# Epic Games v. Apple: The Beginning of a New Technological Era

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**Abstract:** This study discusses the case of Epic Games v. Apple, which has become a topic of great interest in the fields of technology and antitrust law. In August 2020, Epic Games, the company that owns the popular video game Fortnite, released an update to its app on the Apple App Store that allowed users to make in-app purchases without using Apple's payment system, which violated the terms of the App Store developer agreement. As a result, Apple took Fortnite out of the App Store, which prompted Epic Games to file suit against Apple for antitrust violations.

It was not until May 2021 that the US court issued a ruling on this dispute.
We will now study the legal and strategic aspects of this case.

JEL: K21, K42
Keywords: Apple; Epic Games; in-app purchases; antitrust; alternative payment methods

# Content

# 1. Introduction

Fortnite is a video game developed by Epic Games that was released in 2017. Millions of players from all over the world have been drawn to it, making it a worldwide phenomenon. It is a battle royale genre game in which up to 100 players fight to be the last one standing on an island.

The game is known for its unique gameplay style and its eye-catching and colorful visual style, as well as making big collaborations with artists or influencers. Players can create and customise their characters and build structures using materials found in the game. The game also features social gameplay elements, meaning that players can play alone or in teams with friends or strangers.

The popularity of Fortnite has also made it possible for other games to include gameplay mechanics and social features that are comparable to battle royale. The game's influence on the industry is indisputable, and it has developed into a cultural phenomenon that has left the gaming industry and reached mainstream popular culture.

Fortnite has also been innovative in the way it has monetized the game. Although the game itself is free, players can purchase in-game items and customization skins using a virtual currency called V-Bucks. This business model has been extremely successful and has generated hundreds of millions of dollars in revenue for Epic Games.
Players don't need to spend money to enjoy the game, but those who do can obtain additional customization items to enhance their in-game experience.

The provocation by Epic was to offer users an alternative payment method for purchasing the game's virtual currency. Those who bought 1,000 V-Bucks through the App Store would pay $9.99, while those who bought through Epic would avoid the 30% tax that Apple takes from every in-app transaction and only pay $7.99. This second payment method violated the rules of the App Store, and therefore, Apple decided to remove Fortnite from the store. For the same reason, it was also taken down from the Google Play Store, which caters to users of Android smartphones.

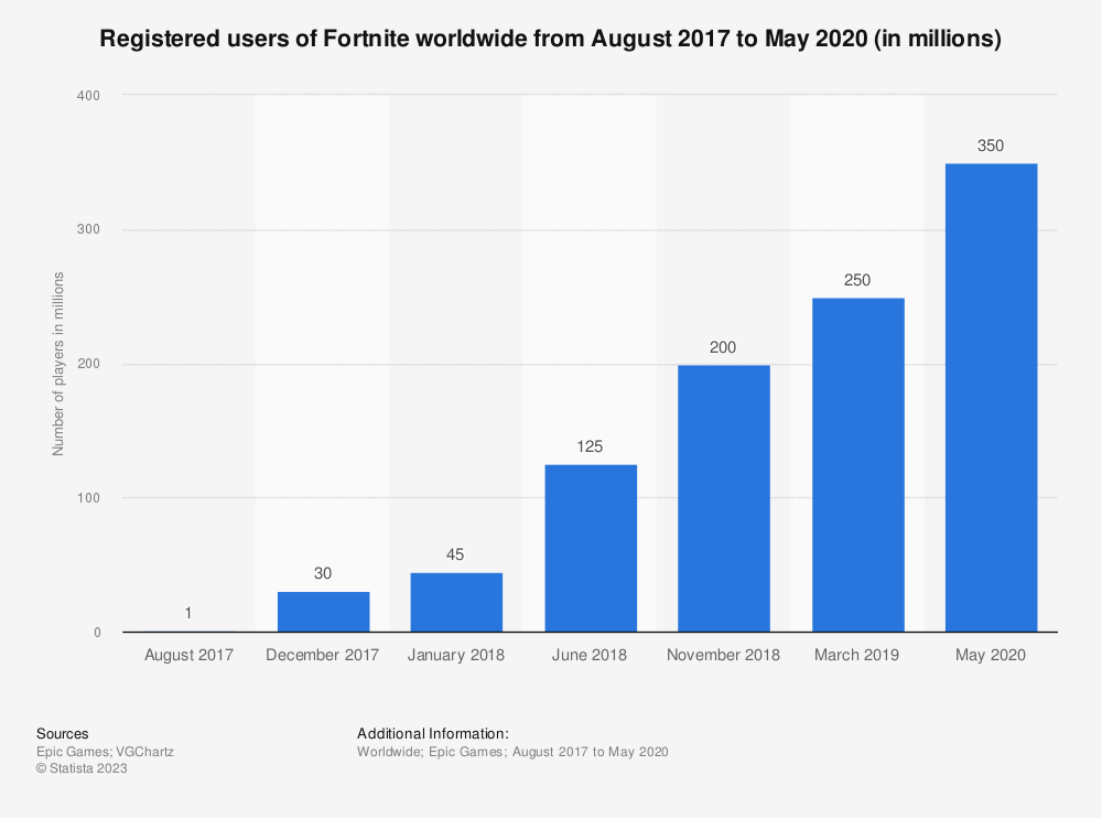
# 2. Analysis of the conflict between Epic Games and Apple

## 2.1. Precedent

Fortnite is a video game developed by the American company Epic Games that was released in June 2017. It was originally sold as an early access version with the single game mode "Save the World", which focuses on defending against hordes of zombies.

It was in September 2017 that Epic Games launched the "Battle Royale" mode. This mode aims to be the last player or team standing fighting against 100 players on a shrinking island. Unlike "Save the World", this game was free-to-play, which made it quickly become a worldwide success and one of the most played video games of all time.

**Figure 1:** Number of registered users of Fortnite worldwide from August 2017 to May 2020 (in millions)




Source: Statista, 2023

The success of Epic Games was also due to its way of monetizing the game. Although the game could be accessed completely for free, Epic launched the "battle pass," a rewards system that offers players the opportunity to unlock exclusive content such as dances, skins,

and other customizable items that do not affect gameplay but allow users to personalise their characters and show off their unique style in the game.

To unlock this pass, you need 950 V-bucks, so the most common purchase among players who wanted to buy the pass is the option of 1000 V-bucks for $7.99. This price will depend on the country from which the purchase is made, as for example, in Europe the price was €7.99.

The reasons why Fortnite's business model with the battle pass has been so successful are:

- Exclusive rewards, which can only be obtained for a limited time (during the 10 weeks of each Fortnite season).
- Increases player participation. To unlock battle pass levels, players need to complete missions, which incentivizes them to increase the amount of time they spend playing.
- In the case of completing the entire pass, besides getting 85 customizable items, you would also get a total of 1500 V-bucks, which made purchasing this pass really attractive. In the case of reaching level 77, you would have already earned 1000 V-bucks, so users could buy the next battle pass for free.
- Great collaborations. With the battle pass, besides getting original Fortnite skins, players have also been able to get some Marvel, NFL, John Wick, Rick and Morty, Batman, and other character skins.

In addition to being able to purchase this pass, other customizable items could also be directly purchased. These items are usually available for a limited time and are constantly updated.

According to an article by Rebekah Valentine (2021), Fortnite has generated a significant amount of revenue for the company in the years 2018, 2019, and 2020. In total, it generated over $9 billion between 2018 and 2019 across all platforms. In addition, Epic Games as a company generated over $5,6 billion in revenue in 2018 and $4,2 billion in 2019. The company generated $5,1 billion in 2020, surpassing the initial financial projections of $3,6 billion. Currently, Fortnite has 400 million registered users in total.

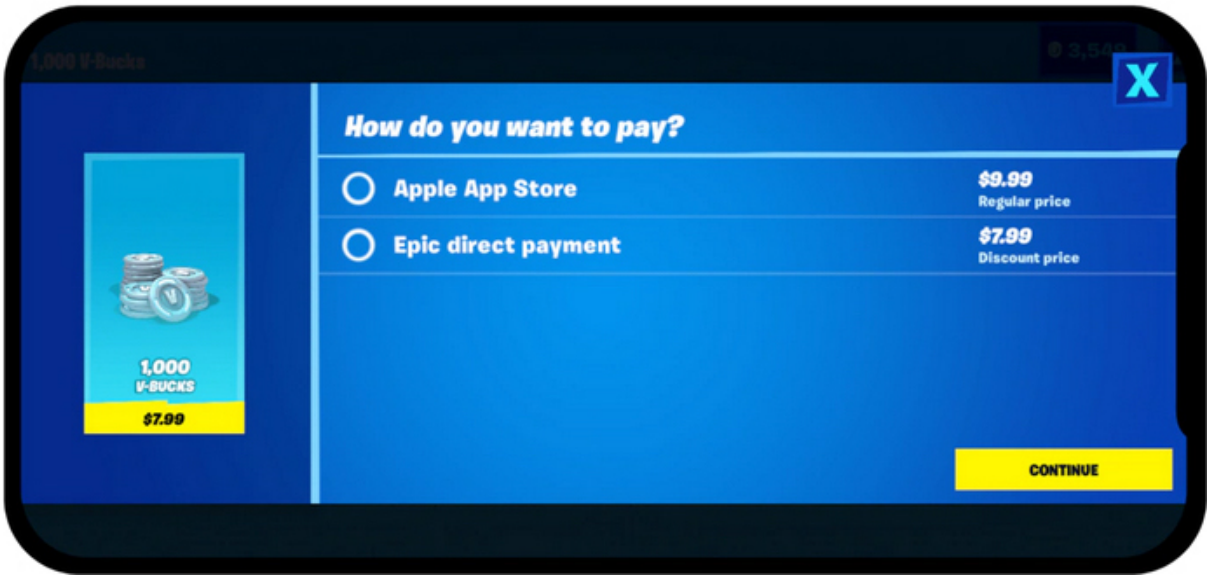
It was in mid-2018 when Fortnite Battle Royale was launched for iOS and a few months later for Android, as the variety of Android hardware is more extensive and consequently more difficult to make compatible for all devices.

The full version of Fortnite on iOS was a huge success, becoming one of the most downloaded and popular mobile games of all time. It also stood out as one of the first mobile games to offer cross-play with other platforms, meaning that iOS players could play with players on PC, console, and other mobile devices.

When the iOS version of the game was updated in August 2020, Epic Games included a direct payment mechanism that let players buy V-Bucks from Epic Games directly in-game rather than through Apple's App Store. This payment method was $2 cheaper than doing it through the App Store, as Epic Games was bypassing paying the 30% commission to Apple. This commission applies to all app purchases and in-app purchases made through Apple's App Store. In addition, developers agree to this commission when setting the terms and conditions for developers who want to publish their apps on the App Store.

Shortly after that update, Apple withdrew the game from the App Store for breaking their guidelines. As a result, Epic Games accused Apple for antitrust violations on the grounds that it was exploiting its dominating position in the app industry. They also filed another lawsuit against Google for the same reason.

**Figure 2:** Payment methods available in the Fortnite app on iOS after the August 2020 update




Source: Xataka, 2020

## 2.2. Relevant market analysis

Every antitrust case begins with determining the relevant market, which is referred to as the "area of effective competition" (FTC v. Qualcomm Inc., 2020). Furthermore, in order for the relevant market to exist, there must be both a geographic and a product market. (Hicks v. PGA Tour, Inc., 2018). According to United States v. Grinnell Corp. (1966), monopoly power is defined as "the power to control prices or exclude competition" and can be inferred from the defendant's dominant market share.

As stated in *Buccaneer Energy v. Gunnison Energy* (2017), a plaintiff cannot "arbitrarily choose the product market relevant to its claims" and disregard economic reality; rather, the plaintiff must define the proposed market in light of the rule of reasonable interchangeability and cross-elasticity of demand.

Defining the relevant product and geographical markets is the plaintiff's responsibility (Fount-Wip, Inc. v. Reddi-Wip, Inc., 1978). In order to meet this burden, a plaintiff must present specific evidence proving the proposed market definition is relevant to the particular legal issue being litigated. (Moore v. James H. Matthews & Co., 1977).

It is necessary to define both the geographic market and the product market in order to evaluate whether a company has monopoly power, since such power can negatively affect competition, and can be inferred from the defendant's dominant market share.

Before defining the regulatory market for both companies, we need to explain two key concepts: foremarket and aftermarket. These concepts are terms used in market analysis and refer to different stages in the supply chain of a product.

The "foremarket" refers to the primary or main market, that is, the market where the original or main product is sold. For example, the primary market for smartphones is the operating systems market, as it is what allows the phones to function. This market is competitive, meaning there are several vendors selling similar products.

The "aftermarket" refers to the secondary markets, which are the markets that develop after the sale of the main product. These markets focus on complementing, improving or maintaining the original product. For example, the secondary market for iOS applications

includes the market for app distribution and the market for payment processing. These markets are monopolised.

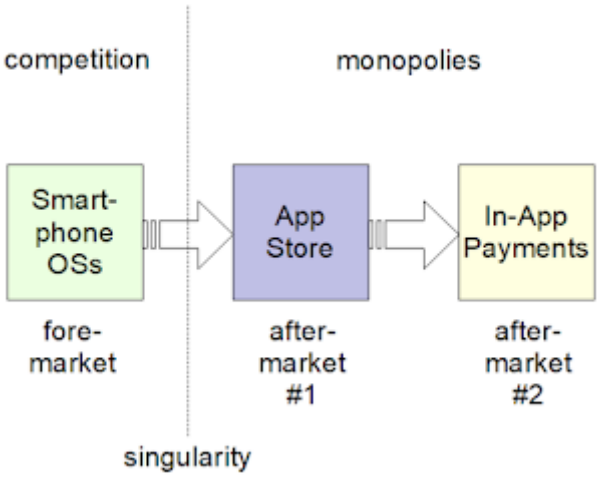
The Court stated that Epic Games "constructs a framework to argue that there are three separate product markets at issue" (Epic Games, Inc. v. Apple Inc., 2021). Epic Games refers to the product market in the foremarket as "Smartphone Operating Systems". According to Epic Games, two significant derivative aftermarkets that stem from this initial foremarket are the "iOS App Distribution" market and the "iOS In-App Payment Solutions" market. The market for iOS IAP solutions, in accordance with the complainant's arguments, is a submarket of the market for iOS app distribution, which is a submarket of the market for smartphone operating systems.

However, Apple argues that only digital game transactions are relevant to this case, which includes all transactions that have been made through any gaming platform for the purchase of items, unlocking of items or removal of advertisements.

**Epic Games arguments**

Epic Games claims to the Court the existence of two aftermarkets, an aftermarket for iOS app payment processing as well as an aftermarket for app distribution. The future of each depends on the evidence of a market for smartphone operating systems. Apple suggests creating a market for purchasing digital games. The Court presents each piece of evidence individually.

**Figure 3:** Structure of the mobile application market




Source: Fosspatents, 2022

The plaintiff argues that there is a market outside of the original market for four reasons, all of which are connected to the legal framework that is relevant to antitrust cases and explained in the legal section, which we will now analyse. The reasons are as follows:

1. The primary market and the secondary market are interconnected but distinct.
2. There are limitations in the secondary market that do not exist in the primary market.
3. Apple's dominance in the market arises from its closed ecosystem, not from independent agreements with consumers.
4. Apple's position in the proposed secondary market is not constrained by competition in the primary market.

Epic Games bases its argument that the iOS in-app payment processing aftermarket is a relevant antitrust market, however, Apple is maintaining a monopoly in the iOS distribution market, as apps can only be downloaded via its shop. This will lead to the payment method also being selected by Apple. The lawsuit has already been lost since Epic Games is unable to demonstrate that such a market exists.

Nonetheless, the Court responds to the argument because there is another important issue. An antitrust market must be defined in terms of the pertinent product.
There cannot be a market based on a product that does not exist, such as the mobile operating systems outlined above. The claim of the plaintiff raises the issue of whether IAP is a product.

The "in-app purchases" (IAP) system from Apple is a crucial component of the App Store ecosystem, enabling millions of users to buy digital content and services within their favourite apps with ease and security. This innovative system has been designed to facilitate various tasks simultaneously, ranging from the initiation of a purchase to the delivery of the purchased content to the end-user.

As the name suggests, in-app purchases allow users to buy additional content or features within an app, such as extra lives in a game or ad-free experiences. The IAP system handles the entire transaction process, from authorising the payment method to delivering the content to the user's device. It also manages revenue distribution, ensuring that developers receive their fair share of the profits.

One of the primary benefits of the IAP system is that it provides a seamless and trustworthy interface for users. Apple has worked hard to ensure that the system is reliable, secure, and

easy to use, which helps to build trust and confidence among its user base. Regardless of the developer, users can rely on the IAP system to handle all their purchases, streamlining the buying process and making it more convenient for users.

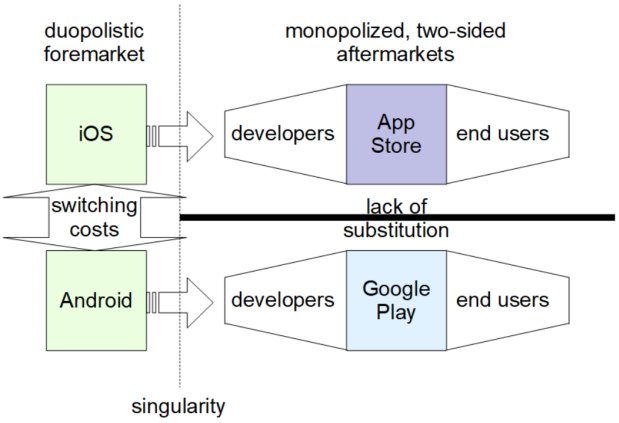
Another significant advantage of the IAP system is that it is not limited to the App Store. Apple has integrated it into several other stores, including iTunes Store, Apple Music, iCloud, and physical retail stores. This integration allows users to enjoy a consistent purchasing experience across multiple platforms and services, further enhancing the convenience and simplicity of the system.

It's worth noting that the IAP system has evolved over time, with Apple introducing new features and functionality to meet the needs of users and developers. However, the exact nature and scope of these changes are not always publicly disclosed, making it difficult to track the system's evolution accurately.

Apple uses third-party payment processors to handle the commission and money transfers between a developer, Apple, and the consumer.
Apple pays those processors between one and two percent of the volume of transactions in question.

To support its claim that Apple only matches developers with consumers, Epic Games overlooks these other capabilities. Apple has never claimed that the existence of this fee is due to the matching of developers and buyers. In fact, Apple claims that this fee serves to monetise its intellectual property against the full feature set, besides paying for 80% of all apps that are free and have no other direct source of revenue from developers other than the $99.00 annual developer fee.

**Figure 4:** Structure of the mobile application market in detail




Source: Fosspaterns, 2022

It was no small feat to develop a seamless system to oversee all of its online transactions. Apart from the ongoing updating of telephones to support more advanced apps, it required a significant investment to extend it to take into account the level of development.

The plaintiff's specialist acknowledged that under current e-commerce models, identical functions for other digital firms were not separate things. Even if IAP was optional, Apple would be entitled to a commission or licensing charge under all models. One aspect of the functionality can only be offered through payment processors. There is no proof that they are able to offer the balance. Accordingly, the Court concludes that the plaintiff has not established that in-app payment is a unique and distinctive product.

**Apple arguments**

Apple contends that the pertinent product market is the larger global market for digital video games. This product market is opposed by Epic Games. The Court sums up the information on international digital video gaming. Much of the evidence is personal to the plaintiff because of how the case was litigated.

The Court defines video games at the outset. Unfortunately, there is no consensus and neither side provided proof of a generally accepted industry definition.

Fortnite is commonly and internally recognised as a video game, thus The Court does not need to establish a specific definition of a video game or games notwithstanding the plaintiff's description of the game. Fortnite is promoted to the public by Epic Games.

**Evaluation of the conduct of Apple and Epic Games by the Court**

The court also thinks that the market should be delimited by gaming activities and not by apps that do not constitute video games.

Within the digital games market, four submarkets stand out:

1. Online mobile app transaction platforms.
2. Online gaming stores for personal computers, including online payment systems that are geared towards the distribution of video games.
3. Digital stores on consoles.
4. Streaming game services.

Apple (App Store) and Google (Google Play app store) are the two leading players in mobile gaming, with a number of other Android OS participants, such as the Samsung Galaxy (Samsung Galaxy Store). Importantly, mobile gaming is recognized as a separate business within the larger video game market in both independent and internal market surveys.

The available evidence suggests that the App Store is not the only platform competing in the realm of cross-platform Fortnite gaming. Other formidable platforms like PlayStation and Xbox also play a significant role in this arena, offering users a range of options to play the game and engage in transactions across different devices.

While cross-platform gaming and transactions are becoming increasingly common, not all video games are equally adaptable to multiple platforms. Popular games like Minecraft or Fortnite can be transferred and played on various platforms, but the majority of games remain platform-specific and leverage the unique capabilities of each platform in terms of graphics, processing power, and portability.

Industry participants have been slow to adapt to these changes, but recent developments suggest that they are starting to respond to the demands of the market and compete more effectively with larger gaming platforms. It remains to be seen how these changes will shape the gaming industry in the future, but the trend towards cross-platform gaming and the emergence of new competitors suggest that the landscape is rapidly evolving.

These platforms are in direct competition with each other for these in-app purchases since cross-platform games like Fortnite are playable on a variety of devices. Some users are simply signing into their mobile apps to make purchases, which suggests that the arrival of

mobile, particularly Apple and Android, may have impacted consumers' purchasing habits. Additionally, to put it another way, a great number of players continue to play on PC/Epic platforms as they always have while making purchases on other platforms like mobile since they may find them to be simpler and more convenient. This is accurate despite the fact that just 10% of daily active iOS Fortnite players are on iOS, and the majority of Fortnite players prefer playing on various platforms.

Some other platform owners have implemented significant policies addressing cross-play and cross-wallet restrictions in reaction to this same scenario, in which players play on one platform but make purchases on another. For instance, Sony has a cross-play strategy that rewards it when customers spend money on other platforms but mostly use the PlayStation platform to play games. In the meantime, Sony and Switch have implemented regulations that restrict cross-platform wallet capability. Apple, in contrast to some consoles, does not mandate pricing parity, therefore developers are able to charge more for in-app content in apps that are downloaded from the App Store than for the same content that is offered on other platforms.

The market for the relevant product does not currently seem to be large enough to cover all platforms, notwithstanding the possibility of convergence of competition among these policies and cross-platform games in the future. This is especially true in light of the separate submarkets for console, PC, and mobile gaming that were mentioned above.

The Court has decided not to regard either the device or the service as a component of the relevant product market for mobile gaming purchases due to the lack of additional proof in the legal records and the upcoming release of the Nintendo Switch and game streaming platforms. While the available records may not yet indicate that these products have a tangible presence in the relevant market, the Court acknowledges that they represent a form of market entry into the mobile gaming industry. Whether these newcomers will challenge the dominance of Apple and Google remains to be seen, and it will require the input and feedback of consumers and developers in the coming years.

## 2.3. Game theory applied to this case

Game theory is a branch of mathematics that uses simple games to analyse, explain, and predict the behaviour of agents in different situations or scenarios. This field has contributed to a better understanding of human behaviour in decision-making.
In the case of Epic Games v. Apple, game theory can be applied to analyse the relationship between the two companies and how the decisions they make affect their relationship and their position in the market.

We can apply several games to explain the behaviour of the competitors:

- Prisoner's dilemma. In this game, the two companies can either cooperate (reach an agreement) or not cooperate (take the case to court).
  If they cooperate, they both benefit from an agreement, which reduces costs and saves all the expenses of the legal process (including possible compensation). In the case where one cooperates but the other does not, the company that does not cooperate will maximise their profits, while the other will reduce theirs.
  If both do not cooperate, they will end up going to court, so neither of them will have any advantage.

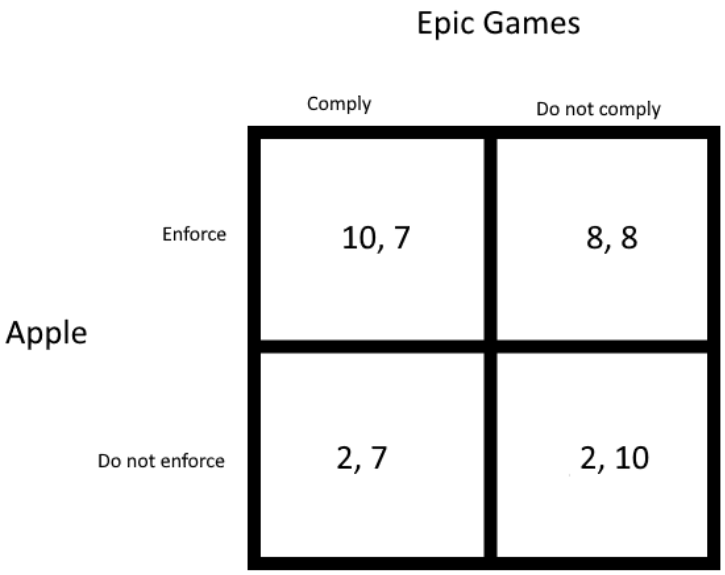
- Chicken game. In this game, both players face a dilemma in which each must choose between defending their position or yielding to the other player.
  Both companies have a safe option (yield) and a risky option (continue). If both companies choose the safe option, there will be no conflict. However, if one of the two companies chooses the risky option while the other chooses the safe option, the company that chooses the safe option will win. If both choose the risky option, there will be a clash, and both will suffer negative consequences.

After the popularity of the case, Cornell University in New York decided to make a publication on its digital blog about the application of game theory in the case of Epic Games v. Apple. To model this scenario where the players are Apple and Epic Games, Cornell University (2021) created this game:

> Apple, as the owner of the App Store and the iOS operating system, will be able to enforce the use of its payment system by users of these devices, but it could also choose not to enforce it. Epic Games, on the other hand, will have the option of

complying with Apple's payment system, but it will also have the option of not complying with it, as it did. The payment matrix for this game will be as follows:

**Figure 5:** Payoff matrix in the Epic Games v. Apple game




Source: Cornell University, 2021

With regard to payments, we can attribute them to actual, simplified payments from both companies. If Apple forces users to use its payment system while Epic Games complies, Apple will get a 30% commission for every purchase that users of Fortnite or other apps make. In this way, Apple will maximise its profits while Epic will pay 30% of in-app purchase revenue to Apple and reduce its profits.

If Apple enforces and Epic Games complies or if Apple does not comply and Epic complies the situation will not cause any major problems. In the second case, Apple would lose a large amount of revenue, as app developers will incentivise users to use the payment sites that have the most profit for developers, although it is likely that some users will continue to use Apple's payment system even if they have an incentive to use the alternate payment method, so Apple will have a payout of 2 and not 0. (Cornell University, 2021)

When Apple enforces and Epic Games does not comply, it will make the situation more complicated. In this article, it is presented as follows:

Apple won't get any revenue from purchases made by Fortnite users, although they will get revenue from in-app purchases. As they will only lose a small part of their revenue, they were allocated a payment of 8.
As it was likely that Apple would remove the app from the App Store, the payment that would belong to Epic would be 0, however, if Apple decides to do so, Epic will have the ability to sue Apple for compensation. In the worst case scenario, Epic would only have to pay out the revenue that Apple would have earned from the 30% commission.

In the real situation, as we will see later, Epic Games will have to pay Apple the overdue payments, but now Apple can no longer prevent Epic or other iOS app developers from charging for their own payment methods, so Epic Games may feel that the outcome has been favourable. If Epic does not have to pay 30% of its iOS revenue to Apple, the costs incurred by its "act of rebellion" will be quickly offset.

While the payouts received by the companies in this game cannot be established exactly, the important thing will be to enforce a strictly dominant strategy for Apple and not to enforce a strictly dominant strategy for Epic Games. Regardless of the strategy Epic chooses, enforcing offers Apple a higher return than not enforcing. Similar to that, not complying always provides a greater reward for Epic than obeying. (Cornell University, 2021)

In this game, we find the Nash equilibrium (that is, the situation in which each player has chosen a strategy that is optimal for them, given the strategies chosen by the other) when Apple enforces and Epic Games do not comply.

Based on the results of this game, we can propose another one that relates to the market and consumers. This game can help us understand consumer behaviour.

In this game, Epic Games has two options: sell through iOS or any other platform (PlayStation, Xbox or PC). Fortnite is a cross-platform game, which not only means that players can play together regardless of the platform they are playing on, but also that players can access their accounts, progress, and even their V-Bucks on any platform they play on, making the game very accessible.

Therefore, if a consumer plays on multiple platforms, they will always pay through the cheapest one. Even if they want to play exclusively on iOS, but have multiple devices, they could use their other device exclusively to add V-Bucks more economically.

Thus, the following payoff matrix is proposed:

**Figure 6:** Payoff matrix in the Epic Games v. Consumers game

| | | Consumers | |
|---|---|---|---|
| | | iOS | Multiple |
| Epic Games | iOS | 7,-10 | 7,-10 |
| | Other | 0,-10 | 8,-8 |

Source: Own elaboration, 2023

If the consumer only has an iOS device, they will be required to add V-Bucks through iOS, so Epic Games will receive $7 and the consumer will spend $10 (-10). In the case that the consumer has multiple devices (one iOS and one different), they can choose on which platform to add their V-Bucks.

Given that all payment methods are considered totally secure for consumers (PayPal or credit card payment is available on all devices, the safest payment methods according to consumers), the payment method used will be irrelevant and will simply be based on price.

Therefore, we have two Nash equilibria in this game. One when Epic Games chooses "Multiple" and consumers choose "Other", resulting in a gain of $8 for Epic Games and $8 for consumers, and another when both choose "iOS".

This means that if the consumer only has an iOS device, they will add V-Bucks through iOS, but if they have multiple devices, they will always add V-Bucks through a device other than iOS, as it will be more cost-effective and maximise their well-being.

The reality is not like that. As we have seen before, there is evidence that even though users play on PC or other devices, they can make purchases from their mobile phone because it may seem easier, faster, or even more accessible to them.

In addition, given that a large proportion of players are minors, some may use prepaid cards. This type of card allows you to recharge your Apple account balance and pay for all digital content online without associating a credit card. They can even be purchased at supermarkets or tobacco shops.

# 3. Regulatory framework

The lawsuit between Epic Games and Apple is being held in the United States because both companies have their main headquarters there. Additionally, U.S. courts have jurisdiction to address cases in which the legality of business practices of companies operating within their territory is being questioned.

**Sections 1 and 2 of the Sherman Act**

The Court initiated its review by examining Sections 1 and 2 of the Sherman Act, which pertain to the degree of market power and potential monopoly power. Before examining Epic Games' claims under Sections 1 and 2 of the Sherman Act, the Court first evaluated Apple's market dominance and monopolistic power in the pertinent market and territory. This is because Apple operates in a specific market and geographic area.

According to the Supreme Court (NCAA v. Board of Regents of University of Oklahoma, 1984), “Market power and monopoly power are related but distinct concepts. Market power is defined as the ability to raise prices above those that would be charged in a competitive market”.

Section 1 of the Sherman Act prohibits agreements between companies that restrain trade or limit competition. This clause is significant to the Epic Games v. Apple dispute because Epic Games contends that Apple's limitations on the App Store's distribution and payment

methods are anti-competitive and prevent app developers from competing on an even playing field. For instance, Epic Games alleges that Apple's 30% fee on IAP is an unfair and anticompetitive practice that hurts smaller companies.

In Section 2 of the Sherman Act, companies are forbidden from monopolising or seeking to monopolise a certain market. In the Epic Games v. Apple case, this section is relevant because Epic Games contends that Apple has a monopoly in the market for app distribution on iOS devices. The plaintiff argues that Apple's restrictions on the App Store effectively block competitors from entering the market and provide Apple with an unfair advantage.

In order for Epic Games to prevail on its claims under Sections 1 and 2 of the Sherman Act, it must prove that Apple's actions have a negative impact on competition in the relevant market. This will require evidence that Apple's actions have harmed competition and resulted in higher prices, lower quality, or reduced innovation.

**California's Cartwright Act**

The legal framework of California's Cartwright Act is established in the California Business and Professions Code. It defines as illegal, opposed to public policy, and void any trust, which is described as a combination of resources, talent, or actions by two or more people to establish or carry out restrictions on trade or business activity. It also establishes that trusts are illegal and anti-competitive.

Regarding the relationship of the Cartwright Act with federal antitrust legislation, it has been noted that federal law interpretations are merely instructive and not conclusive in interpreting the Cartwright Act.

In accordance with the California's Cartwright Act, Epic Games brings three claims against Apple: one alleging an unreasonable constraint of commerce in the iOS app distribution market, another alleging an undue restraint of trade in the iOS in-app payment solutions market, and a third alleging an inappropriate tie between payment processing and app distribution. According to Epic Games, the Cartwright Act allegations and the Sherman Act claims are based on the same behaviour.

One of the key factors in the case is that in-app payment doesn't handle payment processing. Instead, Apple does not directly process payments, but instead uses a third-party settlement provider to do that task. It is important to highlight that, despite the

alternatives suggested by Epic Games such as PayPal, Apple has never sought to promote its payment technology for use in other digital transaction platforms. That is, despite having technology that could be used by other companies, Apple has decided to keep it exclusively for its own ecosystem. It should be noted that Epic Games has not presented arguments indicating otherwise, suggesting that Apple has maintained this stance since the inception of its payment technology in the application. It is interesting to note that this strategy is different from that of other companies in the payment technology market, which have sought to extend their technology to other platforms as a way to increase their reach and business volume.

## 4. Judgment

The Court discovered that Apple's market share in mobile gaming transactions ranged between around 52% and 57% after reviewing data spanning three years. Apple's larger market share reflects strong market domination in the highly concentrated industry, which is predominantly dominated by a duopoly of Apple and Google.

Even though Apple's market share is under the customary thresholds where Section 2 monopolistic power was established by courts, the Court takes other direct and indirect evidence into account to decide if the market share is enough below Section 2 of Sherman Act despite Apple's market share falling below those thresholds.

When taking into account specific indications of monopoly power, Epic Games was unable to show that there was a required constraint on the output of the pertinent product (mobile gaming transactions). The Court is concerned about the 30% commission rate since it seems arbitrarily higher than it would be in a market with more competition, yet it hasn't had a proportionate impact on output. The volume of mobile gaming transactions has not been affected by this commission, according to the information provided by Epic Games.

Apple, on the other hand, argues that the commission is necessary to preserve intellectual property investment, ensure security, and promote intrabrand competition.

Regarding the iOS In-App Payment Processing Market, Epic Games argued that Apple had restricted trade in this market by requiring developers to use Apple's purchasing method, thereby excluding any third-party payment processors. As with the definition of the iOS App

Distribution Market, the Court did not agree with Epic Games' arguments. The court acknowledges that Apple is entitled to receive compensation for its intellectual property. However, a specific 30% rate does not seem to be justified. The 30% commission does not appear to be related to the company's intellectual property, as its model is different from other submarkets in the industry (therefore, they cannot be comparable) and it is also impossible to know if the consideration that Apple provides to its developers really justifies such commission.

However, the Court argues that Apple's ecosystem should not be viewed as a series of isolated restrictions, but within its context. This means that the restrictions are part of a broader set of policies and practices that Apple implements on its platform and must be evaluated based on how they relate to the complete set of Apple's restrictions and policies. Therefore, the Court considers that Apple's anti steering restrictions prevent developers from directing consumers to their own sites, thus harming consumer transparency and information levels. Developers could offer payment methods that improve consumer conditions.
This is significant because it sets up California's unfair competition law's requirement that there be an economic injury and that this loss was brought on by unfair business practices.

The Court argues that Epic Games presents two valid points of view. One is that Epic could be a potential competitor, as the company proposed the opening of its own store in the iOS Store, but Apple did not allow it. On the other hand, although they are not end consumers, they are quasi-consumers, as they are customers of Apple.
Therefore, when it comes to a competing company, the plaintiff must demonstrate that the conduct of the other company threatens to violate antitrust law, goes against the spirit of antitrust laws, or otherwise significantly affects competition. These findings must be tethered to a specific legislative policy or harm to competition, which is known as the "tethering test".
In addition, judges can apply the balancing test to assess the defendant's conduct and the harm caused.

Finally, the Court decided to penalise Apple and supported Epic Games' lawsuit. The court examined the tethering test and determined that Epic was unable to show that antitrust laws had been broken, but it also determined that Apple's anti-steering policies may have the potential to do so by preventing consumers from making informed judgements. To put it another way, the anti-steering regulations represent a risk to the market and its players since they may restrict competition and go against the letter of the antitrust laws. The tribunal also considered the balancing test and came to the conclusion that the advantages acquired

through the anti-steering measures are much less than those that would be obtained if more competition were permitted in the market for mobile apps.

**Apple's counterclaims**

Following the earlier incidents, Apple filed a lawsuit against Epic Games for violating its Developer Licence Agreement (DPLA). Some of the claims that are asserted include those for contractual breaches, infringements of the implied covenant of good faith and fair dealing, unjust enrichment, indemnification, and declaratory judgement. Apple claims that Epic's actions in releasing the update infringed on the DPLA's provisions that prohibit developers from (i) concealing, misrepresenting, or obscuring any features, content, services, or functionality in their applications and (ii) giving Apple a commission in the amount of thirty percent (30%) of all fees paid by each end user via the App Store.

**Epic Games' Affirmative Defences**

"The general rule is that the courts will deny relief to either party who has entered into an illegal contract or bargain that is against public policy." (Tri-Q, Inc. v. Sta-Hi Corp., 1965).
Epic Games contends that because the contracts upon which Apple's counterclaims are predicated are unlawful and unenforceable as they are in violation of the Sherman Act, the Cartwright Act, and the UCL, Apple's counterclaim would be null and void. Although the 30% commission looked excessive, Epic Games did not contest it but did contest the imposition of any fee.

The Court did not find the DPLA's prohibition on developers offering extra features through channels other than the App Store to be unconstitutional or unenforceable. The court determined that Apple's claims based on DPLA clauses were not barred by public policy. The DPLA's anti-steering section was deemed to be unfair, but the other clauses were upheld.
Since Epic Games has not demonstrated that the DPLA is oppressive, the Court finds and concludes as such. Additionally, it states that even though Apple's counterclaims are based on unfair contractual conditions, they are not prohibited by that fact.

# 5. Remedies

Since Epic Games did not pay the agreed-upon 30% commission established in the DPLA, Apple counterclaimed for unjust enrichment alternatively to its breach of contract claim. As the Court had already found and concluded that Apple was entitled to damages for the breach of contract, the counterclaim for unjust enrichment will be invalid.

Apple counterclaimed against Epic as well, requesting compensation for the legal fees and other expenses incurred in defending this case and litigating their counterclaims. Finally, the Court decided that Epic should not be responsible for these expenses.

The remedies to which Apple is entitled according to the court due to Epic Games' breach of contract are:

1. 30% of the $12.167.719 in income that Epic Games received from iOS Fortnite app users between August and October 2020 using Epic Direct Payment.
2. 30% of any additional revenue that Epic Games receives between November 1, 2020, and the day the judgement becomes announced.
3. A declaration that terminates the DPLA and affirms the validity of the agreements between Apple and Epic Games, and another declaration that gives Apple the contractual right to terminate its DPLA with any entity owned by Epic Games.

However, there is also a remedy that prevents Apple from prohibiting its developers from, on the one hand, using alternative payment and purchase methods, and on the other hand, communicating through contact points obtained with customer consent through the creation of an account in the respective app. This must be effective within 90 days of the judgment.

As we have seen with this case, technology is increasingly encompassing more markets. The mobile gaming transaction submarket, currently valued at $100 billion, has not yet been fully exploited and is ripe for economic exploitation.

In its ruling, the Court considered the balance between promoting competition and preserving the procompetitive justifications of Apple's iOS ecosystem in the submarket for mobile gaming transactions. The Court ultimately concluded that while Apple does not hold a monopoly in this submarket, there is room for improvement in promoting consumer choice and information. As such, the Court ordered a remedy that would allow third-party developers to provide links or buttons within their apps that would direct users to alternative

payment methods outside of the App Store, without fear of retaliation or termination from Apple.

This remedy seeks to promote competition by giving users the ability to choose between different payment options, which could lead to lower prices and increased innovation in the submarket for mobile gaming transactions. At the same time, the Court acknowledged the procompetitive justifications of Apple's iOS ecosystem, which include maintaining the security and privacy of the platform, fostering intrabrand competition, and protecting Apple's intellectual property investments.

It's important to note that this remedy does not require the Court to directly manage Apple's commercial operations, but rather encourages greater transparency and competition within the App Store. Furthermore, the Court found in favour of Apple on all grounds, except for a partial violation of California's unfair competition law and the demand for declaratory relief.

As the case comes to a close, the Court reminds all parties that they are responsible for their own expenses and that a post-trial motion cannot be filed if it is based on a defence that was already presented. Overall, the Court's ruling seeks to strike a balance between promoting competition and innovation in the submarket for mobile gaming transactions, while also preserving the procompetitive justifications of Apple's iOS ecosystem.

Both Apple and Epic Games have publicly stated that they will appeal.

## 6. How will this case impact the future? Is this the beginning of a new era?

Although the Epic Games v Apple case is still ongoing and currently in the process of appeal, both parties had to make certain changes to their businesses after the trial ended.

The Court forced Apple to allow developers to use other payment options outside of the app store starting in December 2021. This means that developers can offer lower prices outside of the App Store, which could impact Apple's revenue. However, the use of external payment methods will require a lot of legal work on the part of the developers.

In the event that a consumer encounters fraud when using an external payment method, who should be held responsible? Can Apple ensure that all payment methods offered by apps are secure?

Apple does reserve the authority to set limitations on how external payment links are presented, which might reduce the effectiveness of these payments without outright prohibiting them, even if the Court compels Apple to include other external payment options. To try to retain customers using Apple's system, the business might demand precise pricing differences between Apple's in-app purchases system and any rivals as well as the presentation of the systems side by side. External payments could be a straightforward button or a confusing web of links and procedures.

If Apple makes using these payment methods difficult, consumers are likely to spend fewer dollars through the alternative route.
Although the ruling affects all sources of revenue in the App Store, it is unclear how many developers will seek an external payment method. If most companies offer an external payment method and consumers prefer it over the App Store's payment method, Apple may be forced to change and abandon the commission system forever. Most developers have not yet sought methods outside of the Apple system, but perhaps over time, this will change.

# 7. Conclusions

After studying this case in detail, we can draw several important conclusions in the field of digital competition.
Firstly, the case emphasises the necessity of tighter regulatory and antitrust oversight in the technology sector, particularly in respect to digital platforms that regulate market access and set guidelines for users and developers. The court's willingness to step in when market-dominant firms are abusing their position and stifling competition is demonstrated by the judge's ruling in this instance.

The case additionally demonstrates the rising conflict between the interests of developers and those of the digital platforms that host their applications. By requiring the exclusive use of their payment systems, which enables them to charge commissions for transactions, developers contend that digital platforms are exerting excessive market control and limiting

competition. The technology sector is particularly sensitive to this conflict of interest, which is expected to generate debate for some time to come.

Thirdly, the case highlights how antitrust laws are becoming more important in the technology sector. Regulators are taking action to ensure that consumers and developers have access to a fair and open platform as they realise how crucial it is to manage market power in the digital era. The Epic v. Apple case, along with other well-known cases, might serve as a model for upcoming legal and regulatory issues in the technology sector.

In summary, the Epic Games v. Apple case is going to mean a before and after for the future of digital competition. As digital platforms become more powerful and dominant, there is a growing need for regulators to intervene and ensure fair competition. This will involve a delicate balance between protecting consumers, developers, and small businesses from anti-competitive practices, while also fostering innovation and growth in the industry.

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