

The Rising Tide of Antitrust Litigations and Lawsuits Against Apple: App Developers May See a Wave of Changes

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Big Tech is caught in the undertow of a growing number of antitrust battles domestically and abroad. In particular, Apple is getting pressed on its App Store policies by the U.S. Department of Justice, State Attorneys General, the European Commission, and in private litigation. In addition, the House Judiciary's antitrust subcommittee recently grilled Big Tech CEOs in hearings that dove deep into allegations of antitrust misconduct.

This Q&A offers insight into the global investigations and lawsuits scrutinizing the antitrust implications of Apple's App Store policies and practices, as well as broader implications for app developers and others impacted by a technology industry in flux.

Mike: What are the U.S. federal and state agencies investigating with regard to Apple and what can we expect will happen with these investigations?

Neely: Rumors and news reports that the DOJ was investigating Apple began in February 2019. According to a Reuters report at the time, DOJ representatives had met with the FTC to give clearance to the DOJ to potentially investigate Apple and Google. There were also reports of various companies and app developers being called by the DOJ and certain State AGs about Apple's App Store practices.

Subsequently, in June 2020, Politico reported that the DOJ and several State AGs were taking the first steps toward launching an official probe of Apple. The report stated that the DOJ and State AGs had spoken with several companies that were unhappy with how Apple managed and controlled its App Store, including with respect to how Apple applies its rules inconsistently particularly for apps that compete with Apple's own products. For example, the CEO of a parental control app told Reuters that he was interviewed by the DOJ in November 2019 about his company's interactions with Apple. Notably, Apple had introduced its screen time app which includes parental controls in mid-2018 and then temporarily removed competing parental control apps around this time for failing to meet certain of Apple's requirements. Apple's backward vertical integration into app development is a concern across many other app categories beyond parental control apps and has been a focus for the DOJ.

In addition, there have been reports that the DOJ is investigating Apple's requirement that the App Store be the only app distribution platform for iOS devices, Apple's requirement that developers only use Apple in-app payment processing and Apple's 30% commission rate for in-app purchases, which app developers have argued is anticompetitive and raises rivals' costs because Apple is in competition with the app developers. With all of the

moving parts and various issues being investigated, it has been interesting to watch the developments over the last year and these investigations will continue to pique the interests of the legal and tech communities as they continue to develop.

Mike: Based on the issues being investigated and possible charges being considered against Apple, what are the potential remedies that the DOJ may seek?

Neely: If the DOJ concludes that some or all of Apple's practices are anticompetitive, there are a variety of potential remedies depending on which conduct the DOJ ultimately concludes is problematic. For example, the DOJ could require Apple to open up its iOS platform to allow for alternative distribution platforms or require Apple to stop requiring that apps use Apple payment processing and allow for the use of alternative payment processing. The DOJ may also prohibit Apple from favoring its own apps in the App Store. In addition, it is possible, albeit unlikely, that the DOJ will require some separation of Apple's businesses from the segments in apps where Apple has vertically integrated, either by divestiture or by setting up walls. As these examples demonstrate, there are a variety of remedies that the DOJ may consider depending on what conduct, if any, the DOJ determines is problematic.

Mike: Can concerned companies talk confidentially to federal or state agencies about their concerns without fear of those communications becoming public or ramifications from Apple?

Neely: DOJ investigations are typically confidential and the DOJ takes time during the investigation to speak with companies confidentially to determine what the concerns really are and what conduct, if any, is anticompetitive. The DOJ is generally careful not to reveal the identity of companies that have talked to the DOJ if the company does not want to be named. Accordingly, concerned companies can approach the DOJ under this cloak of confidentiality.

If a company is particularly concerned that there will be ramifications for speaking with the DOJ, the company should tell the DOJ about its concerns at the outset and can specifically ask the DOJ to keep the company's identity confidential. In addition, to the extent a company shares written data or documents with the DOJ, the company can ask that the DOJ issue a Civil Investigative Demand so that the documents and data can be sent pursuant to the CID to provide additional confidentiality protections and ensure that the information is not subject to FOIA requests in the future.

Mike: A hearing was held on July 29, 2020 before the House Judiciary's antitrust subcommittee related to Big Tech's market power, where the CEOs of Apple, Amazon, Facebook and Google each took the witness stand. What insights can be gained from the hearing with respect to Apple?

Neely: Apple appeared to receive the least amount of scrutiny and focus amongst the top four Big Tech companies during the approximately six-hour hearing. The questions posed to Apple during the hearing were generally parallel to what has been reported by the press regarding the DOJ's investigations and what companies have indicated has been discussed with the DOJ. The majority of the questions focused on the 30% commission that Apple charges for in app payments. Representative Demings also posed some questions regarding Apple's removal of the parental control apps. It therefore appears that the House Subcommittee is looking at similar issues as the DOJ and State AGs.

Mike: Just prior to the hearing in late July, Apple released a report from The Analysis Group defending its 30% commission as in line with commissions charged on other digital platforms. What is the impact and message of that report?

Neely: The Analysis Group report finds that Apple's App Store commission rates are similar to the commission rates charged by other app stores and digital content marketplaces, including the Google Play Store, Amazon Appstore, Samsung Galaxy Store, and Microsoft Store, and thus argues that Apple's commission rates are not supracompetitive. However, just because another app store charges similar commission rates does not mean that those rates are not also supracompetitive as it is possible that more than one company has market power and is thus able to charge supracompetitive prices. In other words, simply comparing Apple to other app stores may not be a sufficient defense, particularly where Apple does not apply the 30% commission rate consistently.

Mike: With respect to private litigation in the United States, one of the most watched cases is the dispute in *Epic Games Inc. v. Apple Inc.*, No. 3:20-cv-05640-YGR (N.D. Cal.). What is the nature of this lawsuit?

Jeffrey: Epic Games, a U.S. video game and software developer valued at over \$17 billion, has launched a full legal and public relations campaign against Apple with respect to Apple's exclusive payment services. Epic Games is most well-known for Fortnite, which is a very successful free-to-play Battle Royale game. Epic has made Fortnite available across multiple different platforms, including traditional at home gaming consoles and mobile applications, and has monetized the game through in-game purchases.

The litigation that Epic commenced centers on Apple's business model of requiring certain apps on the iOS system to only be downloaded on Apple's App Store and Apple's requirement that developers process any app payment through the App Store and pay Apple a 30% commission. Importantly, and consistent with Epic's free-to-play model, Epic is not seeking any monetary damages and is only seeking injunctive relief to use its own payment system as opposed to Apple's payment process. Meanwhile, Apple has filed a counterclaim against Epic for breach of contract and is seeking monetary damages.

The Court recently denied Epic's request for a Temporary Restraining Order based on Apple removal of Epic from the App Store for violating Apple's Terms of Service. The Court will decide Epic's preliminary injunction motion in a hearing that is scheduled to take place on September 28, 2020.

Mike: What legal issues are in play in the Epic case?

Jeffrey: There are many hefty legal issues at play in the litigation and there will be weighty antitrust and economic arguments subject to decisions down the road. Monopolies are not per se illegal under U.S. law, which will make the case more difficult to prove for Epic. Epic will need to establish each element of an unlawful monopoly, including monopoly power, which is the power to control prices or exclude competition in the relevant market, and the willful acquisition or maintenance of monopoly power. In addition, Epic will need to establish the relevant antitrust market and show antitrust injury, which means that Epic will have to show injury to the competitive process and not just injury to itself.

Some of these serious legal questions will arise during the hearing on Epic's preliminary injunction motion as Epic has advanced a tying antitrust theory. A tying claim is beneficial for plaintiffs as plaintiffs can argue that the conduct is a per se violation of antitrust laws rather than having to analyze the conduct through a rule of reason analysis, which weighs various factors and is more difficult for plaintiffs to substantiate.

Mike: What does this case mean for app developers and what should app developers be looking out for?

Jeffrey: App developers and any company that uses the iOS platform should closely monitor the Epic case and other class actions that have been filed against Apple, such as *Cameron, et. Al. v. Apple Inc.*, No. 4:19-cv-03074-YGR (N.D. Cal.) and *In re Apple iPhone Antitrust Litigation*, No. 4:11-cv-06714-YGR (N.D. Cal.). App developers are members of the putative classes proposed by these class actions and will therefore need to determine whether to stay on the sidelines of these litigations or to take matters into their own hands by filing their own opt-out litigation, like Epic. It is important for each company to separately assess potential avenues and implications with legal counsel.

Mike: What investigations with regard to Apple that have been pursued in the European Union?

Peter: The conduct being investigated in the European Union is similar to the conduct that is the subject of investigations in the United States. Spotify made a public complaint 18 months ago and the European Commission indicated that it was taking the complaint very seriously at that time. This summer, the Commission announced that two investigations into Apple were being formally opened.

The first investigation is related to Apple Pay and to what extent Apple uses its power on the iOS system to gain an advantage for itself with respect to the payment system on apps and websites. In addition, the Commission is looking into whether it is anticompetitive for Apple to lock in its own payment technology in the offline environment. For example, when a consumer uses their iPhone to make a payment in a brick and mortar store, Apple has restricted access to the chip set so that other companies are unable to provide a competing payment service.

Notably, some countries in the European Union have already taken issue with this conduct. For example, Germany has passed legislation that it is unlawful to restrict access to such payment technology.

The second investigation, which has attracted the most public attention, involves three separate strands: (i) music streaming; (ii) eBooks; and (iii) miscellaneous conduct, including, for example, iCloud and video game storage. The third strand of this investigation is continuing to evolve. Based on public statements, there are two primary theories of harm that the Commission is pursuing. First, Apple has locked all providers into using Apple's payment technology. Second, app developers are prohibited from telling consumers that they can get a better deal outside of Apple's platform. For example, Spotify is unable to communicate to the consumer that it is cheaper to download the app from Spotify's website. Notably, all of the conduct that the Commission is investigating focuses on situations where Apple itself has an app and thus is in competition with the other app developers.

Mike: When can a resolution to the Commission's investigations be expected?

Peter: The investigations are frustratingly slow from the perspective of competitor. The Commission has already been investigating the conduct for approximately 18 months before it announced the investigation. Based on the timeline of a typical technology case, one can expect that the investigation will take several years and it will be surprising if a formal statement of objections is provided before next summer.

Mike: What potential legislation is being considered in Europe and is there a way for companies concerned about the pending legislation to be heard?

Peter: The Commission is currently consulting on potential legislation in an attempt to sort out the recurring problems with respect to gate keeper issues in the online space. In this regard, the Commission is currently collecting information and is supposed to produce proposed legislation before the end of the year.

Companies can submit comments on the legislation via the standard form available on the Commission's website. The Commission depends on the information that companies provide in order to understand what the reality in the marketplace is. The Commission may also conduct sector inquiries if the Commission does not obtain the necessary information.

Mike: Is private litigation being pursued against Apple in Europe?

Peter: Although it is possible, in principle, for private litigation to be brought against Apple in the EU, in practice, litigation is generally not filed while the Commission is actively investigating the conduct as the national court will invariably stay the proceeding. However, we can expect to see follow on litigation in Europe if there is a finding of infringement by the Commission.

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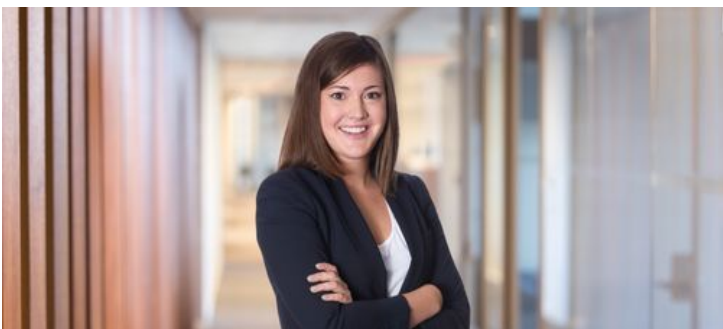
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