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(The Big) Apple's "Walled Garden": CASE AT.40437 – Apple – App Store Practices (music streaming)

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Background

Asymmetrical relationships can be defined as

unequal status or power relations between participants, whose roles are termed superior (…) and subordinate. Expectations and behaviour are largely non-reciprocal (…). This may be reflected in the initiation, termination, direction, amount, form, or style of the communication that takes place. (…) (Goffman).' (Oxford Reference).

Apple was fined by the European Commission €1.8bn for abusing its dominance by imposing anti-steering provisions. These terms and conditions govern the use of Apple's App Store by developers i.e. companies offering software applications on Apple's devices. The provisions were applicable to music streaming services that run on Apple's smart mobile devices.

To set the scene, the Commission analysed Apple's role in the European Economic Area. Apple is a multinational company, the most valuable technology brand worldwide in 2022 with a market capitalization estimated at $ 3bn (para 101). Its primary revenues come from smartphone sales; it shipped 55.2 mn devices in 2023 (para 103). Apple targets high-end consumers and offers a product with increased security and privacy (para 104). Apple is well-known for its ecosystem which is characterized by its tight control over many aspects of the user experience (the so-called "walled garden") (para 100, see also McMahon 2022). The App Store enjoys direct and indirect network effects, i.e. it needs to attract both developers and users (para 107). The App Store is also the only channel for the distribution of apps for iPhones and iPads (paras 97 and 112, see also Geradin & Katsifis 2021). The app distributor cannot then, reach iPhone or iPad users without offering its apps on the App Store.

Developers also need to follow the terms and conditions offered by Apple (para 112), among others these that are preventing anti-steering. The Anti-Steering Provisions in the Guidelines and their interpretation by Apple have since their adoption been subject to multiple modifications by Apple over the years.

Developers who sell their apps or offer any digital goods or services, such as the obligation of subscriptions to be funnelled via the in-app purchase system (hereinafter IAP) for the distribution of paid content. No other payment mechanism is available on iOS for in-app purchases to digital

content (paras 118 and 119). The use of IAP is subjected to an obligation to pay a non-negotiable 30 % commission to Apple for each in-app sale involving digital content during the first year. This is reduced to 15 % after one year of subscription for the majority of third-party app developers who can opt into the Small Business Program (para 124).

There are a few exceptions to this rule. In fact, the rule does not apply to the majority of apps distributed through the App Store – those that handle the selling of physical goods and services consumed outside the app, such as purchases of goods on an Amazon website, an Uber ride, an Airbnb booking of a hotel room or the use of Deliveroo for the delivery of food or groceries (para 132). Moreover, the in-app sale obligation does not apply when apps allow a user to access the content she has previously purchased or if she has a subscription to a particular content such as a newspaper, audio, magazine etc. (the so-called "reader" rule, para 135). This "reader" rule applies to Spotify, which had since 2016 disabled IAP.

Similarly, the IAP rule does not apply to apps that are present on different platforms, since Apple would allow users of such apps to access content, subscriptions, or features they have acquired in the app on other platforms or websites. Apple allows access to such content, and subscriptions if they are also available as in-app purchases within the app. This is known as the so-called "multiplatform" rule (para 135). If one has subscribed to content elsewhere, it can then be accessed also through iOS (para 138). The rule applies to Deezer, YouTube Music or SoundCloud apps, all of which offer in-app subscriptions through IAP.

Many examples provided as exceptions to the IAP rule are enjoyed by apps that provide access to music streaming services. Most of the music streaming providers, such as Spotify or YouTube, operate on the basis of the "freemium" model. They offer (1) free access to the service that is supported with ads, but also (2) a premium service, which generates most of these services' revenues, based on a paid subscription. This is an ad-free service that is supported by additional functionalities such as unlimited plays of songs, higher quality sound and a larger music library (para 151). Other services such as Apple Music are subscription-only (para 154).

Let us go through the main assessment performed by the Commission to conclude that there was an abuse of dominance.

The Commission started to investigate Apple's conduct already in 2015 as regards both the IAP (in-app purchase mechanism) obligation and the Anti-Steering provisions (para 16). However, it was not until Spotify's complaint on 9 April 2019 that things started to take shape. Spotify complained about the requirement set by Apple to offer paid digital content or subscriptions to such content, such as music streaming subscriptions, in their iOS apps to make use of Apple's in-app purchase mechanism ("IAP") and pay a 30 % or 15 % commission fee to Apple, and Anti-steering provisions. The latter concerns prevented developers such as Spotify from informing iOS users about the possibility of purchasing other (sometimes cheaper) subscriptions that are available outside apps.

The complainant – Spotify – had itself originally implemented the in-app subscriptions through IAP as of 30 June 2014 and was forced to increase the price of the Spotify Premium service for in-app subscriptions as it had to absorb the commission fee. The fee was set at 30 % of the app price during the 1st year of an app subscription, after which it was lowered to 15 %. Spotify had then disabled the in-app purchase functionality in May 2016 (paras 213, 216 and 217). As a result of that, and in combination with Apple's Anti-Steering provisions, Spotify users can only subscribe to

its Premium version outside of iOS. Music streaming service providers can either follow the rules set by Apple, such as Anti-Steering provisions or stop offering their paid versions within iOS devices (para 230).

Anti-Steering Provisions

On 30 April 2021, the Commission issued a Statement of Objections finding that the imposition of the Anti-Steering provisions could be preliminarily considered an infringement of Article 102 TFEU. The first Statement of Objections included the concern about the "mandatory use of Apple's proprietary in-app purchase system ("IAP") for the distribution of paid digital content". The Commission noted that where Apple charges app developers a 30 % commission fee on all subscriptions bought through the mandatory IAP, most streaming providers passed this fee on to end users by raising prices (ibid.).

The First Statement was then replaced with a revised Statement of Objections issued on 28 February 2023. Here, the Commission explicitly stated that it "*does no longer take a position as to the legality of the IAP obligation (…) but rather focuses on the contractual restrictions that Apple imposed on app developers which prevent them from informing iPhone and iPad users of alternative music subscription options at lower prices outside of the app and to effectively choose those*" (ibid.)

The Commission's decision focuses only on the imposition of Anti-Steering provisions, but it stresses that these provisions should be also analysed in the context of obligations imposed on developers to use Apple's own purchasing IAP method for in-app sales of digital content or services (para 164). Moreover, even where the "reader" or "multiplatform" rules would in theory allow music service providers to inform their users about the ability to purchase music streaming subscriptions outside of their iOS app and use these subscriptions in their iOS apps, the Anti-Steering Provisions, and the way in which Apple has interpreted and implemented them, have ruled out such a possibility in practice. In particular, developers are prevented from offering buy buttons or other direct links within their iOS apps to subscription possibilities outside of their apps. They are also prevented from informing users within the apps about the prices of subscription offers outside of the app; about price differences between subscriptions through IAP and those available elsewhere; and about the developer's website on which subscriptions can be bought (para 184).

Developers cannot, then, instruct users, e.g. in an email, where and how to subscribe outside the iOS app, give information on offers or promotions (para 184). However, they can, as stressed by Apple, inform iOS users within their iOS app in a general manner about the different services and subscription plans they offer. Developers can also mention that their services cannot be purchased on the app (para 185). This prohibition extends to in-app premium pop-ups and premium tabs, as well as to in-streaming and pop-up advertisements, which appear to the user while engaging with the service (para 205). Apple will, therefore, reject the app update of a particular developer if it finds it incompatible with the Anti-steering provisions (para 186). In practice, it is unclear for developers what is allowed and what is not allowed, which creates uncertainty, and this is especially detrimental to competition insofar as Apple may change its interpretation at any point.

Apple's interpretation of these provisions has been tightened throughout the years, and it has become more rigorous in its interpretation of the Guidelines. This happened after the launch of

Apple Music in June 2015 and Spotify's decision to disable IAP in May 2016, Apple started to consider e-mail communication by Spotify that was triggered by an action in the app to be in contradiction with the Guidelines and modified the wording of the Guidelines accordingly (para 187).

Apple continued to be strict with its interpretation of the anti-steering provisions until the European Commission issued its first Statement of Objections on 30 April 2021. After the SO, Apple started to relax its interpretation of the Anti-Steering Provisions (para 201). According to Apple, the practical impact of these Anti-Steering Provisions is limited because it allows the implementation of the reader and multiplatform rules (para 187). Apple claims that "*consumers are "not clueless" about their ability to transact directly with music streaming developers outside the app*". However, according to the Commission, these provisions "*actually largely offset the benefits that iOS users could draw from the reader and multiplatform rules"* (para 208).

Defining the relevant market

Apple has been arguing throughout the case that the relevant market should be defined as the market for the sale of music streaming subscriptions that would be wider than purchases via IAP, as it would also include sales outside the apps (para 275).

The Commission disagrees with this view and considers that the relevant market in this case is the market for the provision to developers of platforms for the distribution of music streaming apps to iOS users from at least 30 June 2015 where it enjoyed a 100 % market share (paras 276 and 520). This aspect accounts for the developer-facing side of the two-sided App Store. On the other side, the Commission's analysis shows that users stream music mostly via mobile, even though alternative options such as desktops, smart speakers, smart TVs etc., are also able to stream music (para 279). Moreover, according to the Commission, where the App Store is the sole distributor of native apps for iOS devices, it gives *it" full control over the terms of access between consumers and developers of such native apps"* (para 307). Finally, the Commission also concluded that music streaming services have only limited demand-side substitutability e.g. from physical distribution of music (para 314).

The Commission opted for a really narrow product market instead of some other possibilities it had already looked into, such as the market for smart mobile devices (both iPads and iPhones in which Apple compete against OEMs offering smart mobile devices to end consumers), or the overall market for the provision of music streaming services (where Apple competes with a number of firms, such as Spotify, Deezer etc.). Defining the market narrowly constitutes a similar choice as in the Google Search decision, where the Commission opted for defining a market for a product search to narrow the market down. This choice of the relevant market in Apple's case is however disputable for being excessively narrow.

One of the important contributions of the Apple case here is the assessment of the barriers to entry. The crucial barriers to entry that the European Commission points at are switching costs between Apple's smart mobile devices and Android devices. This is because one does not switch lightly from one operating system to another. Switching would involve both monetary and non-monetary costs imposed on the users, as demonstrated by the evidence presented the Commission (para 388).

An example of the monetary switching cost is the investment in purchasing a mobile device as well

as accessories linked to it (para 389). Moreover, throughout the period when the mobile device with a certain operating system is used, consumers have already purchased apps, and cloud storage services as well as familiarized themselves with the user interface (para 390). Consumer satisfaction is one the factors that strengthen brand loyalty (para 410) and therefore impedes switching of consumers from Apple to Android, for example, The Commission acknowledges that consumer satisfaction may indeed be one of the factors for Apple's strong brand loyalty, but that does not change the fact that they could be locked in into Apple's ecosystem (para 410). Consumers are very likely to buy iOS-based devices once again and not to choose rivals (para 502). Due to the Anti-Steering Provisions, app users that are unaware of price differences cannot make informed choices (para 511).

Unfair trading conditions as violation of Article 102(a) TFEU

When analyzing whether Apple enjoys a special responsibility not to impose unfair trading conditions under Article 102(a) of the Treaty, the Commission refers to para 35 of the opinion of Advocate General Trstenjak in Case C52/07 Kanal 5 and para 165 of Case C-52/09 TeliaSonera Sverige as well as to para 84 of Case T-162/17 Google and Alphabet v Commission (Google Shopping).

The Commission found that Apple has been abusing its dominant position by means of imposing unfair trading conditions that can be captured under the prohibition of 102(a) TFEU.

Most importantly, the Commission laid down the criteria for unfair trading conditions to be qualified as abuses under Article 102(a) TFEU (para 529). Firstly, the conditions need to be imposed by a dominant undertaking on its trading partners (the Commission is referring to Case C-127/73 BRT v SABAM para 15; Case C247/86 Alsatel v Novasam, para 10). Secondly, the terms need to be unfavourable or detrimental to the interests of that undertaking's trading partners or of third parties, including consumers, that are affected by the trading conditions imposed by the dominant undertaking (referring to Case C-27/76 United Brands, paras 156-159, where the Court analyses the ways in which the conditions imposed were detrimental to the interests of the companies affected by them). Finally, these unfair trading terms should not be necessary for the achievement of a legitimate objective or in any event not proportionate for that purpose, in that they go beyond what is strictly necessary to achieve it (Case T-139/98, AAMS para 79).

Apple has argued that its terms and conditions are not unfair but rather unfavourable or detrimental to the interest of trading partners or consumers (para 531). However, according to Apple, terms are unfair when they are "*so "disadvantageous" that no user would be interested in purchasing music streaming subscriptions"* (para 531). According to Apple, there is also a need to show a link between a dominant position and the ability to impose e unfair terms, under Article 102(a) TFEU (para 780).

However, according to the Commission, Article 102(a) of the Treaty expressly refers to the direct or indirect "imposition" of unfair trading conditions without requiring a specific causal link between the dominance and the content of those unfair trading conditions (para 538). The Commission refers to the Europemballage judgment where the Court of Justice explicitly rejected the requirement of a causal link between the dominant position and the abuse (para 540). What is more, it also refers to Atlantic Container Line where the General Court clarified that the link does

not apply only in cases of reinforcement of a dominant position but also to exploitative abuses.

Standard practices in a particular sector can be found abusive. This is a case where a company is dominant and has a special responsibility not to abuse this dominance, here by imposing unfair trading terms. Where it is an unavoidable trading partner with a special economic strength, it gives it the power to behave independently of its customers, but this position should not be used in an anticompetitive way (para 545). Moreover, the causal link between the dominant position and the conduct in question is not needed to distinguish between exploitative and exclusionary abuses (para 546).

Finally, the Commission pointed out that unfair conditions do not need to be imposed on trading partners, as they could be unfair towards consumers (para 549). In this case, unfair conditions affect also users, as "*the Anti-Steering Provisions are specifically designed and applied to prevent music streaming service providers from informing iOS users about options available to them under the reader rule and the multiplatform rule and from allowing iOS users to effectively exercise an informed choice between different options. The iOS users are therefore the target of the Anti-Steering Provisions* (…)" (para 549).

The Commission, therefore, concluded that the Anti-Steering provisions are anticompetitive, where they constitute an exploitative abuse of a dominant position under Article 102 TFEU as they impose unfair trading conditions. This is because: *"(i) they are unilaterally imposed by Apple on music streaming service providers; (ii) they are detrimental to the interests of iOS users of music streaming services; and (iii) they are not necessary for the achievement of a legitimate objective or in any event not proportionate for that purpose"* (para 555).

Apple's special responsibility under Article 102 of the Treaty

The Commission defined Apple as a dominant undertaking with a special responsibility which denotes that it should abstain from imposing unfair trading conditions (para 556). In particular, the Commission pointed out that Apple's consumers are locked into its devices after purchasing them and this leads to the imposition of switching costs (para 559). Moreover, the position of App Store, which the Commission labels as the "*only gateway for developers to reach iOS"* and the fact that consumers are also locked in due to the major importance of the App store to the distribution of smart mobile devices and native apps (para 560) imposes a special responsibility on Apple. It should not, therefore, resort to imposing unfair trading conditions upon music streaming service providers (and are detrimental to the interests of) iOS users (ibid.). This special responsibility derives from: *(a) Apple's monopoly on music streaming app distribution on iOS; (b) the fact that consumers predominantly use native apps on smart mobile devices to stream music and; (c) Apple's full control over the apps for iOS devices* (para 561).

Where Apple does not allow any competition from other app distribution platforms, the App Store is the only channel through which developers can offer apps to iOS users (para 563) and it gives it the power to dictate the rules "*according to which iOS users and music streaming service providers interact on the iOS platform, in particular the power to set and impose the terms and conditions under which the App Store operates, including the Anti-Steering Provisions and payment rules, as well as the power to accept or reject music streaming developers' apps and apps updates in the App Store"* (para 566).

The Commission also finds that the Anti-Steering Provisions are detrimental to the interests of iOS music streaming users as they cause both monetary and non-monetary harm (para 576). This includes users paying a higher price for subscription (para 590), as well as a degraded user experience and lessened choice (para 591). As to the latter, the Commission points out that "*an iOS user who is interested in upgrading the functionalities of the music streaming app is not able to find the relevant information within the app about how, where and at what conditions to unlock additional functionalities, due to the Anti-Steering Provisions"* (para 694).

Apple aimed to defend itself by claiming that music streaming providers can price their services as they wish and charge consumers more to compensate for the fee (para 639). However, the Commission finds that even a 15 % fee is problematic for developers and will be passed on to consumers (para 649).

Objective justification and appreciable effect on trade

According to the EC's decision, the Anti-Steering Provisions are not objectively justified. This is because they are not complying with the principle of proportionality (para 815). The Commission also does not find them necessary to (i) prevent developers of music streaming service providers from bypassing the contractual obligation to pay a fee for music streaming subscriptions sold in the app and from free-riding and (ii) finance the App Store (para 816).

The abuse is capable of having an appreciable effect on trade between Member States (and Contracting Parties to the EEA Agreement) (para 847). Apple was ordered, besides paying a very large fine of EUR 1,8 bn, to remove the Anti-Steering Provisions from the relevant terms and conditions governing the use of Apple's App Store by music streaming service providers (para 871).

Comments on the decision

The Commission's Decision on Apple is important for a number of reasons, but most of all, because it clarifies the criteria for unfair trading conditions to be qualified as an abuse of dominance under Article 102(a) TFEU, but still to a very insufficient degree and a judgment of the General Court would be needed to flesh out further these conditions. This has also happened with self-preferencing in the Google Search case, where the Commission laid down its theory of harm in the decision, but then the General Court clarified these conditions later on in its judgment. When talking about cases where a dominant intermediary in one market (here Apple being dominant in the market for the provision to developers of platforms for the distribution of music streaming apps to iOS users) is trying to leverage its market power to adjacent market(s) (here music streaming services), finding a causal link between the abuse and the market may be more challenging and requires a detailed analysis.

The Commission has narrowed down the market to a non-disputable area and it has, in my view, laid down well the connection between the adjacent markets. However, the choice of the relevant market can always be challenged to a certain extent.

Anti-steering provisions may also be causing unnecessary CO2 emissions where users are

searching for premium, paid options than if they would make a regular purchase they would do in-app or if they had a direct link. Moreover, when users stick with unpaid options as they are unaware of the premium ones, they end up listening to ads that also eat up a lot of energy and data, and they gather data on their preferences target them and steer into buying a lot of items they do not need. We could, therefore, claim that free services are less sustainable than their premium versions and that search costs create a waste of energy. This observation may seem quite exotic at this point but considering the ongoing twin transition in the EU, which denotes the combination of digital and green transitions, this is a goal that needs to be promoted on a larger scale. Similarly, any attempts to open up closed ecosystems, and allow interoperability, may be promoting the sustainability of online platforms.

The Commission could also back the analysis of non-monetary switching costs with a more detailed analysis of biases and heuristics consumers face when choosing to stick with Apple devices. It is disappointing that the Commission only resorts to the arguments relating to lock-in effects and gateways, as well as Apple's strong brand loyalty. What about the low cognitive effort of users, and information asymmetries? (see e.g. Mäihäniemi 2022).

As to the special responsibility of the intermediary and its role as a gateway to the closed ecosystem, the Commission is tackling this issue not only with competition law but also with the Digital Markets Act.

As to investigations based on competition law, only recently, on 11 July 2024, the Commission accepted commitments by Apple to open access to 'tap and go' technology on iPhones. This is an important additional step in tackling Apple's power asymmetry. The Commission found that Apple abused its dominant position by refusing to supply the technology used for contactless payments with iPhones on iOS to competing mobile wallet developers while reserving such access only to Apple Pay. Apple committed to, among others, allowing third-party wallet providers access to the technology used for contactless payments on iOS devices free of charge, without having to use Apple Pay or Apple Wallet. It will also apply a fair, objective, transparent and non-discriminatory procedure and eligibility criteria to grant access to third-party mobile wallet app developers (ibid.).

The Commission is also tackling Apple as a designated gatekeeper under the Digital Markets Act (hereinafter DMA).

Firstly, it sent preliminary findings to it on 24 June 2024 since App Store rules may be in breach of the DMA as they prevent app developers from freely steering consumers to alternative channels for offers and content (Press release on the issue). This is tackled under Article 5(4) of the DMA. The Commission focused on a few aspects of Anti-Steering provisions, for example the fact that developers cannot provide pricing information within the application or communicate it in any other way with customers to promote their offers that are available on other channels. The Commission is also analyzing the fact that steering is available only through the so-called "link-outs" – a link redirecting consumers to a website where she can conclude a contract. Finally, the Commission looks at fees developers need to pay to Apple for every purchase of digital goods or services a user makes within seven days after a link-out from the app. According to the Commission, these go beyond for it is necessary for such remuneration. Apple now can reply in writing to the Commission's preliminary findings. The Commission has now 12 months from the opening of proceedings on 25 March 2024 to adopt a non-compliance decision (ibid.).

Secondly, the Commission has also opened a third non-compliance investigation into Apple's new

contractual terms for developers as a condition to access some of the new features enabled by the DMA, notably the provision of alternative app stores or the possibility to offer an app via an alternative distribution channel. Apple has so far kept the option to subscribe to the previous conditions, which do not allow alternative distribution channels at all (Press release on the issue). The Commission will assess whether they breach Article 6(4) of the DMA (i.e. are they necessary and proportional). These are, for example, Apple's Core Technology Fee, where developers of third-party app stores and third-party apps need to pay a fee a €0.50 fee per installed app. Moreover, the Commission will check if the steps required for users to download an alternative app or app store for iOS users are not too complicated and whether some of the requirements imposed on developers are necessary (ibid.).

All in all, it seems that the Big Apple "walled garden" is coming to an end, and it will need to open up its ecosystem to some extent. This means good news for developers and consumers as more choice and interoperability will be possible. However, it will surely discourage some companies from opting for a closed ecosystem in the future.

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