

Dutch Antitrust Authority investigates Apple: does this support Spotify's complaint?

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After Google has been fined several times for breach of (EU) competition rules the last couple of years, it might now be Apple's turn. Last month (March 2019), Spotify filed a [complaint](#) against Apple with the European Commission. The Dutch Authority for Consumers & Markets ("ACM") immediately responded by stating that ACM is finalizing its market study into mobile app stores which it launched a year before. ACM added that it examines similar practices as Spotify is complaining about to the Commission. On 11 April 2019, ACM indeed published its [market study](#) into mobile app stores. Most interesting development is, however, perhaps that ACM simultaneously announced the launch of an [investigation into abuse of dominance by Apple](#) in its App Store. Does this mean that Spotify indeed has a case? And/or is ACM stepping in to assist the European Commission in applying competition rules to curtail the market power of online giants, like Apple?

Why did Spotify file a complaint at the European Commission in the first place?

According to Spotify, Apple does not play fair. Amongst others, Spotify alleges that:

1. Apple charges a discriminatory "tax". Apple requires that certain apps pay a 30% fee for use of their in-app purchase system ("IAP").^[fn] That revenue share is 30 percent for the first year of an annual subscription but it drops to 15 percent in the years after.^[fn] According to Spotify, this fee is discriminatory because only digital goods and services that are delivered inside an app are charged. Thus apps like Uber or Deliveroo are not charged this fee. Also, Spotify alleges that Apple does not apply this fee to Apple Music giving its own app an unfair advantage;
2. Apple does not let Spotify share deals - like 99c for three months of Spotify Premium - if Spotify does not use IAP, while Apple promotes its own offer for a free month of Apple Music via a push notification, Spotify argues;
3. Apple would allegedly not allow customers to upgrade to Spotify Premium with ease;
4. Apple rejects Spotify's app enhancements, and
5. Apple does not allow Spotify access to all devices, like HomePod, Apple Watch and a connection with Siri while - again - Apple Music does have access.^[fn] See also the five "facts" that Spotify published and would shows that Apple doesn't play fair: <https://tmetoplayfair.com/facts/>^[fn]

As a result, according to Spotify, Apple abuses its dominant position as both the owner of the iOS platform and App Store and a competitor to services like Spotify.^[fn] See for more information about the possible qualifications of the abuse (discrimination, tying, refusal to supply, margin squeeze etc.) an interesting blog of [Friso Bostoen](#) of 24 April 2019.^[fn]

Why is the ACM investigating Apple?

The concerns expressed by ACM in its press release reflect Spotify's complaints about Apple's App Store. According to the [press release](#), ACM will investigate, amongst others, whether Apple gave its own apps a preferential treatment in violation of the prohibition to abuse a dominant position. ACM received indications that app providers do not always have a fair chance against Apple's own apps. Providers of digital products and services are required to use Apple's payment systems for in-app purchases, and they are also required to pay a 30% commission. Moreover, they are not always able to use all functionalities of an iPhone. And finally, they say they have difficulties when communicating with Apple about the application of their conditions. In other words, ACM clearly recognizes the issues that Spotify has complained about to the European Commission.

What evidence follows from ACM's market study?

Although the objective of ACM's market study was explicitly not to carry out a competition law analysis, ACM describes a number of restrictive practices by both Apple and Google in the findings of the market study that may be found at odds with competition rules.

For example, on the one hand the market study acknowledges that an app store with popular apps contributes to the attractiveness of the overall ecosystem, which means that Apple and Google both have an incentive to assist app providers. However, on the other hand, the market study also stresses the dual role of both parties since they also compete directly with a selection of third-party app providers. According to the market study, this could give them an incentive to favor their own apps over apps of their competitors. The important position that Apple and Google both hold with the app stores on their respective ecosystems might also give them the opportunity to act in such way.^[fn] The market study reveals that the app stores from both Apple and Google form a bottleneck for app providers to reach consumers on both mobile OSs. The app stores are becoming a default gateway for consumers to reach online content. On iOS, moreover, no viable alternatives exist for the Apple Store, while on Android alternatives are only realistic if the app provider already has an established user base.^[fn]

Examples thereof are limitations faced by third-party app providers regarding interoperability with the mobile OSs and the requirement to use IAP for apps that directly compete with Apple and Google. Another issue addressed in the market study is the unequal treatment of apps in general.^[fn] ACM therefore also suggests to further debate whether there is a need for ex-ante regulation. For example a regulation comparable to the Net Neutrality Regulation which requires Internet Service Providers to treat similar Internet traffic non-discriminatory.^[fn] Examples mentioned in the market study report are (i) the technical or interoperability restrictions such as access to APIs while other apps were apparently granted access to these APIs and access to the NFC-chip, (ii) limited access to certain data concerning payments and customer relations while app providers are required to use the app stores payment systems for IAP and (iii) the featuring of apps in the app store (rankings).^[fn] The market study also revealed problems that app providers experience with regard to the lack of communication with Apple and Google. These issues are most apparent when it concerns a discussion about the interpretation of the terms and conditions or a removal (unjustified or otherwise) of an app. In the opinion of ACM, transparency and the ability to get in touch with Apple and Google are important requisites for app providers to do business. ACM does note that the upcoming [EU Platform to Business regulation](#) might be a step in the right direction and will not prioritize transparency issues at this moment insofar as these issues fall under the aforementioned regulation.^[fn]

Does this mean that Spotify has a case?

It goes beyond the scope of this blog to discuss all aspects that would provide an initial answer to this question. At first sight, however, the issues revealed in the market study report seem to underpin the complaints filed by Spotify against Apple at the Commission. Also, the fact that ACM commenced an investigation against Apple based on these issues could be seen by some as an indication that Spotify indeed has a case. However, whether these issues also qualify as an abuse of a dominant position remains to be seen.

Especially since Apple fiercely rebutted Spotify's arguments and [defended its App Store rules](#) publicly. According to Apple, Spotify does, for example, have access to Apple Watch and has the same app development tools and resources that any other developer has. Besides that, Apple emphasizes that Spotify cannot expect to use all functionalities of the App Store ecosystem, paid by Apple, while also retaining 100 percent of the revenue. After all, Spotify wouldn't be the business they are today without the App Store ecosystem. Moreover, Apple stressed towards ACM, amongst others, that it would not be rational for Apple to discriminate unfairly against third-party apps, because Apple earns the vast majority of its revenues from devices. And the more popular Apple's App Store is, the more devices it sells. In other words, Apple seems to argue that the conduct either did not take place, was justified and/or was just an incident - which according to the ACM could well be the case since, in a market place as large as the app store, mistakes can be made.

Furthermore, ACM's investigation will initially focus on Dutch apps for news media that offer their apps in Apple's App Store; not on music apps. The reason for this is that ACM received many indications about such apps (and perhaps not so much about music apps).^[fn] Nevertheless, there are some similarities between the news and music apps. Both kinds of apps offer digital goods. Moreover, Apple plays in both situations a dual role as Apple offers not only its own Apple Music app, but recently also started a news service offering readers access to a range of publications on a subscription basis, known as [Apple News Plus](#). This might also explain the support by Schibsted, Scandinavia's largest publisher, and European Publishers Council for Spotify's complaint. These news media parties highlighted that the same challenge is faced by news publishers offering apps for media consumers. See for example: <https://musically.com/2019/04/16/nordic-publisher-schibsted-backs-spotifys-apple-battle/> and <http://europe.eu/news-media-development-on-mobile-stifed-by-anti-competitive-app-stores-european-publishers-council-supports-spotifys-eu-competition-case/>.^[fn] It will be interesting to see whether ACM will expand its investigation from only news media apps into other kinds of apps, like music apps. Although Spotify filed its complaint at the Commission, ACM has given an open invitation to Spotify and any other app provider that experiences restrictions in Apple's App Store to feed into the ACM's investigation. If the European Commission takes up Spotify's complaint for investigation - which seems to be the case as apparently questionnaires have been sent to the market^[fn] See <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1084314&siteid=1906&dir=1>^[fn], however, ACM's market study might perhaps in any case aid the Commission's case.

Finally, it will also be interesting to see whether comparable complaints will be filed and investigations will be commenced against Google.^[fn] It appears that at least one complaint has already been filed at the European Commission by the app developer Disconnect Mobile. At the time of this writing, it is unclear how the Commission will deal with this claim. See, for example, <https://www.politico.eu/article/why-margrethe-vestager-android-case-is-googles-worst-nightmare/>. The Dutch market study and investigation also seem to complement the Commission's prohibition decision against Google's Android mobile operating system.^[fn] The Dutch market study revealed that Google uses comparable terms & conditions as Apple. ACM has, therefore, called upon app providers to come forward if they experience any problems with not only Apple's App Store, but also if they experience similar problems with Google's Play Store.^[fn] According to ACM, the investigation will currently focus on Apple because, at the moment, the most detailed reports have been received about Apple's App Store. ACM believes that these reports may indicate conduct that is at odds with competition law.^[fn] Perhaps Apple is thus not the new target, but the first target of ACM.

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