs could include measures to overcome network effects and barriers to entry/expansion through mandating interoperability, third-party access to data or certain separation measures. It could also include measures that increase consumer control over data.[90]

109. Specific examples of Pro-Competition Measures applying to digital platforms could be an order requiring Apple or Google to:

- unbundle their respective IAP systems, whereby Apple and Google must allow app developers to use third-party payment systems within their apps, instead of exclusively using Apple or Google's respective in-app payment solutions; or
- prohibit significant commissions taken by Apple on Google on in-app payments.[91]

110. While Match considers that the proposed approach of having broad and specific legislation as outlined in Part C 4) a) is preferable to PCIs, in the absence this approach being adopted in Australia, Match considers there could be benefits if a similar regime of PCIs was implemented in Australia. Such a regime may provide a degree of flexibility, it may be quick in addressing issues and be able to impose bespoke remedies.

111. However, while there might be some benefits that arise from Pro-Competition Measures, Match considers that they are also complex and come with significant implementation risks. Accordingly, if the ACCC were to be granted such powers in relation to Digital Platforms, there must be appropriate safeguards in place such as:

- criteria setting out on what basis the ACCC could impose such measures and against whom; and
- clear avenues of review where such measures are imposed.

112. Match considers that an appropriate set of criteria for when and against whom the ACCC could impose Pro-Competition Measures might be as follows:

[88] Charley Connor, 'Apple hit with sixth penalty in Dutch non-compliance saga' *Global Competition Review* (28 February 2022) available at: https://globalcompetitionreview.com/digital-markets/.
[89] ACCC, 'Dairy Inquiry: Guide to the ACCC's mandatory code recommendation' (August 2018) available at: https://www.accc.gov.au/system/files/Dairy-inquiry-fact-sheet.pdf, p 4.
[90] UK Government, *A new pro-competition regime for digital markets*, July 2021, 34.
[91] Apple and Google both charge commissions up to 30% for in-app purchases. These are significant fees, particularly when compared with the cost of payment processing services more broadly, and is a particularly significant cost for new and smaller app developers.

- The ACCC must have found that the relevant digital platform has met certain criteria. These criteria could be similar to the UK's proposed 'Strategic Market Status' ie, the ACCC would conclude that the firm has 'substantial and entrenched market power' in at least one activity, and that this power provides it with a 'strategic position';
- The ACCC must have conducted an inquiry into that firm and concluded that conduct from that firm has an adverse impact on competition; and
- After these criteria have been met, the ACCC may impose appropriate and proportionate Pro-Competition Measures.
- There should be avenues of review / rights of appeal. However, such avenues of review / rights of appeal should also ensure that firms with Strategic Market Status cannot escape or unduly delay compliance with such measures.

113. Regarding the avenues of review / rights of appeal against a Pro-Competition Measure, Match understands that under the PCI regime in the UK, it is proposed that any PCIs that are imposed would be monitored, reviewed and possibly amended by the DMU over time. This process could be initiated by the DMU, requested by the relevant digital platform, or requested by any other third parties affected by the PCI. Match considers that it would be beneficial if a similar model were adopted in Australia. This is because it would provide the ACCC with the capacity to ensure that any Pro-Competition Measures that are imposed remain appropriately calibrated to address the adverse effects on competition, and if necessary, strengthen or terminate such measures.

114. However, any reviews that are requested by the relevant digital platform or by any other third party affected by the PCI should not be an internal review conducted by the ACCC. Instead, it should be a merits review with the Australian Competition Tribunal. This is for the following reasons:

- It will ensure that a body other than the ACCC will review the ACCC's proposed Pro-Competition Measures and confirm that they are (i) made in accordance with the relevant powers granted to the ACCC, and (ii) preferable, ie, if there are a range of Pro-Competition Measures or other options that are available to the ACCC, this set of Pro-Competition Measures is the most appropriate considering the relevant facts; and
- merits review would ensure that there is strong level of accountability of the ACCC in relation to any Pro-Competition Measures it imposes.

e) Third-party access regimes

115. Match considers that some digital platforms are 'essential facilities' akin to national infrastructure and 'natural monopolies' like rail, telecommunications and electricity. This is particularly so for app stores such as Apple's App Store and Google's Play Store because app stores form an essential part of everyday life and the global economy, and access is required to distribute apps. As the ACCC noted in the App Store Report, '*[m]ost adult Australians own a smartphone and use the apps installed on it many times a day to engage with friends, family and colleagues, for entertainment, work and to complete tasks such as banking, booking appointments and accessing critical information and services. Consumers rely on the ability to complete a multitude of tasks wherever they are; apps installed on mobile devices make this possible*.'[92]

116. Moreover, the ACCC outlined that it considers that Apple and Google act as 'gatekeepers' with respect to their app stores,[93] having the power to unilaterally set, amend and enforce terms of access to their app stores.[94] Match agrees with this assessment. For example, Apple possesses

[92] App Store Report, p 3.
[93] App Store Report, pp 44, 78.
[94] App Store Report, pp 44, 63, 78.

substantial market power because it controls the entire iOS app ecosystem, including various layers within this ecosystem (eg, the operating system or the App Store). Without Apple's approval, it is impossible to legally distribute apps to consumers on iOS. In order to gain Apple's approval, it is necessary to comply with whatever rules it imposes, including the mandatory use of IAP [redacted] Apple's position of power entails that app developers are not in the position to discuss or negotiate with Apple, which, furthermore, refuses to genuinely engage with developers, e.g., with regards to appeals on its arbitrary decision-making.

117. To address these issues, access regimes have been considered, and in some cases implemented, in overseas jurisdictions. For example:

- In **Germany**, the GWB Digitalisation Act came into force on 19 January 2021. The amendment extended the 'essential facilities'[95] doctrine to make a refusal to grant access to data, networks or other infrastructure facilities (including platforms or interfaces) that are necessary to compete an unlawful abuse of market position; and
- In **the EU**, article 6(i) and (j) of the proposed DMA would require certain digital platforms to provide business users with free access to data generated by those business users or their customers and to provide any third-party providers of online search engines with access to ranking, query, click and view data on fair and reasonable terms (with protections regarding personal data).

118. However, while having an access regime to app stores like those in Germany and the EU may be an option, Match does not consider that it would suitably address the competition and consumer harms of Apple and Google outlined in Part C 3. Instead, as outlined in Part C 4) a) Match considers the most effective option to be tailored legislation obligating and prohibiting specific conduct of certain digital platforms, as well as legislation applying to digital platforms broadly.

5 Addressing data advantages

8. A number of potential regulatory measures could increase data access in the supply of digital platform services in Australia and thereby reduce barriers to entry and expansion such as data portability, data interoperability, data sharing, or mandatory data access. In relation to each of these potential options:

e) What are the benefits and risks of each measure?
f) Which data access measure is most appropriate for each of the key digital platform services identified in question 6 (i.e. which would be the most effective in increasing competition for each of these services)?
g) What types of data (for example, click-and-query data, pricing data, consumer usage data) should be subject to these measures?
h) What types of safeguards would be required to ensure that these measures do not compromise consumers' privacy?

9. Data limitation measures would limit data use in the supply of digital platform services in Australia:

a) What are the benefits and risks of introducing such measures?

[95] The 'Essential Facilities Doctrine' is a doctrine under European law prohibits a dominant company from refusing access to a network or infrastructure that is needed to compete.

b) Which digital platform services, out of those identified in question 6, would benefit (in terms of increased competition or reduced consumer harm) from the introduction of data limitation measures and in what circumstances?

c) Which types of data should be subject to a data limitation measure?

10. In what circumstances might increasing data access be appropriate and in what circumstances might limiting data use be appropriate? What are the relative benefits and risks of these two approaches?

a) Improving data interoperability and data access for app developers

119. Through the (mandatory) use of their respective in-app payment systems, Apple and Google collect valuable transaction and billing data (e.g., credit card information) [redacted]

120. In addition, app marketplaces collect app usage statistics, including the number of times each app on a device was opened, the amount of time it was open for and the time it was opened. [redacted]

121. [redacted]

Articles 6(1)(i) of the DMA
In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (i) provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/679;

[96] Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0499_EN.pdf; Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) - General approach, available at https://data.consilium.europa.eu/doc/document/ST-13801-2021-INIT/en/pdf.

Section 2(b)(4) of the American Choice and Innovation Online Act
(b) OTHER DISCRIMINATORY CONDUCT.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to — (4) restrict or impede a business user from accessing data generated on the platform by the activities of the business user or its customers through an interaction with the business user's products or services, such as contractual or technical restrictions that prevent the portability of such data by the business user to other systems or applications;

122. Match agrees that introduction of additional regulatory measures to improve access, sharing and use of personal data should be accompanied by robust consumer-level controls that limit the privacy risks of data sharing and use.

b) Measures to limit incumbent's use of data

123. As discussed above, Apple and Google have access to valuable app usage and transaction data through the operation of their app stores and the imposition of their in-app payment systems. Not only can this data potentially be monetised through sales to third parties,[97] it could also be leveraged by Apple and Google if they were to combine it with data obtained through their other platforms to offer more targeted services to consumers. Apple or Google could also leverage this data to develop their own apps competing with those of third-party developers which distribute their apps through Apple's and Google's app stores and use their in-app payment systems. [redacted]

124. As the ACCC's App Store Report noted, Apple and Google have the ability and incentive to use information gathered from apps to gain a competitive insight into rival businesses to assist their own strategic or commercial app development decisions.[98] Hypothetically, if Apple or Google were to develop dating apps, they could leverage data generated from all dating-app developers and consumers using their app stores and in-app payment systems (e.g., customer lists, the purchasing activity of individual users and the success of subscriptions) to enter the market with a service that would compete with these app developers.

125. [redacted]

126. To this end, Match is supportive of introducing a similar prohibition to section 3(c) of the OAMA which prohibits use of 'non-public business information derived from a third-party App for the purpose of competing with that App'. Broader prohibitions that could also be useful to consider include article 6(a) of the DMA and section 2(b)(3) of the American Choice and Innovation Online Act, both of which prohibit 'gatekeeper' or 'covered' digital platforms using non-public data generated through activities of business users for their own platforms or services. In addition, article 5(a) of the DMA prohibits the combining of data sourced from across a gatekeeper's services.

[97] If not prevented by the contractual agreement in place between the app developers and app marketplace.
[98] App Store Report, p 130.

Article 5(a) DMA
In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (a) refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679.
Article 6(1)(a) DMA
In respect of each of its core platform services identified pursuant to Article 3(7), a gatekeeper shall: (a) refrain from using, in competition with business users, any data not publicly available, which is generated through activities by those business users, including by the end users of these business users, of its core platform services or provided by those business users of its core platform services or by the end users of these business users;
Section 2(b)(3) of the American Choice and Innovation Online Act
(b) OTHER DISCRIMINATORY CONDUCT.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to — (3) use non-public data obtained from or generated on the platform by the activities of a business user or its customers that is generated through an interaction with the business user's products or services to offer or support the offering of the covered platform operator's own products or services;

127. Regulatory measures addressing data advantages of app marketplaces could also be informed by the fairness principles originally set out by the Coalition for App Fairness (***CAF***), a group formed by app the global app developer community including Match, Spotify, Epic Games, etc concerned with conduct arising in app marketplaces.[99] The CAF's App Store Principles are:

> *1. No developer should be required to use an app store exclusively, or to use ancillary services of the app store owner, including payment systems, or to accept other supplementary obligations in order to have access to the app store.*
>
> *2. No developer should be blocked from the platform or discriminated against based on a developer's business model, how it delivers content and services, or whether it competes in any way with the app store owner.*
>
> *3. Every developer should have timely access to the same interoperability interfaces and technical information as the app store owner makes available to its own developers.*
>
> *4. Every developer should always have access to app stores as long as its app meets fair, objective and non-discriminatory standards for security, privacy, quality, content, and digital safety.*

[99] See Google 'Supported locations for distribution to Google Play users' available at https://appfairness.org/app-developers-coalition-for-app-fairness-competition-innovation/.

5. A developer's data should not be used to compete with the developer.

6. Every developer should always have the right to communicate directly with its users through its app for legitimate business purposes.

7. No app store owner or its platform should engage in self-preferencing its own apps or services, or interfere with users' choice of preferences or defaults.

8. No developer should be required to pay unfair, unreasonable or discriminatory fees or revenue shares, nor be required to sell within its app anything it doesn't wish to sell, as a condition to gain access to the app store.

9. No app store owner should prohibit third parties from offering competing app stores on the app store owner's platform, or discourage developers or consumers from using them.

10. All app stores will be transparent about their rules and policies and opportunities for promotion and marketing, apply these consistently and objectively, provide notice of changes, and make available a quick, simple and fair process to resolve disputes.[100]

128. In an environment which operated on these principles, app developers would be able to compete on the merits with an app marketplace.

6 Transparency

16. In what circumstances, and for which digital platform services or businesses, is there a case for increased transparency including in respect of price, the operation of key algorithms or policies, and key terms of service?

a) What additional information do consumers need?

b) What additional information do business users need?

c) What information might be required to monitor and enforce compliance with any new regulatory framework?

129. As addressed in Match's previous submission to the ACCC, there is need for greater transparency around app search and display rankings[101] as well as the processes for approving an app or update for distribution on app marketplaces.[102]

a) Search ranking

130. High organic search ranking based on an app's popularity and a highly relevant search query by a user does not ensure that an app will appear at the top of the app search results page for that user. Match does not receive specific or useful insights into the operation of search ranking on the major app marketplaces. This lack of transparency around the ranking process increases the cost base of app developers wanting to ensure their apps feature in the search results page, as developers can pay for advertising that results in their apps being 'featured' at the top of the search results page. Apple is understood to generate $5 billion a year as a result of this practice.[103]

[100] CAF, 'Our vision for the future' available at https://appfairness.org/our-vision/.
[101] See Submission by Match Group, Inc. to the ACCC 'Response to Digital Platform Services Inquiry Interim Report No. 2 – App Marketplaces (March 2021)' dated 9 September 2021 and Submission by Match Group, Inc. to the Australian Competition and Consumer Commission, 'Response to app marketplaces Issues Paper (as part of the Digital Platform Services Inquiry)' dated 16 October 2020.
[102] See Submission by Match Group, Inc. to the Australian Competition and Consumer Commission, 'Response to app marketplaces Issues Paper (as part of the Digital Platform Services Inquiry)' dated 16 October 2020.
[103] Patrick McGee, 'Apple's privacy changes create windfall for its own advertising business' *Financial Times* (17 October 2021) available at: https://www.ft.com/content/074b881f-a931-4986-888e-2ac53e286b9d.

b) App update, review and distribution process

131. The app review process put in place by app store providers is arbitrary and non-transparent, with Apple and Google having unfettered discretion to decide on the rules apps must comply with as well as on the interpretation of those rules. As numerous app developers have pointed out over the years, Apple often suddenly changes its rules or their interpretation, meaning that app developers cannot know in advance whether their app or update will be approved or rejected. In fact, it is possible that an app or update is rejected while previous versions of the app with similar features or similar apps offered by other developers were approved. Apple often does not even provide clear feedback to app developers for the rejection of an app or update which would be necessary for them to understand what changes they need to make in order for their apps to be approved.

132. While developers respect that app review processes are in place to enable a level of quality control to benefit end users, in some cases it is unclear when an app developer will be subject to certain conditions or a certain interpretation of the rules while other apps offering similar services are not. This confusion impacts developers who are often unable to push through updates to their apps and who must operate their business in an uncertain environment.

133. Match is therefore of the view that transparency (as well as fairness) around the app listing process is necessary.