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Fair Competition For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 24 of 2021

In Re:

Together We Fight Society
B-201, Flat No. 103
Golden Height Apartments
Rajendra Marg, Bapu Nagar
Jaipur - 302015 **Informant**

And

Apple Inc.
One Apple Park Way
Cupertino, CA 95014 **Opposite Party No.1**

Apple Distribution International Limited
Hollyhill Industrial Estate
Hollyhill, Cork, Republic of Ireland **Opposite Party No. 2**

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Order under Section 26(1) of the Competition Act, 2002

1. The present Information has been originally filed under Section 19(1)(a) of the Competition Act, 2002 ("**Act**") by Together We Fight Society ("**Informant**"), a non-government organisation, against Apple Inc. ('**OP-1**') and Apple India Private Limited ('**AIPL**'), alleging contravention of various provisions of Section 4 of the Act.

2. At the outset, it is noted that Apple in its submissions has averred that AIPL is an entity of Apple Group which is in charge of sales, marketing and support of Apple branded products in India. Whereas Apple Distribution International Limited ('**ADI**') is the relevant Apple entity that makes available, Apple-owned apps, content and services in its own name and on its own account to consumers and is stated to be responsible for the App Store. As such, Apple Inc. and ADI are the relevant entities to be considered in the captioned matter. Accordingly, it has been requested that AIPL is not the relevant entity in the present matter and should be substituted with ADI under Regulation 24 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"). Considering the submissions of Apple, the Commission in terms of Regulation 24 of the General Regulations, decided to amend the array of opposite parties in the present matter, by substituting AIPL with ADI. The case title has been accordingly mentioned in this order. Thus, Apple Inc. and ADI are hereinafter collectively referred to as '**Apple'/ 'OPs**'.

3. OP-1 is stated to be engaged in designing, marketing and selling smartphones (including the iPhone), personal computers (including iMacs), tablets (including the iPad), wearables and accessories, and selling a variety of related services. Further, Apple is stated to own and operate the Apple's App Store (the 'App Store') to distribute applications (apps) through the App Store. As already stated, ADI is the Apple entity which is responsible for Apple's proprietary App Store.

4. The Informant has alleged that Apple uses a barrage of anti-competitive restraints and abuse of dominant practices in markets for distribution of applications ('apps') to users of smart mobile phones and tablets, and processing of consumers' payments for digital content used within iOS mobile apps ('in-app content'). The Informant has averred that Apple imposes unreasonable and unlawful restraints on app developers from reaching users of its mobile devices (*e.g.*, iPhone and iPad) unless they go through the 'App Store' which is stated to be controlled by Apple. Further, Apple also requires app developers who wish to sell digital in-app content to their consumers to use a single payment processing option offered by Apple, which carries

a 30% commission. In contrast, app developers can make their products available to users of an Apple personal computer (*e.g.,* Mac or MacBook) in an open market, through a variety of stores or even through direct downloads from a developer's website, with a variety of payment options and competitive processing fees that average 2-5% (ten times lower than the exorbitant 30% fees which Apple charges for in-app purchases on mobile devices). As per the Informant, this amounts to abuse of its dominant position on the part of Apple in violation of Section 4 of the Act.

5. For the purpose of the present matter, the Informant has submitted that three relevant markets *namely*, market for non-licensable smart mobile operating system, market for app store for apple smart mobile operating system in India and market for apps facilitating payment through Unified Payment Interface (UPI). The Informant has further asserted that Apple enjoys a dominant position in the market for non-licensable mobile OS for smart mobile devices as well as in the relevant market for app store for apple smart mobile OS in India. It has been *inter alia* submitted that Apple's App Store comes pre-installed in all iOS devices and other competing app stores are not allowed to be either pre-installed or downloaded. Thus, Apple's App Store is the only approved app store for iOS devices. App developers have no other alternative except Apple's App Store through which they can reach users of iOS. Thus, Apple is stated to have a monopoly in the iOS app distribution market. The Informant has alleged that Apple prevents iOS users from downloading app stores or apps directly from websites; pre-installs its own App Store on every iOS device it sells; disables iOS users' ability to remove the App Store from their devices; and conditions all app developers' access to iOS on the developers' agreement to distribute their apps solely through the App Store and not to distribute third-party app stores. It is stated that no developer alone has sufficient power to overcome the network effects and switching costs associated with iOS, and if a developer does not develop apps for iOS, the developer must forgo all the iOS users.

6. The Informant has stated that various litigations are pending against the OPs in different parts of globe, such as in European Union where the European Commission decided to open formal antitrust proceedings to assess whether Apple's rules on the

distribution of apps *via* the App Store violate EU competition law wherein the European Commission will focus its investigation on (i) the mandatory use of Apple's in-app payment solution In-App Purchase ('IAP') for distribution of paid digital content; and (ii) Apple's rules prohibiting developers from informing users about alternative purchasing possibilities.

7. The Informant has alleged that Apple is abusing its dominant position in the aforementioned markets through the following conduct:

App Store Review Guidelines

7.1. These Guidelines are determined by OPs unilaterally and are one sided, dotted form of contract ('take it or leave it' contracts), whose applicability, adjudication *etc*., lies at the sole discretion of OPs, and OPs apply these Guidelines in an unpredictable, arbitrary and discriminatory fashion, which in turn disrupts the ability of app developers to run their business properly as they have no choice but to concede to such unfair, arbitrary and unilateral enforcement of App Store Review Guidelines and their arbitrary implementation by OPs.

7.2. It has been alleged that such conduct on the part of OPs tantamount to violation of Section 4(2)(a)(i) of the Act which prohibits imposition of unfair or discriminatory condition in purchase or sale of goods or service by a dominant enterprise. It has been further averred that it leaves app developers with no choice but to concede to such unfair, arbitrary and unilateral enforcement of App Store Review Guidelines and their arbitrary implementation by OPs. Accordingly, the same conduct is also alleged to result in denial of market access in violation of the provisions of Section 4(2)(c) of the Act.

Excessive commission of 30% on IAP

7.3. The Informant has alleged that Apple has made it mandatory for app developers to use Apple's in-app payment solution *i.e*., In-App Purchase ('IAP') for distribution of paid digital content and pay 30% commission, which could be considered as 'unfair' in violation of the provision of Section 4(2)(a)(i) of the Act. It has been further submitted that App Store commission of 30% is a 'payment processing fee' and it is patently exorbitant as payment processors

such as Bill Desk, Razor Pay, CC Avenue *etc.* charge significantly lower fees for similar services (usually between 1-5% of the transaction value, plus a fixed fee).

7.4. It is also submitted that high commission would increase the cost of Apple's competitors and affect their competitiveness *vis-à-vis* Apple's own verticals (the fee in respect of which, in any case would be internalized). Apple's practice deters entry (and the resulting innovation) in violation of the provisions of Section 4(2)(c) of the Act.

7.5. The Informant has further averred that Apple's imposition of 30% commission may also amount to a form of 'margin squeeze' in breach of the provisions of Section 4 of the Act. A margin squeeze may occur where, as in the present case, a vertically-integrated company sells a product or service to competitors on an upstream market where it is dominant (*i.e.*, the App Store) and competes with those companies in a downstream market for which the product or service is an input.

7.6. Further, when a purchase is made through IAP, Apple is stated to become the merchant of record and usurps crucial aspects of the customer relationship, and the developer is alienated from its own customer base resulting in a complex and poor user experience, as well as additional inefficiencies. As per the Informant, developers are precluded from offering customers extra services (*e.g.*, allowing them to carry over unused credits to subsequent months), as they cannot identify them.

Mandating In-app purchases and other restrictions

7.7. It has been alleged that the mandatory use of Apple's in-app purchases for paid apps & in-app purchases restrict the choice available to the app developers to select a payment processing system of their choice especially considering when Apple charges a commission of 30% (15% in certain cases) for all app purchases and IAPs. As a general rule, Apple's Guidelines mandates that apps that sell 'digital goods or services' are obliged to use IAP (and pay a 30% commission). This means that no commission is charged on apps that generate revenue through advertising or apps that sell 'physical goods or services' consumed outside of

the app. Moreover, whether a product or service is considered 'physical' or 'digital' is determined at Apple's sole discretion.

7.8. The Informant has also alleged that Apple's marketing restrictions makes it difficult for multi-platform apps to inform their users of the ability to make out-of-app purchases, and since Apple has a monopoly over the distribution of iOS apps, app developers have no choice but to assent to this anti-competitive tie-in-arrangement and such conduct on part of OPs is in violation of the provisions of Section 4(2)(d) and Section 4(2)(e) of the Act.

7.9. Apple's alleged anti-competitive conduct is claimed to foreclose competition in the iOS in-app payment processing market as it affects a substantial volume of commerce in that market and causes anti-competitive harms to would-be competing in-app payment processors, app developers and consumers.

7.10. Apple mandating use of IAP limits the ability of the app developers to offer payment processing solutions of their choice to the users for app purchases as well as IAPs and amounts to imposition of unfair terms and condition in purchase or sale of goods or services in violation of the provisions of Section 4(2)(a)(i) of the Act. Moreover, it also amounts to denial of market access for the competing payment processors/ payment gateway in violation of the provisions of Section 4(2)(c) of the Act.

Tying the App Store to In-App Purchase in the iOS In-App Payment Processing Market

7.11. Through its Guidelines/ Agreement and unlawful policies, Apple expressly conditions the use of its App Store on the use of its In-App Purchase to the exclusion of alternative solutions in a *per se* unlawful tying arrangement. Apple's conduct has foreclosed and continues to foreclose, competition in the iOS In-App Payment Processing Market, affecting a substantial volume of commerce in these markets. Such anti-competitive tie-in-arrangement is in violation of the provisions of Section 4(2)(d) and Section 4(2)(e) of the Act.

8. Based on the above, the Informant has prayed the Commission to order an investigation against Apple in terms of Section 26(1) of the Act along with imposition of penalty under the provisions of Section 27 of the Act.

Consideration by the Commission

9. The Commission considered the Information in its ordinary meeting held on 15.09.2021 and decided to seek response of the Opposite Parties thereon. Thereafter, the Informant was also allowed to file its rejoinder, if any, to the response filed Apple. Such response from Apple as well as rejoinder from the Informant have since been received. The Commission considered the information available on record including the response filed by Opposite Parties and the rejoinder filed by the Informant, in its ordinary meeting held on 14.12.2021 and decided to pass an appropriate order in due course.

Submissions of Apple

10. Before adverting to the issues arising out of the present Information, it would be appropriate to note, in brief, the submissions of Apple:

10.1. Apple's business model is focused on making its devices (including the iPhone) as attractive as possible to consumers by developing and aligning the various components (hardware, software, services, *etc.*) in-house, in an integrated ecosystem that is differentiated from that of competitors. The App Store, through which apps are distributed on iPhone, is a key part of this.

10.2. The relevant market definitions put forth by the Informant are overly narrow, fail to capture the market and economic reality, and appear to be tailormade to falsely portray Apple as a dominant enterprise.

10.3. The appropriate relevant market is the overall market for smartphones in India, wherein Apple's market share is [0-5] % [based on the data provided by International Data Corporation]. This categorically bars any allegation of dominant position and potential abuse of dominant position against Apple.

10.4. Any purported dominant position even in an incorrectly delineated market is defeated by the well-recognized ability to switch between OS' which is inherently seamless.

10.5. Even if the "market for app stores for Apple smart mobile OS in India" were to be considered and demonstrated (*quod non*), in which the Informant has alleged that Apple is 100% dominant, dominance *per se* is not an offence under the Act; a showing of abuse is required as well. There is no evidence that Apple's practices are abusive.

10.6. The App Store Review Guidelines are not unfair or arbitrary and they have been put in place to ensure that the App Store is a safe and secure place for consumers to discover and download apps and purchase digital content.

10.7. To support the App Store, Apple charges a commission to developers that generates revenue from the sale of digital content through their iOS apps. The commission, collected through Apple's In-App Purchase ("IAP") feature, is Apple's compensation for providing these developers with a built-in user base and significant technical and marketing know-how. Apple has spent billions of dollars on developing and running the App Store. The commission derives from, and is consistent with, the value developers can and do receive from Apple.

10.8. Apple's commission is not unfair or excessive. Most developers that use the App Store pay no commission, and for those that do, most pay only a commission of 15%. Apple's commission is not unfair by reference to competing commissions and it has never exceeded the standard industry rate.

10.9. A recent decision by the United States District Court in *Epic Games Inc. v. Apple Inc.*, (*US Epic Games* case) largely embraces the App Store's business model, making findings that undermine many of the allegations in the Information.

10.10. The Informant is likely acting in concert with parties with whom Apple has ongoing commercial and contractual disputes globally and/or that have complained to other regulators. It has been further averred that while the Informant presents itself as an information provider and has the benefit of not requiring specific *locus standi*, the Commission should nevertheless be wary of attempts by persons who use proxy parties as a front rather than coming forward in their own name.

10.11. Accordingly, Apple has prayed that the Commission should dismiss this Information as being unfounded, deny any relief requested by the Informant, and proceed to pass an order under Section 26(2) of the Act.

Submissions of the Informant in the rejoinder

11. The submissions of the Informant in the rejoinder are briefed as follows:

11.1. Even if the contention of the OPs is accepted that *'information is completely premised on allegation raised against Apple in foreign jurisdiction*', but Apple in none of its submissions has come on record to contend that the practices/ policies followed by Apple worldwide is not implemented in India.

11.2. The decision of United States District Court in *US Epic Games* case has not yet attained finality and is currently pending appeal in the higher court of necessary and proper jurisdiction.

11.3. Apple's mobile device customers face significant switching costs and lock-in to the Apple iOS ecosystem, which serves to perpetuate Apple's substantial market power.

11.4. Apple has failed to present a complete picture in the form of cost incurred in the form of operating and maintenance ('O&M') expenditure of App Store *vis-à-vis* income generated from App Store. Only, such data could throw a light on the ground realties of the assertion raised by Apple.

11.5. Removal or refusal of apps from Apple's App Store without an objective justification, may constitute an abuse of dominant position by Apple. When such actions concern apps that compete with the App Store on an adjacent market, additional scrutiny is warranted.

11.6. The Informant has concluded by submitting that Apple has market power and engages in practices raising both exclusionary and exploitative concerns, which require thorough investigation followed by due remedies including passing of cease-and-desist order.

Analysis

12. At the outset, it is noted that Apple has contended that the Informant is likely acting in concert with parties with whom Apple has ongoing commercial and contractual

disputes globally and/or that have complained to other regulators. It has also been averred that the Commission should be wary of attempts by persons who use proxy parties as a front rather than coming forward in their own name. In this regard, the Commission notes that as per the *extant* statutory framework, the Informant has a limited role and the proceedings before the Commission are purely guided by the merits of the matter in terms of the provisions of the Act. The Commission would intervene in any matter only if same merits consideration under the relevant provisions of the Act.

13. The grievances of the Informant primarily relate to the alleged restrictive obligations imposed by Apple on app developers for giving access to iOS users through its proprietary App Store, which are stated to be in violation of various provisions of Section 4(2) of the Act. For examining the allegations pertaining to alleged abusive conduct of Apple under Section 4 of the Act, delineation of the relevant market and determination of dominance of Apple, if any, in those markets is essential.

Determination of Relevant Market and Dominance of Apple

14. The gravamen of the allegations of the Informant relates to the policies/practises of Apple with respect to its App Store. At this stage, it is noted that the smart device ecosystem of Apple (based on iOS) and Google (based on Android OS) have emerged as the two major mobile ecosystems, former being non-licensable and closed source whereas latter being licensable and open source. Apple's ecosystem is tightly knit and vertically and exclusively integrated throughout the value chain wherein it offers apps, app store as well as smart devices. Some consumers may have preference for closed ecosystem like Apple and others may have a preference for open ecosystems like that of Google.

15. App stores are a crucial component of each of these ecosystems, as the consumer downloads apps on their smart devices from app stores, to access content and services on the internet. Thus, app stores have become a necessary medium for distribution of apps by app developers to the app users. Thus, app developers appear to be dependent

on the app stores to reach the app users and app users are also dependent on the app stores to download apps.

16. The app stores are developed to work on a particular OS (*i.e.*, iOS or Android) and the consumer *i.e.*, app developer or the device user, cannot use app store developed for another OS to offer the app or download the app, as the case may be. The Informant also stated that app stores are OS-specific and resultantly, app developers cannot distribute their apps to iOS users through a non-iOS app store. There are two distinct smart device ecosystems *i.e.*, iOS and Android, wherein the consumer generally do not multi-home due to switching costs associated with porting to another ecosystem which includes cost of a different smart device. As per Apple's own survey referred to in its submissions, limited number of iPhone and iPad users own a non-Apple tablet or smartphone. Further, Apple has not submitted any concrete data to evidence multi-homing by consumers or that switching costs between operating systems are negligible.

17. However, the app developers, in order to maximise their reach to maximum set of consumers, would not like to confine their offerings exclusively to one of the ecosystems as it would imply losing a sizable portion of the potential consumers' revenue who are available on the other platform. Therefore, they multi-home and offer apps on both the platforms. The essentiality of the iOS ecosystem from the app developers' perspective cannot be overlooked. For the consumers too, certain popular apps are a must have irrespective of the ecosystem and hence app developers' have to service them. Recognising the cross side network effects, app developers have to develop and innovate for each of the ecosystem to be able to maximise their revenue and provide a wider consumer choice.

18. Therefore, *prima facie*, the relevant market for the examination of app store policies of Apple would be '*market for app stores for iOS in India'*. Theoretically, this would include all the app stores which are meant for iOS platform. This approach is also consistent with the decisions of the Commission, passed under Section 26(1) of the Act, in Case Nos. 39 of 2018 and 07 of 2020, wherein the Commission noted that

relevant market for app stores for android mobile operating systems is appropriate and necessary for the assessment of the impugned conduct in those matters.

19. After delineation of the relevant market(s), the next step would be determining dominance of Apple in the same. In relation to the relevant market *i.e.*, market for app stores for iOS in India, it is noted that App Store is the only means for developers to distribute their apps to consumers using Apple's smart mobile devices running on Apple's smart mobile operating system iOS. Similarly, Apple's App Store is the only app store that iPhone and iPad users can use to download apps for their mobile devices. The users on iOS platform do not have any other alternative app store through which they can download apps, on their iOS devices. It appears that Apple acts as a gateway between users and app developers. Given the same, the app developers appear to be dependent on the Apple's App Store to reach the app users and app users are also dependent on the App Store to download apps. Thus, the Commission is of the *prima facie* view that Apple holds a monopoly position in the relevant market for app stores for iOS in India. This dependence of the app developers appear to result in acceptance of Apple's mandatory and non-negotiable rules *inter alia* relating to distribution of apps through App Store, by the latter.

20. The Commission has also assessed the averments of Apple in this regard and notes that Apple has proposed a market for smartphones wherein it has a market share of [0-5] % only. The Commission is of the view that the approach of Apple is completely misdirected as the alleged anti-competitive restrictions, in the present matter, have been imposed on the app developers in the form of App Store policies, by Apple. In other words, the allegation in the present matter pertains to abuse of dominance by Apple in relation to the app developers. Therefore, at this stage, it appears that the relevant market has to be defined from the perspective of the app developers and not from the perspective of end users.

21. Apple has also contended that there is no market for app stores for Apple smart mobile OS in India and made various assertions in that regard *viz.* overtly narrow relevant market based on illogical segmentation of customers, segmentation based

on hardware platform that have been rejected globally, access to app content is not limited to iOS devices, *etc*. The Commission has examined the same and is of the view that the criticality of app stores in smart device digital ecosystems requires nuanced approach to market definition. Apple has contended that defining the relevant market for the App Store in terms of access to the iOS devices would lead to an extremely narrow, and artificial single-brand market. However, it is noted that unlike traditional 'single-brand' markets or aftermarkets, the present digital ecosystems including app stores operate as a platform connecting two or multiple different sets of market participants, as the case may be (in the present matter, app developers and users). Whereas the traditional 'single-brand' aftermarkets generally do not operate as a platform. Therefore, the traditional approach to aftermarkets cannot be simply juxtaposed on the digital markets and the multisided nature of this market needs to be recognised to address the intricacies, complexities and interdependencies of such markets. Further, in relation to app stores for iOS, Apple has contended that users of iOS devices can purchase and access digital content from multiple avenues. However, to access this content on iOS devices, the user first needs an app which can only be downloaded from Apple's App Store. Further, as already detailed *supra*, the essentiality of the iOS ecosystem from the app developers' perspective cannot be overlooked. Be that as it may, at this stage, the Commission is not required to make any detailed analysis and findings on delineation of relevant market and dominance of Apple therein. These aspects would require a detailed investigation. In the light of the foregoing discussion, the Commission is *prima facie* satisfied that Apple is dominant in the relevant market proposed in this order.

Assessment of alleged abusive conduct

22. An app developer that wishes to reach iOS users has to enter into the Apple Developer Program and agree to pay Apple an annual $ 99 fee for participating in the same[1]. Further, Apple implements its App Store policies through App Store Review Guidelines which lists out the various requirements to be met by app

[1] https://developer.apple.com/support/compare-memberships/

developers before their apps are allowed to be listed on the App Store. In this regard, it is noted that Article 3.1.1 of the App Store Review Guidelines states that,

> "*If you want to unlock features or functionality within your app, (by way of example: subscriptions, in-game currencies, game levels, access to premium content, or unlocking a full version),* ***you must use in-app purchase. Apps may not use their own mechanisms to unlock content or functionality, such as license keys, augmented reality markers, QR codes, etc.*** *Apps and their metadata may not include* ***buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase****."*
>
> (Emphasis added)

23. Further, as per the copy of the App Store Review Guidelines Article provided by the Informant, Article 3.1.3 reads as follows:

> *"…Apps in this section cannot, within the app, encourage users to use a purchasing method other than in-app purchase.* ***Developers cannot use information obtained within the app to target individual users outside of the app to use purchasing methods other than in-app purchase*** *(such as sending an individual user an email about other purchasing methods after that individual signs up for an account within the app). Developers can send communications outside of the app to their user base about purchasing methods other than in-app purchase…"*
>
> (Emphasis added)

24. Thus, it is noted that Apple makes it mandatory to use Apple's proprietary in-app purchase system (IAP) for distribution of paid digital content and it charges app developers commission of up to 30% on subscriptions bought through the mandatory IAP. Further, Apple prohibits app developers from informing app users about the ability to purchase on the web. Article 3.1.1 (anti-steering provisions) states that "*Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase*." Thus, Apple prohibits app developers to include a button/link in their apps which take/steer the user to third party payment processing solution other than Apple's IAP. While the App Store policies of Apple allows users to consume content such as music, e-books, *etc* purchased elsewhere (*e.g.,* on the website of the app developer) also in the app, its rules restrict the ability of app developers to inform users about other purchasing options through a notification in the app itself, which might be cheaper. This would result in higher price for the users of such apps. This is supported

by Article 3.1.3 pursuant to which the developers are restricted to use information obtained in the app for the purpose of communicating alternative methods of purchase other than IAP.

25. However, as per the copy of the App Store Review Guidelines Article provided by Apple, Article 3.1.3 reads as follows:

> *"...Apps in this section cannot, within the app, encourage users to use a purchasing method other than in-app purchase. Developers can send communications outside of the app to their user base about purchasing methods other than in-app purchase."*

In this regard, it is noted that the difference in the two clauses is resulting from the App Store Review Guideline update announced by Apple on 22.10.2021[2]. The erstwhile Article 3.1.3, *prima facie* imposed an unfair restraint on the ability of app developers to offer cost-effective subscription models to app users. This policy was subsequently updated by Apple and seemingly and purportedly, it was relaxed in favour of the app developers. This aspect requires detailed investigation.

26. At this stage, it appears that the lack of competitive constraint in the distribution of mobile apps is likely to affect the terms on which Apple provide access to its App Store to the app developers, including the commission rates and terms that thwart certain app developers from using other in-app payment systems.

27. The Commission is of the *prima facie* view that mandatory use of Apple's IAP for paid apps & in-app purchases restrict the choice available to the app developers to select a payment processing system of their choice especially considering when it charges a commission of up to 30% for app purchases and in-app purchases. Further, considering that App Store is the only source of downloading apps in the iOS and its condition requiring use of application store's payment system for paid apps & in-app purchases, it appears that Apple controls the significant volume of payments processed in this market. The resultant market power being enjoyed by Apple due to

[2] News and Updates: App Store Review Guideline updates now available dated 22.10.2021, as accessed from: https://developer.apple.com/news/

its grip over iOS ecosystem apparently resulted in 'allegedly' high commission fee of up to 30%. As per the Informant, other payment processing solutions charge significantly lower fee for processing payments. This tying of two distinct products (*i.e.*, distribution service and payment processing service for in-app purchases) does not allow the app developers to take the advantage of a competitive payment gateways market. Rather, it creates conducive condition for expropriation of the app developers as they cannot use alternate payment gateways and negotiate/pay commission at a competitive rate. The alleged high fee charged by Apple is sustained through its imposed tying of distribution service with payment processing service.

28. It is also noted that in many cases Apple's proprietary apps are competing with third party apps on the iOS platform. Resultantly, it appears that such 'allegedly' high fee would increase the cost of Apple's competitors and thus might affect their competitiveness *vis-à-vis* Apple's own apps (the fee in respect of which, in any case would be internalized). Such a policy of the App Store may disadvantage its competitors in the downstream markets, such as music streaming, video streaming, e-books, *etc*. If the application developers, in response, raise their subscription fees to offset these costs or remove/reduce premium/paid subscription offers for users, it may affect user experience, cost and choice. Alternatively, if the app developers decide to internalise the cost, it would affect their profitability and thus their ability to invest in innovation which could be extremely detrimental to the consumer interest. Such conditions imposed by the app stores also limit the ability of the app developers to offer payment processing solutions of their choice to the users for app purchases as well as IAPs.

29. Moreover, it also needs to be seen whether Apple would have access to data collected from the users of its downstream competitors which would enable it to improve its own services. However, such competitors may not have access to this data for improvisation/ innovation of their own app. This would result in a competitive advantage to Apple over its competitors. Therefore, the Commission is of *prima facie* view that imposition of such condition is unfair in terms of Section 4(2)(a) of the Act. Further, this intermediation by Apple between the app developer and the app user for

payment-processing purposes, would also result in leveraging on the part of Apple as it is using its dominant position in the app store market to enter/protect its downstream market of various verticals (*e.g.*, music apps), in violation of Section 4(2)(e) of the Act.

30. Further, such conduct also results in tying of its in-app purchase payment processing service with App Store *i.e.*, the app developers have to agree to the usage of Apple's IAP payment processing service, if they want to distribute their apps to the iOS users through Apple's App Store. Apple conditions the provision of app distribution services on the app developer accepting supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contract for provision of distribution services. This appears to be in violation of Section 4(2)(d) of the Act. Further, it also *prima facie* results in leveraging by Apple of its dominant position in App Store market to enter/protect its market for in-app purchase payment processing market, in violation of Section 4(2)(e) of the Act.

31. It is also noted that pursuant to Article 3.1.3 of the App Store Review Guidelines, Apple has allowed different categories of apps to use purchase methods other than IAP which *inter alia* includes 'Reader' Apps, Multiplatform Services, Person-to-Person Services, *etc.* It needs to be *inter alia* examined whether there is any objective criteria being followed by Apple for granting exemption from the mandatory use of IAP.

32. It has also been alleged that Apple often applies its guidelines in an unpredictable, capricious and discriminatory manner. The resulting uncertainty, coupled with the difficulty in getting in touch with Apple, may severely affect app developers' ability to run their business properly. The Informant has alleged that such conduct on the part of OPs tantamount to violation of Section 4(2)(a)(i) of the Act. Further, it is also claimed to result in denial of market access in violation of the provisions of Section 4(2)(c) of the Act. This aspect also requires to be investigated.

33. In addition, the Commission notes that App Store is the only channel for app developers to distribute their apps to iOS consumers which is pre-installed on every

iPhone and iPad. Further, third party app stores are not allowed to be listed on Apple's App Store as the developer guidelines as well as agreement prohibits app developers from offering such services. Article 3.2.2(i) of the App Store Review Guidelines restricts the app developers from "*Creating an interface for displaying third-party apps, extensions, or plug-ins similar to the App Store or as a general-interest collection".* Further, Article 3.3.2 of the Apple Developer Program License Agreement *inter alia* provides that "…*the Application must not create a store or storefront for other code or applications*...". These restrictions imposed by Apple forecloses the market for app stores for iOS for potential app distributors. It *prima facie* results in denial of market access for the potential app distributors/app store developers in violation of Section 4(2)(c) of the Act. It also *prima facie* results in limiting/restricting the technical or scientific development of the services related to app store for iOS, due to reduced pressure on Apple to continuously innovate and improve its own app store, in violation of Section 4(2)(b) of the Act.

34. Various pleas of Apple like the commission charged for IAP is Apple's legitimate compensation for providing various benefits, App Store Review Guidelines being reasonable and justifiable, commission charged by Apple does not increase costs for competitors and does not affect their competitiveness *vis-à-vis* Apple's own verticals, *etc.*, need detailed examination which can be appropriately done during investigation. Apple has also repeatedly relied on *US Epic Games* case, to assert its various submissions. The Informant has, on the other hand, submitted that the said case has not attained finality and is currently pending appeal. Be that as it may, the Commission is of the view that the foreign case laws only have persuasive value in India and are not determinative. Further, as elaborated *supra*, the Commission at this stage is convinced that a *prima facie* case is made out against Apple which merits investigation. Needless to say, Apple shall be at liberty to bring forth such aspects during investigation.

Conclusion

35. Thus, the Commission is of the *prima facie* view that Apple has violated the provisions of Section 4(2)(a), 4(2)(b), 4(2)(c), 4(2)(d) and 4(2)(e) of the Act, as elaborated *supra* which warrants detailed investigation.

36. In view of the foregoing, the Commission directs the Director General ('DG') to cause an investigation to be made into the matter under the provisions of Section 26(1) of the Act. The Commission also directs the DG to complete the investigation and submit the investigation report within a period of 60 days from the date of receipt of this order.

37. Apple has also sought an opportunity for a preliminary conference hearing before the Commission prior to passing an order. However, the Commission, based on the information available on the record (including the submissions made by Apple), is *prima facie* convinced that a case is made out for directing an investigation by the DG. Apple would be at liberty to make further submissions before the DG during the investigation wherein the same would be appropriately examined. In this regard, it is also noted that a three judges Bench of the Hon'ble Supreme Court through its judgment in Civil Appeal No. 7779 of 2010 titled *Competition Commission of India v. Steel Authority of India Ltd.*, decided on 09.09.2010 has already settled the issue by holding that "…*Neither any statutory duty is cast on the Commission to issue notice or grant hearing, nor can any party claim, as a matter of right, notice and/or hearing at the stage of formation of opinion by the Commission, in terms of Section 26(1) of the Act that a prima facie case exists for issuance of a direction to the Director General to cause an investigation to be made into the matter.*"

38. It is further noted that Apple has filed its submissions dated 16.11.2021 in two versions *viz*. confidential as well as non-confidential. It has also filed an application seeking confidentiality over certain documents/information filed by it under Regulation 35 of General Regulations, 2009. The confidential version was kept separately during the pendency of the proceedings. The DG, however, shall be at liberty to examine the confidentiality claims as per law. It is, however, made clear that nothing used in this order shall be deemed to be confidential or deemed to have

been granted confidentiality, as the same have been used for the purposes of the Act in terms of the provisions contained in Section 57 thereof.

39. It is also made clear that nothing stated in this order shall tantamount to a final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

40. The Secretary is directed to send a copy of this order along with the Information and other material available on record to the office of DG forthwith, through speed post/e-mail.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 31 / 12 / 2021