

Apple's Constraints on App Store Payment Methods Violate California Antitrust Laws, Judge Rules

Article By:

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Apple, Inc. has been enjoying a tremendous advantage in the highly lucrative gaming-app market. This is thanks to the immense popularity of Apple devices running the iOS platform and restrictions imposed by Apple barring merchants from steering iOS users to non-Apple payment options. Nor has Apple allowed merchants to communicate directly with users about alternatives to Apple's App Store for game-related purchases.

But U.S. Judge Yvonne Gonzalez Rogers' decision on Friday (Sept. 10, 2021) has taken much of the edge off that advantage, ruling in the case brought by video game maker Epic Games, Inc. that Apple's "anti-steering" restrictions are unlawful (*Epic Games, Inc. v. Apple, Inc.*, No. 4:20-cv-05640-YGR, N.D. Calif.). That's a blow to Apple that could cost it dearly, so it is likely of limited comfort that the judge found Apple was not a monopolist in any of the relevant markets alleged by Epic.

Defining the market in a complex industry can be highly technical and arduous, but it's a task that is often essential in evaluating antitrust claims. The judge said it is clear that "big tech" encompasses many markets and the market for mobile gaming transactions is one of many. It is a lucrative one, though, generating about \$100 billion a year. Epic argued that the relevant market was confined to application sales through the App Store, where Apple has no competitors. That is, Epic argued for a single-product product market (the App Store) definition. For its part, Apple maintained that the market includes the sale of all digital video games regardless of platform. Judge Rogers rejected both definitions of the relevant market, however. Citing the evidence presented at trial, the judge held that the relevant market was "digital mobile gaming transactions market, not gaming generally and not Apple's own internal operating systems related to the App Store."

Judge Rogers noted that most App Store revenue comes from mobile gaming apps, which account for 70% of all sales, and that revenue comes from less than 10 percent of App Store customers, primarily those who make in-app purchases. The judge added that 80 percent of App Store customer accounts generate no revenue, and the same percentage of apps are free on the store.

The judge acknowledged Epic's motives for bringing the suit; the company is successful in all other gaming markets – it generates more than \$5 billion a year – but regards Apple as an obstacle to better monetization in this flourishing space for sales through the App Store. However, Judge Rogers

concluded that Epic overreached in attacking Apple's oft-heralded market power. "While the Court finds that Apple enjoys considerable market share over 55% and extraordinarily high profit margins, these factors alone do not show antitrust conduct. Success is not illegal." If it were, Apple would be in big trouble – it generated \$274 billion in 2020. But, ultimately, Epic failed to show "that Apple is an antitrust monopolist in the submarket for mobile gaming transactions" in spite of its high market share. Nor did Epic demonstrate negative impacts on innovation, market entry, and output, the judge held.

But Epic was convincing when it came to Apple's conduct. "[T]he trial did show," the judge held, "that Apple is engaging in anticompetitive conduct under California's competition laws." Apple's conduct in enforcing anti-steering restrictions is anticompetitive, the court held, because it "hide[s] critical information from consumers and illegally stifle[s] consumer choice."

Ordering Apple to eliminate these requirements, Judge Rogers concluded, is a "measured remedy [which] will increase competition, increase transparency, increase consumer choice and information while preserving Apple's iOS ecosystem which has pro-competitive justifications."

Commentary

Such an outcome is only possible by a wholesale rejection of the expert testimony presented by the parties' economists. In the court's view, neither expert appropriately defined the area of effective competition that a proper market definition should reflect. Clearly, evidence that iOS users can make game-related purchases on other platforms from sources other than the App Store was a principal factor leading the court to reject Epic's narrative that the App Store is the sole source for such purchases and, thus, that Apple is a monopolist.

In other cases, where cross-platform purchases may not be possible, the result could be different. The outcome here illustrates that antitrust cases are highly fact specific. Epic has already filed its Notice of Appeal, so the appellate court will have an opportunity to opine, one way or the other, on whether the decision here was sufficiently supported by the evidence, or the judge made a clear error by defining a market that neither party had proposed.

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