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The Apple-Epic Saga and the Digital Markets Act

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The Digital Markets Act (DMA) came into full force on the 7th of March 2024. This entailed the submission of compliance reports by gatekeepers to demonstrate how they would implement their newfound obligations. For Apple, this includes the obligation of Art. 6(4) DMA, which states that "[t]he gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system".

As a result of years of global litigation, Apple had removed Epic Games' Fortnite from the iOS app store. However, due to Art. 6(4) DMA, Epic Games announced on the 16th of February 2024 that it would return to iOS with Fortnite and the mobile Epic Games Store, through a newly approved developer account for its Swedish subsidiary. On the same day that the DMA went into full effect, Apple deleted that same developer account. In support of its action, Apple noted that due to Epic Games' contractual breaches, courts in the United States had authorised Apple to terminate any or all accounts owned by or affiliated with Epic Games.

In light of the required DMA compliance, European Commission officials requested explanations from Apple on the 7th of March. The next day, Internal Market Commissioner Thierry Breton, announced on X "that following our contacts Apple decided to backtrack its decision on Epic exclusion." Following this commitment to the European Commission, Epic Games' developer account was reinstated.

Summary of events by Fabian Ziermann, PhD Candidate at Vienna University of Economics and Business

In this post, CREATe researchers explore what the recent developments between Apple and Epic Games signify for the broader digital ecosystem.

Magali Eben - Senior Lecturer in Competition Law – University of Glasgow

"The *Apple-Epic* saga is a protracted one, involving competition law complaints and court proceedings on both sides of the Atlantic. The DMA has added another dimension to this battle: enabling Epic to claim that Apple needed to allow it access to iOS without having to rely on formal decisions or judgments. Even before it has been fully tested by the European Commission (and in court), the DMA is changing business strategies in digital services. The Commission seems to have taken quite a critical stance towards the proposals of gatekeepers to comply with the DMA – including those offered by Apple. This is evidenced not only by this back-and-forth between Apple, Epic, and the Commission – but also by the announcement on 25 March that it will investigate Apple for non-compliance with different obligations under the DMA. It remains to be seen how far Apple's changes must go – and how convincing its claims of security and privacy. Still, it may be wrong to portray the Apple-Epic battle as one of David vs Goliath, given Epic's importance in the games industry. Perhaps it's the battle of Gatekeeper vs Goliath, and the DMA will be enforced to the benefit of all? Only time will tell."

Ayse Gizem Yasar - Assistant Professor (Education) - LSE Law School

"The issues that we are now seeing about DMA compliance are not dramatically different from the old chestnut of how to design effective remedies under competition law. The DMA puts an end to certain practices but leaves design choices largely to the gatekeepers when it comes to compliance. If we have learned anything from Microsoft antitrust cases in the EU and the US it is that effective remedies are far from easy to design, even for competition authorities. To make matters even more difficult, gatekeepers can only be expected to design compliance methods with their own interests in mind. Hence, I do not expect the dust to settle anytime soon. It is likely that

we will see more Apple/Epic style battles royale, and more compliance proceedings by the Commission, be it on its own initiative or at the request of gatekeepers under Article 8(3) DMA."

Konstantinos Stylianou - Professor of Competition Law and Regulation – University of Glasgow

"Apple is playing a strategic game here. It knows that blocking Epic's account would not go unchallenged; the European Commission has moved too swiftly and too forcefully with the implementation of the DMA to leave any doubt that it takes compliance seriously and that it will dedicate the necessary resources to it. But by introducing friction into onboarding of competitors it sends a signal to the industry that it will make it as costly as possible for them by raising uncertainty around their business plans, lowering their reliability in the eyes of users, and introducing high fees. This is "malicious compliance." But this is likely to be a losing battle. The DMA contains explicit prohibition against behaviour that undermines effective compliance, and the rule is so broadly phrased ('regardless of whether that behaviour is of a contractual, commercial or technical nature, or of any other nature') that it practically gives the Commission unlimited margin to find any half-hearted compliance against the spirit of the DMA. Then again, it was to be expected that Apple would not go down without a fight – not being a team player is its signature move."

Kristofer Erickson - Professor of Social Data Science – University of Glasgow

"Everything old is new again. Just as voice over IP became a flash point for competition in the early days of the smart phone, the multiplication of the platform business model heralds new challenges for tech regulation. In a world where there are many competing software platforms, the most consequential battlegrounds for competition are likely to be access to physical devices, and infrastructure (spectrum and compute). The ability for metaverse developers to access users across different device ecosystems without being subject to fees will likely spur innovation and competition. Allowing Skype on the first-generation iPhones didn't mark the end of Apple's profitable new product line. Instead, it unlocked a torrent of new value cases for smartphones and propelled Apple to a $1 trillion market cap by 2018. Indeed, it is hard to imagine a smartphone environment that didn't permit transfer of messages and calls over third-party apps.

The willingness of EU authorities to enforce openness on devices suggests that the lead time for incumbents to charge for access may become shorter. As next-generation devices become platforms-of-platforms, incumbents and new entrants will need to adopt new strategies and business models to attract customers and generate value.

Interoperability, rather than walled garden architectures, may encounter more favourable trade winds."

Amy Thomas - Lecturer in Intellectual Property and Information Law – University of Glasgow

"On the face of it, the crux of the dispute from an IP lawyer's perspective is quite simple: what are the legal conditions under which Apple can licence the use of its app store to other users? Are Apple obligated to continue to licence the use of their software to 'bad actors' who break their licensing terms?

Epic have persistently attempted to reduce or subvert Apple's 30% fee cut for in-app transactions, which they describe as an 'exorbitant' amount. This is an obvious legal target for Apple (and is supported by the US's district court decision) but has been further compounded by Epic's 'catty' email exchanges, social media clapback's, and alleged 'smear campaigns'. Indeed, Apple relied on this broader pattern of 'untrustworthy' behaviour and breach of contract as authority for the initial ban of Epic's new developer in the EU.

But following the reversal of this decision, Epic have instead been painted as the unlikely challenger and Apple as the 'medieval feudal lord'. Given Epic's history of predatory microtransactions and sketchy data protection compliance, it is rare to see them win in the court of public opinion. Are Epic pursuing Apple and critiquing their DMA plan in the interests of consumer welfare? No – it is almost exclusively in the interests of maximising their own profits."

Sevra Guzel – Lecturer in Law – Bath Spa University

"By wielding its regulatory teeth, the DMA facilitated a pivotal outcome, prompting Apple to reverse its stance and allow Epic Games to reintroduce Fortnite and its game store on iOS devices in Europe. The reinstatement of Epic Games' developer license in Europe by Apple is welcomed as a demonstration of the DMA's early effectiveness. Excitingly, this development also highlights the active role of the Digital Services Act (DSA) in regulating platform behaviour. This can be seen from the European Commission's statement which suggests a broader scope for its investigation, in particular, DSA.

As someone who specialises in platform regulation research, I find the DSA perspective on this development particularly interesting. The DSA mandates that platforms exercise moderation in a diligent, objective, and proportionate manner. The indefinite ban imposed on Epic by Apple raises questions about compliance with this proportionality

standard. By taking proportionality as the main principle, the compliance of the ban with DSA and in a larger scale, with freedom to conduct a business, is something worth exploring. Also, the potential for this to set the stage for the Brussels effect is exciting."

Weiwei Yi – PhD Candidate – University of Glasgow

"The Epic vs. Apple case appears to be yet another instance of Apple's efforts to erect barriers against competitors and evade the obligations imposed by the DMA. Another related strategy involves the utilisation of dark design patterns[1] aimed at dissuading users from engaging in sideloading. Recent investigations have uncovered Apple's use of dark patterns within its user interfaces, imposing unreasonable burdens on consumers attempting to sideload apps from external sources. Consumers have reported that, through the newly proposed Apple flow, installing an app via sideloading requires navigating through 15 clicks, including repetitive pop-ups for potentially groundless security checks and warnings, likely discouraging users from opting for sideloading.

Although dark patterns are commonly associated with issues of data privacy and consumer protection, the Apple case illustrates how these patterns, and the broader power of platforms to design online choice architecture, can undermine effective competition. This manipulation directly exploits users' cognitive biases, representing a form of market failure on the consumer side that is often less attended by competition law."

Fabian Ziermann – PhD Candidate - Vienna University of Economics and Business

"In Fortnite, players improve their skills by limit-testing their abilities, as well as what the game permits. Apple similarly limit-tested the Commission by deleting Epic's developer account. How far can we go? What kind of reaction will this provoke? Will the Commission react swiftly, or can we drag this out?

It was important for the Commission to react swiftly and decisively, leaving no leeway, especially as Apple had removed a competing Appstore, i.e., a potentially major direct competitor, since gaming accounts for a significant portion of Appstore revenues. This probably included the mention of the more deterring fine of 10% of worldwide turnover, rather than the 'mere' € 1.8 billion for its music streaming abuse. Moreover, Apple's reliance on U.S. court rulings shows once again that European digital regulation prevails over slower-paced U.S. efforts.

[1] Dark patterns refer to tactics employed by designers on websites and applications to manipulate choice architecture and user experience, nudging users towards decisions that benefit the designers but often to the detriment of users.

However, it is paramount to remember that this is not a case of David (Epic) vs. Goliath (Apple). In many ways, Epic is just as monopolistic in its gaming ecosystem, and it is long overdue for the Commission to take on the gaming gatekeepers that have so far flown under the radar, i.e., expand the applicability of the DMA."

Bartolomeo Meletti – CREATe Creative Director – University of Glasgow

"On the Fortnite island, gamers incessantly battle until there is only one player standing. In the EU, Epic Games has just won the latest fight in its feud with Apple. They used a new weapon: Art. 6(4) DMA. In a parallel IP universe, another clash is taking place. Major copyright and trademark owners are competing to reach Fortnite's player base. In the game, players can attend virtual concerts by music superstars, or watch an exclusive preview of an upcoming film. They can buy and dress their avatars with cosmetic items based on the IP of competing rights holders. These include Marvel (Disney) and DC (Warner Bros), with whom Epic also published comic books (see here and here). Entire game modes are built on high value third-party IP, such as LEGO® Fortnite® or the upcoming "entertainment universe" in collaboration with Disney, which intends to invest $1.5 billion to acquire an equity stake in Epic. Is Fortnite just a game or a platform where rights holders compete to conquer the popular virtual island? Would the latest deal with Disney (subject to regulatory approval) be the end of that competition? Competition and IP lawyers will continue to follow Epic deeds with interest."

Stefan Luca – Postdoctoral Researcher – University of Glasgow

"The Epic Sweden incident has the hallmarks of content moderation: the developer account was probably approved automatically, then removed following a more detailed review, only to be re-instated after regulatory indignation. How to square marketplace fairness with desirable content moderation? A week before, the US Supreme Court wrestled with whether state laws seeking to restrict platform moderation would apply to Etsy or Uber. In the EU, commercial relations between Apple and developers fall under the DMA, carving out third-party app marketplaces on iOS, and substantively restricting App Store rules, e.g. by requiring alternative payment methods. Conversely, App Store policies, e.g., banning pornography and realistic violence, persist under the DSA, subject to VLOP procedural and transparency obligations.

The Epic incident illuminates the limbo in which Apple places developer accounts, necessary both to run independent app marketplaces under the DMA, and to gain access to the App Store. Granularity about account-level enforcement in the DSA transparency database was one of CREATe 's recommendations to the Commission. There are further

shortcomings in applying DSA transparency to marketplaces and understanding Apple's relations with developers. Searching today for App Store moderation returns a deluge of reviews (113974), with a few ads (148) and apps removed (386). While developer bans cannot be directly searched, we find 23 app removals accompanied by termination of the developer's account. Interpreting the DSA narrowly, Apple doesn't appear to be reporting on the apps and updates it rejects, even though it applies the same rules as for app removals."

Seeds for Future Reflection:

This episode between Apple and Epic Games, catalysed by the DMA, hints at a future where tech giants must navigate the balance between competitiveness and regulatory compliance. How will the implementation of the DMA influence the strategies of other tech giants? Are there potential unintended consequences of the DMA that could impact the digital market's ecosystem? As the digital landscape continues to evolve, the impact of such regulations on the industry's competitive dynamics, consumer rights, and the fabric of digital ecosystems have the potential to be profound. This case might not only reshape the relationship between developers and platform owners but also sets the stage for ongoing discussions about the role of regulation in tech innovation and market fairness.

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