

App Store Antitrust

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1 Introduction

App stores have been at the centre of attention in the antitrust community—and certainly at the centre of *our* attention.¹ While the discontents of app developers have long remained under the surface, they are starting to become more public. The first significant development was driven by Spotify, as the European Commission (EC) started formally investigating its complaint against Apple mid-2020.² Two months later, Epic Games filed complaints in the US against Apple and Google.³ Their app stores (the App Store and Google Play) had removed Epic’s Fortnite app when it introduced its own in-app payment mechanism—a breach of the app stores’ (allegedly anticompetitive) terms and conditions.

In December 2020, Epic brought its claim to Europe, registering it with the UK Competition Appeal Tribunal.⁴ Shortly after, in February 2021, it also filed a complaint with the EC.⁵ As in the US, the complaint is twofold: firstly, the app stores reserve to themselves the distribution channels for apps and in-app payment processing; secondly, they use their resulting position of dominance to charge unfair prices for the distribution of apps. Given that many of the concerns of app developers relate to these two points, we take them as the starting point of our assessment. Before delving into each point, however, we take a closer look at mobile ecosystems and how to define markets and establish dominance within them.

2 App distribution markets: definition and dominance

Mobile ecosystems constitute a technological layer cake, where each layer is built on top of or at least interconnected with another layer. The mobile operating system (OS) can be considered the heart of the of the ecosystem, which allows for the operation of smartphones and provides the

¹ The authors have written widely on app stores, most comprehensively in Friso Bostoen and Daniel Mândrescu, ‘Abuse of dominance in the platform economy: a case study of app stores’ (2020) 16 European Competition Journal 431. This article relies and builds on that work.

² EC, ‘Commission opens investigations into Apple’s App Store rules’ (press release, 16 June 2020) IP/20/1073.

³ US District Court for the Northern District of California, Case 4:20-cv-05640, *Epic Games v Apple* (Complaint), 13 August 2020 and US District Court for the Northern District of California, Case 3:20-cv-05671, *Epic Games v Google* (Complaint), 13 August 2020.

⁴ See Competition Appeal Tribunal, Case 1377/5/7/20, *Epic Games v Apple* (Notice of Claim), 8 December 2020 and Competition Appeal Tribunal, Case 1378/5/7/20, *Epic Games v Google* (Notice of Claim), 29 December 2020.

⁵ ‘Epic Games files EU antitrust complaint against Apple’ (press release, 17 February 2021)

<<https://www.epicgames.com/site/en-US/news/epic-games-files-eu-antitrust-complaint-against-apple>>.

technical infrastructure on top of which app stores and apps are built. The central role played by mobile OS software has led to the emergence of two prominent ecosystems: Apple's iOS-based ecosystem, which is integrated and proprietary, and Google's Android-based ecosystem, which is (partly) open-source and licensable.

App stores are the financial core of these ecosystems as they constitute the main distribution channel for apps, which allows their owners to capitalize on the apps brought to market. The financial importance of app stores has been clearly understood by Google and Apple, which have taken both technical and contractual steps in order to ensure that their incumbent app store is the *main* (in case of Google) or even the *only* (in case of Apple) app store for their respective OS.

In addition to the financial incentive to maintain a gatekeeper role in app distribution, control over app distribution is also key for ensuring the viability of the ecosystem. The success of the ecosystem depends on the success of each of its constitutive elements (mobile devices, OS, app store and apps). The bitter experience of Blackberry, Nokia, Windows Mobile shows how intertwined such elements are and how the governance of an ecosystem, and particularly the availability of popular and well-functioning apps, determines its success.

The different, interdependent layers of mobile ecosystems translate to separate yet related markets in competition policy. The broad market is that for app distribution. In this market, app stores operate as multisided platforms between developers and consumers, competing—to some extent—with other distribution channels. However, due to the lack of interoperability between iOS and Android, as well as their app stores and apps, such competition takes place *in parallel*. App distribution is therefore segmented in the distribution market for iOS apps and the distribution market for Android apps. These findings, which may at times appear counterintuitive due to the seemingly fierce competition between Google and Apple, are supported by the recent market study of the Dutch competition authority (ACM) and the *Google Android* decision.⁶

Furthermore, due to impossibility or at least difficulty of using alternative (non-platform) app distribution channels such as side-loading (i.e. directly downloading apps), pre-installation and web apps, the ACM found that such alternative channels do not constitute realistic substitutes for app stores for consumers nor developers. Consequently, the iOS and Android app distribution markets are further narrowed down to app stores specifically.

Under such market conditions, it can be argued that the respective app stores of Apple and Google both enjoy a position of dominance. In the case of Apple, its iOS governance does not allow for other app distribution channels (in the form of an app store or any other form) to exist, both contractually and technically. Consequently, Apple holds 100% of the iOS app distribution market with its App Store. This outcome is unlikely to be challenged by any potential competitors as entrance to the iOS app distribution market is fully in the hands of Apple, which is unlikely to relax its governance given its strategic and financial advantages.⁷ For potential competitors, this absolute control and exclusion amounts to an insurmountable barrier to entry.

⁶ See ACM, 'Market study into mobile app stores' (Report ACM/18/032693) 2019 and *Google Android* (Case AT.40099) Commission Decision.

⁷ See Mitchell Clarrck, 'Apple's App Store made an estimated \$64 billion in 2020' (*The Verge*, 8 January 2021) <<https://www.theverge.com/2021/1/8/22220873/>>.

In the case of Google, the creation of third-party app stores is theoretically possible, as is side-loading. In practice, however, Google's Play Store accounts for more than 90% of Android app distribution. Potential competitors can challenge this position, but experience indicates that is not easy. Google's Play Store is pre-installed on virtually every Android device, meaning that any alternative app store will have to overcome the status quo bias of consumers.⁸ This in itself is a significant barrier to entry, even in the event that Google takes no action to counter attempts to challenge its Play Store as the main distribution channel for Android apps.⁹

Finally, given the intermediary nature of app stores that bring together a multitude of mostly small developers, it is unlikely that any of them have countervailing (buyer) power. Bigger developers rarely have (price-related) quarrels with the incumbent app stores as they either (i) finance their apps through advertising (e.g. social networks) or (ii) distribute physical rather than virtual goods (e.g. hotel booking portals and ride-hailing apps)—in both cases, they are exempted from app store fees.¹⁰ Consequently, there is little incentive for such players to finance the creation of alternative third-party app stores. When disagreements did arise, these players have mostly turned to other options, e.g. individual agreements with app stores or pre-installation deals with device manufacturers.¹¹

If the positions of the incumbent app stores are to be disrupted, progressive web apps are a promising candidate. Web apps have always been an option, albeit an inferior one (in terms of functionality and user experience, among others).¹² However, their development is taking flight now that Apple refuses cloud gaming apps (which operate a sort 'Netflix for gaming' in that the consumer has access to a wide variety of games). In reaction to this move, developers such as Microsoft are bringing their cloud gaming service to iOS via the web.¹³ However, despite improvements, many hurdles to true competition from web apps remain.

In light of these market conditions (high market shares, significant barriers to entry, limited buyer power and uncertain prospects of disruption), the incumbent app stores of Apple and Google are likely dominant in their respective markets—and, barring intervention, will remain so for the foreseeable future. The next question is whether that dominance is being abused. Here, there are two perspectives, both of which are reflected in Epic's claim. The first one focuses on exclusion, i.e. how the incumbents have monopolized the app distribution and (in-)app payment markets (the latter is also the subject of the EC investigation). The second one focuses on the results of that exclusion, i.e. exploitation through unfair prices for app distribution. We examine each in turn

⁸ See *Google Android* (Case AT.40099) Commission Decision, paras 782 for the EC's findings on status quo bias regarding the pre-installation of the Google Search app.

⁹ Of which there are arguably examples, see e.g. Natasha Lomas, 'Aptoide, a Play Store rival, cries antitrust foul over Google hiding its app' (*TechCrunch*, 4 June 2019) <<https://techcrunch.com/2019/06/04/aptoide-a-play-store-rival-cries-antitrust-foul-over-google-hiding-its-app/>>.

¹⁰ See App Store Review Guidelines, section '3.1 Payments' <<https://developer.apple.com/app-store/review/guidelines/>>.

¹¹ Amazon, for example, concluded a preferential deal with Apple, see Kim Lyons, 'Documents show Apple gave Amazon special treatment to get Prime Video into App Store' (*The Verge*, 30 July 2020) <www.theverge.com/2020/7/30/21348108/>. Amazon does have its own app store, which can be side-loaded on Android, see <<https://www.amazon.com/gp/mas/get/amazonapp>>.

¹² See ACM, 'Market study into mobile app stores' (Report ACM/18/032693) 2019, 42–44.

¹³ See Tom Warren, 'Here's a first look at Microsoft's xCloud for the web' (*The Verge*, 15 February 2021) <<https://www.theverge.com/2021/2/15/22283739/>>.

under the relevant legal tests. For simplicity, we focus on one mobile ecosystem, i.e. Apple's, given that it is the most restrictive.

3 Monopolizing iOS app distribution and payment processing

According to Epic, Apple abuses its dominant position by 'reserving to itself the sole channel for the distribution of apps to and/or the payment processing mechanism for purchases of in-app content for and by consumers who use iPhones and iPads'.¹⁴ To assess these allegations, two forms of abuse (and their legal tests) are of particular relevance: refusal to supply and tying.

3.1 Refusal to supply

Apple's iOS governance, which restricts any possibility for alternative app distribution channels to emerge, and—to a lesser extent—its App Store rules, which prevent third-party payment processing for certain transactions, both give rise to refusal to supply allegations. In Epic's US complaint, this type of abuse is explicitly mentioned, while Epic's UK claim (of which only a summary is available) is subtler on this point.

When it comes to preventing the emergence of alternative distribution channels, it is not hard to see how such a claim can be constructed. Since iOS is a closed system fully controlled by Apple, any matter of access and interoperability is entirely subject to its discretion. The emergence of third-party app stores or other app distribution channels is prevented by denying access to iOS—a potentially essential facility. In absence of such access there is no way in which app developers can reach iOS users other than the App Store. Under such circumstances even the stringent criteria (in particular 'indispensability') of the *Bronner* case law may be fulfilled.¹⁵ The expected remedy would be that Apple must allow alternative app distribution channels—as Google does on Android and Apple itself does on Mac. Then again, security may provide a valid justification to refuse access (see Section 5 below).

The issue of developers wanting to make use of third-party payment processors instead of Apple's In-App Purchase system (IAP) can also be considered from a refusal to supply perspective. Currently, alternative payment solutions can only be relied on for the billing of *physical* products (e.g. Uber rides or Booking.com stays). It can therefore be argued that developers of *digital* products (including Spotify and Fortnite)—and to some extent third-party payment processors—are denied access to an essential facility, namely the App Store. Again, *Bronner's* condition of 'indispensability' (as well as its flip side, 'elimination of competition') would apply, imposing a high burden of proof.

However, it must be noted that the exact scope of the *Bronner* case law has never been entirely clear, and is now again in question. The case law has long distinguished between *de novo* refusals and refusals within established commercial relations.¹⁶ The recent Advocate General (AG) Opinion in *Slovak Telekom* reflects on a related distinction.¹⁷ According to AG Saugmandsgaard Øe, where access to a facility is not entirely refused i.e. it is not made *un-available* to others as such, the *Bronner*

¹⁴ Competition Appeal Tribunal, Case 1377/5/7/20, *Epic Games v Apple* (Notice of Claim), 8 December 2020.

¹⁵ Case C-7/97 *Oscar Bronner v Mediaprint* EU:C:1998:569.

¹⁶ Most recently, see Joined cases C-468/06 to C-478/06 *Sot. Léllos v GlaxoSmithKline* EU:C:2008:504, para 34.

¹⁷ Cases C-152/19 P and C-165/19 P *Slovak Telekom v Commission* EU:C:2020:678 Opinion of AG Saugmandsgaard Øe, paras 79 *sq.*

case law is not relevant. Difficulties concerning access in such scenario's require instead assessing the *terms of the contract* that regulate access to the facility, which may be found to be unfair.

In the context of app stores, such an interpretation of the essential facility doctrine may mean that Apple's rules concerning the use of third-party payment processors could be assessed as a different form of abuse such as tying or unfair terms.¹⁸ This is because neither app developers nor third-party payment processors are completely denied access to the App Store. Their access is simply subject to very strict limitations.

If an abuse would be found, the remedy would require Apple to allow all developers—regardless of the kind of app they offer—to use third-party payment processors. Opening up the (in-)app payments market to more competition would probably lower transaction costs for consumers and developers. Then again, financial viability/free-riding may provide a valid justification for the current restriction (see Section 5 below).

3.2 Tying

Apple's removal of Fortnite from the App Store, based on the prohibition for app developers to use other payment solutions than IAP, can also be considered a form of tying. This approach is taken in Epic's claims in the US and UK as well as in the EC investigation. Apart from dominance, finding abusive tying practices requires: (i) the existence of *separate products*; (ii) *coercion*, i.e. that customers are unable to get the tying product with the tied product; and (iii) *foreclosure* in either the tying or the tied market.¹⁹ The mandatory use of IAP when distributing certain apps through the App Store may meet those conditions.

App Store distribution (the tying product) is separate from IAP (the tied product). The two services are not technically interdependent nor do they have to be linked *per se* on the basis of commercial usage. Indeed, the IAP system was not introduced together with the App Store in 2008 and the obligation to use it grew over time.²⁰ Furthermore, as required, there is independent demand and supply of alternative payment solutions (the tied product). App developers have voiced their desire to use alternatives to IAP and those already exist for apps that sell physical products for which Apple does not mandate the use of IAP. The potential competitive harm of such tying practices is in line with the concerns identified in economic literature, i.e. preventing or making more difficult entry in the market for the tied product (which then allows for higher prices).²¹ Finally, the tie is made robust by Apple's prohibition to inform consumers of alternative membership/purchasing avenues.²²

It must be mentioned that this potentially anticompetitive tie between the App Store and IAP is sustained by *another* potential tie, namely between iOS and the App Store. By preventing the

¹⁸ Further on this, see Daniel Mândrescu, 'Why you (often) don't need the essential facility doctrine in the digital economy? Interpreting Lithuanian Railways and Slovak Telekom' (*CoRe Blog*, 3 December 2020) <<https://www.lexxion.eu/en/coreblogpost/why-you-often-dont-need-the-essential-facility-doctrine-in-the-digital-economy-interpreting-lithuanian-railways-and-slovak-telekom/>>.

¹⁹ Case T-30/89 *Hilti v Commission* EU:T:1991:70 and Case C-333/94 P *Tetra Pak v Commission* EU:C:1996:436.

²⁰ Subscription-based apps were required to implement the IAP as of 2011, see 'Apple launches subscriptions on the App Store' (press release, 15 February 2011) <<https://www.apple.com/newsroom/2011/02/15Apple-Launches-Subscriptions-on-the-App-Store/>>.

²¹ See e.g. Michael Whinston, 'Tying, foreclosure and exclusion' (1990) 80 *The American Economic Review* 837.

²² See App Store Review Guidelines, section '3.1.1 In-App Purchase'.

emergence of other app stores (with more favourable commission fees), Apple is able to maintain its 30% commission fee on in-app sales of digital products. Summarily applying the EU tying framework here leads to a similar conclusion. It is quite evident that iOS and the App Store are separate products that offer different functionalities, while serving different technical and commercial purposes. Furthermore, Epic's plans for an iOS app store and the 'jailbreaking' of iPhones by consumers indicate there is demand for alternative distribution channels for iOS apps. The potential harm stemming from such tying must be sought in the market for iOS app distribution channels (the tied market) and—indirectly—in the market for payment processing.

When it comes to remedies, there are several options, which range from more to less intrusive. The most intrusive remedy would entail untying the App Store from iOS and voiding the obligation to use IAP. This would open up competition between app distribution channels *and* payment solutions for iOS apps. A less intrusive remedy would entail requiring Apple only to untie the App Store from iOS, which would allow competition between app distribution channels and payment processing services for iOS apps *outside* the scope of the App Store. Even less intrusive would be to require Apple to stop making IAP mandatory for apps offered in the App Store. This option would not unblock the competitive bottleneck for app distribution that is the iOS-App Store combination, but would increase developer choice of payment processors *inside* the App Store and may thus decrease the level of fees. Finally, one could allow certain apps (so-called 'reader' apps) to simply refer to options to subscribe/purchase elsewhere (e.g. on the desktop app).

Finally, it must be noted that many of the aforementioned remedies for the potential abuses of tying or refusal to supply are included in the proposal of the Digital Markets Act (DMA), which may enter into force in the coming years.²³ If the current formulation of the DMA is an indication of what can be expected on the antitrust front, Apple may be required to open iOS up to other distribution channels and allow (certain) apps to inform consumers of alternative subscription/purchasing options in the App Store.

4 Charging unfair prices for app distribution

While the previous section took the *exclusionary* perspective, one could examine (aspects of) the same conduct through the lens of *exploitation*. The obvious candidate here is excessive pricing/unfair terms and conditions, although that abuse is a bit of an outcast in the EU competition law framework. In a recent workshop, an antitrust economist remarked that 'it has become impossible to bring exploitation cases, so complainants put everything in terms of exclusion; for example, App Store fees are not excessive but rather constitute a margin squeeze.'²⁴ Indeed, margin squeeze targets the same 30% fee but from an exclusionary angle. However, it is interesting to note that the abuse is based on Article 102(a) TFEU—just like excessive pricing.²⁵ Therefore, both are discussed under this section.

4.1 Excessive pricing/unfair terms and conditions

²³ EC, Proposal for a Regulation on contestable and fair markets in the digital sector, COM(2020)842, in particular arts 5(c) and 6(1)(c).

²⁴ Paraphrased and not attributed, given the Chatham House rules guiding the workshop.

²⁵ See Case C-52/09 *Konkurrensverket v TeliaSonera Sverige* EU:C:2011:83 [2011] I-527, para 25.

Epic argues that Apple ‘us[es] its position of dominance to charge unfair prices for the distribution of apps via the App Store and/or use of the Apple IAP’.²⁶ Does Apple’s 30% commission fee constitute an unfair price as prohibited by Article 102(a) TFEU? According to the ECJ, a price is unfair—or excessive—when ‘it has no reasonable relation to the economic value of the product supplied’.²⁷ This formula has been operationalized through a two-pronged test: first, one has to determine whether the difference between the costs actually incurred and the price actually charged—i.e. the profit margin—is excessive; second, if the profit margin is excessive, it must be established whether the price is unfair in itself or in comparison to the prices of competitors.²⁸

The App Store’s profit margin is undoubtedly high: while the number is not public, analysts put it at 90%.²⁹ But is the 30% fee *comparatively* high? This depends, of course, on the chosen point of comparison. Play Store fees are also set at 30%, but this point of comparison is unhelpful given that Google also enjoys market power. And even app stores without market power model their fees on market leader Apple.³⁰

Perhaps PC game stores offer a more useful point of comparison. Here too the incumbent (Steam) charges a 30% fee for distribution. However, this fee is being challenged by Epic, which set up its own store, charging only a 12% fee.³¹ Remember that Epic seeks to achieve exactly this: the possibility to set up its own app store—with lower commission fees—within Apple’s ecosystem.

Finally, Geradin and Katsifis argue that Apple does not offer distribution services, but just payment processing and related services.³² One would then have to compare Apple’s 30% fee with those of PayPal, Stripe and the like, which hover around 3% (often combined with a small fixed fee).³³ While Apple’s price does look excessive from this perspective (it is ten times higher), it must be acknowledged that the App Store offers more than simple payment processing.

However, this quantitative method may not be the right one. Apple has stated that ‘84% of apps obtained through the App Store share no revenue with Apple’ (these include ‘free’ apps that are monetized through advertising).³⁴ This means that a small minority of developers is subsidizing the great majority of developers: they overpay while others benefit freely from the App Store. Perhaps the unfairness of the fees is rather found in this imbalance, even though such an analysis does not fit naturally with established excessive pricing doctrine.

4.2 Margin squeeze

Finally, it is worth shortly discussing margin squeeze, which captures situations where an upstream operator forces its downstream competitor—who is just as efficient—off the market by squeezing

²⁶ See Competition Appeal Tribunal, Case 1377/5/7/20, *Epic Games v Apple* (Notice of Claim), 8 December 2020.

²⁷ Case 27/76 *United Brands Company v Commission* EU:C:1978:22, para 250.

²⁸ *ibid*, para 252.

²⁹ Adam Levy, ‘Apple’s App Store revenue growth is accelerating’ (*The Motley Fool*, 9 September 2019) <<https://www.fool.com/investing/2019/09/09/apples-app-store-revenue-growth-is-accelerating.aspx>>.

³⁰ See e.g. Samsung, Galaxy Store Seller Portal, Section 6. ‘Revenue Share and Tax’ <<https://seller.samsungapps.com/help/termsAndConditions.as>>.

³¹ For an updated list with articles on the competition between the Epic Store and Steam, see <<https://www.theverge.com/2019/1/9/18174064/>>.

³² Damien Geradin and Dimitrios Katsifis, ‘The antitrust case against the Apple App Store’ (2020) 18–26 and 34–38 <<https://ssrn.com/abstract=3583029>>.

³³ See e.g. <<https://www.paypal.com/us/webapps/mpp/merchant-fees>>.

³⁴ House Committee on the Judiciary, ‘Apple responses to Steube questions for the record’ (Online Platforms and Market Power, Part 2: Innovation and Entrepreneurship, 16 July 2019).

its profit margins. This description aligns well with Spotify's allegations: Apple uses its control over the upstream App Store to levy a high commission fee, which depresses Spotify's profitability and competitiveness in the downstream music streaming market.³⁵ Applying the as-efficient-competitor test used in margin squeeze cases,³⁶ the question is whether Apple Music's €10 subscription model be profitable if it had to pay its own commission fee of 30%.

However, margin squeeze is a poorer fit for the situation of Epic. First of all, while Spotify has mostly posted losses (due to high marginal costs in the form of royalties), Epic is safely profitable (due to the near-zero marginal cost of the V-Bucks it sells in-game). Secondly, the downstream competition between Apple and Epic is less direct. Apple does offer 'Arcade', a subscription-based gaming bundle, but the substitutability between that bundle and Fortnite is clearly not the same as that between Apple Music and Spotify. However, that may change as Apple expands its offering and Epic more fully realizes its vision of Fortnite as a metaverse.

5 Justifications for seemingly anticompetitive conduct

It must also be stressed that there may good reasons for the seemingly anticompetitive app store conduct assessed under the previous two sections. Three justifications stand out: ensuring the security of the ecosystem, safeguarding user privacy, and maintaining financial viability.

Let us start with perhaps the most important justification: security. Guaranteeing the security of consumers that download apps is one of the—if not *the*—main task of app stores. They do so through detailed guidelines and, especially in the case of Apple, a strict approval process. Having to allow other app stores within iOS 'threatens to destroy iPhone as you know it', argues Apple, as it would 'undermine the ... security, safety, and performance that's built into iPhone by design'.³⁷ It must be acknowledged that Android, which is policed less strictly, has to deal with more malware than iOS.³⁸

Next, there is the related justification of privacy. Again, Apple in particular has made a point of wanting to protect their users' privacy.³⁹ It relied on this justification, for example, when removing parental control apps from its store, allegedly because these apps were using a 'highly invasive technology' that 'gives third parties control and access over a device and its most sensitive information'.⁴⁰ However, the fact that those parental control apps competed with Apple's own app Screen Time offers a good reason for scrutinizing the veracity of Apple's proffered justification. Apple's privacy-motivated changes recently led to another antitrust antagonist: Facebook.⁴¹

³⁵ This case study is reviewed in Friso Bostoën, 'Online platforms and vertical integration: the return of margin squeeze' (2018) 6 *Journal of Antitrust Enforcement* 355.

³⁶ Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paras 196–202.

³⁷ Nick Statt, 'New North Dakota bill would force Apple to allow alternative app stores and payment systems' (*The Verge*, 10 February 2021) <<https://www.theverge.com/2021/2/10/22276511/>>.

³⁸ See e.g. '172 malicious apps with 335M+ installs found on Google Play' (*The Next Web*, 1 October 2019) <<https://thenextweb.com/apps/2019/10/01/google-play-android-malware-2/>>.

³⁹ See <<https://www.apple.com/privacy/>>.

⁴⁰ 'The facts about parental control apps' (press release, 28 April 2019) <www.apple.com/mg/newsroom/2019/04/the-facts-about-parental-control-apps/>.

⁴¹ For a description of the dispute and a first assessment, see Herbert Hovenkamp, 'Big Tech's fight over privacy: could Facebook win an antitrust lawsuit against Apple?' (*ProMarket*, 8 February 2021) <<https://promarket.org/2021/02/08/privacy-facebook-antitrust-lawsuit-apple-ios14-data/>>.

Finally, when it comes to financial viability, there is the concern of free-riding, meaning that users benefit from the platform without paying (enough) to support its operation.⁴² Apple has defended 30% commission fee on this ground, accusing Spotify of ‘seek[ing] to keep all the benefits of the App Store ecosystem ... without making any contributions to that marketplace.’⁴³ Indeed, if all developers would be able to use external payment systems, contributions to the App Store would dry up, which is not sustainable without a more fundamental rethinking of the fee structure (e.g. increasing developer subscription fees or charging a distribution fee separate from payment processing fees).

In the end, the validity of these justifications depends on whether they are genuine (and not simply a cover) and proportional (i.e. there is no less restrictive alternative).⁴⁴ A quick-look assessment shows that the above justifications are more convincing when it comes to keeping iOS closed than for excluding alternative payment processors, but that even doing away with the latter entails a business model shift.

6 Conclusion

Apple is now dealing with app store antitrust on multiple continents. Its main antagonists Spotify and Epic have overlapping interests (avoiding IAP), but Epic clearly wants to go further (its own iOS app store). Driven by complaints regarding cloud gaming (e.g. Microsoft) and user tracking (Facebook), ever more firms are supporting these complaints. As we discussed, there may indeed be a *prima facie* case (in particular when it comes to in-app payment processing), but the assessment of justifications will be crucial. Meanwhile, Apple is clearly trying to pre-empt findings of abuse by making changes to its policies. For example, it recently lowered its commission fee to 15% for developers earning <\$1M, and now allows users to set Spotify as their default. Time will tell whether those moves can appease antitrust enforcers. Even if they do, however, such actions will only be a temporary solution as Apple may still have to address the far-reaching obligations of the DMA when/if it enters into force.

⁴² Competition authorities allowed narrow MFNs based on free-riding justifications, see Friso Bostoën, ‘Most favoured nation clauses: towards an assessment framework under EU competition law’ (2017) 1 CoRe 223, 232.

⁴³ ‘Addressing Spotify’s claims’ (Statement, 14 March 2019) <www.apple.com/newsroom/2019/03/addressing-spotifys-claims/>.

⁴⁴ Case C-209/10 *Post Danmark v Konkurrencerådet* EU:C:2012:172, para 41; Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 30.