

# Competition & Regulatory Newsletter

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## European Commission launches two antitrust investigations into Apple

On 16 June 2020 the European Commission initiated two parallel investigations into Apple's [App Store](#) and [Apple Pay](#). These will investigate the rules and restrictions that Apple imposes on users of its App Store and Apple Pay.

### App Store investigation

Apple's App Store is a digital distribution platform that allows users with Apple devices to browse and download apps. In March 2019 the Commission received a complaint from Spotify that Apple imposes excessively high commission fees on apps that use its App Store and compete with its own products, and in particular, that this gives Apple's own music streaming service an unfair advantage over its rivals.

In a preliminary investigation into competition in the music streaming market following Spotify's complaint, the Commission found that:

- Apple's competitors in music streaming had responded by either disabling in-app subscriptions altogether or raising in-app prices (passing on this fee to consumers). At the same time, Apple also restricts app developers from informing consumers of cheaper alternative subscription possibilities outside of the app.
- The in-app purchasing system gives Apple full control over the relationship with customers of its competitors subscribing to the app, isolating these app developers from important customer data whilst allowing Apple to obtain valuable data about the activities and offers of its competitors.

In March 2020 e-book distributor Kobo filed a complaint containing similar allegations to those made by Spotify but in the context of e-book/audiobook distribution. Similar concerns have been raised by other companies including tracking app maker Tile and new email app Hey.

The new App Store investigation will focus on competition in markets where developers are competing with Apple's own apps in the EEA, in particular in the music streaming and e-book/audiobook markets. The investigation will focus on two specific restrictions imposed by Apple in its agreements with app distributors

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which the Commission considers may ultimately harm consumers by preventing them from benefiting from greater choice and lower prices:

- The mandatory use of Apple's proprietary in-app purchase system, under which Apple charges app developers a 30 per cent commission on all subscription fees paid by consumers.
- Restrictions on the ability of app developers to inform users of potentially cheaper ways to purchase content outside of apps e.g. through the app developer's own website.

Horacio Gutierrez, Spotify's chief legal officer and head of global affairs, commented that Apple's conduct has "*intentionally disadvantaged competitors, created an unlevel playing field and deprived consumers of meaningful choice for far too long*".

European Commissioner for Competition, Margrethe Vestager, warned that Apple has "*obtained a 'gatekeeper' role*" in the distribution of apps and content to users of Apple products, and the Commission must "*ensure that Apple's rules do not distort competition in markets where Apple is competing with other app developers*".

## Apple Pay investigation

Apple Pay is Apple's proprietary mobile payment system which allows users to pay for goods or services online or instore directly from their Apple devices. The Commission launched a preliminary investigation into Apple Pay in 2017, finding that the terms, conditions and other measures imposed by Apple may distort competition and reduce choice and innovation. In October 2019 the Commission issued questionnaires to payment companies asking for feedback on Apple Pay, confirming that it was "*monitoring*" the mobile payment market. In November 2019 Vestager noted that the Commission had received "*many, many concerns*" relating to Apple Pay.

The present investigation will assess the possible impact of Apple's practices on competition in the market for the provision of mobile payment solutions. It will examine the terms and conditions imposed on merchants who wish to accept payments through Apple Pay, as well as whether Apple restricts access to its near field communication (NFC) technology to its own payment system. The technology allows Apple device users to complete a payment by holding their device near a card reader, but it currently only works with Apple Pay.

Vestager commented that "*it is important that Apple's measures do not deny consumers the benefits of new payment technologies, including better choice, quality, innovation and competitive prices*".

## Reaction

In response, Apple has said that the Commission is advancing "*baseless complaints from a handful of companies who simply want a free ride*". However, at its annual developer conference on 22 June 2020 Apple **announced** the introduction of certain new measures for app developers which may be seeking to assuage antitrust concerns, including concessions that will allow them to (i) appeal decisions about whether an app violates the App Store guidelines and (ii) challenge the guidelines directly, signifying a degree of relaxation of the strict rules governing the use of the iOS system. Other new measures include

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allowing iPhone and iPad users to choose email and web browsers from companies other than Apple as their default. However, the issues around payment of 30 per cent commission have seemingly not yet been addressed.

## Grappling with Big Tech

The Commission has promised to carry out these investigations “*as a matter of priority*”. These probes form part of the Commission’s broader fight against Big Tech, and in particular against ‘gatekeeper’ platforms which simultaneously compete against users of their platform at a different level of the value chain. In one of the most prominent examples, the Commission fined Google €2.4bn in 2017 for giving an anti-competitive advantage to its own comparison shopping service on its search platform. Additionally, the Commission is currently preparing its conclusions in relation to an investigation focusing on Amazon’s use of sensitive data from third-party retailers with whom it competes on its platform. In a webinar on 26 June 2020 Vestager said that, as part of the Commission’s proposal for new investigative powers in the digital sphere (which are currently being consulted on), Big Tech companies could be prevented from using their platforms to promote their services over those of rivals - with the ability to potentially force the breakup of companies as a “*last resort*”.

We have also produced a recent [blog post](#) discussing the Apple investigations.

## Other developments

### Antitrust

#### German Federal Court of Justice issues ruling on Facebook handling users’ data

On 23 June 2020 Germany’s Federal Court of Justice [ruled](#) that Facebook can be prevented from collecting user data on certain online properties.

Judges of Germany’s highest civil court overturned an [injunction granted](#) to Facebook by the lower Higher Regional Court in Duesseldorf, which suspended an earlier decision by the Bundeskartellamt, the German Competition Authority. In February 2019 the Bundeskartellamt [concluded](#) that Facebook’s collection of its users’ data as a condition of the use of its platforms amounted to an abuse of its market power. It decided that Facebook could only collect user data if it had its users’ “*voluntary consent*” to pool data from other services with its own Facebook user data. It ordered the company to stop collecting user data from third-party websites. The authority ordered that if consent is not given for data from Facebook-owned services and third party websites, Facebook had to substantially restrict its collection and combining of data. Facebook had four months to comply with the decision but instead appealed it in August 2019.

The court in Duesseldorf then granted the injunction suspending the Bundeskartellamt’s order. Judges in that court said that they had “*serious doubts about the legality*” of the order, and drew attention to the fact that breach of data protection rules did not itself amount to an abuse of competition law. But the

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Federal Court of Justice has now provisionally confirmed the allegation of abuse of a dominant position by Facebook and lifted the injunction.

The main appeal against the competition authority's decision will be heard later this year, or in early 2021. In the meantime, Facebook must comply with the order and stop collecting user data.

## General competition

### SAMR's targets in AUCL enforcement

On 12 June 2020 China's State Administration for Market Regulation (SAMR) issued a [press release](#) detailing a recent notice on strengthening SAMR's enforcement of the Chinese Anti-unfair Competition Law (AUCL). The AUCL is one of two laws in China that governs competition-related issues, alongside the Anti-Monopoly Law (AML).

The SAMR specified certain industries that will be targeted for AUCL enforcement, including production of materials for combating pandemics, daily consumption, internet, e-commerce, live streaming platforms, purchase and sale of medicines, medical services and production facilities. The SAMR stated that some industries are prone to illicit promotional activities and will be particularly targeted following the end of the lock-down period, such as e-commerce, dining and education. Interim Provisions on Prohibiting Illicit Promotional Activities will be promoted to such companies and to consumers to ensure that their rights are protected.

The SAMR is particularly concerned with the protection of trade secrets, requiring local market regulatory bodies to investigate trade secret infringements in a steadfast manner.

The notice reflects SAMR's proactive approach in regulating market activities, especially as business begins to resume after the COVID-19 lock-down. The SAMR has also been stepping up enforcement of the AML, with two recent gun-jumping [decisions](#) taken on 15 June 2020 against the same companies in the building materials sector.

### European Parliament and Council reach agreement on collective redress

On 22 June 2020 the European Parliament (EP) [announced](#) that it had reached a deal with European Council negotiators on the first EU-wide rules concerning collective redress. The rules will allow citizens from EU Member States to bring an individual action in court as one collective group.

The rules will be known as the Representative Action Directive and will protect consumers in all EU Member States against "*mass harm*" while still ensuring that vexatious actions are not brought. The Directive will achieve this by:

- the introduction of the "*loser pays principle*", ensuring the unsuccessful party always bears the cost of the action; and
- allowing courts and administrative authorities to dismiss "*manifestly unfounded*" cases at an early stage in proceedings.

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According to the agreement reached, there must be at least one representative action procedure for injunction and redress in every Member State, which must allow representative action at both a national and EU level. The new legislation offers new rights to consumers by which qualified entities will be empowered to launch actions on behalf of groups of consumers. The European Commission will consider whether to introduce an Ombudsman for collective redress, who will deal with cross-border representative actions. The scope of possible collective actions is wide in scope, covering areas from data protection to air passenger rights. The introduction of the legislation forms part of the 'New Deal for Consumers' introduced by the Commission in April 2018 in order to protect consumer rights.

The agreement reached must still be formally approved by the EP and the Council of Ministers of the EU.

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