

# Kluwer Competition Law Blog

## The ACM vs. Apple App Store – A Second Chance At Getting it Right

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The Dutch case concerning the Apple App Store appears to make a (welcome) comeback. The case that started in 2019 came to a rather disappointing end in the summer of 2022 when the Dutch competition authority issued a public statement that gave the impression that it was satisfied with Apple's adjustments to the App Store front in the Netherlands.

This week, however, news came out that this case may not have ended yet and that the ACM is still expecting further changes to the Apple Store pricing scheme. The question is, can the ACM achieve this, and if so, how?

### Background to the case

The abuse of dominance investigation against Apple in the Netherlands [was initiated in 2019 by the Dutch competition authority \(ACM\)](#). The initial investigation was aimed at a potential abuse of dominance by Apple regarding several categories of apps on the Dutch market. In the final stages of the investigation, the focus was limited to the case of dating apps.

Within this scope, [in the summer of 2021, the Dutch competition authority found that Apple abused its dominant position](#) by prohibiting (paid) dating apps from making use of third-party payment systems in their respective iOS apps, as well as prohibiting such apps from informing consumers about transaction modalities outside of these apps (i.e., an anti-steering prohibition). According to the ACM, this combination of obligations (or prohibitions) constituted a form of unfair trading conditions.

In the context of the investigation, the ACM found that Apple had a dominant market position with respect to dating apps and their distribution to iOS device owners (in the Netherlands). The (narrow) scope of the relevant market was motivated by the fact that dating apps, by virtue of their service, need to reach as many users as possible. When using dating apps, consumers do not expect that their app only displays other consumers who use the same mobile OS. Thus, from the perspective of such apps, iOS and Android cannot be seen as substitutes, but rather as two markets that need to be accessed to make the dating app service viable. From here, the finding of dominance is relatively easy to establish since the App Store is the only (realistic) distribution channel for iOS apps.

The remedies imposed at the time by the ACM required Apple to allow dating apps to use alternative payment services in their iOS apps and remove the anti-steering prohibition. Following the decision, Apple appealed to the Dutch administrative court while initiating a preliminary relief proceeding to delay the implementation of the decision. The latter case was [decided in the favour of the ACM](#), forcing Apple to eventually adjust its App Store rules pending the final decision on appeal.

The implementation of adjustments by Apple did not go smoothly and cost Apple over 50 million EUR in penalty fees for non-compliance. Nevertheless, during the summer of 2022, Apple finally made some significant adjustments to comply with the ACM's requirements. Under the [new App Store rules for the Netherlands storefront](#), dating app providers are allowed to choose between i) continuing with IAP as their only payment method, ii) using a link that redirects consumers to a payment method outside the app, iii) using an alternative payment method within the app, or iv) using both an alternative payment method within the app and offering a link to an alternative payment service outside the app. App providers using options ii-iv will receive a 3% discount on the usual App Store fees (i.e., 27% instead of 30% per transaction).

These [changes seemed to satisfy the ACM initially](#); however, [recent reports from Bloomberg](#) state the opposite, indicating that the ACM is still not satisfied with the pricing scheme of Apple, where certain apps carry most of the cost, nor with the level of transaction fees, i.e., the 30% transaction fee, which may lead to inflated prices for consumers.

One can imagine that if it is true, Apple will be hardly happy about this case dragging along. For enforcement, however, this may present a second chance to obtain better results, as the current adjustments made by Apple are unlikely to be effective. That is not to say that intervening in the pricing scheme or level of transaction fees will be easy, as that is certainly not the case; quite the contrary. However, this case can serve as a template for comparable cases across all of the Member States, in delivering better results than what is currently offered by Apple for the Dutch market.

### **The established abuse and the current (unsatisfactory) remedies**

The abuse of dominance, in this case, adopted the form of the imposition of unfair trading conditions. The ACM identified the harm caused by this abuse with respect to dating app providers whose freedom of choice (of payment systems) and access to consumers was disproportionately restricted. Although the ACM could have identified the same problem and harm in the case of consumers, these were not mentioned in the ACM's public documents.

This focus on app providers also extended to the remedy phase, where Apple tailored its adjustments only on the app developer side of the App Store. As noted earlier, under the new App Store terms, Dutch dating app providers can choose from the following options: (i) continue to use IAP only; (ii) use alternative payment methods in the app; (iii) redirect consumers to alternative payment methods outside the app; or (iv) a combination of options (ii) and (iii). All options not involving IAP lead to a reduction of the transaction fee by 3%. Under these current rules, there is no option to continue using IAP alongside alternative payment methods inside or outside the app. However, it is precisely this option that could provide an additional important part of the actual solution in this case, as Apple's current changes still put app providers in a clinch.

App providers have two choices: (i) the IAP payment method, which all iOS users (read consumers) are accustomed to, and (ii) implementing one or more alternative payment methods,

which requires several adjustments, both on the provider's and the consumer's side. The second option, thus, requires app developers to undertake an absolute switch from the payment method used by their current customers, which makes this remedy less attractive and, therefore, likely less effective.

When making this switch, app providers must consider how consumers will be presented with their choice of an alternative payment method. If the choice requires consumers to find their way around new software, default bias may increase the likelihood of them switching to competing apps that stick to using the IAP system. Once such a trend occurs in practice, the direct network effects at play may cause a particular app to run into trouble relatively quickly; the more consumers switch, the less attractive a dating app becomes for the remaining users. If such a prospect is not unimaginable, then lowering the commission fee from 30% to 27% will hardly suffice to make switching an actual option for providers. This margin created by this reduction will eventually be partly taken up by the alternative payment solution to which developers can switch, which means that the actual costs that developers can save by switching will be even smaller. Consequently, the prospect of abandoning IAP entirely, as is now made possible by Apple's adjusted rules, is highly unattractive.

This issue could have been avoided by acknowledging that the App Store rules, in this case, harm both app developers and consumers by limiting their choice of payment methods within paid apps. This acknowledgement, in turn, would also require that the harm to be mended by the remedies should address both 'sides' of the App Store platform. In practice, this would entail, at the very least, that Apple should allow app providers to combine the IAP with other payment methods (inside or outside the app). This option would remove the risk that the app developers currently face when considering switching to alternative payment methods. By doing so, the final choice will be left to the consumers and, thus, result from competition between payment settlement service providers rather than between dating apps due to their payment processing choices. If the ACM is still up to revisiting Apple's adjustments, such an addition would be the bare minimum to increase the effectiveness of the current measures.

The next step forward would be to intervene in the pricing scheme and levels of the App Store. This may seem like what the ACM is currently displeased about, but this [is a much more complex matter to resolve](#).

### **Imposing adjustments to the App Store pricing scheme**

To further increase the impact of such a remedy, the ACM could also intervene in App Store pricing for dating app providers. Indeed, the 3% discount leaves little room for price competition between IAP and alternative payment methods. However, taking this next step would be difficult in practice because intervening in pricing would require the ACM to demonstrate something is wrong with it, making the qualification of abuse of dominance more complex. In this respect, there is a limited number of options to deal with Apple's pricing: [discriminatory pricing](#), [excessive pricing](#), or margin squeeze.

The prospect of showing that Apple's pricing is discriminatory in the sense of Article 102 TFEU (or its national equivalent) would require showing that the various pricing categories in the App Store are not set along the lines of competition. In other words, it would require showing that apps

that belong to different pricing tiers or categories compete with each other, and Apple's pricing distorts this relation of competition. This is, in general, quite unlikely to happen when looking at the types of apps that are subject to transaction fees and those that are not. In the specific case of the ACM, which focuses on dating apps, this is even more so as the only apps that dating apps compete with are other dating apps, all of which are subject to the same terms. The fact that Uber is, for example, not subject to similar fees is irrelevant since Uber is not in competition with dating apps. Furthermore, differentiation across categories of apps is not problematic since platforms must rely on skewed pricing schemes to attract different types of desired actors.

The only realistic option where discrimination can play a role is in situations where Apple itself offers an app that competes with other apps in the App Store under different terms. This could occur in the case of Netflix and Spotify, which compete with Apple's services. This situation involves, however, an entirely different case, which is now partly being pursued by the EU Commission and would more likely fit a margin squeeze analysis.

This leaves only one option open, namely unfair or excessive pricing. Needless to say, analysing such abuses is far from easy, and in the case of the App Store, this will only be more complex. Proof of excessive pricing requires showing that the prices charged bear no relation to the economic value provided. Doing so requires evidence showing that prices are both (i) excessive and (ii) unfair. Showing this requires making various cost-price assessments and using multiple comparators (territorial, temporal, in and out of the market). The excessiveness of the price based on a cost-price analysis is difficult to assess since it concerns a high-risk and innovative product that justifies high-profit margins on the basis of a product of a higher quality. The unfairness aspect is equally challenging to show since Apple's fee structure is the same worldwide and has been so for many years. Comparisons with other app store-like services (e.g., on gaming consoles or dedicated gaming stores) will have limited value since they are subject to different market conditions. The only genuinely comparable app store is Google's Play Store; however, its terms will be similar to Apple's. After all, why should the two main dominant actors in the smartphone app store space have different terms and conditions when they exert almost no competitive pressure on each other?

The only aspect of this abuse that would offer some solid ground is the fact that the outcome of Apple's pricing is that a small part of app developers (including dating app developers) carry almost the entire financial burden associated with running the App Store. While it can be expected that app developers are willing to subsidize the App Store service for consumers which they want to access via the App Store, this is not the case when it comes to subsidising other app developers. Of course, the more apps are presented on the App Store the more attractive it is for consumers to use and vice versa. Nevertheless, this fact alone does not suffice to justify such a division of fees, even in the context of platform structures where skewed pricing is an inherent characteristic of them. In this respect, one could argue that Apple's pricing for some app developers is no longer linked to the value provided by the App Store. In this way, one could say that Apple's pricing fulfils the conceptual fundament of exploitative abuse. In other words, Apple is making use of an opportunity that is available to it, due to its market power, that would otherwise not be open to it in a competitive market setting.

The question is whether such a problematic outcome on its own is sufficient to satisfy the burden of proof for establishing an abuse of unfair/excessive pricing. If this is insufficient, intervening with Apple's pricing would require using Article 102 TFEU's open-ended character to identify a new type of stand-alone abuse, which follows the rationale of exploitative abuses under this

provision but does not fit the existing legal tests. Although this option is possible from a legal-formalistic perspective, it is easy to see that it will be met with quite some apprehension due to the inevitable element of legal uncertainty it involves.

Finally, regardless of the approach taken, intervening in the price setting of Apple also requires the ACM to have an idea about a better scheme and/or level of pricing, which would not be considered abusive. This is one of the main, and perhaps the only valid, objections against the enforcement of exploitative pricing strategies, as it presupposes that NCAs are better at determining prices than the market. This aspect is even more problematic in the context of platforms, where the price schemes are non-neutral, meaning that they do not only represent the number of fees charged by the platform that determines the demand for their service (or product) but they also demonstrate how such fees are divided across the various sides /customer groups of the platform.

What would be an alternative pricing structure for the app store and how high should the transaction fee be to not be deemed abusive? These are not easy questions to answer and it's unlikely that Apple would come around and voluntarily change any of its decisions regarding price. At best, moving this case forward would push Apple to reduce its transaction fees more so that the eventual switches by app developers to a third-party payment system would result in noticeable price reductions for consumers, which is currently not feasible.

As said, this case is not only about dating apps in The Netherlands. It is about all app developers that are in the same position across the entire EU. It is also not only about an abuse of dominance case under Article 102 TFEU but also about the enforcement of the DMA. The current adjustments of Apple would also be in (formal) compliance (at least *prima facie*) with the DMA, which does not go into the matter of pricing nor the need to display IAP alongside alternative payment systems, despite the desirability of the implementation of such measures for consumers and developers ([see an extensive commentary on the case in Dutch here](#)).

## Outlook

There is much at stake with the ACM's case against Apple, which is perhaps also the reason for the numerous interim legal battles between the two since the initiation of this case in 2019. With the above in mind, it is clear that demanding more far-reaching adjustments to the App Store rules is needed for this case to contribute effectively to the competition process.

Unfortunately, it is not certain to what extent the ACM will be able to push through and successfully intervene directly in the price setting of the App Store in a manner that would benefit both consumers and (dating) app developers. What remains true for now is that a more interventionist stance needs to be taken to prevent the current, ineffective, adjustments from becoming the common practice across the EU. However, for all of this to be possible, the ACM's decision, which is now in the process of appeal, must make it through judicial review, where the matter of [market definition and dominance will also be disputed](#).

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\* This entry is a re-post of the contributor's own CoRe Lexxion blog post, find link [here](#).

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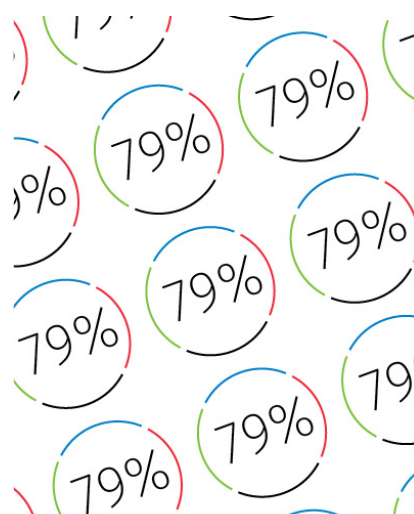
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