

APPLE'S ANTITRUST SAGA

by Hoi Jack S'ng & Aida Faralyana Binti Azlan

Apple fined by the European Commission over its in-app purchases system after a complaint by Spotify.

On 4 March 2024, the European Commission (**Commission**) fined Apple over €1.8 billion for abusing its dominant position in the market for the distribution of music streaming apps to iPhone and iPad users (**iOS users**) through its App Store. In particular, the Commission found that Apple applied restrictions on app developers, preventing them from informing iOS users of alternative and cheaper music subscription services available outside of the app (i.e., anti-steering provisions).¹

Background

The investigation by the Commission began in June 2020, after a complaint from Spotify, a music streaming provider and competitor of Apple Music. Spotify raised issues with two rules found in Apple's license agreements with developers and the associated App Store Review Guidelines, and their impact on competition for music streaming services.²

Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) prohibits anticompetitive agreements and decisions of associations of undertakings that prevent,

restrict, or distort competition within the EU's Single Market, whereas Article 102 of TFEU prohibits the abuse of a dominant position.

Article 102(a) of the TFEU provides that any abuse by one or more undertakings of a dominant position within the internal market, or in a substantial part of it, shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist of (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.

Infringement

The two rules imposed by Apple in its license agreement with music streaming app developers are as follows³:

- a. The mandatory use of Apple's proprietary in-app purchase system (**IAP**) for the distribution of paid digital content. Apple charges app developers a 30% commission fee on all subscriptions bought through the mandatory IAP. The Commission's investigation showed that most streaming providers passed this fee on to end users by raising prices; and
- b. "Anti-steering provisions", which limit the

[1] https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161

[2] *ibid*

[3] https://ec.europa.eu/commission/presscorner/detail/es/ip_21_2061

ability of app developers to inform users of alternative purchasing possibilities outside of apps. While Apple allows users to use music subscriptions purchased elsewhere, its rules prevent developers from informing users about alternative and cheaper music subscription services available outside the app.⁴

The Commission concluded that Apple's anti-steering provisions amount to unfair trading conditions, in breach of Article 102(a) of the TFEU. These anti-steering provisions are neither necessary nor proportionate for the protection of Apple's commercial interests and negatively affect the interests of iOS users, who cannot make informed and effective decisions on where and how to purchase music streaming subscriptions for use on their device as information is withheld from them.⁵

In addition to the fine, the Commission has also ordered Apple to remove the anti-steering provisions. This order echoes a requirement under a new EU rule – the Digital Markets Act (**DMA**), which came into force on 7 March 2024.⁶

It is important to note that market dominance is not illegal under the TFEU. However, dominant companies must not abuse their powerful market position by restricting competition.

Following the Commission's decision, Apple has stated that it will be appealing against the decision.⁷

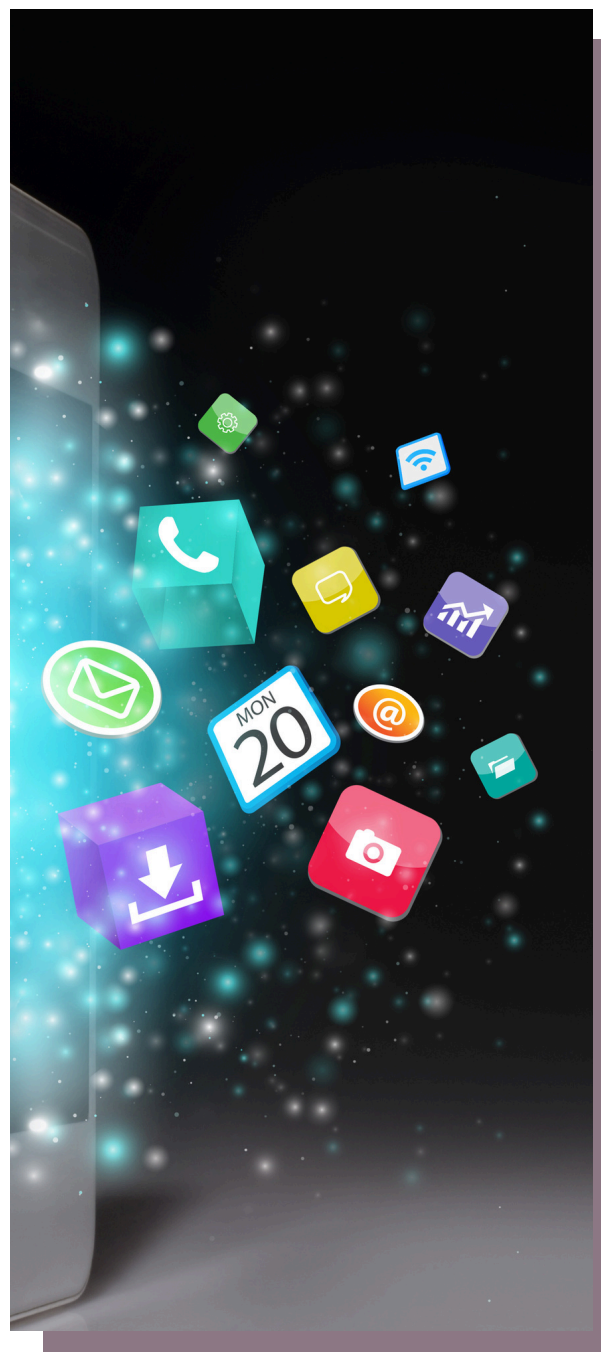
On 24 April 2024, Spotify, through X (formerly Twitter), alleged that "Apple continues to break European law". Spotify's chief public officer further stated that "By charging developers to communicate with consumers through in-app links, Apple continues to break European law. It is past time for the Commission to enforce its decision so that consumers can see real, positive benefits."⁸

Spotify claims Apple rejected their attempt to communicate with customers about their prices unless Spotify pays Apple an extra charge to communicate with consumers through in-app links.⁹

Spotify alleges that, to circumvent the DMA,

Apple has purposely created an alternative to the status quo of the 30% commission fee it charges for in-app purchases, where the developers have to pay Apple a €0.50 fee for every customer download, in addition to a recurring 17% digital goods fee for every purchase made.¹⁰

The Commission is also now investigating Apple, Meta, and Google for non-compliance with the DMA over fees and self-preferencing.¹¹



[4] *ibid*

[5] https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1309

[6] https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689

[7] <https://www.apple.com/newsroom/2024/03/the-app-store-spotify-and-europes-thriving-digital-music-market/>

[8] <https://www.engadget.com/spotify-tests-apples-resolve-with-new-pricing-update-in-the-eu-120004754.html>

[9] *ibid*

[10] <https://newsroom.spotify.com/2024-05-24/the-u-k-holds-firm-in-the-fight-for-fair-competition-with-the-dmcc-act-but-its-not-over-yet/>

[11] <https://www.engadget.com/the-eu-is-investigating-apple-meta-and-google-over-fees-and-self-preferencing-124147179.html>

Competition Law in Malaysia

It is interesting to note that Section 10 of the Malaysian Competition Act 2010 (**CA**) provides for a similar prohibition to Article 102(a) of the TFEU as follows:

- (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct that amounts to an abuse of a dominant position in any market for goods or services.
- (2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include:
 - (a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions on any supplier or customer.

Although we have yet to see whether similar complaints will be lodged against Apple for its conduct in our jurisdiction.

Not The First Rodeo

This is not the first time Apple has been in hot water due to its anti-steering provisions.

Back in 2020, Apple was involved in a dispute with Epic Games, the developer of the popular video game Fortnite, which sought to challenge App Store rules requiring developers to use Apple's IAP system if purchases are offered in the app. Under this IAP system and its agreements with app developers, Apple collects payments made to developers, remits 70% to the developers, and keeps a 30% commission.

In late 2020, Apple introduced the Small Business Programme, which reduced Apple's commission to 15% for developers making less than one million dollars.¹²

Epic Games then implemented changes in its games to bypass Apple's payment system, which caused Apple to block its games in the App Store. This led Epic Games to file a suit in the United States District Court for the Northern District of California, citing a violation of California's Unfair Competition Law¹³. Its main complaint are as follows:

Apple had acted unlawfully in violation of California's Unfair Competition Law by:

- (1) Restricting app distribution on iOS devices to Apple's App Store;
- (2) Requiring in-app purchases on iOS devices to use Apple's in-app payment processor; and
- (3) Limiting the ability of app developers to communicate the availability of alternative payment options to iOS device users.

These restrictions were imposed under the Developer Programme Licensing Agreement (**DPLA**), which developers were required to sign in order to distribute to iOS users.

Apple also filed a counterclaim alleging that Epic Games had breached the terms of the DPLA.

While the District Court's findings were in favour of Apple, it held that the third restriction, or the anti-steering prohibition, was anticompetitive



[12] United States District Court Northern District of California | Case No. 4:20-cv-05640-YGR | *Epic Games Inc v Apple Inc*, U.S. District Court, Northern District of California, No. 20-05640

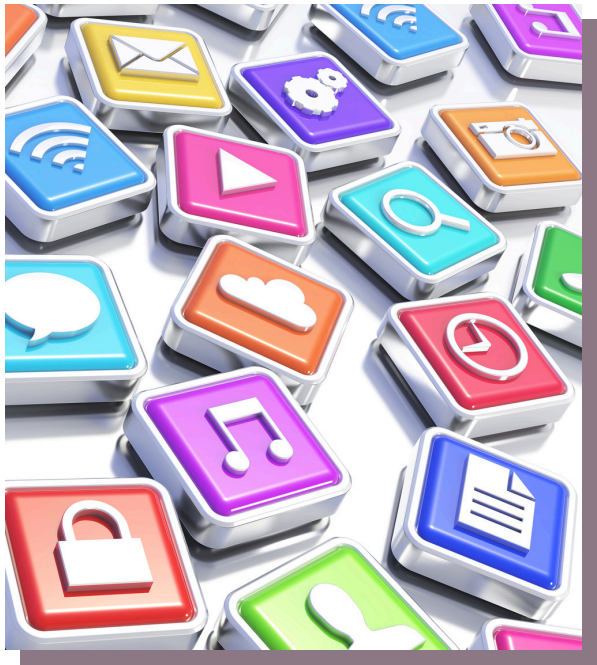
[13] <https://cand.uscourts.gov/cases-e-filing/cases-of-interest/epic-games-inc-v-apple-inc/>

and issued an injunction whereby Apple is permanently restrained in prohibiting developers from the following ¹⁴:

- (1) Including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms in addition to In-App Purchasing; and
- (2) Communicating with customers through points of contact obtained voluntarily from customers through account registration within the app.

It was held that while Apple is not considered a monopoly and did not engage in antitrust behaviour on nine of ten counts, Apple's conduct in enforcing anti-steering restrictions is anticompetitive.¹⁵

This decision was affirmed by the United States Court of Appeals for the Ninth Circuit when both Apple and Epic Games appealed.¹⁶ In January 2024, the United States Supreme Court declined to hear the full appeals of both Apple and Epic Games, which means that although Apple remains primarily victorious, it must now allow developers to include notices about alternate payment systems in their apps available on the App Store.¹⁷



Separately, in March 2024, Epic Games filed an application to declare Apple in contempt of court for violating the injunction order against it.¹⁸

Apple sued by the United States Department of Justice (US DOJ) over its alleged monopoly of the market through its ecosystem.

On 21 March 2024, the US DOJ, together with 15 states and the District of Columbia, filed a complaint in the federal district court in New Jersey.¹⁹

Specifically, it is alleged that Apple intends to eliminate its smaller competitors by blocking the expansion of 'super-apps' that provide identical functionality across devices, such as:

- (a) **Blocking Innovative Super Apps.** Apple has disrupted the growth of apps with broad functionality that would make it easier for consumers to switch between competing smartphone platforms.
- (b) **Suppressing Mobile Cloud Streaming Services.** Apple has blocked the development of cloud-streaming apps and services that would allow consumers to enjoy high-quality video games and other cloud-based applications without the need for expensive smartphone hardware.
- (c) **Excluding Cross-Platform Messaging Apps.** Apple has degraded the quality of cross-platform messaging apps, making them less innovative and secure, to compel its customers to continue buying iPhones.
- (d) **Diminishing the Functionality of Non-Apple Smartwatches.** Apple has limited the functionality of third-party smartwatches, leading users to face substantial out-of-pocket costs if they choose not to continue buying iPhones.
- (e) **Limiting Third Party Digital Wallets.** Apple has prevented third-party apps from offering tap-to-pay functionality, hindering the creation of cross-platform third-party digital wallets.²⁰

[14] *Epic Games Inc v Apple Inc*, U.S. District Court, Northern District of California, No. 20-05640 | Permanent Injunction dated 21 September 2021 <https://cand.uscourts.gov/cases-e-filing/cases-of-interest/epic-games-inc-v-apple-inc/>

[15] <https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-v.-Apple-20-cv-05640-YGR-Dkt-814-Judgment.pdf> & <https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-v.-Apple-20-cv-05640-YGR-Dkt-813-Injunction.pdf>

[16] <https://law.justia.com/cases/federal/appellate-courts/ca9/21-16506/21-16506-2023-04-24.html>

[17] <https://www.theverge.com/2024/1/16/24039983/supreme-court-epic-apple-antitrust-case-rejected>

[18] <https://www.reuters.com/legal/apple-denies-violating-us-court-order-epic-games-lawsuit-2024-04-13/>

[19] <https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets>

[20] <https://www.justice.gov/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets>



Conclusion

Although the US DOJ suit against Apple is still in its infancy, we expect the outcome to have a significant impact on big tech companies, including Apple's operation worldwide, including in Malaysia.

It also seems that antitrust regulators in the West are very actively pursuing big tech companies. Google recently closed its argument in a battle with the US DOJ in *U.S et al. v Google*, where the US DOJ accused Google of illegally abusing its power as a monopoly. It allegedly orchestrated its business dealings with device makers like Apple and Samsung, and web browser companies like Mozilla, which runs Firefox.²³

We look forward to seeing whether the directives imposed by the Commission or the United States Court would in the future promote or hinder competition between big tech companies. Some big tech companies might consider these directives restrictive, as this might hinder big companies from further improving their technologies, maximising capitalisation potential.

For example, Apple allows iPhone customers to send high-quality photos and videos seamlessly to one another, but multimedia texts to Android phones are slower and grainier. Apple has since improved the quality of the standard it uses to interact with Android phones via text messages, but it still maintains those messages in green bubbles, which may help perpetuate a class divide.²¹

Apple also allegedly stifled the use of non-Apple smartwatches by limiting how users interacted with them on the iPhone and used cloud streaming, location services, and web browsers on iPhones to snuff out smaller rivals.²²

The antitrust lawsuit alleges that Apple has violated Section 2 of the Sherman Act.

Section 2 of the Sherman Act provides that every person who shall monopolise attempt to monopolise, or combine or conspire with any other person or persons to monopolise any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanour.

HOI JACK S'NG

Partner
Dispute Resolution |
Regulatory and Compliance
hjs@lh-ag.com



AIDA FARALYANA BINTI AZLAN

Associate
Dispute Resolution |
Regulatory and Compliance
afa@lh-ag.com



[21] <https://edition.cnn.com/2024/03/21/tech/apple-sued-antitrust-doj/index.html>

[22] *ibid.*

[23] <https://apnews.com/article/google-antitrust-trial-search-engine-dominance-e7fa82026c31efe9c0a4fe95be014a74>