Insight

Apple's Antitrust App Store Win

JEFFREY WESTLING | MAY 3, 2023

Executive Summary

- The 9th Circuit Court of Appeals ruled in favor of Apple in a major antitrust case regarding third-party access to, and use of, the company's application store, relying largely on the consumer welfare standard to determine that the competitive benefits of the company's practices outweigh any competitive harms.
- Some lawmakers have long pointed to Apple's application store exclusivity and fees as examples of anticompetitive practices that should be outlawed regardless of any pro-consumer benefits, so the 9th Circuit's decision could renew calls for legislation, such as the Open App Markets Act, to prohibit such practices.
- Before passing legislation in response to the court's decision in *Epic Games v. Apple*, Congress would benefit from more data about the relative costs and benefits of such reforms, which it could glean from Europe's own recently enacted legislation to regulate practices it deems anticompetitive.

Introduction

In April, the 9th Circuit Court of Appeals determined in *Epic Games v. Apple* that Apple's iPhone and application store practices – which limit users to applications offered through Apple's App Store and charge a 30 percent commission on sales – didn't violate antitrust law. In its ruling, the court adhered largely to the consumer-centric analysis of modern antitrust law. As the court explained, Apple had important, pro-competitive reasons for its practices, such as enhanced cybersecurity, and consumers had the choice to use or not use these products and services.

The litigation mirrored a larger discourse about competition in online markets, and application store practices writ large, with many proponents of reform arguing that the size

of major technology firms is a problem in isolation regardless of competitive effects. In response to the decision, there may be renewed pushes for bills such as the Open App Markets Act (OAMA), which would force companies such as Apple to allow customers to install applications outside of the App Store or approved by Apple – a practice known more commonly as sideloading. Given that the court highlighted in its decision that bans on sideloading generate pro-competitive benefits, current law may not provide immediate relief for those who believe application store markets as they currently operate are anticompetitive, and so proponents of cracking down on such practices may see OAMA as the only viable path forward.

Yet it is unclear whether Congress should act on such claims of anticompetitive behavior. Rather than dismissing the consumer-focused analysis of the court, Congress may benefit by waiting for more evidence to accumulate on the risks and benefits of sideloading. Apple will soon allow sideloading on devices sold in Europe to comply with forthcoming European Union regulation. The EU's regulation will likely provide quantitative data on the cybersecurity risks that come from sideloading, as well as information about how consumers value the added security that comes with a closed system. If the data show few competitive benefits, litigation against app store owners under existing law could succeed with little need for an actual change to the law as courts consider new evidence.

This insight provides an update on the sideloading debate, as well as the efforts to pass legislation targeting application stores.

Judicial Decision

The 9th Circuit's decision in demonstrates the key focus of modern antitrust law: consumers. When a given business or practice is alleged to have violated antitrust law, reviewing courts examine whether consumers have alternative, substitutable choices and whether seemingly anticompetitive practices generate benefits for competition and consumer choice. Here, the court used this analysis to answer two questions: Does Apple's application store constitute a single-brand aftermarket (i.e., the App Store being a separate market from other application stores due to the limitations placed on the iPhone) and whether banning sideloading is an unreasonable restraint on trade.

On the first question, the 9th Circuit explained that when consumers make a knowing choice to restrict their aftermarket options, single-brand aftermarkets generally do not constitute an individual market because consumers have a choice in the original market. That is, if a consumer purchases an iPhone, it is assumed that he has consented to the rules of the Apple App Store, and that the two constitute a single choice. As a result, courts look to factors such as whether aftermarket restrictions are generally known when making the foremarket

purchases, whether significant switching costs exist, or whether the cross elasticity of demand undermines the proposed single-brand market. In this case, the court explained consumers generally do know of the application restriction when choosing to purchase an iPhone, and that indeed consumers make that choice willingly and do so knowing other brands without similar restrictions exist. In other words, consumers knowingly choose aftermarket restrictions, and thus the App Store isn't a "Single-Brand Aftermarket."

Even accepting Epic's broader market definition of mobile-games transactions (which Epic primarily participates in), Apple could still violate the law if within that market it imposes an unreasonable restraint on trade or illegally monopolizes a market. Even in these cases, courts generally allow firms to justify anticompetitive behavior by showing that the procompetitive justification for that behavior outweighs any potential harm, resulting in benefits to consumers. In this case, some costs could be passed on to consumers due to the restrictions Apple imposes, but improving security and privacy features is a direct response to consumer demand and used to differentiate its products from competitors. Even though rivals may struggle to compete, consumers are better off.

Relying heavily on this analysis, the court largely sided with Apple, determining that the firm didn't violate existing law by placing restrictions on sideloading and access to the App Store.

Potential Congressional Response: Open App Markets Act

Despite the ruling, a movement of antitrust reformers has questioned the merits of this consumer-centric analysis, especially for large technology firms' significant market capitalization. Specifically concerned with the mobile application sector, a bipartisan group senators introduced OAMA in the last Congress which would require firms such as Apple to allow access to mobile operating systems without going through the operating system's own application store. While the bill gained significant momentum and moved out of the Senate Judiciary Committee, the push largely stalled due to both cybersecurity concerns and the fact that OAMA was tied to more controversial bills.

With the 9th Circuit Court's decision further condoning Apple's conduct in the mobile application space, a renewed push to regulate the market could arise. While the cybersecurity concerns remain, and arguably have become more prevalent in light of hacks and breaches of different systems, Congress could simply choose to dismiss the procompetitive benefits of closed systems and make the determination that the size of Apple, regardless of competitive constraints, justifies intervention into the market. As it stands, the courts will provide little remediation for proponents of reform, so looking to legislation may seem like the optimal path forward.

If Congress moves on OAMA, it should carefully consider the same questions the court: What are the anticompetitive harms and are there benefits to justify those harms? Perhaps Congress may come to a different conclusion than the courts, but banning the practices without clear evidence about competitive effects risks harming American consumers.

Additional Data from Europe

Even if Congress wants to act, it should wait for more data to accumulate regarding the relative costs and benefits. The European Union recently enacted the Digital Markets Act, which among myriad other competition reforms essentially requires Apple to allow sideloading on their devices in Europe. Indeed, Apple announced it will allow sideloading in Europe to comply with the law.

Perhaps the court got the decision wrong, and the promised cybersecurity features do not help consumers or increase competition. If that is the case, quantitative data should soon be available from Europe supporting the conclusion of reformers. Not only could Congress use this data to support OAMA or similar legislation, a renewed antitrust case launched by the Department of Justice or Federal Trade Commission on app markets as a whole – rather than just video games as in the *Epic* case – could support its arguments using such data, obviating the need for such a law in the first place. If it isn't the case, and consumers in Europe are left with fewer options and increased risk of cybersecurity-related harms, it would suggest that the court made the right decision and the law need not be changed.

Conclusion

The 9th Circuit's decision in *Epic v. Apple* may spark future legislation targeting firms' mobile application store practices. Congress should be careful not to harm consumer benefits and choice in a rush to regulate large firms, especially as more data about potential costs and benefits of regulation will soon become available.