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To : Tim Cook, CEO of Apple

## The courage to change is to play fair

*An open letter for a fair, reasonable and non-discriminatory AppStore's commission.*

In a famous speech held in January 2009<sup>1</sup> now known as setting the “Cook doctrine”, emphasis has notably been made on Apple’s “self-honesty to admit when [it is] wrong and the courage to change”. In 2020, these words have a peculiar echo while **so many business partners, consumers and somehow regulators around the world are exhorting Apple to change the paradigm of the 30% commission<sup>2</sup> taken on many apps sales.**

Thirteen years ago, the introduction of the iPhone as a revolutionary smartphone device has brought **about another game changing innovation i.e. a Siamese online marketplace on iOS.** From an initial 500 apps offering, the AppStore quickly became one of the world’s largest commercial center generating around half a trillion US dollars of sales last year alone.

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<sup>1</sup> Tim Cook, Acting Apple CEO, January 2009 [FOI 2009 Earnings Call](#)

<sup>2</sup> The commission falls to 15% after one year in case of autorenewal, subscriptions. But in case of expiry and re-subscription, the commission returns to 30%, unless the user subscribes within the 60 days from the date of expiry. For the purpose of the present, we shall use the 30% as a generic term to qualify the commission.

With the rise of the digital economy and the combination of an excellent device coupled with an attractive app offer, **Apple has become a private gatekeeper that strictly controls third parties' access to market, data and consumers in the AppStore ecosystem.**

Given the market position Apple has gained in just thirteen years, bypassing the AppStore is not an option for at least two reasons: **Apple is in dominant position and unavoidable not only on the market for the provision of iPhone smartphone devices but also a monopolist on the market for apps distribution on iOS** - which is in any case a related market. **Content providers are in turn in an absolute economic dependency on Apple** to provide their content on the iPhone, where the only store available is the AppStore.

Despite having become unavoidable, **Apple still takes the original 30% commission on sales generated by providers of digital contents and forbids not only links to alternative payment methods** outside the app through an anti-circumvention rule, **but also denies access to essential customer data thereby impeding any possible serious alternative.**

If for example a consumer subscribes to a newspaper through the AppStore, the newspaper is denied the possibility to even enter in contact with the subscriber - directly or indirectly - to propose or generate relevant content or better offerings – which is a nonsense for the content provider, the consumer but also Apple since each sale generates the payment of a commission. **To make a long story short, Apple now acts as a “disintermediator” between a content provider and a “content viewer” to tightly secure an anachronistic high commission.**

Not only **this unilateral behavior has a detrimental effect on content providers such as newspapers who are striving to survive in the most adversarial times, but it also reduces variety of choice, diversity and quality of content provided to consumers.**

**As fake news abounds, publishers have a huge responsibility in the provision of qualitative information to the public and so does Apple as an enabler** with the AppStore. In that it threatens the sustainability of content providers, the 30% commission refrains consumers' ability to access qualitative information

As such, **it raises issues from a European competition law's perspective.** Irrespective of whether or not the 30% commission is aimed for anticompetitive purposes and whatever it is supposed to cover, there is a large and growing consensus among digital service providers on the fact that **this commission level has significant anticompetitive effects in being excessively high, unfair and the conditions under which it is applied are discriminatory.**

- **Excessive:** in itself and in relation to the services provided, the level of this commission is **excessively high.** There is unfortunately no relevant and serious comparison or benchmark possible with any other commission since the iPhone is exclusive, the iOS is exclusive, the AppStore is exclusive and Apple is unavoidable to access these three.

Since the Apple ecosystem is closed and there is at the present time no regulatory framework applicable to enable or facilitate access to the AppStore, barriers to entry and expansion are excessively high and subject to the discretionary power of a super dominant market player.

The 30% commission is so high that it amounts to a rent and somehow to a counterintuitive minority stake in the business of each content provider rather than the payment of a service to access an infrastructure or distribute a service, and even less to a payment processing fee which is usually closer to 3% than 30%. **Only a monopolist striving to maintain a high rent can impose such excessive amount on its business partners without the fear of being bypassed.**

- **Unfair:** Unlike US antitrust, article 102 of the Treaty on the functioning of the European Union prohibits exploitative practices as abuses of dominant position notably when they consist in

*“directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”* or abusing one’s economic dependency. In this respect, not only the current EU antitrust rules prohibit these practices but the future EU digital single package is most likely to facilitate enforcement.

A situation where content providers are locked into the AppStore which is the only store available on iOS and where no negotiation can take place given Apple’s market power and strict policy, can only result in unbalanced and unfair terms. This is the case of **the level of the commission but also of the strict anti-circumvention rule and the denial to provide access to essential customer data.**

- **Discriminatory:** under EU competition law, treating different market players equally although they are not placed in the same situation is a form of discrimination. So is differentiation between market players who are placed in the same situation. The implementation of the 30% commission is discriminatory at least for two reasons.

First, **the 30% commission applies to many operators but not all** of them based on a consideration (the place where the service is provided) that is discretionarily defined by Apple and debatable. **The criteria are neither clear, transparent, nor objective or rationale to qualify one app rather than the other.** Second, the level of **the commission is set one time for all** as if all market players were placed in a similar situation which is obviously not the case. As such, **Apple treats “equally” market players which are not placed in a similar situation and thereby discriminates them.**

From a European law’s perspective, where such practices are implemented by a dominant player, they constitute abuses in violation of antitrust rules. The circumstance that such dominant position has been gained on the merits is irrelevant to the assessment, so is the fact that the 30% commission was at the time relevant to amortize the investment or costs.

**There is a particular responsibility arising from a dominant position which is the pendent of great market power. Apple has now the opportunity to build a better working digital world by playing fair, for it has mastery of the game. It is the right time for Apple to make such changes rather than be required to do so after long-lasting and costly procedures, with the full support of publishers and to the ultimate benefit of consumers.**

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