

APP DEVELOPERS VS. APPLE

AN OVERVIEW OF THE PROCEEDINGS IN EUROPE

As the famous Apple slogan says, “there’s an app for that.” Indeed, much of the value of an iPhone lies in the presence of almost 2 million apps in the App Store. The trouble is that Apple has attracted the ire of app developers whose apps sell “digital goods or services” (as defined by Apple) by mandating them to use its in-app payment system to accept user payments. IAP, as it is called, disintermediates app developers from their users, depriving them of the direct access they need to run their business optimally and improve their services, while its use also comes with a hefty commission on transactions.

While app developers and Apple should have a reciprocal relationship, Apple holds all the bargaining power and controls the only app distribution channel to iOS devices, which is the App Store. This “gatekeeper” position allows Apple to subject app developers to arbitrary and discriminatory App Store policies, as well as to charge a 30% commission, subject to some limited exceptions. In this context, it is not surprising that app developers have taken matters in their own hands, filing complaints to competition authorities, as well as lobbying for the adoption of legislation preventing Apple from using

its gatekeeper position to impose unfair trading terms and conditions on them.¹

Against this background, this short paper provides an overview of the competition issues raised by Apple’s app store policies. It then discusses the investigations recently launched against Apple in the EU and the UK, explains how these investigations articulate with each other, and how Apple has reacted so far. Next, it discusses whether the European Commission’s proposal for a Digital Market Act addresses the issues at stake in these investigations, before laying down some concluding remarks.

an overview of the competition issues

Article 102 TFEU prohibits firms that hold a dominant position in the EU internal market to abuse that dominant position.

While Apple likes to argue that it has a small

market share of the mobile devices market compared to Android devices, this is irrelevant to the fact that Apple has a monopoly in app distribution on iOS devices as there are no alternative app distribution channels on such

¹ See, e.g., Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020 COM(2020) 842 final.

devices.² Apple therefore holds a dominant position on the market for app distribution on iOS.

App developers claim that Apple abuses its dominant position in two distinct ways. First, they claim Apple uses its dominant position in app distribution to exclude apps that compete with its own apps (i.e., Apple engages in *exclusionary* conduct). In addition, they claim Apple uses such dominant position to impose unfair terms and conditions on app developers that do not necessarily compete with Apple's own apps (i.e., Apple engages in *exploitative* conduct).

Hugely successful apps, such as Facebook, Google Search or Amazon Shopping, will not pay any commission, while they are also distributed through the App Store and use the same services as those apps that must pay a commission.

While a variety of claims have been made against Apple's App Store practices, a lot of attention has revolved around Apple's obligation imposed on app developers whose apps sell "digital goods or services" to use IAP to accept user payments and pay a commission as high as 30%.³ Apple's App Store rules also prohibit developers from informing users about alternative purchasing possibilities.⁴ While Apple's commission is subject to some exceptions (which it applies in an inconsistent fashion),⁵ it is the very structure of this commission that is problematic. According to Apple's own data, only 16% of apps in the App

² That is the case because Apple does not allow any other app stores on iOS devices. Moreover, so-called sideloading that would allow users to circumvent the App Store is not realistic on iOS devices.

³ See Section 3.1.1 of the App Store Review Guidelines.

⁴ Id.

⁵ See, Damien Geradin and Dimitrios Katsifis, "The Antitrust Case against the App Store", forthcoming *Journal of Competition Law & Economics*, 2021. Draft available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3744192

⁶ For instance, a user who experiences problems with her subscription (e.g., refund or cancellation requests) will often expect the app developer to help.

Store pay a commission (i.e., those apps selling digital goods or services); the remaining 86% pay nothing (save for an annual \$99 fee per developer), even though they are equally distributed through the App Store. This means that hugely successful apps, such as Facebook, Google Search or Amazon Shopping, will not pay any commission, while they are also distributed through the App Store and use the same services as those apps that must pay a commission.

Besides coming with a hefty commission, IAP is problematic in that it disintermediates app developers from their customers. The reason is that whenever a payment is made through IAP, Apple becomes the merchant of record and gets to handle crucial aspects of the customer relationship such as billing, despite the fact Apple does not provide the good or service in question. This leads to considerable inefficiencies for app users.⁶ In addition, whenever a payment is made through IAP Apple typically collects personal data, such as name, postal address, email address, and credit cards details, which it does not share with app developers, hence preventing them from improving their services and offering adequate customer service.

which investigations have been launched so far?

To this day, three competition authorities in Europe have launched investigations against Apple's App Store practices, namely the European Commission (the "Commission"), the Dutch Competition Authority (the Autoriteit & Consument Markt or "ACM"), and the UK Competition Authority (the Competition and Markets Authority or "CMA").⁷

However, the latter will generally not be able to do so when the subscription has been paid via IAP, since in that case Apple holds the client relationship. The developer will be limited to directing the user to Apple.

⁷ Although this decision does not strictly concerns the App, the French competition authority also announced on 17 March 2021 that it would investigate whether the implementation by Apple of the ATT framework cannot be regarded as a form of discrimination or "self-preferencing", which could in particular be the case if Apple applied without justification, more binding rules on third-party operators than those it applies to itself for similar operations. See <https://www.autoritedelaconurrence.fr/en/press-release/targeted-advertising-apples-implementation-att-framework-autorite-does-not-issue>.

In April 2019, the ACM announced the launch of a probe into the App Store,⁸ as a follow up to its Report on its market study into mobile app stores.⁹ In February 2021, Reuters ran a story stating that the ACM was “nearing a draft decision in a years-long investigation into Apple Inc over rules requiring

possibilities. The probe, which is focused on apps competing with those of Apple, was launched in response to a highly publicized complaint filed by Spotify in March 2019, where the music streaming service criticized Apple for acting as both a player (with Apple Music) and a referee (as operator of

KEY DATES

APR 2019

Netherlands Authority for Consumers and Markets (ACM) investigates if Apple abused its dominant position in the App Store.

○ EXPECTED 2021H1

JUN 2020

European Commission (EC) opens formal investigation into if distribution of apps via App Store violates EU competition law.

○ H1 2021

DEC 2020

EC proposes “Digital Markets Act,” intending to impose regulatory obligations on providers of “core platform services” designated as “gatekeepers;” likely to apply to Apple.

○ DISCUSSIONS IN EUROPEAN PARLIAMENT END H1 AND H2 2021

MAR 2021

UK’s Competition and Markets Authority announces investigation into Apple “following complaints that its terms and conditions for app developers are unfair and anticompetitive.”

○ ONGOING

software developers to use its in-app payment system.”¹⁰

On 16 June 2020, the 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.¹¹ The Commission focuses its investigation on (i) the mandatory use of Apple’s in-app payment solution IAP for the distribution of paid digital content and (ii) Apple’s rules prohibiting developers from informing users about alternative purchasing

the App Store),¹² as well as another complaint by Rakuten.¹³ On 4 March 2021, Reuters claimed that the Commission was finalising a Statement of Objections that would be sent to Apple before the summer.¹⁴ Although its focus is a bit different, on 17 February 2021, Epic Games also announced it had filed a complaint against Apple to the European Commission.¹⁵

Finally, in March 2021, the CMA announced that it has launched an investigation into Apple “following complaints that its terms and conditions for app

8 “ACM launches investigation into abuse of dominance by Apple in its App Store”, 11 April 2019, available at <https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store>.

9 Market study into mobile app stores, Report, 11 April 2019, available at <https://www.acm.nl/sites/default/files/documents/market-study-into-mobile-app-stores.pdf>.

10 Stephen Nellis, Dutch competition regulators nearing draft decision in Apple investigation, Reuters, available at <https://www.reuters.com/article/netherlands-apple-antitrust/dutch-competition-regulators-nearing-draft-decision-in-apple-investigation-idUSL1N2KV20C>

11 Press release: “Antitrust: Commission opens investigations into Apple’s App Store rules”, 16 June 2020, IP/20/1073.

12 Daniel Ek, “Consumers and Innovators Win on a Level Playing Field”, Spotify

Newsroom, 13 March 2019, available at <https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/>.

13 On 5 March 2020, Rakuten, whose e-book and audiobook app competes with the Apple Book app, also filed a complaint with the Commission, raising similar concerns to those in the Spotify investigation. See Tom Warren, Apple faces another EU antitrust complaint as App Store pressure grows, The Verge, 16 June 2020, available at <https://www.theverge.com/2020/6/16/21292625/apple-rakuten-kobo-app-store-antitrust-complaint-europe>

14 EXCLUSIVE-EU antitrust regulators ready Apple charges on Spotify complaint – sources, 4 March 2021, available at <https://www.reuters.com/article/eu-apple-antitrust/exclusive-eu-antitrust-regulators-ready-apple-charges-on-spotify-complaint-sources-idUSL5N2L264X>

15 Epic Game Files EU Antitrust Complaint Against Apple, 17 February 2021, available at <https://www.epicgames.com/site/fr/news/epic-games-files-eu-antitrust-complaint-against-apple>

*developers are unfair and anti-competitive.*¹⁶ Andrea Coscelli, Chief Executive of the CMA, observed that *"complaints that Apple is using its market position to set terms which are unfair or may restrict competition and choice – potentially causing customers to lose out when buying and using apps – warrant careful scrutiny."*¹⁷

how do these investigations articulate with each other?

Although these investigations are pursued by different authorities, they all focus on Apple's App Store practices, even though they appear to involve different parties and take different angles. First, the Commission investigation, which has been triggered following complaints by Spotify and Rakuten, is focused on the risk that Apple uses its dual role as the owner of the App Store and a developer of apps (e.g., Apple Music) which competes with other developers (e.g., Spotify) to

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exclude the latter. The problem is thus essentially one of vertical leveraging where a platform seeks to leverage its dominant position on an upstream market to distort competition on a downstream market.¹⁸ The more recent complaint by Epic Games brings another important dimension, which relates to the fact Apple does not tolerate the presence of competing app stores on its iOS devices, hence effectively monopolizing the app distribution market on iOS devices.

¹⁶ See, CMA Press Release, Press release CMA investigates Apple over suspected anti-competitive behaviour, 4 March 2021, available <https://www.gov.uk/government/news/cma-investigates-apple-over-suspected-anti-competitive-behaviour>.

¹⁷ Id.

¹⁸ The Commission's recent decisions against Google relied on vertical leveraging theories. See Commission decision of 27 June 2017 (Case AT.39740 – *Google Search (Shopping)*); Commission decision of 18 July 2018 (AT.40099 – *Google Android*).

Second, while little is known on the Dutch investigation, it seems to focus on the fact that Apple imposes unfair terms and conditions on app developers. In other words, the investigation seems focused on questions of exploitation, rather than exclusion. It would indeed be surprising if both the Commission and the Dutch competition authority would focus on the same competition issue; as soon as the Commission opens an investigation, the competition authorities of the Member States are relieved of their competence to act on the same matter.¹⁹ Now, the same practice (i.e., the imposition by Apple of its in-app payment system, IAP) can at the same time be exclusionary and exploitative, hence allowing the Commission and a national competition authority to investigate it in parallel.

Finally, while the CMA did not indicate the scope of its App Store investigation, it is not subject to the same constraints as EU Member State competition authorities since the UK has left the EU. Nothing therefore prevents it from investigating the full gamut of Apple's anticompetitive practices and it probably intends to do so, at least initially.

how has Apple reacted so far?

Despite being subject to several investigations, Apple has not significantly modified its conduct. Apple has, however, made a minor concession when it announced in November 2020 a new App Store Small Business Program,²⁰ whereby participating developers will benefit from a reduced commission of 15% (as opposed to 30%), provided they generated no more than \$ 1 million

¹⁹ See Article 11(6) of Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

²⁰ Press Release, Apple announces App Store Small Business Program, 18 November 2020, available at <https://www.apple.com/newsroom/2020/11/apple-announces-app-store-small-business-program/>

in proceeds from their apps in the previous calendar year. New developers will also be eligible to participate in the program.²¹

Apple's new program for "small" business will no doubt be welcomed by developers that fall within its scope (which Apple claims are "the vast

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majority" of developers selling "digital goods or services"). Yet, this program is less attractive than it sounds. First, while paying 15% is less 30%, it is still hard to understand why small app developers will still have to pay a 15% commission where large app developers, such as Facebook or Amazon, that use the same App Store services will not pay any fees. Second, the \$1 million cap is arbitrary: An app developer that generates \$999,999 in one calendar year will profit from a 15% reduction, while a developer that garners \$1,000,001 will have to pay a 30% commission. As a result, this program creates terrible incentives in that app developers surpassing \$1 million in revenue may end up earning less than those that stay under that amount. From that standpoint, Google's approach is better in that the 15% rate applies for the first \$1 million of revenue, independently of the total amount of revenue earned in a given year. In addition, Apple's new program addresses only one issue, that of the level of the commission paid by app developers. It does nothing to address other equally important issues relating to IAP, such as the fact that through IAP Apple confiscates the customer relationship of app

developers (e.g., they cannot refund their customers) and collects sensitive commercial data of potential rivals.

could the proposal for a Digital Markets Act help?

On 15 December 2020, the Commission unveiled its proposal for a DMA, which intends to impose a series of regulatory obligations on the providers of "core platform services" that are designated as "gatekeepers". Considering that both app stores and operating systems qualify as core platform services and that Apple fulfils the criteria for the designation of gatekeeper, these obligations will likely apply to Apple in its capacity as (a) operator of the App Store; and (b) provider of the iOS operating system.²² These obligations would, for instance, require Apple to allow third-party app stores on its iOS devices, as well as allow app developers to promote offers to app users acquired through the App Store.²³ Apple would also be prohibited from favouring its own apps in the App Store search results compared to third-party apps and would be required to apply fair and non-discriminatory general conditions of access for app developers.

While these obligations would force Apple to abandon most of its anticompetitive practices, the DMA proposal will now have to go through the EU legislative process, which may take up to two years before the proposal (that will likely be subject to amendments) will become binding law and some additional time before it is fully implemented in all EU Member States. In the meantime, antitrust intervention is needed to force Apple to bring these practices to an end.

²¹ Note that on 16 March 2021, Google announced that starting on 1 July 2021 they will be reducing the service fee Google Play receives when a developer sells digital goods or services to 15% for the first \$1 million of revenue every developer earns each year. Boosting developer success on Google Play, 16 March 2021, available at <https://android-developers.googleblog.com/2021/03/boosting-dev-success.html>

²² Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final.

²³ See Article 5-6 of the proposal.

proceedings and investigations against outside Europe

In the United States, lawmakers have been particularly critical of Apple's App Store rules, most notably in a landmark report (the "US House Antitrust Report") released in October 2020, according to which Apple wields monopoly power over app distribution on iOS devices.²⁴ The US House Antitrust Report was preceded by a Congressional hearing on antitrust and online platforms where Apple CEO Tim Cook faced intense scrutiny over Apple's App Store practices. Moreover, Epic Games filed a lawsuit against Apple before the US District Court for the Northern District of California, claiming Apple has unlawfully monopolized the market for app distribution on iOS devices (by precluding alternative app stores) and the market for in-app payment processing on iOS devices (by precluding alternative payment solutions for in-app transactions).²⁵ The case is slated for a bench trial in May 2021.²⁶

The app stores have also attracted the attention of the Australian Competition & Consumer Commission ("ACCC").²⁷ On 8 September 2020, the ACCC announced it will be working on an inquiry followed by a report on app marketplaces to be published in March 2021, as part of its ongoing five-year inquiry into digital platform services.²⁸ The ACCC published an Issues Paper and invited stakeholders to comment, inter alia, on the

significance of Google Play and the App Store, the competitive interactions between the two, as well as in-app purchases and commission fees. In November 2020 it was reported that Epic Games had sued Apple in Australia, alleging misuse of market power.²⁹

conclusions

Over the past couple of years, Apple's App Store practices have attracted a growing level of attention from antitrust authorities. A central question in these proceedings is whether Apple should be free to use its control of the App Store to discriminate against rivals, as well as to take advantage of app developers by imposing unfair trading terms and conditions on them. While Apple often claims that the App Store brings considerable value to app developers in that it gives them access to its vast user base, Apple devices would not be worth much but for the presence of a wide range of attractive apps. Therefore, Apple's market power in app distribution should be curbed to allow both rival and non-rival apps to flourish.

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²⁴ Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets, Majority Staff Report and Recommendations, 4 October 2020, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf, pages 334-372.

²⁵ Nick Statt, "Epic Games is suing Apple", *The Verge*, 13 August 2020, available at <https://www.theverge.com/2020/8/13/21367963/epic-fortnite-legal-complaint-apple-ios-app-store-removal-injunctive-relief>.

²⁶ Andy Chalk, "Epic and Apple will go to trial in May 2021", *PC Gamer*, 8 October 2020, available at <https://www.pcgamer.com/epic-and-apple-will-go-to-trial-in-may-2021/>.

²⁷ Australian Competition & Consumer Commission, "Mobile apps market under scrutiny", 8 September 2020, available at <https://www.accc.gov.au/media-release/mobile-apps-market-under-scrutiny>.

²⁸ Australian Competition & Consumer Commission, "Digital platform services Inquiry - March 2021 report on app marketplaces, Issues Paper", September 2020, available at <https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20report%20-%20Issues%20Paper.pdf>.

²⁹ Josh Taylor, "Fortnite maker Epic Games sues Apple in Australia for App Store ban", *The Guardian*, 18 November 2020, available at <https://www.theguardian.com/technology/2020/nov/18/fortnite-maker-epic-games-sues-apple-in-australia-for-app-store-ban>.

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