

The Open App Markets Act

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Efforts to reform competition law proceed at different levels of generality. Some [bills](#) would [tackle](#) antitrust writ large. Others are more [focused](#), applying [special rules](#) to a [handful of Big Tech companies](#). The Open App Markets Act (OAMA) is narrower still, targeting one segment of the digital economy—mobile software application (app) stores—with sectoral regulation.

While limited in scope, the legislation would reshape key technology markets. Last year, the two largest app stores—Apple’s App Store and Google Play—generated combined sales of \$133 billion, which reportedly contributed a [fifth of the operating profits](#) at Apple and at Google parent Alphabet. The OAMA ([S. 2710](#), [H.R. 5017](#), and [H.R. 7030](#)) would require these firms to make major changes to their business practices in the name of protecting app developers and consumers from alleged abuses of monopoly power.

This Sidebar provides an overview of [S. 2710](#), a version of the OAMA which the Senate Judiciary Committee advanced with amendments in February 2022.

Competition Issues in the App Industry

App stores are considered [critical nodes in the digital economy](#), enabling software developers to distribute their apps to mobile-device users. In turn, those apps allow consumers to perform a sweeping array of tasks, ranging from messaging to gaming to ordering food.

The app-store market is [dominated](#) by Apple and Google, which also control [the leading mobile operating systems \(iOS and Android\)](#). Both the app-store market and the market for mobile operating systems contain high entry barriers and exhibit strong [network effects](#), potentially giving Apple and Google significant power to shape the app industry.

Global competition authorities have investigated several ways in which the firms have allegedly abused that power. The practices motivating the OAMA’s proponents include:

- **Restrictions on the Availability of Rival App Stores.** Apple and Google have allegedly [leveraged control](#) of their operating systems to favor their own app stores over alternatives. In Apple’s case, the alleged self-preferencing is straightforward—Apple’s App Store is the [only app store available on iOS devices](#). Google’s policy is less

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prescriptive, but some commentators [argue](#) that the firm's conduct has nevertheless harmed competition. While Google allows users of Android devices to download competing app stores, it has [required](#) device manufacturers to pre-install the Google Play Store as a condition of licensing the Android operating system. Critics [contend](#) that this pre-installation requirement gives Google Play major advantages over rival app stores, because consumers [tend to stick with pre-installed options](#). Market participants have also [alleged](#) that Google has implemented measures that make downloading competing app stores unnecessarily difficult.

- **In-App Payment Processing and Anti-Steering Provisions.** Apple and Google have [developed](#) tools for collecting payments from users who make purchases within apps downloaded from their app stores. The firms also [require](#) that [developers](#) use these tools as a condition of participating in their app stores. The requirement has not been cheap. Before [recent changes](#), Apple and Google charged fees of up to 30 percent for processing in-app purchases (IAPs). Apple had also [required](#) developers to abide by anti-steering provisions that prohibited communications with customers about alternative payment options. Some observers [argued](#) that these measures harmed competition in the market for IAP processing, injuring both developers and consumers.
- **Technological Self-Preferencing.** The firms have also allegedly favored their own apps over rivals. Some of the putative self-preferencing [involves access to technology](#)—in particular, application programming interfaces (APIs). Developers of mobile operating systems create APIs to allow apps [to access a device's features](#), like its camera or microphone. Apple makes many APIs for iOS publicly available, but has also created a [variety of private APIs](#). Some developers have [accused](#) Apple of unfairly favoring its own apps by allowing them to access these private APIs while denying similar opportunities to rivals. The alleged favoritism may also extend to other device functionalities. For example, Apple allows its payment app (Apple Pay) to access technology enabling communications between devices and payment terminals, but [blocks such access for third-party payment apps](#).
- **Self-Preferencing in Search.** Some commentators have made similar allegations regarding App Store search results. Separate investigations by *The New York Times* and *The Wall Street Journal* have concluded that Apple's apps are often ranked higher than more relevant and popular rivals in the App Store, leading to claims of favoritism. (Apple has [denied](#) its search algorithm preferences the company's own apps.)
- **App Pre-Installation and Default Settings.** As discussed, some observers have argued that pre-installation of the Google Play store on Android devices harms competition in the app-store market. Some developers have criticized pre-installation of certain Apple and Google *apps* on similar grounds. In 2020, the majority staff of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law [found](#) that Apple pre-installed roughly 40 of its own apps on the latest iPhone models. Several of those apps were also set as the [default options](#) for Apple devices. Google has similarly [required](#) device manufacturers to pre-install and give default status to some Google apps, including Google Search.
- **Sherlocking.** Some commentators have [accused](#) Apple of exploiting its control of iOS and the App Store to collect competitively sensitive information from app developers. The firm has [allegedly](#) used such information from popular apps to build competing offerings and integrate certain functionalities into iOS—a practice dubbed “sherlocking.” Similarly, the House Antitrust Subcommittee's 2020 report [concluded](#) that Google has used data from third-party apps to support its own competing offerings.

The Legislation

The OAMA would prohibit many of the practices described above. The bill would impose the following prohibitions and requirements on firms that own or control app stores with [more than 50 million U.S. users](#).

- **Section 3(a): Exclusivity and Tying.** S. 2710 would prohibit covered companies from requiring app developers to use their IAP processors as a condition of participating in their app stores. The bill would also prohibit “most favored nation” pricing requirements, whereby app-store operators dictate that developers price their offerings on terms that are equal to or more favorable than those the developers offer in other app stores. Likewise, covered companies could not take “punitive action” against developers based on prices offered in other app stores or via other payment systems.
- **Section 3(b): Interference with Legitimate Business Communications.** S. 2710 would buttress these prohibitions by preventing covered companies from imposing restrictions on app developers’ communications with users concerning “legitimate business offers,” including pricing terms. Accordingly, app developers could inform users of the benefits of using alternative payment options for IAPs.
- **Section 3(c): Nonpublic Business Information.** S. 2710 would prohibit sherlocking by making it unlawful for covered companies to use non-public business information derived from third-party apps for the purpose of competing with those apps.
- **Section 3(d): Interoperability.** The legislation would also impose certain requirements intended to prevent covered companies from favoring their own apps and app stores over competitors. In particular, S. 2710 would require covered companies that own or control the operating systems on which their app stores run to allow users to:
 - Choose third-party apps and app stores as defaults;
 - Install apps or app stores through means other than the covered company’s app store (commonly called “sideloading”); and
 - Hide or delete pre-installed apps and app stores.
- **Section 3(e): Self-Preferencing in Search.** Under the bill, covered companies would be barred from “unreasonably preferencing or ranking” their own apps over rivals in their app stores’ search results.
- **Section 3(f): Open App Development.** Finally, S. 2710 would prohibit certain forms of technological self-preferencing. The bill would require covered companies to provide developers access to their operating-system interfaces, development information, hardware, and software on terms that are functionally equivalent to those they offer to their own internal development teams or business partners.

These requirements and prohibitions would not be absolute. S. 2710 would offer covered companies several affirmative defenses. In particular, a covered company would not be in violation of any of the provisions discussed above for an action that is:

- Necessary to achieve user privacy, security, or digital safety;
- Taken to prevent spam or fraud;
- Necessary to prevent unlawful infringement of preexisting intellectual property; or
- Taken to prevent a violation of, or comply with, federal or state law.

To prevail under these defenses, a covered company would need to show by a preponderance of the evidence that its action was non-pretextual, applied consistently to all apps, and “narrowly tailored and could not be achieved through a less discriminatory and technically possible means.”

S. 2710 would grant enforcement authority to the Federal Trade Commission and state attorneys general. The bill would also provide a private right of action for treble damages to injured app developers, with the exception of app developers owned or controlled by a foreign state.

Analysis

There are several strategies for addressing concerns about excessive market power. First there is *antitrust*, a common law system of adjudication that requires courts to apply broad principles—no [unreasonable restraints of trade](#), [monopolization](#), or [unfair methods of competition](#)—to specific fact patterns. This approach is already being deployed to combat allegedly anticompetitive conduct in the app economy. Developers, consumers, and state attorneys general have brought antitrust lawsuits against [Apple](#) and [Google](#) that are currently working their way through the courts.

Ex ante regulation represents a second approach to market power. While antitrust lawsuits require courts to determine after the fact whether challenged conduct violates certain general standards, regulation identifies specific practices as lawful or unlawful before a firm engages in them.

There are also a variety of approaches that lie somewhere between antitrust and regulation. One scholar has employed the term *administration* to describe systems that rely primarily on informal solutions and negotiated agreements between regulated parties and their regulators. The [Hart-Scott-Rodino merger-review regime—in which regulators and merging parties can agree to bespoke remedies that ameliorate competition concerns](#)—is one example. Another commentator has identified an *agency-oversight model* in which a specialist regulator is tasked with implementing general standards and exercising ongoing supervision over regulated entities.

Each modality has potential costs and benefits for different stakeholders. Antitrust is flexible, but can be slow and may not produce guidance that can be generalized for use by non-parties. Policymakers also may not like prevailing antitrust doctrine [at any given point in time](#). For its part, regulation may be faster and provide greater certainty than antitrust lawsuits, [but can err by being over-inclusive](#). Finally, intermediate approaches that combine ongoing agency oversight with flexible legal standards can work quickly and potentially avoid the error costs of regulation, but may create institutions that are vulnerable to [regulatory capture](#).

This rough taxonomy offers a framework for evaluating the OAMA and its alternatives. The bill embraces the regulatory approach to promoting competition in app markets, prohibiting covered companies from engaging in specified categories of conduct. Accordingly, the legislation may have efficiency advantages over antitrust litigation, which can be costly and time-consuming. The OAMA would also hedge against the possibility that plaintiffs will not prevail in such litigation. (A game developer is currently [appealing](#) a lower-court decision rejecting its federal antitrust claims against Apple.)

At the same time, regulation arguably entails [higher potential error costs than antitrust](#). While a court adjudicating an antitrust dispute can delve deeply into a detailed factual record, bright-line rules [apply broadly and may condemn some procompetitive conduct](#). For example, Apple has [argued](#) that rules requiring it to allow app sideloading and the use of alternative IAP processors will threaten the security of iOS devices. Likewise, some commentators have [argued](#) that a categorical prohibition of sherlocking would be on net anticompetitive. (When Apple or Google integrates a feature into their operating systems that was previously supplied by third parties for a fee, [consumers may benefit](#) even if third-party developers suffer.)

More generally, supporters of Apple and Google have argued that existing app-store revenue models produce several benefits that the OAMA would disrupt. In particular, the current commission-based model may [subsidize](#) upstart developers by forcing popular apps to bear most of the costs of maintaining the relevant platforms. Observers have also argued that the revenue Apple and Google derive from their app ecosystems may allow the firms to lower prices elsewhere. Google, for instance, has [argued](#) that pre-installation of its search engine allows it to monetize Android, which it otherwise might not license to device manufacturers for free. One scholar has similarly [suggested](#) that Apple may charge less for its devices because of the revenue it earns from apps and IAPs.

While antitrust and regulation have recognized costs and benefits, intermediate approaches to digital competition have received less attention in the United States. The United Kingdom (U.K.), however, is [developing one such strategy](#). The U.K.'s Competition and Markets Authority (CMA) has established a Digital Markets Unit (DMU) to oversee firms with "strategic market status." While Parliament has yet to adopt legislation empowering the new unit, the CMA's [proposal](#) envisions a regime in which the DMU would develop firm-specific codes of conduct to achieve the general objectives of "fair trading," "open choices," and "trust and transparency."

Other countries have gone in a different direction. South Korea recently [adopted](#) rules prohibiting dominant app stores from forcing developers to use their in-app purchase processors. The European Union is also considering [comprehensive legislation](#) that would impose *ex ante* regulations on digital "gatekeepers," with several of the rules mirroring provisions in the OAMA. Congress thus has several possible models to draw from in developing its approach to competition issues in app markets.

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