As regards market definition, the app economy is an area that, until last week when the Commission launched an investigation into certain conducts by Apple in its app stores, had not been very prominent in the minds of competition practitioners. The latter focused on operating systems and devices, but not on the app economy. However, the market definition of the app economy matters: there is a duopoly in the operating system that is then matched by a duopoly in the app stores. The Dutch competition authority has stressed that there likely to collapse into a single operating system.
There are a number of different prices charged by the app stores. An annual fee must be paid to Apple, against a one-off to Google. Apple and Google receive 30% of the price of paid apps bought in their stores (similar to a retail margin) and 30% of paid-for digital services bought within the app, using IAP. In 2011, Apple introduced IAP for digital subscriptions at 30%. Google followed in 2012. From 2016, both reduced it to 15% from the second year on. The subscription revenue has significantly increased over the last years.

Is there a two-sided market? We do not need to consider for market definition whether the structure of prices is changed. The owner of a digital subscription app charges the subscribers through the platform itself, and there is no strong restriction on their ability to do that. If there is an increase in the price which Apple or Google charges to an app developer, we may expect the price increase to be passed on. The app developer would not switch away from the Apple platform if it were to increase the price of the IAP. App developers do not have much choice: Apple shares 50% of the market. Developers would thus not switch away from the iPhones.

Could customers turn to other app stores and download the apps directly? The answer is no. Could they find another way of subscribing to that same service and use a free app on the phone? It depends on what sort of service is at stake. Would consumers switch to another phone? Apple has an incentive to keep everything on the phone highly competitive in order to stop people from switching to Android. When IAP came in for subscription and increased the prices by 30%, it had little effect on consumers. There is evidence of brand loyalty towards the iPhone, and it is hard to save money on apps by switching phones. There is no evidence of significant competitive constraints on IAP percentages. The Apple App Store is in a market by itself and therefore has 100% market share. There is, thus, evidence of dominance.

Nigel Parr

Are digital markets different and what does it mean for investigatory tools, due process and the rights of defence? According to the April 19 EU Digital Report, they are indeed different. The EU report mentions strong positions of market power, non-transitory barriers to entry and expansion, and therefore the agencies should err in support of challengers. It also identifies incumbent advantages due to extreme returns to scale, network externalities and the role of data, which requires a re-thinking of analysis and enforcement. On 2 June 2020, the Commission launched a consultation and identified structural problems under Articles 101 and 102 TFEU that cannot be tackled or addressed effectively under those instruments. Two types of structural competition problems are identified. The first one is where there are structural risks for competition (e.g. network and scale effects, lack of multi-homing, lock-in effects...) coupled with company conduct and possible unilateral strategies by a non-dominant business. The second is a structural lack of competition even without companies acting anti-competitively. That would be the case through high concentration, high entry barriers, consumer lock-in, lack of access to data or data accumulation. It also identifies oligopolistic market structures which increase the risks of tacit collusion.

As regards the scope of the new competition tool, the Commission consultation paper identifies four options. One of them targets all companies across all sectors. Another option focusses on dominant companies in particular sectors, including the digital economy. As regards remedies, there is a reference to behavioural but also structural remedies (e.g. through divestment, legislative action, but not through infringement findings and the imposition of fines or through damages claims). What will be the relationship of the new tool with Articles 101 and 102 TFEU? A number of key questions arise, including whether the substantive and procedural safeguards established under articles 101 and 102 will be bypassed by the use of the new tool, particularly given the likelihood will go beyond the imposition of penalties to divestment?

A useful comparison arises with the UK market investigation regime and particularly the institutional set-up. This power was introduced in 1948 and has been developed ever since. Market investigations can review all companies across all sectors. A key characteristic is an institutional separation between Phase 1 (market study, i.e. the
Overall, one needs to distinguish between the legal fiction of the agreements surrounding the app stores and the economic reality.

Having access to app stores and having many consumers spending much time on their phones is giving publishers the ability to reach broader audiences. Would these people have been users of a print or HTML version of a site if they were not using the apps? App stores are also an opportunity to convert these users into subscribers. Another opportunity is data collection: publishers should have control over the data that is being collected and used. Thanks to the apps, consumers can also be moved away from the two main browsers (Chrome and Safari), which have increasingly specific rules about what websites can do.

The first challenge faced by app developers is the costs of development. Since app stores update their rules frequently, developers constantly have to catch up. Another challenge is the cost of the commissions. It is not always clear how the commissions apply to all developers (there are exceptions for inner purchases or certain services). The commissions' rate goes from 15% to 30% for news publishers, which is a high fee. Other challenges include restrictions on the ability to inform users of a cheaper alternative to subscribing or exclusive payment systems. Increasingly, there are issues with access to user data. For those developers that do advertising, there is less competition for ad-tech in applications, which may mean a higher take rate from the intermediaries. Lastly, there can be competition against news aggregators.

Between app stores and app developers, app stores present themselves contractually as agents of the developers. There is only one agent on an app store. From the developers’ perspective, there needs to be an agreement with the agent in order to access the app audience. Therefore, what is the connection between the developer and the user? Is there really a relationship between the app store and the user since there is an agency contract with the developer? In the US Supreme Court decision in Apple v. Pepper of 2019, the question was whether users have a potential monopolisation case against the Apple app store for paying this 30%. At the federal level in the US, there is still a principle according to which indirect purchasers cannot bring monopolisation claims. The Supreme Court found that there is a direct connection between the user and the app store. If the app stores overcharge the users, they are entitled to bring a claim. Although based on a procedural question, this solution will have an impact on future substantive discussions.

The Commission investigation appears to be investigating the substantive issue. App stores have the ability and incentive to restrict competition, in particular when their own apps compete on the store. There is also an important amount of pay-to-play on the app stores: not only must developers pay commissions, but they also need to advertise their services, which represents added costs.

In order to reestablish fairness between developers and app stores, regulators should look at competition for the marketplace. How many stores are available on each mobile device? If there is only one, there may be investigations and cases but the manufacturer of the device can always change its rules. Regulation may be needed to make sure app stores are healthy ecosystems for developers and users.
Oliver Bethell

Microsoft leveraged its dominant position in PC operating systems in order to favour Internet Explorer and Windows Media Player. Google has leveraged its dominant position in online search to give leverage to adjacent products. The Apple case is yet another example. The same leveraging abilities and incentives are likely to remain present in the future. What is competition law to do about it? Competition law proceedings are timely and costly, and small developers may not have the will to challenge a powerful platform. Thus, competition enforcement must act before harm becomes irreversible. Potential reforms of competition rules include lowering thresholds for finding anticompetitive effects or making more frequent use of rebuttable presumptions. Procedural mechanisms could include increased use of interim measures.

Harry Clarke

App stores can be a vehicle for anticompetitive conducts. In 2019, Spotify filed a complaint against Apple for abusing their dominant position as the gatekeeper of the iOS app store, and a competitor in the music streaming service with the Apple Music service. Spotify contends that Apple abused this dual position to shield Apple Music from competition on the merits, favouring Apple Music and discouraging rivals such as Spotify.

As regards the relevant toolkit, vertically integrated platforms have both the ability and the incentive to self-favour. They have control of the app store as a gatekeeper, and they drive increasing revenues from third party services. The first abuse is exclusionary app approval terms, both on the rules themselves and in the enforcement. Another way is tying access to the app store with ancillary services or obligations (e.g. through the exclusive use of payment or a billing system). Thirdly, there has been a rising of rivals’ costs and there has been evidence of degrading rival apps’ interoperability with the platform (e.g. Siri).

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Oliver Bethell

Firstly, there is increasing use of mobile phones by consumers. The most important part of the time spent on the mobile phone is dedicated to using apps, and not browsers. Evidence also shows that consumers value subscription-based services. Technologic progress such as 5G is most likely to reinforce the trend of the increasing use of the apps.

Secondly, there are different ways for app developers to reach consumers. Against that backdrop, it is absolutely reasonable, looking at the success of Android and iOS, to ask about the value provided by these access points. There is a value to the app stores: they reduce search costs by providing a navigable tool and a large audience. Consumers generally trust the security and payment measures taken by the app stores. The latter also help developers ensure that their app is installed properly. Thus, there is value creation but the question of fairness remains of utmost relevance.

Thirdly, due distribution is a valid and reasonable question. It derives from the Google Shopping decision that an app store owner should subject its app to the same process and methods for the positioning and display in the app store as those used for competing apps.

Fourthly, in that context, conflicts are likely to be avoided through proper safeguards. Key safeguards would include equal treatment, transparent rankings of the apps, pay-by-performance, and the absence of penalties for distributing apps through other channels.