

Kluwer Competition Law Blog

Competition Authorities to Investigate Mobile Application Store Dominance

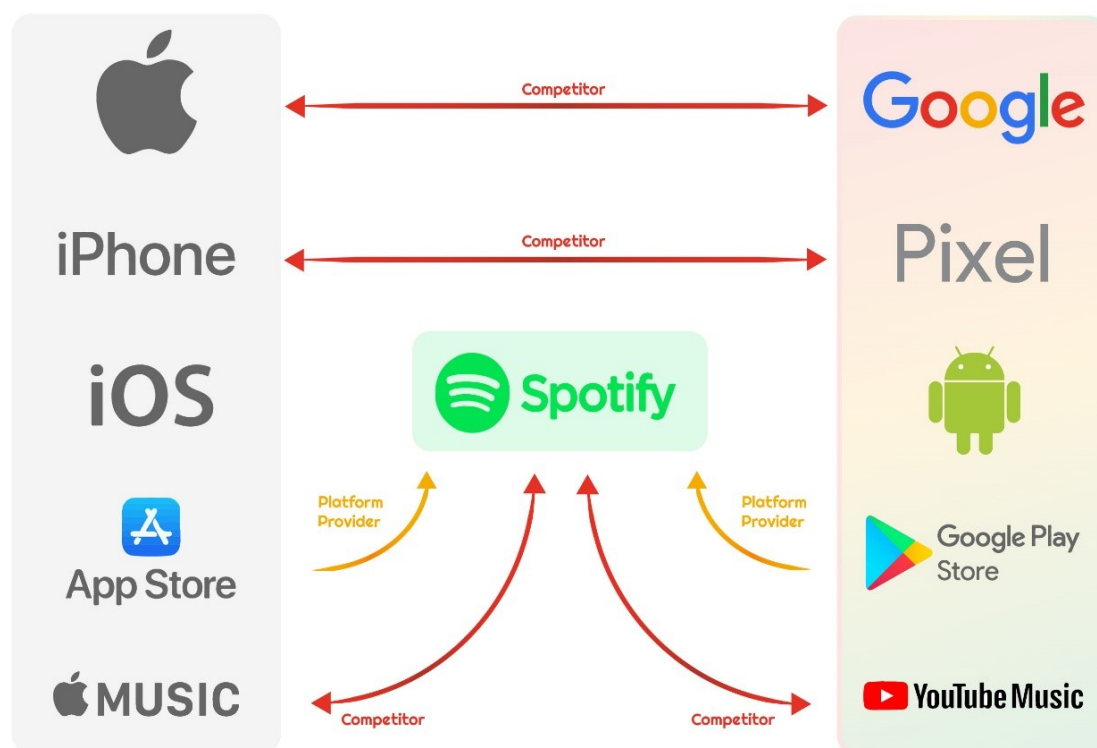
Bar?? Yüksel, Nabi Can Acar, Mehmet Salan (ACTECON) · Tuesday, October 15th, 2019

Competition authorities are tuned into mobile app stores, trying to implement classical competition rules into non-traditional digital markets. This tendency is loudly revealed when European Commission (“**Commission**”) deemed Google LLC (“**Google**”) as the dominant undertaking in the app stores for the Android mobile operating system (i.e. Google Play Store) and hit the online search and advertisement giant with €4.34 billion for its anti-competitive practices to strengthen its position in various of other markets through its dominance in the app store market[1].

This scenery may beg the question; is Google the only app store owner troubled with competition authorities? The answer is clearly negative when considered that the Commission, the Dutch Antitrust Authority (“**ACM**”), the US District Court and Federal Antimonopoly Service of the Russian Federation (“**FAS**”) are now looking into Apple’s activities as the owner of the App Store placed into iOS devices. The Commission’s Android Decision is of particular importance for Apple since it directly places it as the dominant undertaking in the market for “*iOS app stores*”.

Both Apple and Google have a dual role as a platform: (i) they distribute their own apps (ex. Apple Music and Youtube) on their app stores (respectively App Store and Google Play Store); and (ii) they provide an app store where third-party app developers may offer their product and services directly to the smartphone users. This dual role, which creates both vertical and horizontal relationships, is apparently leading up to a competition fight among app store owners and third-party app developers, which resulted in numerous complaints to be made to competition authorities worldwide. The story behind all these complaints are the same, a monopolist trying to leverage its dominance in the upstream market (i.e. platform) via favoring its downstream division (i.e. apps) vis-à-vis its competitors.

The market structure of mobile device ecosystem is summarized under the following chart:



It is clear that there is so much hype around the “*digital markets*” with the claims that the dynamics of these markets do not resemble anything that we have encountered before and thus the policymakers (including competition authorities to the extent that they are shaping the competition law policies by way of interpreting the existing rules) are urged to be hesitant when interfering with these vibrant, dynamic and delicate institutions. Yet, from a competition law perspective, the alleged anti-competitive conduct of the platform owners does not seem to be materially different from one of the oldest tricks in the sleeves of monopolists that have been around for so long, namely foreclosing downstream competition by way of leveraging power in the upstream infrastructure markets (some of the examples include; foreclosure of the market for railroad transportation by way of leveraging the monopoly in railways, foreclosure of the market for maritime transportation by way of leveraging the monopoly in ports, foreclosure of the market for retail internet by way of leveraging the monopoly in internet infrastructure etc.). Hence it seems that the difference does not arise from the nature of the conduct but from the underlying “*infrastructure*” which is used by its owners to monopolize related markets in which such infrastructure constitutes a crucial input.

Apparently, the digitization of the economy also led to the digitization of the vital infrastructure in the economy (from railroads and ports to platforms and search engines). However, this does not necessarily mean that the competition rules, which were unarguably designed during times where the economy was more “*physical*”, may not answer the needs of the digital era. On the contrary, as long as the nature of the conduct that is dealt with remains the same, the changes in the characteristics of the relevant market would only constitute new factors that must be considered while applying the rules. In other words, a fine-tuning, rather than a revolution, in competition law may be what is needed to address the challenges of our age.

The ongoing investigations we focus on in this article constitute one of the most recent examples of the “*competition law-related problems of the digital era*” that are at the top of the list in the

agendas of some of the most competent competition authorities around the globe. Since the complaints in these cases were widely made public, we can deep dive into the ongoing investigations, along with the current developments on this issue.

Commission's (Probable) Investigation into Apple-Spotify Dispute

Leading music streaming service Spotify announced that it filed a formal complaint against Apple before the Commission, based on the alleged anti-competitive conduct of Apple in the digital music streaming market.

Before looking into the complaint in greater detail, background story of Apple's entry into digital music streaming market is worth mentioning. Apple Music was launched in 2015, a year after Apple's gigantic (3 billion USD) acquisition of Beats Electronics. This acquisition kickstarted music streaming capabilities of Apple by granting it with an established streaming platform, consisting of contracted artists and paying customers. Apple's entry strategy into the digital music streaming market worked out to be just fine; in five years after its launch, Apple Music caught the world digital music streaming leader Spotify in the United States, and its 40 million subscribers (and counting), are paying off Apple's investment in the music streaming services. Apple Music's value for Apple may also be followed from its acquisition of Shazam, biggest player in the market for music recognition apps which forced Commission to investigate whether the acquisition would put competing music streaming services into a competitive disadvantage[2].

Spotify's complaint could be deemed as inevitable, as the competition between Apple Music and Spotify has been heating up since Apple Music's introduction. The complaint is made public under Spotify's battle cry of "*time to play fair*". As per this complaint, which involves a couple of entertaining animated mini clips that apparently aims public support, the alleged anti-competitive behaviors of Apple (whereby its dominance in the app store market, is used to leverage its own music streaming service Apple Music against Spotify) are as follows:

Implementing Discriminatory Fees

Apple is using the in-app purchase system ("**IAP**") which allows it to charge digital content providers such as Spotify, a 30% fee for using its payment system for any subscriptions sold through App Store. Spotify has claimed that this 30% fee caused unfair "*taxation*" for other players in the market such as Google's Play Music, YouTube Music, Amazon and Tidal, which would force the companies to fully pass the 30% commission on to their consumers thus "*artificially inflating the price*" of membership above the price of Apple Music. Spotify further claims that Apple charges this allegedly excessive fee in a discriminative way; requesting it only from the competing platforms. According to Spotify, as Apple does not compete with Uber and Deliveroo, it does not charge those platforms for using its payment system.

On a separate note, it is worth to mention that Apple's %30 IAP fee is also currently under US District Court's examination. The case was initiated by a group of consumers', alleging Apple as being a monopolist retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anti-competitive (excessive) price.

Obstructing Communications with Customers and Complicating Upgrade Process

Spotify suggested that if it refuses to utilize Apple's payment system in order to refrain from the IAP fee, Apple restricts Spotify's communication with costumers through in-app notifications or even e-mails. Besides, Apple prohibited app developers from referring to an external payment system under its Paid Applications Agreement and this prevented app developers from avoiding the IAP fee amounting to 30% of the subscription fee.

Apple's removal of third-party payment methods from in-app payment ecosystem resulted in some app providers' collecting their service payments via web browsers. However, since the app developers are prohibited to place an external payment link into their apps or send in-app notifications to their customers, they are unable to directly inform the consumers via their apps.

Rejecting App Enhancements

Spotify further accused Apple of routinely rejecting its bug fixes and app enhancements based on unilaterally imposed restrictions which were not implemented against Apple Music. Apple deems itself as the Supreme Court of App Store and this attitude is boldly announced under the terms and conditions of App Store:

"We strongly support all points of view being represented on the App Store, as long as the apps are respectful to users with differing opinions and the quality of the app experience is great. We will reject apps for any content or behavior that we believe is over the line. What line, you ask? Well, as a Supreme Court Justice once said, "I'll know it when I see it". And we think that you will also know it when you cross it."

This quotation explicitly grants Apple with large discretion as to what it will and will not allow. However, such great discretion may also be justified since the quality of apps available to a hardware directly relates to the end-user experience and is the most important battleground for smartphone developers. The fact that Apple Store is not licensable thus solely installed to Apple devices strongly indicates dedication to ensure high level end-user experience. Indeed, Apple could have made iOS licensable, monetarize (realistically speaking) one of two mobile operating systems in the world and collect huge amounts of license fee from third-party device manufacturers running on iOS. Instead, Apple preferred to keep its ecosystem closed in nature for the sake of its brand image. Actually, iPhone's well-established brand image takes its roots from Apple's ability to perfectly integrate its product's hardware and software since the introduction of Macintosh back in 1984. Under these facts, Apple's expectation from app developers satisfying "*high expectations for quality and functionality*" under its Human Interface Guidelines may very well be explained by Apple's legitimate priorities aimed at keeping its ecosystem clean and tidy.

Blocking Access to Certain Services and Devices

Spotify also claimed that Apple prevented it from utilizing Siri (Apple's smart assistant) and HomePod (Apple's smart speaker) and unduly postponed its introduction into Apple Watch (Apple's smart watch). It is argued that Apple is using its vertical integrated position to target competitors with device compatibility issues while offering its proprietary apps full access to hardware features. This complaint is often voiced by third-party app developers, suggesting that Apple is not providing the same Application Programming Interfaces ("**APIs**") which grant app developers access to hardware features (such as GPS, NFC Chip and Camera) in the same manner with Apple's propriety apps. The examples of such dissimilar treatment are exemplified by way of referring to the music streaming capabilities of Siri; whereas Apple Music can directly launch

through Siri, Spotify cannot.

Apple addressed Spotify's claims with its press release, rejected all the claims set forth by Spotify, suggesting that Spotify made false accusations. Apple stated that its IAP fee is being objectively implemented and not in a discriminatory manner; meaning that Apple is offering similar conditions to equivalent transactions with other parties. It is further stated that "*Spotify seeks to keep all benefits of the App Store ecosystem without making any contributions to that marketplace*" and "*Spotify's aim is to make more money off others' work*"[3].

Despite the loud allegations of Spotify, the Commission has not yet announced that it initiated a full-fledged investigation. However, Commissioner Margrethe Vestager addressed Spotify's complaint stating that:

"We are looking into that and we have been asking questions around in that market but of course also Apple themselves, for them to answer the allegations. And when they come back, we will know more."

Accordingly, Financial Times reported on 5 May 2019 that the Commission is to launch a formal antitrust investigation against the alleged anti-competitive practices of Apple[4]. Thus, we can soon be hearing the initiation of a full-fledged investigation aiming to take a deeper look into the tech giant's practices due to numerous and parallel complaints.

ACM's Market Study into App-Stores Followed with Initiation of a Full-fledged Investigation Against Apple

To follow up or even pioneer the global developments on the issue, ACM also conducted a market study into mobile app stores, aiming to "*gain more insight into how app providers get their apps in app stores, and what influence the app stores have on the selection of apps for users*"[5]. In result, it published a report on 11.04.2019.

In the report it is established that Apple and Google are reaching the consumers in three ways; their operating systems (iOS and Android respectively), app stores (the App Store and Play Store) and their proprietary apps (such as Apple Music and Google Chrome). It is further determined that by allowing third-party developers to distribute their apps via app stores, Apple and Google benefited from indirect network effects (i.e. *the more apps in the app stores, the more consumers come to the platform, the more attractive the platform gets for app providers*). In this way, Apple and Google both attained strong positions in the smartphone-related markets and are both able to decide whether an app is available in the app store and how this app can reach its customers.

In order to understand whether Google and Apple hold dominant positions with respect to app stores installed on their operating systems, the ACM assessed whether alternative app stores for Android and iOS exist or not. While installation of different app stores on Android devices is possible, iOS completely bans third-party app stores from devices running on iOS and considers sideloading a foreigner app store to be a breach of warranty. Nevertheless, this differentiation between Android and iOS ecosystems was not deemed as material and it was stated that there are no realistic alternatives within either of these ecosystems. It is concluded that App Store of Apple and Play Store of Google constitutes a bottleneck and their app-ecosystems are closed by design.

Google's strong position in licensable mobile operating systems may also be observed from the latest move of the all-time software company Microsoft, announcing introduction of a new smartphone, Surface duo, to be running on Android OS rather than its famous failure, Windows Mobile. The sole reason behind Microsoft's backstepping from using its own mobile operating system is that it is not willing and most probably unable to support its operating system with an app store rich enough to attract customers from iOS or Android ecosystems, as it failed to in "*Windows Marketplace for Mobile*". The reasoning behind this approach of Microsoft is also confirmed by one of its officials as follows^[6]:

"Well, because those are the apps you want," says Panay. "Because there's hundreds of thousands of apps, and you want them. And [Microsoft CEO Satya Nadella] and I talked about it, and it's about meeting our customers where they are, where they're going to be. I don't think the mobile application platform's going anywhere anytime soon. It's pretty simple. Like, literally, you need the apps.

You want to give customers what they want in the form factor that they're using. We've learned this — let's put the right operating system on the wrong product or the other way around. But what's the right operating system for the form factor? And in this case, on mobile devices, Android's the obvious choice, But anything [bigger than] that, Windows is everything."

In addition to the closed nature of these ecosystems, the ACM determined certain indicators that Google and Apple might favor their own apps and conduct discriminative practices among apps.

While sharing its market study findings, ACM also announced the initiation of a follow-up investigation into Apple with respect to abuse of dominance claims^[7] and Henk Don, Member of the Board of ACM stated that:

"To a large degree, app providers depend on Apple and Google for offering apps to users. In the market study, ACM has received indications from app providers, which seem to indicate that Apple abuses its position in the App Store. That is why ACM sees sufficient reason for launching a follow-up investigation, on the basis of competition law."

FAS's Investigation

According to its 09.08.2019 dated Press Release, FAS initiated an investigation into Apple upon an antivirus software developer Kaspersky Laboratory's ("**Kaspersky Lab**") complaint^[8]. The complaint was filed on 19.03.2019^[9], suggesting that Apple has abused its dominant position in the market for parental control apps.

According to Kaspersky Lab's press release, the conflict stemmed from Apple's notice, stating that Kaspersky Safe Kids ("**KSK**"), a parental control app, does not meet the requirements of guidelines for apps hosted in App Store, regarding utilization of Mobile Device Management ("**MDM**") technology which allows app developers to access personal data including user location, app use, email accounts, camera permissions, and browsing history. In its notice, Apple requested Kaspersky to submit an updated version of its app to avoid being banned from the App Store. From Kaspersky Lab's point, such an update would mean removing two key features from KSK; app control and Safari browser blocking by parents. These features are deemed to be essential for a

parental control app; therefore, according to Kaspersky Lab, KSK lost a significant part of its functionalities.

Kaspersky Lab noted that Apple's move was simultaneous with the introduction of Screen Time, proprietary parental control app of Apple, and claimed that Apple dictated terms and prevented other app developers from operating on equal terms with Screen Time by using its position as the owner of App Store, the sole channel for delivering apps to users. It is further suggested that Apple created a competitive advantage for its parental control app by way of this conduct. Apple addressed Kaspersky Lab's claims suggesting that it has always supported third-party apps on the App Store that help parents manage their kids' devices and further stated that utilization of MDM *"put users' privacy and security at risk"* and *"a clear violation of App Store policies"*[10].

The investigation initiated by the FAS is of crucial importance as FAS will analyze whether Apple tries to foreclose the downstream market where it competes with Kaspersky, through leveraging its dominance in the upstream market via unilaterally prepared policies and guidelines.

What to Expect?

One could argue that Apple's practices whereby it leverages its dominance in the app store market form a part of its new business strategy that improves the services it offers to the consumers along with its flagship products. Indeed, Apple's income derived from its hardware sales has been declining[11] and we now see Apple, while prioritizing its services, is seeking long term profitability through increased brand loyalty (or in other words, shifting its focus into software rather than hardware). In parallel, a newly published article[12] by Maribel Lopez reads as follows *"In a market where other hardware manufacturers offer compelling designs, where can Apple differentiate and grow? Of course, there's always usability but increasingly Apple's layering services on top of its hardware to grow the business. While much of the recent commentary on Apple's strategy focuses on declines in smartphone sales, the company has been consistently ramping its services play."*

This change of strategy manifested itself through Apple's Keynote Events organized in the recent years, where the launch of its services such as News+, Apple-exclusive content for the Apple TV, Apple Arcade, Apple Pay and, indeed the Apple Music were announced. However, it seems that this strategy of Apple will also be evaluated by the competition authorities throughout the world because of its dominant position in the app store market. Apple's conducts in question seem to be quite similar with Amazon's allegedly anti-competitive business strategies (Amazon also has a vertically integrated structure that is claimed to allow it to abuse its position as a marketplace to get ahead of its competitors in the retail level) and Google's practices that are already labelled as anti-competitive in the Google Shopping decision of the Commission.

There is no doubt that competition law shall ensure fair competition between third-party app developers and vertically integrated app store owners. On the other hand, in doing so, competition authorities should at all times bear in mind the reason behind their existence, which is maximizing the consumer welfare (though the debates regarding how this welfare should be measured should also not be disregarded). It is worth mentioning this as it is currently argued by many that the Android decision, whereby similar leveraging concerns were examined and deemed as violations, may have negative impacts on the consumer welfare in the long run through higher prices for the

smart-phones due to the insufficient analysis made by the Commission of a zero-price structured market.

The allegations made by downstream competitors such as Spotify and Kaspersky suggest that the platform owners are causing significant harm on the downstream competition. In order to address these allegations, ACM referred to the Net Neutrality Regulation[13] and suggested that *“it could be questioned whether app stores have the opportunity to restrict end-user rights effectively as protected under the Net Neutrality Regulation”*. In other words, it is possible to see a court or a competition authority decision suggesting that Apple and Google’s conducts are violating European Open Internet Regulation. In such event, often advocated *“integrity, safety and the quality of the app stores and the ecosystems”* justification behind strong control over app stores would have been deemed as not worthy to be protected.

The competition authorities and (as the premier policy-maker) the Commission shall come up with a solution that paves the way for those that better serve to consumer needs while ensuring the quality standards of the app stores which Apple and Google are (supposedly) trying to protect. Accordingly, the up and coming[14] EU Regulation on Promoting Fairness and Transparency For Business Users Of Online Intermediation Services (**“P2B Regulation”**) aimed at this very purpose, to *“ensure a fair, predictable, sustainable and trusted online business environment”* and shall also apply to application stores. In accordance with its preamble, the P2B Regulation aims to prevent the providers of online intermediation services from behaving unilaterally as they often have superior bargaining power, through requirements such as;

- Ensuring the terms and conditions of the services to be plain, clear and available to all business users,
- Prohibition of restriction, suspension or termination of services without cause or prior notice,
- Including a description of any differentiated treatment to its own services and
- Restriction of offering different conditions through other means.

Likewise, in parallel to the current complaints against the application stores, the preamble of the P2B Regulation also provides a brief explanation to the dual relationship of online intermediation services (Google and Apple) as follows[15]:

“(…) In such situations, in particular, it is important that the provider of online intermediation services acts in a transparent manner and provides an appropriate description of, and sets out the considerations for any differentiated treatment, whether through legal, commercial or technical means, such as functionalities involving operating systems that it might give in respect of goods or services it offers itself compared to those offered by business users.”

It is without doubt that the P2B Regulation would help to mitigate potential anti-competitive conduct of application stores, nonetheless, associated with discrimination between separate *“business users”*. However, one should also keep in mind that the claims concerning *“excessive pricing”* of these platforms shall still be dealt with by the competition authorities. ACM also agrees that *“the P2B Regulation is a good first step to solve some of the transparency issues that were raised by app providers”*. On the other hand, most app providers which ACM spoke to, considered this regulation as *“a step in the right direction, but the regulation does not go far enough”*, since it does not cover all aspects of the problems. The P2B Regulation should simply be deemed as a supportive legislation for addressing certain type of behavior.

Accordingly, it seems that the new tech giant in competition authorities' spotlight will be Apple after Google's long-term leadership. It would not be surprising to see several full-fledged investigations against Apple to examine whether it is abusing its dominance in the app store market. Such investigations could make Apple reconsider its relatively new strategy to prioritize its services as a source of revenue.

When one examines the ongoing debates about the potentially anti-competitive behaviors of the tech giants that own various mega-platforms by distancing oneself from the technical terms and the ever-changing technologies, it becomes clear that the fundamental competition law issues are quite similar to those discussed and resolved (somehow differently in the two sides of the Atlantic) in the past. For example, when Spotify's allegations as to how Apple is trying to leverage its upstream monopoly position via utilizing a vast array of different strategies, which ultimately aim to put Spotify at a competitive disadvantage vis-à-vis its retail division, are examined along with the counter-arguments raised by free market proponents with respect to potential "*chilling effects*" of any intervention to such strategies along with their high expectations from Schumpeter's "*creative destruction*" process, one cannot help but remember the following quote from the Supreme Court in the famous *Verizon v. Trinko* ruling^[16]:

"Allegations of violations of §251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. Amici States have filed a brief asserting that competitive LECs are threatened with "death by a thousand cuts," (...) —the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs."

At that time, the concern was that the owner of the internet infrastructure (*i.e.* Verizon) could kill its downstream competitors (*i.e.* Local Exchange Carriers or LECs) by way of various practices the combination of which would lead to a "*death by a thousand cuts*". The Supreme Court have responded by saying "*let these be dealt with via regulation*". This was an approach that has never approved by the Commission. *Verizon v. Trinko*, along with its counterparts in the European Union, fueled the discussion as to whether such complex unilateral conduct of the infrastructure owners (especially telecommunications infrastructures), which may lead to the foreclosure of downstream markets should (and could) be dealt with via competition law or whether there is a need for regulation. Not surprisingly, just a few years after the tech giants proved that their infrastructures constitute the backbone of the digital economy and they can easily undertake the role of gatekeepers that decides who can enter which market, similar discussions have recently become very popular with respect to the platforms as well.

Not a day goes without a statement made by officials as to regulating the digital markets in order to better deal with the potential anti-competitive conduct of the tech giants. Others, who point out to the virtues of disruptive innovation and creative destruction, argue that this increased motivation to over-regulate seems futile, since, thanks to the increased motivation to innovate, we come up with newly created markets on a daily basis along with their (potentially) anti-competitive nature due to the monopoly of its creator. In parallel with the discussion regarding the need to regulate, there are also different views concerning the suitability of the century-old competition rules in tackling these non-traditional digital markets. While some argue that the long-established concepts of competition

law that are directly related with its ultimate aim should be questioned and a brand-new competition law policy for digital markets should emerge, others believe that minor modifications would do the trick.

As it is eloquently narrated by the Commission in its report entitled *Competition Policy for the Digital Era*, “there is no general answer to the question of whether competition law or regulation is better placed to deal with the challenges arising from digitization of the economy. This question can only be sensibly answered with respect to specific issues”. To our understanding, control over app stores indeed enhances end-user experience and is the key feature in sales of mobile devices for many years. However, it may also be the case that the allegedly anti-competitive conduct of vertically integrated giants such as Apple and Google in the upstream platform markets where they are in a dominant position is obstructing their competitors in the downstream markets. Time will show whether these are real concerns and how they shall be dealt with by the policymakers.

For further commentary on this topic, please see this post from Mariska van de Sanden: [Dutch Antitrust Authority investigates Apple: does this support Spotify’s complaint?](#)

[1] The European Commission, Case numbered 40099 Google Android Decision.

[2] https://europa.eu/rapid/press-release_IP-18-5662_en.htm

[3] <https://www.apple.com/newsroom/2019/03/addressing-spotifys-claims/>

[4] <https://www.ft.com/content/1cc16026-6da7-11e9-80c7-60ee53e6681d>

[5] <https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf>

[6]

<https://www.theverge.com/2019/10/3/20895268/microsoft-surface-duo-foldable-phone-dual-screen-android-hands-on-features-price-photos-video>

[7]

<https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store>

[8] <http://en.fas.gov.ru/press-center/news/detail.html?id=54248>

[9] <https://www.kaspersky.com/blog/apple-fas-complaint/26017/>

[10] <https://www.apple.com/newsroom/2019/04/the-facts-about-parental-control-apps/>

[11] Apple’s iPhone sales in 2019 are down 12% versus 2018. Please see: <https://www.cnbc.com/2019/07/30/apples-iphone-sales-miss-estimates-down-13percent-versus-last-year.html>

[1 2]

<https://www.forbes.com/sites/maribellopez/2019/09/07/evaluating-apples-services-strategy-ahead-of-the-apple-watch-5-release/#3c3d5a101ba8>

[13] European Open Internet Regulation prohibiting Internet Service Providers from blocking or slowing down of Internet traffic based on commercial considerations

[14] Please note that the P2B Regulation will apply 12 months after its adoption and publication (July 12, 2020), and will be subject to review within 18 months thereafter.

[15] Preamble of the P2B Regulation, para. 30.

[16] Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP (02-682) 540 U.S. 398 (2004) 305 F.3d 89, reversed and remanded.

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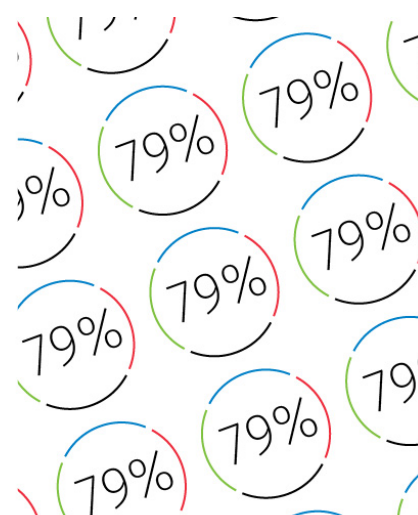
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