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The Great Antitrust Retreat: Why We Should Worry About the New Commission's Statement of Objections to Apple

Oscar Borgogno (Central Bank of Italy) · Friday, March 10th, 2023

In competition policy circles around the world, app stores remain a major topic of discussion regarding the regulation of digital markets. On February 28th, 2023, the European Commission (EC) sent a new Statement of Objections (SO) to Apple, "*clarifying its concerns over App Store rules for music streaming providers*". This replaced the original SO, which alleged that Apple had abused its dominant position in the distribution of music streaming apps through its App Store.

The antitrust assessment over app store's in-app purchases

One of the main competitive concerns in app stores is the practice of charging fees on third-party apps, coupled with the imposition of anti-steering provisions. Apple charges a fee ranging between 30% and 15% for in-app purchases made through their respective payment channels, and the app stores' rules prevent developers from using in-app payment mechanisms other than those provided by Apple ("IAP obligation"). Admittedly, the concerns are not only represented by the 30% commission in itself but mainly by the fact that it comes with the obligation to use only the payment mechanism provided by Google and Apple, insofar as anti-steering provisions limit the flow of information to consumers on the payment structure related to in-app purchases. A similar approach has been applied by Google. Indeed, this policy has led to a number of complaints regarding the fact that Apple and Google are unlawfully foreclosing app distributors, deterring entry into the app market, and depriving end users of potential new apps.

The value of the commission levied by Apple and Google for their in-app purchases is difficult to assess from an antitrust perspective. On one hand, it puts rivals at a competitive disadvantage by raising their costs or squeezing their margins, leading overall to higher prices for consumers. On the other hand, the fee perhaps, at least partly, reflects the cost of services incurred in maintaining the app store and the benefits provided by the app marketplace as a privileged channel for the distribution of developers' apps, thereby allowing particularly small and new developers to reach a large audience with a relatively small investment. Moreover, it is troublesome to establish if and how much the amount of the commission charged for in-app payments is inflated as a consequence of Apple and Google's market power.

The European Commission's saga against Apple as the ecosystem holder

The European Commission's initial allegations: IAP and anti-steering obligations

At first, the European Commission believed that these practices raised costs for Apple's rivals and distorted the competitive process for music streaming services, ultimately harming consumers. Indeed, the original statement of objections issued by the EC against Apple with reference to the distribution of music streaming apps through its App Store was likely to be based on a margin squeeze claim. Under EU competition law, the spread between the commission levied for in-app purchases and the price charged to final consumers downstream for using proprietary apps can be evaluated as exclusionary when it undermines the ability of rivals to compete on equal terms.

Indeed, there were good reasons for assessing comprehensively IAP obligations and anti-steering provisions through the competition law lens (as I've argued here). Over the years, the CJEU has progressively shaped the requirements of the margin squeeze conduct and rejected the concept of an implicit refusal to grant access, holding that margin squeeze shall not be treated as a subcategory of refusal to deal, thereby introducing a broader exception to *Bronner* than the ones set out by *Telefonica*. Notably, in *Deutsche Telekom* an essential facility was involved, the owner of the facility had a regulatory obligation to share, and rivals' margins were negative. In *TeliaSonera*, the Swedish competition authority detected a margin squeeze in a situation where the input of the dominant undertaking was not indispensable, there was no regulatory obligation to supply, and rival firms' margins were positive but insufficient as the rivals were forced to operate at artificially reduced levels of profitability. *Telefonica* and *Slovak Telekom* upheld the approach of considering margin squeeze as an independent form of abuse distinct from that of a refusal to supply so that the criteria established in *Bronner* would not apply, and, in particular, the condition relating to the indispensability of access.

The EC's renewed SO against Apple: anti-steering takes it all

Nonetheless, the EC's new press release does not target exclusionary conduct, as the previous one did with reference to the hypotheses around the raising of rivals' costs hypotheses. Even though the EC did not illustrate the reasons behind this choice, it is possible that the justification put forward by Apple convinced the EC not to test its chances before the EU Courts. In particular, Apple has always motivated this restriction by invoking the need to ensure high standards of security for iPhone users, together with the overall integrity of its mobile ecosystem. However, it is unlikely that these limitations are justifiable from an antitrust perspective. For instance, in 2022, the District Court of Rotterdam upheld the injunction against Apple dismissing the arguments that IAP is necessary to maintain security and privacy within Apple's ecosystem.

The new EC's strategy, instead, is likely to take issue with the exploitative character of the anti-steering provisions alone. Setting aside the economic and legal rationale for such a choice, it is worth noting that the EC is now focusing on a partially solved issue.

The Japan Fair Trade Commission (JFTC) closed its investigation in 2021 after accepting Apple's measures to allow developers of "*reader*" apps to include an in-app link that provides access to previously purchased content or content subscriptions for various digital media types such as books, music, magazines, and video. The reader apps include popular services like Netflix, Amazon Prime, Spotify, and Kindle. Although the agreement was made with the JFTC, Apple

promised to apply this change worldwide to all reader apps in the App Store. This implementation allows developers of reader apps globally to link their external website for setting up or managing an account avoiding the App Store fee. However, this change does not apply to e-games. The JFTC acknowledged that this remedy would eliminate concerns about the prohibition on providing sales channels other than in-app purchases (IAP), but it only applies to reader apps.

Under the best-case scenario, the EC's intervention could marginally improve the current framework by enabling developers to directly inform users about cheaper prices on channels other than the App Store, such as the developer's website.

Interestingly, the present case follows the footsteps of the US Epic v Apple litigation, which saw Judge Rogers hand down a decision in September 2021. Indeed, the combination of high commission fees and anti-steering provisions is at the heart of the litigation brought by Epic Games against Apple. The dispute was triggered by the removal of the popular Fortnite game from the App Store as a reaction to the offer of a new direct (and cheaper) payment option alternative to Apple's payment processor. The US court concluded that Apple's anti-steering provisions are anticompetitive, as they hide critical information from consumers and illegally stifle consumer choice. As a result, the Californian District Court issued an injunction that forbade Apple from prohibiting developers from informing users about alternative payment options to Apple's in-app purchase (IAP) system. Apple is now restrained from prohibiting developers from including buttons, external links, or other calls to action in their apps and metadata that direct customers towards purchasing mechanisms other than the IAP system. Developers are also allowed to communicate with customers through points of contact obtained voluntarily from them by way of account registration within the app. However, Apple remains free to prohibit third-party IAP systems within the App Store, thus maintaining the convenience of its own IAP for the user. The Court's decision only challenged the prohibition on communicating external alternatives and allowing links to those external sites.

It is important to note that the US Court did not challenge the amount charged by Apple's fee, the prohibition of sideloading apps onto iOS devices, or the prohibition of allowing third-party competing app stores on iOS. Rejecting the arguments of both Apple and Epic regarding the relevant market, Judge Rogers stated that the effective area of competition is the market for digital mobile gaming transactions, and while Apple enjoys a considerable market share of over 55% and extraordinarily high-profit margins, "*these factors alone do not show antitrust conduct. Success is not illegal*". Additionally, the Court did not conclude that Apple is a monopolist, and the injunction was granted under California state unfair competition law, rather than antitrust law.

In contrast to the US, the EU case plays out in the shadow of the Digital Markets Act (DMA), which not only prohibits IAP obligations under Article 5(7) but also imposes fair, reasonable and non-discriminatory (FRAND) app store fees under Article 6(12). Arguably, by issuing the new SO, the EC opted for a U-turn in the aftermath of the disappointing experience of the Dutch Authority for Consumers and Markets (ACM)'s decision. Indeed, since the IAP is only a convenient mechanism to extract rent, providing alternatives does not remove the right of app store orchestrators to seek compensation. Indeed, while implementing the ACM's order, Apple continued to charge a 27% commission fee (instead of the original 30%), in order to provide payment processing services, which is still regarded as excessive by app developers.

Conclusions

In general, the current situation shows a missed opportunity for EU competition law. By dropping the first allegation on IAP obligations, the EC gave up the chance to establish a clear precedent under the European antitrust rulebook regarding the freedom enjoyed by platform orchestrators to extract profits from their ecosystems and exclude competitors.

This was a unique occasion for demonstrating how EU competition law enforcement is more adaptive and effective than US antitrust regulations in addressing the new challenges presented by the app economy (as suggested in 2020 by the U.S. House Judiciary Antitrust Subcommittee, along with Herbert J. Hovenkamp). While the DMA can constrain specific gatekeepers' conduct, it may not be sufficient for providing future guidance on digital platform behaviour in emerging contexts such as the metaverse and the Internet of Things (IoT). As EU competition law is inherently designed to be in constant evolution through economic-based enforcement and case law, it is better situated to develop new economically sound principles applicable to this environment as opposed to regulations. More broadly, this experience reveals the risk born by EU antitrust of calcifying, as enforcers will increasingly rely on *ex-ante* regulation to challenge alleged anti-competitive scenarios in the digital arena, rather than the use of traditional competition tools.

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** The views expressed in this post are those of the author and do not involve the responsibility of the institution to which he belongs.*

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