

How Apple Music breached EU competition law

By **Abanti Bose** - July 11, 2021



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Introduction

Tech companies like Google, Amazon, Facebook, and Apple are under the tight scrutiny of Competition authorities across jurisdictions. They are being accused of abusing their position and stifling competition in the digital markets.

Apple Inc who disrupted the mobile phone market and mobile apps by launching the iPhone (2007) and the App Store (2008) respectively, rose to new heights banking on its success; is now under investigation by the Department of Justice in the US and the EU Commission for imposing unfair terms upon App Developers.

On April 30, 2021, the EU Commission completed its initial investigation against Apple (based on Spotify's complaint) and informed Apple of its preliminary view that it has distorted competition in the *music streaming market* as it abused its dominant position for the distribution of music streaming apps through its App Store.

This article is divided into two parts; the first part explores the origins of the App Store, Spotify-Apple brawl, and the core contentions for this case; Apple Tax and In-app purchase mechanism. The second part explores the investigation of the EU Commission against Apple based on the antitrust complaint filed by Spotify.

As mentioned before, the App Store is the core of this case and therefore is imperative to understand how Apple's most successful product, the iPhone that led to the creation of one of the most popular platforms for app developers on the planet, generating \$120 billion for them and kick-started the era of mobile apps.

Apple: "The Gatekeeper" of the App Store

"Study the past if you would define the future." - Confucius. There is a symbiotic relationship between the iPhone and the App Store and to understand it, we need to travel back to 2007 when Apple disrupted the mobile phone market with the iPhone. Had the iPhone not been a successful product, there would not have been much demand for native-third party apps as the iPhone launched solely with first-party apps (developed by Apple) and no App Store!

Sounds strange right?

The late Steve Jobs was in favour of web apps, calling it a "very sweet solution" but was later saw the "benefits" of having natively built apps for the iPhone and launched the iPhone Software Developer Kit ("SDK") in early 2008 that allowed developers to design apps for the iPhone and later for the iPad.

On July 10, 2008, with only 500 apps the App Store was born and was an instant hit with over 10 million downloads in the first week itself! This created a new industry for the developers "The App Economy" and a new source of income for Apple in the form of commissions.

In 2009, Apple allowed developers to offer in-app purchases, allowing developers to monetize their apps. There are four ways a developer can monetize their apps.

1. **Free Model**– Apps can be downloaded and be used for free, developers may integrate ads to monetize these apps; Social Media Apps like Instagram, Facebook, etc
2. **Freemium Model**– Apps can be downloaded for free but requires users to pay to unlock additional features; Games like PUBG, Fortnite, etc
3. **Subscription Model**– Apps can be used for free but requires users to pay renewable fees to use the app. Streaming services like Netflix, Amazon, Spotify, etc
4. **Paid Model**– Apps are downloaded by paying an upfront amount and use all features of the app. Professional Apps like Duet, Luma Fusion, Procreate Pocket, etc

Around 2010-11 Apple introduced the [App Store Review Guidelines](#) ("Guidelines"); a set of rules to provide guidance to the developers while building Apps to be sold in the App Store.

According to Apple, these guidelines ensure the apps offered in the App Store are "*safe, provide a good user experience, adhere to our rules on user privacy, secure devices from malware and threats and use approved business models*". Apart from this, Apple rigorously reviews each app before it publishes in the App Store.

In summary, Apple controls every aspect of the App Store; from who can build apps, how it is to be developed to what kind of app goes to the App Store. Apple also has the power to reject an app that does not adhere to its Guidelines and takedown apps if they are found to violate the same.

So, to conclude, the App Store is a 'Marketplace' where;

- iPhone users (consumer) can browse and download apps of their liking;
- Developers (sellers) can build and sell their apps adhering to the guidelines set by Apple, and
- Apple (owner) is the sole point of connection for both parties.

Hence, the term "Gatekeeper of the App Store" is coined by antitrust authorities for Apple because it literally decides who enters and exits the market.

Now that we have explored how Apple is in a dominant position with regards to the App Store, we move to the elephant in the room; the Spotify and Apple shenanigans.

Spotify v. Apple Music debacle

"Apple is the owner of the iOS platform and the App Store -and a competitor to Spotify [Apple Music]. In theory, this is fine. But in Apple's case, they continue to give themselves an unfair advantage at every turn" – Daniel Ek (CEO of Spotify). This is from Daniel's post on Spotify's Newsroom [For the Record](#) where he formally announced that he would be filing an antitrust complaint against Apple with the European Commission, the Competition watchdog of the EU. His complaint revolves around three issues;

1. Apple requires Spotify and other digital services to pay a 30% Commission to Apple ["Apple Tax"] on purchases made through Apple's payment system [in-app purchase (IAP)] This forces Spotify to artificially inflate the price of their Premium service well above its competitor; Apple Music who doesn't have to pay this tax.
2. If Spotify chooses not to use Apple's payment system, they are barred from reaching out to customers as Apple applies a series of technical and experience-limiting restrictions on them. Sometimes they are barred from sending emails to their iPhone customers iPhones. [Another example of this restriction is Spotify users on iPhones cannot upgrade to the Premium service within the App itself.]
3. Apple has for the longest time has locked Spotify and other competitors out of its new products such as Siri, Homepod, and Apple Watch. [It was very recently when Apple allowed Spotify and other competitors of Apple Music such as Amazon Prime, YouTube Music, etc to integrate with these products]

There is a [timeline of events](#) developed by Spotify where they have recorded every instance when Apple has indulged in anti-competitive behaviour to favour their own services.

At the end of his blog, he requested for;

- Fair competition between apps based on merit and not based on who owns the App Store.
- Giving consumers a real choice of payments and not being "locked-in" or forced to use Apple's Payment System.
- Allowing apps to communicate freely to their customers without any unfair restrictions on marketing and promotions

Apple's clap-back on Spotify

"Spotify is free to build apps for — and compete on — our products and platforms, and we hope they do". This is a quote from [Apple's Newsroom](#) where they responded to Spotify's allegations and explained how their App Store is a safe, secure platform with the sole aim of more apps to thrive including those who competed with Apple. They said that Spotify has every right to determine their own business model but felt the need to respond to them when Spotify seeks to keep all benefits of the App Store ecosystem without contributing to that marketplace.

Here is the summary of their response;

1. Spotify's claim on blocking access to Apple's other products and updates to their app

1. Apple claimed to have approved and distributed nearly 200 app updates on Spotify's behalf which resulted in over 300 million download copies of the Spotify app.
2. They have collaborated with Spotify frequently to help them bring their services to other Apple products such as;
 1. Siri and Airplay 2 support.
 2. Spotify's deep integration with CarPlay
 3. Spotify app on the Apple Watch App Store; which at the time was the No. 1 app in Watch Music Category

2. Who and how much does Apple charge on the App Store?

84% of the apps in the App Store pays zero amount to Apple when consumers download and use them, according to Apple. There are four categories of apps that aren't charged by Apple;

1. Free Apps (WhatsApp, Signal etc)
2. Apps that earn revenue from Advertising (Facebook, Instagram)
3. Apps that sell physical goods like riding hailing or food delivery services (Swiggy, Zomato)
4. The app allows business transactions where users purchase digital goods outside the app.

They charge only on purchase of digital goods or services that are purchased inside the app using their IAP and contrary to Spotify's claim, Apple charges 30% commission only for the first year of an annual subscription which dropdowns to 15% in the subsequent years- meaning developers pay 30% commission to Apple only for the first year of their of the app listing on the App Store and 15% from the years after.

This contradicts Spotify's claim that they are forced to pay a 30% fee as it offered users to sign up for a subscription to their premium plans from 2014 to 2016 i.e., Spotify was charged 30% in the first year (2014) and 15% 2015 onwards until 2016.

3. How Spotify pretends to be a 'free app' without being one?

Apple goes on to give the full picture that Spotify 'left out' while alleging Apple for malpractice;

1. Spotify's majority of customers use their app free, the ad-supported version which makes zero contribution to the App Store's revenue.
2. Spotify's significant number of customers come through partnerships with mobile carriers which again contributes nil amount to the App Store.
3. Spotify's subscriptions fall under a tiny fraction of Apple's revenue-sharing model and now Spotify wants that number to be zero.

EU Commission launches Antitrust Investigation

"It appears that Apple obtained a "gatekeeper" role when it comes to the distribution of apps and content to users of Apple's popular devices. We need to ensure that Apple's rules do not distort competition in markets where Apple is competing with other app developers, for example with its music streaming service Apple Music or with Apple Books" – Margrethe Vestager (Vice President of EU Commission). On 16th June 2020, the competition watchdog of the European Union: EU Commission ("Commission") initiated a formal antitrust investigation based on Spotify's complaint. This investigation aimed to assess whether Apple's rule for app developers on the distribution of apps via the App Store violated EU Commission competition rules. This investigation focussed on the two restrictions imposed by Apple in its agreements with app developers and companies:

1. The mandatory use of Apple's IAP for distribution of paid digital content on which Apple charges a 30% commission fee.
2. Developers' inability to inform their users of an alternative purchasing possibility outside of apps.

Commission's preliminary investigation in the music streaming service ("market") saw:

1. Apple's competitors like Spotify, disable the IAP altogether or raise their subscription plans; passing the cost to the end consumers. This according to the Commission is a direct result of Apple's restrictions on developers vis-à-vis may have distorted competition in the market.
2. The IAP obligation upon developers, on a prima facie level gave Apple full control over the relationship with customers of its competitors including possessing its competitors' valuable data, giving Apple an unfair advantage
3. Following this, the Commission initiated an investigation to assess the possible impact of Apple's App Store practices with respect to competition in the market

In-app purchasing and Apple Tax: Explained

The developers are mandated to use Apple's in-app purchase system under the Guidelines if they wish to monetize their apps.

They are prohibited from using their own in-app purchase system. If an individual is found by-passing this rule and using their own in-app payment system; they are immediately removed from the App Store.

The developers are required to pay Apple a 30% commission [Apple Tax] on every purchase made by the consumers in their apps [which uses Apple's in-app payment system]. This forces developer to artificially inflate their base price, which is ultimately borne by the consumers.

EU Commission sends 'Statement of Objections' to Apple

A Statement of objection is the formal step taken by the Commission to initiate an investigation into suspected violations of EU antitrust rules. The Commission raises objections against the parties involved and informs them in writing.

On 30th April 2021 the Commission sent its Statement of Objection to Apple informing them about Commission's preliminary view that it finds;

1. The tech giant to be in a dominant position in the market for the distribution of music streaming apps through its App Store.
2. Apple to be the gatekeeper of the App Store; it being the sole gateway to Apple's customers for developers.
3. Apple has formed a "closed ecosystem" with tight integration between its operating software (iOS) and hardware (iPhone and iPad) and to be in control of every aspect of the user experience.
4. Apple customers to be very loyal to the brand and do not switch easily, thus developers wishing to distribute their app to them, must do so through the App Store and subject themselves to Apple's mandatory and non-negotiable rules.

The primary concern for the Commission against Apple were;

1. The mandatory use of Apple's proprietary IAP by app developers for distribution of paid digital content for which Apple charges 30% commission fee. Streaming service providers cover their margins by raising prices which are ultimately borne by the users. ("Activity 1")
2. Rules imposed by Apple on developers prevented them from informing users about alternative ways to purchase digital content ("Anti-steering provisions") which are usually cheaper. ("Activity 2")

In Commission's preliminary view these rules imposed by Apple, have distorted competition in the market for music streaming services by raising the cost of its competitors (Spotify), which is borne by consumers who choose to purchase in-app subscription plans. Additionally, the Commission found Apple to be an intermediary for all IAP transactions, billing relationships and related communication for its competitors.

Next, the parties (in this case Apple) will review the documents in the Commission's investigation, reply in writing and request an oral hearing to present their side before the representatives of the Commission or National Competition Authorities. It is to be noted that sending of a Statement of Objections by the Commission does not prejudice the outcome of this or any investigation.

Which EU provisions are being allegedly violated by Apple?

From the Commission's preliminary view, it seems Apple is allegedly violating Article 102 of the Treaty on the Functioning of the European Union (TFEU) which prohibits undertakings from abusing their dominant position.

Activity 1 and 2 are on prima facie level violating Article 102 subsection (a) and (b) where:

- Apple is imposing unfair trading conditions on the developers by mandating them to use its proprietary IAP and penalising them by removing their applications if found to use their own IAP. It also disallows developers from informing their users of an alternative way to avail their services (violating Article 102 (a)) and;
- If developers could use their own IAP, the prices for their services would go down significantly as they wouldn't be paying the Apple tax and customers would have to pay less for the same. Thereby Apple seems to stifle innovation to the prejudice of customers (violating Article 120 (b))

An example of this is the infamous Apple-Epic Games showdown; where Epic Games implemented their own [direct payment option](#); bypassing Apple's IAP in Fortnite which reduced the prices for its in-game currency (V-bucks) from \$9.99 to \$7.99. Subsequently, Apple removed Fortnite from its app store and in retaliation, Epic Games filed an Antitrust lawsuit against Apple.

Apple's music streaming service "Apple Music" is a first-party app that is not bound by the Guidelines, (means no 30% commission on IAP). This is giving Apple an unfair

advantage over its competitors and seems to violate Article 102 (c). This is resonated by Margarethe Vestager's remarks while sending Statement of Objections to Apple;

"By setting strict rules on the App Store that disadvantage competing music streaming services, Apple deprives users of cheaper music streaming choices and distorts competition. This is done by charging high commission fees on each transaction in the App Store for rivals and by forbidding them from informing their customers of alternative subscription options"

Conclusion

Apple or any Tech giants need to retrospect their policies and business models. The late Steve Jobs once said, ["tie all of our products together, so we further lock customers into our ecosystem"](#). This has been the ethos for Apple after his death. The tech community often refers to Apple users as "Living in Apple's walled garden" where every product is so tightly integrated that users often find it impossible to switch to competitors' products.

A very recent example of this case would be the "Butterfly Keyboard disaster" where Apple's MacBook was equipped with extremely fragile keyboards that were prone to fail compared to keyboards with traditional keyboards. This infuriated many users and many wanted to switch to other brands but were locked in "Apple's Ecosystem". This [business model](#) in my opinion is restricting user's choice and must be investigated by authorities.

On an ending note, I would like to present some shortfalls on part of the EU Commission in this case;

1. The Commission has taken a very narrow approach while delineating the relevant market limited to *distribution of music streaming services*, where Apple is dominant in a narrow fashion. Instead, it should have taken a broader market definition i.e., the *market for app distribution*, where Apple is a monopoly.
2. The Commission failed to explain how Activities 1 and 2 of Apple qualifies under Article 102 TFEU and limited itself to stating that these activities distorted competition in the market for streaming music by raising its rival's costs.
3. Another bizarre and problematic issue is the stance taken by the Commission on those Rules not being applicable to Apple's own services. Even if Apple were to abide by those rules (30% tax) the sum would still end up with Apple.
4. Lastly, the Commission fails to provide any types of remedies for Apple if they were found guilty. It is to be assumed that they haven't reached the point of a final decision.

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