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ARTICLE

The Apple Music Streaming Case: The Good, The Bad, and The Ugly

Thibault Schrepel

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On March 4, 2024, the European Commission fined Apple €1.84 billion "over abusive App store rules for music streaming providers".[1] In particular, the Commission was concerned about the anti-steering provisions that Apple imposed on these providers. Although the full decision has not yet been published (I am told it could be a matter of months), the public information underpinning this decision is already interesting on several levels. In the following, I explore the good (**1.**), the bad (**2.**), and the ugly (**3.**) of the "App Store Practices (music streaming)" decision based on the information available as of this writing.

1. The Good

The decision is "good" for at least two reasons. *First*, the European Commission did not shy away from being specific and telling us that Apple infringed Article 102(a) of the TFEU. That's a change. In recent years, the European Commission has sanctioned several "new" standalone practices. The most important example is the *Google Shopping* case (2017), in which the European Commission avoided calling the practice "discrimination" (Article 102c) and instead referred to it as "preferential treatment." The reason why referring to 102(a) is good is that it ties the Commission to previous decisions, and therefore to a clearly defined – and known – legality test. This is all the better because the Commission rarely provides a clearly defined legality test when punishing new, independent practices, re *Google Shopping* (2017).

Second, the decision not only focuses on monetary damages, but also insists on consumer harm caused by non-monetary practices that stifle innovation. This is rare. In a study published last year, I found that only 20 cases before the EU courts (General Court and Court of Justice) give innovation a proper role (and only 5 in digital

[1] European Commission, "Commission Fines Apple."

markets).[2] Given the "principle of party disposition" (i.e., judges can only rule on the disputes brought before them), this indirectly means that the European Commission rarely gives innovation a role in its decision-making. The Apple Music streaming case could then play a significant role in shaping EU jurisprudence.

2. The Bad

The decision is "bad" on at least three counts. *First*, EU officials (including Margrethe Vestager) have long insisted that the Digital Markets Act is not competition law. I quote: "The Digital Markets Act is very different to antitrust enforcement under Article 102 TFEU. First, the DMA is not competition law."[3] I fail to see how Apple's practices differ from those listed in Articles 5.4 and 5.5 of the DMA. See for yourself:

Article 5.4: The gatekeeper shall allow business users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired via its core platform service or through other channels, and to conclude contracts with those end users, regardless of whether, for that purpose, they use the core platform services of the gatekeeper.

Article 5.5: The gatekeeper shall allow end users to access and use, through its core platform services, content, subscriptions, features or other items, by using the software application of a business user, including where those end users acquired such items from the relevant business user without using the core platform services of the gatekeeper.

In fact, Margrethe Vestager said at the press conference announcing the decision that "in a couple of days, on 7 March 2024, Apple will have to comply with the full list of 'dos' and 'don'ts' under the DMA. Among others, Apple can no longer impose rules, such as the anti-steering obligations, which were at the core of our investigation in this case. And this holds for any app on the App Store, not just music streaming apps."[4] This inconsistency is unfortunate. It creates a trust problem with our officials.

Second, the disconnect between the Revised Market Definition Notice and the market definition in this case is, at the very least, quite surprising.[5] Paragraph 104 of the Revised Market Definition Notice emphasizes the importance of considering digital ecosystems; I quote:

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[2] Schrepel, "A Systematic Content Analysis of Innovation in European Competition Law."
[3] Vestager, "Keynote of EVP Vestager at the European Competition Law Tuesdays: A Principles Based Approach to Competition Policy."
[4] European Commission, "Remarks by Executive Vice-President Vestager on the Adoption of an Antitrust Decision against Apple over Abusive App Store Rules for Music Streaming Providers."
[5] European Commission, "Commission Notice on the Definition of the Relevant Market for the Purposes of Union Competition Law (C/2024/1645)."

(Digital) ecosystems can, in certain circumstances, be thought of as consisting of a primary core product and several secondary (digital) products whose consumption is connected to the core product, for instance, by technological links or interoperability (42). When considering (digital) ecosystems, the Commission may thus apply similar principles to those applied to after-markets to define the relevant product markets) (143). When the secondary (digital) products are offered as a bundle, the Commission may also assess the possibility of that bundle constituting a relevant market on its own. Although not all (digital) ecosystems fit an after-market or bundle market approach, the Commission takes into account, where relevant, factors such as network effects, switching costs (including factors capable of leading to customer lock-in) and (single- or multi-) homing decisions for the purpose of defining the relevant product markets).

Meanwhile, the European Commission defines the market in the simplest – linear, isolated – way possible, emphasizing that it "fined Apple over €1.8 billion for abusing its dominant position on the market for the distribution of music streaming apps to iPhone and iPad users (iOS users') through its App Store."[6] Admittedly, ecosystems are not easy to delineate, but here are a few ecosystem-related questions the European Commission could have asked (and apparently did not, although I am told the Commission refers to "lock-in" in its decision, which is a good start, but as such does not take into account the feedback loops and adaptive strategies lock-ins create):

1. How many players are using Apple In-App Purchase ("IAP")?
2. How do players respond to Apple IAP in terms of pricing?
3. How does Apple's behavior affect the ratio of free apps to paid apps?
4. How does Apple's strategy affect specific players within the ecosystems? Are these players robust? Fragile? Do they benefit less from increasing returns, including network effects?
5. How are users adapting to Apple's change in App Store policy?
6. Are there other market dynamics affecting the ecosystem?

To be sure, I do not say that the market definition is wrong, but I do say that the failure to ask the right (ecosystem) questions may at best result in the European Commission getting the market definition right by luck. I doubt that we want the

[6] European Commission, "Commission Fines Apple."

Commission to repeat this kind of (random) experience. Instead, I suggest that it takes advantage of the many insights of complexity science.[7]

The *third* "bad" aspect of the decision relates to the monetary harm. First, let me remind you that Apple does not charge developers for offering free apps on the App Store. Apple charges (30%) for the in-app purchase. This (over?) covers the App Store (infrastructure costs such as data centers, software development and maintenance, security and fraud prevention, app review process, customer support, legal and regulatory compliance, etc.). The Ninth Circuit Court of Appeals called these fees legitimate.[8] Developers are still free to charge their users outside of the app, but Apple is restricting how developers can inform users of possible lower prices outside of the app (i.e., the anti-steering commission). Apple says it needs to impose such a requirement to make its store financially viable. Developers – including Spotify – disagree.

Now, it is important to note that there are more music streaming app developers than Spotify. Some may suffer more from the anti-steering provision than Spotify. But looking at Spotify (which has over 50% of the so-called "market"), the company stopped relying entirely on Apple In-App Purchase ("IAP") in 2023.[9] This means that Apple's practice raised Spotify overall prices to premium subscription only for users who subscribed in the app while this was available. I can see how the decision could be justified in that regard (i.e., for all subscriptions made within the app before 2023), but the price increase would have to be offset against the cost of running the App Store, which the Commission does not seem to be doing. This is a missed opportunity.

3. The Ugly

The decision is "ugly" in at least two ways. The *first* relates to non-monetary harm, specifically consumer choice. In line with the Commission's case law, Margrethe Vestager emphasized that Apple's practice "has impacted millions of European consumers, who were not able to make a free choice as to where, how, and at what price to buy music streaming subscriptions."[10] This is "ugly" because the consumer psychology literature has long reached a consensus on what scholars call "choice overload"[11] (i.e., giving consumers more options *can* lead them to consider fewer because they feel overwhelmed). Although the key factors that contribute to choice overload are still being debated, this literature clearly indicates that it is wrong to use choice as a standard for assessing consumer harm. This does not mean that

[7] Schrepel, "Toward A Working Theory of Ecosystems in Antitrust Law: The Role of Complexity Science."
[8] United States Court Of Appeals For The Ninth Circuit, Epic Games v. Apple.
[9] Selleck, "Spotify Cutting off Remaining App Store Billing Customers."
[10] European Commission, "Remarks by Executive Vice-President Vestager on the Adoption of an Antitrust Decision against Apple over Abusive App Store Rules for Music Streaming Providers."
[11] Chernev, Böckenholt, and Goodman, "Choice Overload: A Conceptual Review and Meta-Analysis."

reducing consumer choice never causes harm, but it does mean that the fact of reducing consumer choice cannot, by itself, automatically lead to the conclusion that consumers have been harmed. Antitrust enforcers need to show, in the specifics, that the reduction in choice at issue has harmed consumers (e.g., using computational antitrust to create robust counterfactuals).[12] Unfortunately, the press release seems to indicate that the Commission, as it has done in the past (*re* Google Shopping and others), is making choice a standard.

Now, looking at the specifics, the question is whether (some) users did not subscribe to Spotify Premium because they could not do so within the app, and/or whether the fact that they had to go to Spotify's website caused psychological harm. Given the fact that Spotify informs free users about premium options every few songs, and given the fact that paying on the website would automatically update the account within the app, I fail to see what harm the Commission has identified. At a conference organized by the College of Europe on 26 March 2024, Thomas Kramler (DG Comp) pointed out that Spotify had produced a study showing that 21% of users had failed to subscribe on its website. If this is true, I doubt that these non-technical users would have successfully subscribed from within the app, as they would have had to link their updated bank details to their iCloud account, remember their App Store password, etc. Meanwhile, Spotify still makes money from that 21% through advertising, and Spotify's premium users have grown to 220 million by June 2023, leading Spotify to dominate the music streaming market.[13]

This leads me to ask the following question: Is the fact that users have to subscribe on a website (which they overwhelmingly did) rather than an app what we, as Europeans, want competition law to achieve? This reminds me of the Andrew Tyrie's FT op-ed criticizing the CMA (which he chaired) for taking a case about golf clubs…[14] I have to say that I am really uncomfortable with the idea that we (at least I) are dedicating our professional lives to this kind of inconsequential contribution to society.

While we collectively answer this critical question, I suggest that we consider abandoning the idea of an "average consumer," or at least supplementing it with more granular analysis using unique agents. John Schuler and I offer a way to do this in a recent working paper.[15] This would at least help to dispel (or quantify) assumptions in the likes of 'consumers do not subscribe online' or 'consumers are harmed by having to rely on web-based subscription.'

[12] Schrepel, "Computational Antitrust: An Introduction and Research Agenda."
[13] Iqbal, "Spotify Revenue and Usage Statistics."
[14] Tyrie, "The UK Competition Regulator Is Not Fit for Purpose | Financial Times."
[15] Schrepel and Schuler, "The End of Average: Deploying Agent-Based Modeling to Antitrust."

The *second* reason why this decision has some "ugly" features relates to the calculation of the fine. Quoting Margrethe Vestager, the European Commission "decided to impose a fine of over €1.8 billion on Apple. The fine also includes an additional so-called 'lump sum' to account for the non-monetary harm caused to consumers and to achieve deterrence."[16] The question I ask is this: is the European Commission within its rights to impose such a lump sum of €1.8 billion? To be sure, lump sums are not new in competition cases, although they have never been imposed in such proportions and for the reasons cited by Margrethe Vestager. We have a consistent body of case law on the subject. So let me look at three key principles of EU law and assess how the Apple case squares with them: proportionality (1), legal certainty (2), and legitimate expectations (3).

According to the proportionality principle, the fine must be proportionate to the factors taken into account in assessing the gravity of the infringement. Those factors must be considered in a consistent and objectively justified manner (T-11/06 Romana Tabacchi, para. 105).[17] By consistent, the Court means consistent in how it takes into account the objectives of the fine (T-43/02 Jungbunzlauer, paras. 226-228), not consistent with previous cases.[18] Given this narrow interpretation of "consistency" and the fact that the Commission relied on its Guidelines, the Decision does not appear to be problematic in this respect.

This brings us to legal certainty. According to this principle, rules must be clear and precise, and decisions must follow these rules. In this case, the European Commission relied on paragraph 37 of its Guidelines on the method of setting fines, which states that "the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from."[19] The fine imposed on Apple appears to be consistent with the principle of legal certainty. However, a closer look at the case law reveals a more nuanced analysis. The European Commission is not free to depart from its methodology at will on the pretext that Article 37 opens this door. The Commission may only do so if a well-informed undertaking can foresee "the method and the order of magnitude of the fines incurred for any given conduct" (T-43/02, Jungbunzlauer, para. 90).[20] Given that €1.8 billion is a 4400% increase over €40 million, it is doubtful that such an "order of magnitude" can be considered foreseeable. In fact, I would be surprised if the General Court (Apple has appealed the decision) did not reduce the fine for this reason.

[16] European Commission, "Remarks by Executive Vice-President Vestager on the Adoption of an Antitrust Decision against Apple over Abusive App Store Rules for Music Streaming Providers."
[17] T-11/06 Romana Tabacchi, ECLI:EU:T:2011:560.
[18] T-43/02, Jungbunzlauer, ECLI:EU:T:2006:270.
[19] Guidelines on the method of setting fines
[20] C-70/12 P, Quinn, ECLI:EU:C:2013:351.

Finally, the protection of legitimate expectations requires that the Commission does not depart from its guidelines in an individual case without giving reasons that are compatible with the principle of equal treatment (C-70/12 P, Quinn, para. 53).[21] In other words, the fine imposed must not discriminate between companies. To quote Margrethe Vestager: the "fine we impose today reflects (...) Apple's financial power."[22] Financial power is not one of the criteria listed in the Commission's Guidelines on the method of setting fines, nor is it typically considered by the Commission. It goes beyond the deterrent effect; in the words of the Margrethe Vestager, the "lump sum" also accounts for the non-monetary damage which, of course, is hardly quantified.[23] If this is a way of saying 'we believed we could so we did,' one can doubt that the fine is in line with the principle of equal treatment. Obviously, Apple can afford the fine, but let me remind you that punitive damages are not allowed under EU competition law. Sticking to our legal principles will benefit us all.

Thibault Schrepel
Associate Professor at the Vrije Universiteit Amsterdam, and Faculty Affiliate at Stanford University CodeX Center.

I have nothing to disclose.

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