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# Apple v. Pepper: The Unintended Fallout in Europe

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## I. INTRODUCTION

In *Apple v. Pepper*,[1] the US Supreme Court (hereinafter the Court) held that iPhone users were direct purchasers of apps from Apple, which, according to precedent set by *Illinois Brick v. Illinois*,[2] made them the proper plaintiffs to sue Apple for antitrust damages. The damages were the result of Apple's alleged monopolization of the app distribution aftermarket through imposing a supra-competitive 30 percent commission fee to the price of each downloaded app.

The case was closely watched because the Court's decision controlled whether plaintiffs could proceed with the substantive issues in their complaint, namely whether Apple is a monopolist and whether it has monopolised the app distribution market. The decision was positively received by the public, for it gave standing to consumers against big tech, but scholarly commentary has been more reserved and even critical.

This note adds to the ongoing debate on the case by showing how the Court's decision, whose effects are seemingly confined in US antitrust law, can have an impact on EU competition law and its enforcement. The two ways by which the case can have an unanticipated fallout in Europe relate to the Court's implicit rejection of indirect purchasers' right to claim damages, and the Court's implicit designation of Apple as an intermediary instead of an agent of app developers.

## II. BACKGROUND AND CASE SUMMARY

The case concerns standing in antitrust litigation, and in particular whether users buying apps from Apple can sue Apple for alleged monopolisation of the application distribution market (App Store). The answer depends on whether users are considered to be direct purchasers from Apple, in which case they can sue, or whether the direct purchasers are the application developers, in which case users cannot sue.[3]

Apple has been selling apps on its retail App Store since 2008. The App Store is the only avenue through which users can download apps compatible with Apple devices. To sell an app on the App Store, developers pay Apple a $99 annual membership fee, and Apple further charges a 30 percent commission on every app sale. App developers, not Apple, set the final price users will pay.

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[1] *Apple v. Pepper*, 587 U.S. _ (slip op. 2019).
[2] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
[3] In the words of the Court "[t]he sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were 'direct purchasers' from Apple," *Apple* (n 1) 4, citing *Illinois Brick* ibid 745-746.

In 2011, four iPhone owners sued Apple alleging that Apple has unlawfully monopolized the iPhone apps aftermarket.[4] It has done so by locking iPhone owners into buying apps only from Apple and by making them pay a supra-competitive price which includes the 30 percent commission. They claim that the only reason why Apple can charge such a high commission is because it is a monopolist, and that the 30 percent commission is "pure profit" for Apple since in a competitive environment with other retailers "Apple would be under considerable pressure to substantially lower its 30% [sic] profit margin."[5]

Apple argued that the iPhone owners were not direct purchasers from Apple and therefore may not sue. It grounded this reasoning in *Illinois Brick*, a case where the Supreme Court held that only direct purchasers may sue antitrust violators. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not direct purchasers from Apple because the app developers, not Apple, set the consumers' purchase price. The Ninth Circuit reversed, ruling that the iPhone owners were direct purchasers under *Illinois Brick* because the act of downloading apps from the App Store is tantamount to purchasing directly from Apple.[6]

The Supreme Court agreed with the Ninth Circuit. It found that "there is no intermediary in the distribution chain between Apple and the consumer" and that therefore "[t]he iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator" and that "[they] pay the alleged overcharge directly to Apple."[7] It also upheld the validity of *Illinois Brick*, and therefore ruled that, since users are direct purchasers from Apple, they can sue Apple for monopolization. The Court did not touch on the questions of whether Apple is a monopolist or whether it monopolised the market; these were left for the District Court to decide.

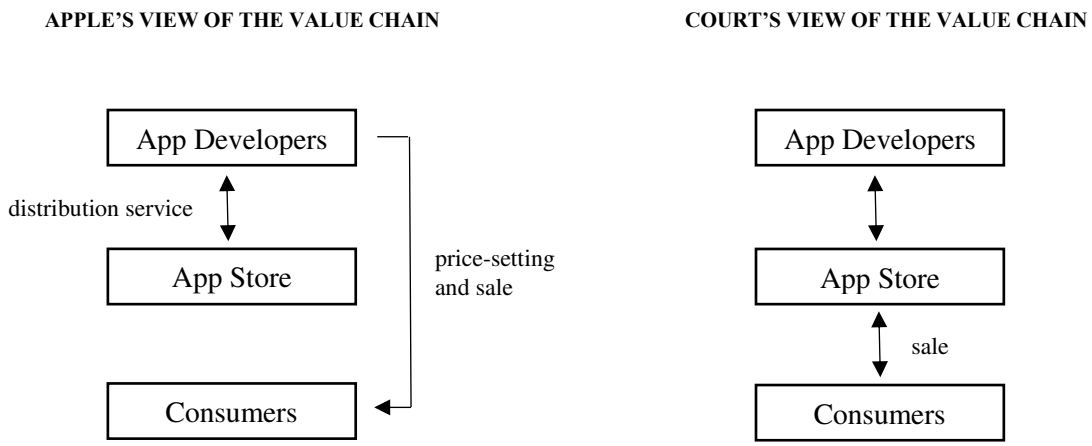


*Figure 1: The different value chain models showing Apple's relationship with developers and consumers.*

[4] Petition for Certiorari, *Apple v. Pepper*, at 53a.
[5] ibid 54a–55a.
[6] *In re Apple iPhone Antitrust Litigation*, 846 F.3d 313, 323-4 (2017).
[7] *Apple* (n 1) 6.

## III. THE CASE'S IMMEDIATE IMPACT

*Apple* became instantly popular. It fuelled the growing discontent against big tech and it was seen as a major victory against it.[8] Its important legal implications became quickly apparent too, although the Court's narrow language left questions on the case's scope of application.

As a first matter, the Court's decision that iPhone users have standing to sue Apple cleared the way for the case to proceed to the substantial question of whether Apple had illegally monopolised the iPhone apps aftermarket. The District Court never got to answer that question, because it ruled that users had no standing to bring a monopolisation claim in the first place.[9] The District Court's decision on that matter is highly anticipated as it will be the first case to discuss monopolisation in aftermarkets involving digital platforms,[10] and if the case makes it to the Supreme Court, it will be the first aftermarket monopolisation case since the landmark Eastman Kodak case almost 30 years ago.[11]

Secondly, the decision dispelled the confusion around the structure of online app distribution platforms like the App Store. At the heart of the case was the question of who transacts with whom when consumers buy apps created by developers but made available by other intermediaries. By determining that Apple has an antecedent relationship with developers and a direct purchase-seller relationship with consumers, the decision crystallised the structure of the app distribution value chain.

Thirdly, by specifying that the direct purchaser relationship between consumers and Apple is the dispositive one, the Court also at the same time rendered irrelevant the price-setting mechanism. One of Apple's key arguments was that it cannot be a monopolist vis-à-vis consumers, because it does not set the allegedly monopolistic price that underpins consumers' antitrust damages claim (see Figure 1). According to Apple, if the 30 percent commission is monopolistic, the first-in-line actors to incur it are developers, not consumers. The Court refused to adopt Apple's price-setting theory as the determinative one, because doing so would condone Apple's arrangement of contractual relationships in a way to shield it from antitrust liability from consumers.[12] To the Court, it should not matter whether Apple, as "a hypothetical monopolistic retailer might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself" or "pay nothing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $10 and keep 40 percent of the sale price; and then sell the product for $10, send $6 back to the manufacturer, and keep $4."[13]

Fourthly, for the same reason, namely that the dispositive factor was deemed to be that consumers bought directly from Apple, the Court's decision implicitly overruled the rule created in *Campos v. Ticketmaster*,[14] which emphasized the antecedent relationship between concert venues and Ticketmaster, and made them the direct purchasers, even though concert-goers (mainly) bought directly from Ticketmaster.[15] Apple argued that its market positioning vis-à-vis app developers and iPhone users was

[8] Rebecca Kelly Slaughter, 'You Should Have the Right to Sue Apple' *New York Times* (12 December 2018).
[9] *In re Apple iPhone Antitrust Litigation*, (Case No. 4:11-cv-06714) (N.D. California, 2013).
[10] See Andrew J. Heimer, Antitrust Treatment of Aftermarkets in the United States, 9th Seoul International Competition Forum (8 September 2016).
[11] *Eastman Kodak Company v. Image Technical Services*, 504 U.S. 451 (1992).
[12] *Apple* (n 1) 8-10.
[13] ibid 8.
[14] *Campos v. Ticketmaster Corp*., 140 F.3d 1166 (1998).
[15] Herbert Hovenkamp, 'Apple v. Pepper: Rationalizing Antitrust's Indirect Purchaser Rule' [2019] University of Pennsylvania Legal Scholarship Repository.

similar to Ticketmaster, but the Court did not respond to that argument, thereby implicitly overruling *Ticketmaster*.

## IV. THE UNINTENDED FALLOUT IN EU COMPETITION LAW

The effects of *Apple* are seemingly confined in US antitrust law, since the case concerns a procedural issue of the law's application. In fact, the standing rule created by *Illinois Brick* is idiosyncratic even for the US, both because it contradicts the black letter of the law, and because the rationale underpinning it, namely to guard against complexities of apportioning antitrust harm (and by extension claims to damages) along the value chain, seems today to have been an overstated concern. As a result, one would expect the case not to have direct bearing on other jurisdictions. Indeed, in the EU, the rules for standing are simplified and create a universal right to claim damages regardless of one's position in the value chain. Article 3 of the Damages Directive provides that "any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm."[16]

Despite the seeming insulation of one jurisdiction from the other on the issue of standing, the decision in *Apple* creates spill-over effects for EU competition law. These stem not so much from what the Court said, but from what the Court did not say. Specifically, the Court's implicit rejection of indirect purchasers' right to claim damages, and the Court's implicit designation of Apple as an intermediary instead of an agent of app developers foreshadow friction between the two jurisdictions and tension with EU competition law's enforcement. I address the issues in sequence below.

### Fragmentation and Strategic Manipulation of Antitrust Proceedings

The first side-effect of *Apple* comes as the result of the Supreme Court's choice to uphold the rule in *Illinois Brick* barring indirect purchasers from pursuing antitrust damages. By doing so, the Supreme Court perpetuates the schism with the EU and complicates recovery of damages when global platforms are involved.

The case was handled as narrowly as possible to address only the very specific question of "whether [iPhone owners] are proper plaintiffs for this kind of antitrust suit—in particular, [the Supreme Court's] precedents ask, whether the consumers were 'direct purchasers' from Apple."[17] The Supreme Court reached a "straightforward conclusion" by reading Section 4 of the Clayton Act, which provides that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue … the defendant …" (emphasis in the original) as "readily cover[ing] consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer."[18]

With such an emphatic reliance on the black letter of the law, one must wonder, then, why the Supreme Court did not avail of this opportunity to allow the black letter of the law to develop its full meaning, and include truly *any* person to sue, both direct and indirect purchasers no matter how far removed from the

[16] Directive 2014/104/EE of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349).
[17] *Apple* (n 1) 4.
[18] ibid.

first-in-line actor to incur harm. There are various reasons why the Supreme Court could and should have distinguished—or even overruled—*Illinois Brick* and bring its practice in line with the more reasonable EU rule.

For one thing, the rationale behind *Illinois Brick* has lost some of its original authoritativeness. *Illinois Brick* aimed to prevent double (or multiple) recovery of damages for the same antitrust violation, and to bypass the complexities of apportioning antitrust damage along the value chain.[19] By creating a simple rule, it vested the claim for antitrust damages to the first-in-line actor to incur them. However, as the Court noted in *Apple*, damages claims and damages calculations are commonly complicated and often require expert testimony, but this is hardly unusual for antitrust cases.[20] Therefore, there was no imperative reason to shy away from the exercise of apportioning damages, which would clear the way for indirect purchasers to be able to sue too.[21] Moreover, Apple's fear that not limiting standing to only one group of actors would open the door to "conflicting claims to a common fund—the amount of the alleged overcharge"[22] is also unfounded because each group would have a separate legal basis to pursue damages; therefore any stacking claims would not be duplicative.[23] While the Court used this argument to suggest that developers, as well as consumers, could sue Apple—both as direct purchasers just on different grounds—there is no reason not to use the same argument to allow any other actor, even those indirectly harmed, to sue for their share of damages.

Secondly, by insisting on allowing only direct purchasers to sue for antitrust damages, the Court downplayed its own prior case-law in *Ohio v. American Express*, where it treated platform markets as one single system and acknowledged the interdependence of the two sides.[24] The Court in *American Express* already recognised the interdependence of the two sides due to "indirect network effects"[25] and due to the fact that platforms "facilitate a single, simultaneous transaction between participants."[26] Taking this to its logical extension would support an argument by which in platform economies the interacting economic actors are intertwined in such a close fashion that the direct-indirect distinction ceases to be determinative.[27]

Thirdly, the Court would be in good company to dispense with the arcane rule in *Illinois Brick*, as it would be joining the EU, several US states, and advisory bodies that have all opted for the equal treatment of direct and indirect purchasers: In the EU, as mentioned, Article 3 of the Damages Directive allows "any natural or legal person who has suffered harm caused by an infringement of competition law" to claim damages, and precedent has reiterated time and again that this includes direct and indirect

[19] William M Landes and Richard A Posner, 'Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick' (1979) 46 University of Chicago Law Review 602.
[20] *Apple* (n 1) 12-13.
[21] Bartlett H McGuire, 'The Passing-on Defense and the Right of Remote Purchasers to Recover Treble Damages under Hanover Shoe' [1971] University of Pittsburgh Law Review 177. See contra Bruce Kobayashi and Joshua D Wright, 'What's Next in Apple v. Pepper? The Indirect Purchaser Rule and the Economics of Pass-Through' [2019] Cato Supreme Court Review (forthcoming).
[22] *Apple* (n 1) 12 citing *Illinois Brick*, (n 2) 737.
[23] *Apple* (n 1) 13.
[24] *Ohio v. American Express*, 585 U.S. _ (slip op. 2018).
[25] ibid 3.
[26] ibid 13.
[27] See also Brief for Verizon Communications as Amicus Curiae Supporting Neither Party, No. 17-20, Apple v. Pepper, 5-9; Geoffrey Manne and Kristian Stout, 'In Apple v Pepper, SCOTUS Leaves Home Without Its Amex' (*Truth on the Market*, 13 May 2019).

victims.[28] Similarly, more than 20 US states have adopted or interpreted their antitrust laws to allow indirect purchasers to sue,[29] which means that for the same conduct direct purchases can claim damages under federal antitrust law and indirect purchasers can claim damages under state law (assuming the conduct is illegal under both). Recognising the impracticality of *Illinois Brick*, and following the wave of state antitrust provisions to give standing to indirect purchasers, the US Antitrust Modernization Commission recommended that the rule in *Illinois Brick* be overruled "to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of the federal antitrust laws."[30] It did so because it found that "[d]uplicative federal direct purchaser and state indirect purchaser litigation imposes undue burdens on the judicial system and the parties, wastes resources, increases the risk of duplicative recoveries, skews the parties' incentives to settle, and hinders efficient global settlements."[31]

The continuing misalignment of US and EU rules on standing complicates antitrust enforcement when both jurisdictions are involved. The differences do not only lie in the barring of indirect purchasers in the US, they also encompass the unavailability of the passing-on defence in the US. Indeed, since indirect purchasers do not have standing and all damages are vested into the direct purchaser, defendants cannot raise a passing-on defence by which a direct purchaser limits their exposure to the defendant's alleged anticompetitive conduct by rolling over some of the costs further down the value chain. As a result, a single antitrust proceeding by which all damages in both jurisdictions are claimed is not possible.[32] This is true both for court and settlement proceedings, and it is particularly problematic in markets such as online app distribution, which are inherently global, and where damages can arise in multiple jurisdictions emanating from the same conduct.

Not only that, but the fragmentation of proceedings can be used strategically to exert pressure to the side that is most sensitive to multiple proceedings.[33] When damages claims can be litigated or settled under a single proceeding, the pressure is lower compared to the threat of multiple proceedings in numerous jurisdictions. For EU competition law parties, who otherwise enjoy a unified damages regime, the persistence of the *Illinois Brick* rule creates unnecessary complexity. Further, the unavailability of the passing-on defence in the US may skew incentives of defendants in terms of where they prefer to be sued. While it is difficult to estimate whether such incentives will mean greater or lesser involvement of EU competition law, in principle, any factor that facilitates using the law as a tool for strategising should be unwelcome.

**Apple as Intermediary and the Single Economic Entity Doctrine**

The second complication created by the decision concerns the Court's implicit designation of Apple as an intermediary in the value chain, instead of an agent of app developers. The distinction was key for the Court to establish the relationship between Apple and iPhone owners, since it refused to adopt Apple's

[28] See Manfredi v. Lloyd Adriatico Assicurazioni SpA, Joined Cases C-295 to C-298/04, 2006 E.C.R. I-6641; Courage v. Crehan, Case C-453/99, 2001 E.C.R. I-6323.
[29] Hovenkamp (n 15) 3.
[30] Antitrust Modernization Commission, Report and Recommendations 267 (2007).
[31] ibid 271.
[32] Cf Antitrust Modernization Commission (n 30) 271.
[33] Edward D Cavanagh, 'Illinois Brick: A Look Back and a Look Ahead' [2004] Loyola Consumer Law Review 1, 27.

"who sets the price" theory. The implicit treatment of Apple as an intermediary may have been a necessary premise in the Court's reasoning, but it also generates unaccounted for spill-over effects for EU competition law's single economic doctrine.

The Court's reasoning revolved around finding the dispositive element in determining standing as per *Illinois Brick*. Apple suggested that the dispositive element was who sets the allegedly monopolistic price,[34] whereas the Court decided that the dispositive element hinged on whether consumers, as plaintiffs, were the ones who transacted directly with the alleged monopolist. Once this was settled, the Court, needed to identify the actor with whom consumers transact directly. On that point, and without any analysis or explanation, the Court opined that "[i]t is undisputed that the iPhone owners bought the apps directly from Apple,"[35] which was functioning as a distribution intermediary between consumers and app developers, making Apple the proper antitrust violator as per *Illinois Brick*.

At first blush, it may seem indeed straightforward that consumers "bought the apps directly from Apple." But this is not at all undisputed as the Court suggested. Apple, in its brief, explicitly raised the issue of the structure of the value chain and specifically argued that "on the consumer-facing side of the platform, Apple acts as the developers' selling *agent*, as is typical in electronic commerce. This makes Apple a 'seller' in the same transactional sense that a travel agent 'sells' airline tickets (for airlines)" (emphasis added).[36] Apple was right to insist on the distinction: an intermediary is an entity that transacts directly with customers in its own name, whereas an agent is an entity that acts on behalf of its principal, as an "auxiliary organ," and simply facilitates the transaction between the principal and customers.[37] If Apple's argument that it functions as an agent had been accepted, it would mean that the dispositive contractual relationship is between app developers and app consumers—not between Apple and consumers—which would in turn imply that consumers could not sue Apple.

The actual answer on whether Apple is an agent or an intermediary is immaterial for the purposes of this note. It is certainly supportable that the relationship Apple has with app developers and consumers is one of agency, as it bears many of the characteristics that are traditionally associated with it (e.g. that agents sell on their principal's behalf, as Apple noted in its brief).[38] What is important to note is that the Court glossed over the question, implicitly took the position that Apple is an intermediary, and provided no guidance on how it reached that conclusion. By focussing only on the fact that consumers buy "directly" from Apple, without further engaging in a discussion on the distinguishing features of agents compared to intermediaries, the Court made an impactful, but utterly unsupported, choice.

The Court's choice will leave EU courts and authorities struggling to make sense of it and its impact as they grapple with the exact same issue. As is well established, for Article 101 TFEU to apply, the challenged agreement must be between independent undertakings; if the involved entities form a single economic entity, then Article 101 TFEU does not apply, and any antitrust action needs, instead, to be taken on the basis of Article 102 TFEU.[39] An intermediary, acting in its own name and serving its own interests, is most likely to constitute a separate entity relative to its suppliers (in this case, app

[34] Apple Pet. Cert. (n 4) 17-20.
[35] *Apple* (n 1) 4.
[36] Apple Pet. Cert. (n 4) 37.
[37] See *DaimlerChrysler AG v Commission of the European Communities* [2005] ECR II-3319, para. 85.
[38] See European Commission Notice on exclusive dealing contracts with commercial agents, OJ 139, 24.12.1962, p. 2921-62. See also Pinar Akman, 'Online Platforms, Agency, and Competition Law: Mind the Gap' (2019) 43 Fordham International Law Journal (forthcoming).
[39] Okeoghene Odudu and David Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' (2014) 51 Common Market Law Review 1721.

developers). Conversely, an agent, acting on behalf of its principals (in this case, app developers) and having aligned interests with them, is most likely to constitute a single economic entity with them. In effect, the Court's characterisation of Apple as an intermediary leaves Apple (and any other similarly situated firm for that matter) vulnerable to action for anticompetitive agreements, which are exceedingly common in the industry on the grounds of quality assurance, market strategy, limitation of free riding etc. This is not per se negative, but any such implication must be considered and weighted, rather mechanically come about, as was the case here. While EU competition law can adopt a different position, the Court's unsubstantiated position potentially creates a presumption and does nothing to clarify this position.

Moreover, as the EU's vertical agreements policy is due for revision in 2022, the *Apple* decision is likely to have an impact on it, particularly considering the lack of other landmark decisions on the issue on either side of the Atlantic. EU competition law analyses vertical agreements in line with the Vertical Block Exemption Regulation (VBER) which is set to expire in 2022 and revised rules will come into force.[40] Since VBER only applies when an agreement is in place, and agreements are understood to require at least two independent undertakings, the Court's choice to treat Apple as an intermediary points to the continuing applicability of EU's VBER rules on online distribution platforms. This may well be a valid legal choice, but it is one that should be taken consciously and after acknowledging the distinction between intermediary and agent as well as the relevant implications. Otherwise, EU competition law will sleepwalk into an impactful legal characterisation without ever engaging in the necessary analysis, which is what the *Apple* decision did.

## V. CONCLUSION

*Apple* will remain relevant for a long time. Since it paved the way for the monopolisation claim against Apple to proceed, it is inextricably tied with the underlying case, and being the first case to consider the issue of standing in platform economies it is bound to set a strong precedent. It now tasks the District Court with the difficult exercise of assessing whether consumers have indeed been overcharged and by how much.

[40] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (VBER), 2010 O.J. (L102) 1.