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Compensation of Damages in Digital Markets

COMPENSATION OF DAMAGES IN DIGITAL MARKETS

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PRIVATE ANTITRUST ENFORCEMENT FOR CONSUMERS AND DIGITAL PLATFORMS. WHERE IS THE COMPENSATION?

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ABSTRACT: This article examines the evolving landscape of private enforcement in abuse of dominance cases within digital markets, focusing on the challenges faced by consumers and businesses in seeking redress from dominant digital platforms. It explores how the rise of Big Tech has intensified bargaining asymmetries and introduced new competition risks, prompting regulatory responses such as the EU's Digital Markets Act and Digital Services Act. Through an initial analysis of two cases, including *Idealo v. Google* in Germany and collective actions against Apple in the UK, the article highlights the procedural and evidentiary hurdles in quantifying harm, particularly for consumers. It discusses the limitations of current legal and economic methodologies, such as the lack of methods for the lack of choice for consumers in Europe. Despite a consensus on the need for effective private enforcement, significant barriers remain—particularly for consumers—due to the fragmentation of collective redress mechanisms and the complexity of proving harm in digital markets. This asymmetry undermines both consumer welfare and the effectiveness of EU competition law, underscoring the urgent need for more accessible and robust enforcement tools.

Keywords: Private antitrust enforcement, Consumers, Digital platforms, Abuse of dominance, Bargaining asymmetries.

SUMMARY: I. INTRODUCTION. II. INFRINGEMENT AND FAULT. III. THEORIES OF HARM. IV. GOOGLE SHOPPING CASE. A. Background. B. B. The effects alleged by Idealo based on the decision of the EC. C. Assessment of Harm. V. DAMAGE CLAIMS AGAINST APPLE IN THE UK COMPETITION APPEAL TRIBUNAL. VI. PRESUMPTION AND PRIVATE ENFORCEMENT IN ABUSE OF DOMINANCE CASES. VII. BIBLIOGRAPHY.

I. INTRODUCTION

Consumers are the final step in the value chain. They are also the main target of digital platforms, as a product or as a client. Traditional bargaining asymmetries have increased exponentially, driven by data and platform power, creating new competition dilemmas and risks for both consumers and other levels of the value chain, as well as for the other side of the platform. States are attempting to regulate these challenges with revamped tools, such as the Digital Markets Act¹ and the Digital Services Act², in the European Union. Abuse of dominance in all its forms requires a sophisticated analysis and often leads to complex and expensive litigation. Additionally, civil society is trying to enforce competition law, using new mechanisms such as collective redress and third-party litigation funding.

On both sides of the Atlantic, we are observing a rapid increase in private enforcement actions by companies and developers against the big platforms, but only a few actions by affected consumers.

While abuse cases are present in private competition law enforcement in national courts, most cases involve injunctive relief (e.g., orders for continued supply or prohibition of conduct). The most frequent damage claims involve excessive pricing in regulated or quasi-regulated markets. However, follow-on damages claims for abuse of dominance remain economically less significant compared to cartel cases.

One reason for this discrepancy may be the historically lower number of abuse cases brought by authorities. However, a shift in enforcement trends is becoming apparent. The number of cartel proceedings has decreased due to a decline in leniency applications, while the Bundeskartellamt (German Federal Cartel Office) and the European Commission are pursuing significantly more cases of abuse of dominance. This trend is expected to continue.

Authorities have focused their efforts on Big Tech companies (Google, Amazon, Facebook, Apple, Microsoft). This increasing number of abuse cases is likely to lead to more private damages claims, especially follow-on claims. However, as we will discuss in this article, private enforcement for consumers is only possible in a private enforcement-friendly system, which includes opt-out collective redress and third-party funding. Even in systems such as those in the United Kingdom or Portugal, access to justice for consumers remains impossible in certain types of abuse.

New theories of harm raise new questions about quantifying harm, such as the loss of profit caused by abusive practices or the passing on of issues to the

1. Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1 (hereinafter: DMA); N Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' [2021] JECL & Pract 529.

2. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)

other side of a platform. In such cases, the traditional methods may reach their limits.

Specific issues related to the harmful effects of abuse of dominance cases have not been broadly discussed in case law. European courts have extensive experience in cartel damage claims, but not in abuse of dominance cases, particularly in digital markets.

There is a consensus that private enforcement, in the form of damages actions, is essential in digital markets to safeguard the rights of European consumers, companies, and citizens. However, the heterogeneity in private enforcement poses several challenges from the procedural and material perspectives³.

All this prompts the question: Where is the harm, and how can it be compensated?

This work will discuss the central questions of private enforcement in abuse of dominance cases in digital markets, drawing on the jurisprudence of National Courts and ongoing cases.

II. INFRINGEMENT AND FAULT

Digital platforms operate in multi-sided markets, acting as intermediaries between service providers, businesses, and end-users. This environment poses challenges in terms of competition and regulation, as a single anticompetitive action can impact multiple parties on both sides of a platform or at different levels of the supply chain.

Therefore, over the last years, the European Commission, as well as National Competition Authorities, have imposed severe fines on the so-called Big Tech. Additionally, since the entry into force of the DMA, we have already observed the first cases involving the prohibitions of articles 5 to 7 of the DMA, including both public and private enforcement⁴.

3. See L. Hornkohl, *Schadensersatzansprüche wegen Verstöße gegen Verhaltensnormen des digitalen Binnenmarktrechts*, EUZW, 2024, 941 y ss.

4. See for private enforcement: Idealo, press release of 12 April 2019, Idealo sues Google for damages for abuse of its dominant market position, <https://fmos.link/29168> (last accessed on 14 January 2025) and OLG Köln 15 UKI 2/25,23.5.2025 and for public enforcement: Commission, decision of 27 June 2017, AT.39740; Google Search (Shopping); decision of 18 July 2018, AT.40099 - Google Android; decision of 20 March 2019, AT.40411 - Google Search (AdSense). Commission, decision of 04.05.2017, AT.40153 - E-book MFNs and related matters (Amazon); decision of 20.12.2022, AT.40462 - Amazon Marketplace; decision of 20.12.2022, AT.40703 - Amazon - Buy Box; FCO, B2-881/18 (discontinuation decision of 17.07.2019 after adaptation by Amazon). Comm., decision of 14 November 2024, AT.40684 - Facebook Marketplace; BKartA, decision of 6 February 2019, B6-22/16 (case report). Ongoing proceedings: AT. 40652 - Apple - App Store Practices (e-books/audiobooks); Commission, decision of 4 March 2024, AT.40437, cited in WuW 2024, 411 - Apple - App Store Practices (music streaming); Commission, decision of 11 July 2024, AT.40452 - Apple - Mobile Payments. Commission, decision of 24 March 2004, AT.37792, Microsoft; decision of 16 December 2009, AT.39530 - Microsoft (tying); ongoing proceedings: AT.40721 - Microsoft Teams and AT.40873 - Microsoft Teams II.

Sections 72 et seq. of the Spanish Competition Act (“SCA”), as well as the Damages Directive⁵, also apply to proceedings for damages due to the abuse of a dominant market position. The burden of presentation and proof of an infringement lies with the plaintiff. However, the declaratory effect of Section 75 SCA or Article 16(1), sentence 1, of Regulation 1/2003 applies in all cases in which the authorities have initiated administrative or fine proceedings. Accordingly, courts are bound by the infringement as established in the final decision. The binding effect encompasses both facts and the legal assessment, applying to the operative part of the decision and its supporting reasons. In turn, the supporting reasons are those that support the administrative or fine decision, rather than those that are only relevant to the claim for damages. In stand-alone cases, i.e., cases without a prior decision by a competition authority or court, claimants must prove infringement. Fault is related to the infringement and not to the harm. Therefore, in follow-on cases, there will be no doubt. In cases with no prior decision, fault is also likely to exist since negligence is sufficient. However, in stand-alone 102 TFEU cases, courts cannot currently rely on the jurisprudence regarding cartel damage claims, and they must look to public enforcement cases for inspiration. The case law of the European Court of Justice is stringent for defendants, who can only rely on an unavoidable error of law in minimal cases⁶.

III. THEORIES OF HARM

Abuse of dominance can take many forms. We describe below some of the most common unilateral practices that can lead to competitive harm: refusal to deal, margin squeeze, exclusive dealing or loyalty rebates, bundling or tying, predatory pricing, exploitative abuse, self-preferencing on platforms, and privacy policy tying.

Refusal to Deal occurs when a dominant firm declines to deal with a competitor or a downstream player, especially when access to the firm’s product or service is essential for competition. This can be particularly damaging in markets where alternatives are limited or non-existent. For example, a dominant technology platform that refuses to allow a rival access to its operating system or app store can effectively exclude that rival from the market⁷. While firms generally have the freedom to choose their business partners, such refusals may be deemed anticompetitive if they lack legitimate business justification and foreclose competition⁸.

5. Directive 2014/104/EU, OJ 2014 L 349, p. 1-19

6. BGH, judgement of. 16.12.1986 (fn. 55), para. 23 - Taxizentrale Essen; Franck, in: Immenga/Mestmäcker (fn. 28), § 33a GWB para. 55.

7. See for instance ECJ, 25.2.2025, Case C-233/23, *Android Auto*.

8. Microsoft Corp. v. Commission (2007) Case T-201/04, where Microsoft was found to have abused its dominant position by refusing to supply interoperability information to rivals.

Margin squeeze is a tactic employed by vertically integrated firms that control both an essential input and a downstream market. The firm may set the price of the input so high—or the cost of its downstream product so low—that downstream competitors cannot compete profitably. For instance, a telecommunications company that owns both the network infrastructure and a retail service may charge rival retailers high access fees while undercutting them at the retail level. This squeezes rivals' profit margins and can ultimately drive them out of the market, reducing consumer choice⁹.

Exclusive Dealing and Loyalty Rebates are practices where a supplier requires customers to buy exclusively from them or incentivises loyalty through rebates. While such arrangements can sometimes increase efficiency, they may also foreclose market access for rivals. If a dominant supplier secures a substantial portion of the market through exclusivity or loyalty programs, new entrants may struggle to gain a foothold, thereby stifling competition and innovation¹⁰.

Bundling and tying involve purchasing one product or service conditional upon the purchase of another. A firm with market power in one area may leverage that power to gain an advantage in another, less competitive market. For example, a software company might require customers to purchase its operating system and office suite together, limiting consumer choice and foreclosing opportunities for competing software providers. Such practices are particularly concerning when they lack objective justification and restrict competition in the tied product market¹¹.

Predatory Pricing is the practice of setting prices below cost to drive competitors out of the market. Once rivals are eliminated, the dominant firm can raise prices to recoup its losses. While low prices are generally beneficial for consumers, predatory pricing can ultimately harm them by reducing competition and leading to higher prices in the long run. Proving predatory pricing requires evidence of both intent to eliminate competition and the ability to recoup losses after rivals exit the market¹².

Exploitative Abuse refers to practices where a dominant firm directly harms consumers or trading partners by imposing unfair prices or conditions. This can include excessive pricing, unfair contract terms, or other exploitative conduct. For example, a dominant digital platform might charge excessive fees to merchants or impose unfair terms on users, taking advantage of its market position. Such

9. Telefónica SA v. Commission (2010) Case T-336/07, where the European Commission found Telefónica guilty of margin squeeze in the Spanish broadband market.

10. Intel Corp. v. Commission (2017) Case C-413/14 P, where Intel's loyalty rebates to computer manufacturers were found to foreclose competition.

11. United States v. Microsoft Corp. (2001) 253 F.3d 34 (D.C. Cir.), where Microsoft was found to have illegally tied its Internet Explorer browser to its Windows operating system.

12. AKZO Chemie BV v. Commission (1991) Case C-62/86, a landmark EU case on predatory pricing.

conduct is particularly scrutinised in jurisdictions like the European Union, where consumer welfare is a central concern¹³.

Self-Preferencing on Platforms: With the rise of digital platforms, self-preferencing has become a significant concern for antitrust. This occurs when a platform operator favours its products or services over those of third parties, often by manipulating search rankings or visibility. For example, a search engine might prioritise its shopping service in search results, disadvantaging independent competitors. Self-preferencing can establish the platform's dominance and reduce consumer choice¹⁴.

Privacy Policy Tying: A more recent form of anticompetitive conduct involves privacy policy tying, where access to a service is conditioned on accepting broad data-sharing policies. A dominant platform might require users to consent to sharing their data across multiple services, thereby reinforcing its data advantage and making it harder for competitors to compete. This practice can harm competition by creating barriers to entry and reducing consumer control over personal data¹⁵.

Let's take two examples of ongoing cases in Germany, regarding self-preferencing (Idealo/Google), and in the United Kingdom, regarding exploitative abuse (Apple App Store).

IV. GOOGLE SHOPPING CASE

The German Idealo vs. Google case marks a significant turning point in the private enforcement of competition law within the European digital economy, underscoring the challenges posed by dominant online platforms and the evolving legal framework designed to address them. At the heart of this dispute is the allegation that Google, leveraging its dominance in online search, systematically favoured its shopping service over rival platforms, such as Idealo, thereby distorting competition and harming both consumers and competitors¹⁶. This case is widely regarded as a test case for similar claims by other European technology firms that have been affected by Google's practices.

13. Apple App Store Antitrust Litigation (2021) and Amazon Marketplace investigations, where platforms have been scrutinised for excessive fees and unfair terms.

14. Google Search (Shopping) Case AT.39740 (2017), where the European Commission fined Google for favoring its own comparison-shopping service in search results.

15. Bundeskartellamt (German Federal Cartel Office) decision against Facebook (19.2.2019), which found that Facebook abused its dominance by tying the use of its social network to the acceptance of extensive data collection across its services. FAQ_Facebook.pdf.

16. For an overview of the Google Shopping case and its implications for fair competition, see Petrucci, Carlo (2023) *Self-preferencing in the EU: a legal and policy analysis of the Google Shopping case and the Digital Markets Act*. Competition Law Journal, 22 (1). pp. 18-29. DOI <https://doi.org/10.4337/clj.2023.01.03>.

A. Background

Idealo, a European price comparison platform based in Berlin, initiated legal proceedings in Berlin, against Google in 2019, claiming that Google's self-preferencing practices—specifically, the preferential placement of Google Shopping results and the demotion of competitors in search rankings—resulted in substantial financial losses and reduced consumer choice. Idealo's initial damages claim amounted to approximately €500 million, reflecting the scale of harm it argued had been inflicted since Google began these practices in 2008.

Idealo is a follow-on claim based on the European Commission's 2017 decision, which found Google guilty of abusing its dominant position under Article 102 of the Treaty on the Functioning of the European Union (TFEU). The Commission imposed a record €2.42 billion fine on Google, concluding that the company had systematically given prominent placement to its comparison-shopping service while relegating rival services to less visible positions in search results. Google's conduct, the Commission argued, deprived consumers of genuine choice and stifled competition in the online shopping market.

Following the Commission's decision, the Berlin Regional Court suspended proceedings pending the outcome of Google's appeal at the European Court of Justice (ECJ). This was a strategic move, as the ECJ's interpretation of EU competition law would be binding on national courts and thus decisive for Idealo's claim.

On September 10, 2024, the ECJ upheld the European Commission's findings, affirming that Google's self-preferencing behaviour constituted an abuse of dominance. The Court clarified that such conduct is unlawful when it distorts competition by impeding equally efficient rivals, even if access to the platform is not entirely denied. The ruling underscored the importance of non-discrimination and fair access in digital markets, setting a precedent that is likely to influence future competition cases across Europe.

In early 2025, Idealo expanded its claim to at least €3.3 billion, including accrued interest, and demanded that Google disclose detailed information about the traffic, sales, and profits generated by its shopping service in Germany. Idealo argued that Google's conduct had not only inflicted financial damage on competitors but had also misled consumers and undermined the diversity of the European e-commerce landscape.

B. The effects alleged by Idealo based on the decision of the European Commission

The self-preferencing practised by Google made it significantly harder for Idealo to reach consumers, as their products were ranked lower or given less visibility compared to the platform's offerings. By leveraging its dominant position, Google created high barriers for new entrants, making it difficult for Idealo to gain a foothold in the market. This reduced the incentives to innovate

and invest in quality, limiting consumer choices. Over time, this could have resulted in reduced quality and variety, as well as higher prices for consumers. Finally, Google had access to valuable data from third-party sellers, which they can use to optimise their competing products, further entrenching their position and undermining fair competition.

C. Assessment of the harm

1. Idealo's harm

Idealo's claim for damages against Google is based on a counterfactual analysis of the difference between the actual market and a hypothetical scenario that describes what would have happened if Google had not engaged in self-preferencing. The study is based on historical data and tries to determine the lost traffic from Idealo diverted to Google, revenue and market share. According to the claim, Idealo lost up to 50% of this market segment to Google, dating back to at least 2008. For that purpose, Idealo has requested extensive disclosure from Google regarding its traffic, sales, and profits related to its shopping service in Germany. This information is necessary to quantify the full extent of the harm accurately and to substantiate Idealo's damages claim in court. The damages claim includes loss of profit, as well as compound interest over the years, which increases the global claim to up to 3.3 billion as of early 2025.

2. Impact on consumer choice and innovation

One of the most significant consequences of self-preferencing is its chilling effect on innovation¹⁷. Third-party providers, such as app developers or independent merchants, rely on platforms to access large consumer bases. When these platforms systematically favour their products—by giving them better placement, enhanced visibility, or preferential access to data—third-party providers are placed at a distinct disadvantage. Empirical research and regulatory studies consistently demonstrate that such practices deter third-party developers from investing in new features or enhancing product quality. If the platform can constantly override or overshadow their offerings, the expected returns on innovation diminish. Consequently, many developers may choose to reduce their investment in quality improvements or even shift their efforts to alternative markets where competition is more open and fairer.

17. Jürgensmeier, Lukas and Skiera, Bernd, Measuring Self-Preferencing on Digital Platforms (June 08, 2025). Available at SSRN: <https://ssrn.com/abstract=4393726> or <http://dx.doi.org/10.2139/ssrn.4393726>.

The reduction in innovation is closely linked to the issue of limited consumer choice¹⁸. When platforms prioritise their products, consumers are less likely to encounter the best or most relevant options available in the market. Instead, their choices are shaped by the platform's commercial interests, not by quality or relevance. This can lead to a marketplace characterised by lower quality, less variety, and, over time, potentially higher prices. The suppression of competitive alternatives not only stifles diversity but also reduces the pressure on platforms to improve their own offerings, thereby further establishing their market power.

In any case, it is a fact that the consumers suffered harm, which, in practice, will probably not be recovered. This harm is diffuse and extremely difficult to quantify, compared to traditional antitrust damages quantification methods that rely more on the surplus than on the loss of choice. Scholars suggest the loss of consumer choice can be quantified through choice experiments¹⁹, consumer surveys, and economic modelling of welfare loss, focusing on both tangible (financial) and intangible (utility) impacts²⁰. The loss of innovation is measured using a combination of input/output metrics, empirical studies, and counterfactual analysis; however, it remains challenging due to its speculative nature and the difficulty of capturing long-term or disruptive effects²¹.

These approaches are widely used in regulatory, antitrust, and policy contexts to ensure that the broader societal impacts of reduced choice and innovation are appropriately considered in decision-making.

However, the experience with private enforcement is currently limited or unknown in Europe. The Discrete Choice Experiment (DCE) method is not explicitly mentioned as a quantification method in the "Guide for Quantifying Harm from Competition Law" issued by the Spanish National Markets and Competition Commission (CNMC) or in the main European antitrust damages' calculation guidance documents. These guides primarily focus on economic and econometric methods, such as comparator-based approaches (cross-sectional, time series, difference-in-differences), financial analysis, and industrial organisation theory-based approaches for quantifying harm and damages in antitrust cases.

In Europe, while these methods are accepted in economics for measuring consumer preferences and changes in welfare (including the loss of consumer choice), they are not currently foreseen or explicitly recommended in the main official guides for calculating antitrust damages. The guides rely more on market

18. Yuta Kittaka, Susumu Sato, Yusuke Zenryo, Self-preferencing by platforms: A literature review, *Japan and the World Economy*, Volume 66, 2023, 101191, ISSN 0922 1425, <https://doi.org/10.1016/j.japwor.2023.101191>. (<https://www.sciencedirect.com/science/article/pii/S0922142523000178>)

19. Bonny Parkinson, *Measuring the Loss of Consumer Choice in Mandatory Health Programs Using Discrete Choice Experiments*, 2012, Sidney, available at: [wp2012_04.pdf](https://www.wpi.edu/research/wp2012_04.pdf).

20. Daniel F Spulber, Antitrust and Innovation Competition, *Journal of Antitrust Enforcement*, Volume 11, Issue 1, March 2023, Pages 5 -50, <https://doi.org/10.1093/jaenfo/jnac013>.

21. <https://www.promarket.org/2024/04/02/at-stake-in-the-apple-case-is-foregone-and-future-innovation/>.

data, econometric models, and financial analysis to establish counterfactual scenarios and quantify harm²².

In the US, there are specific case examples where Discrete Choice Experiments (DCE) have been used in damages estimation, particularly in antitrust litigation when market data is unavailable or insufficient.

In the *BNLFood Investments Limited SARI v. Martek Biosciences Corp.* case in the USA., BNLfood used a choice experiment method to estimate the damages caused by alleged anticompetitive foreclosure in the infant formula additives market. Economic experts designed a survey targeting recent purchasers of infant formula to assess consumer preferences for different additive types at various price points. The results from the experiment were used to estimate the market share BNLfood would have captured in a counterfactual scenario without the alleged foreclosure. This evidence supported the calculation of damages by showing the potential demand for BNLfood's products in the absence of the anticompetitive conduct²³.

In Europe, there are no documented cases²⁴. Most of our cases involve cartel damage claims, traditional abuse cases, or B2B cases.

Tools for quantifying the loss of consumer choice remain theoretical in European competition law damages estimation, rather than a practical, court-tested method.

In our view, the *BNLfood* case demonstrates that alternative methods, such as the choice experiment, can be applied in antitrust damages estimation when direct market evidence is lacking and a counterfactual scenario must be constructed.

Additionally, procedural hurdles, such as the imposition of individual proceedings and limitations on collective initiatives and actions, render this type of action against self-preferencing impossible in practice, leaving the harm suffered by consumers in the hands of the infringing undertaking. There is consensus about the harmful effects of self-preferencing. Still, this consensus is limited to the theoretical or regulatory sphere, leaving private enforcement in an asymmetrical situation that harms consumer welfare in the interest of dominant market players, all this eroding the principle of effectiveness.

22. Guide for Quantifying Harm from Competition Law” issued by the Spanish National Markets and Competition Commission (CNMC); Daniel L. Rubinfeld, Quantitative Methods in Antitrust, in 1 ISSUES IN COMPETITION LAW AND POLICY 723 (ABA Section of Antitrust Law 2008) <https://www.cnmc.es/sites/default/files/4968354.pdf>; <https://www.oxera.com/wp-content/uploads/2018/03/Quantifying-antitrust-damages-3.pdf> https://www.law.berkeley.edu/files/QM_Antitrust.pdf

23. <https://www.oxera.com/insights/agenda/articles/the-use-of-discrete-choice-experiments-in-applied-economic-analysis/>.

24. The Amazon Buy box opt out claim filed in the CAT follows a similar approach but the claim is limited to the harm caused to businesses. CAT Ruling 5.2.2024, Hunter vs. Amazon Case Nos: 1568/7/7/22.

V. DAMAGE CLAIMS AGAINST APPLE IN THE UK COMPETITION APPEAL TRIBUNAL

In recent years, Apple Inc. has faced multiple high-profile damages claims in the UK Competition Appeal Tribunal (CAT), reflecting growing scrutiny of its business practices under UK and EU competition law. These claims, brought as collective proceedings, allege abuses of dominance in relation to Apple's App Store, payment processing systems, and device performance management.

We will focus on two significant collective proceedings against Apple regarding its App Store practices: *Dr. Rachael Kent v Apple Inc.* (on behalf of consumers) and *Dr. Sean Ennis v Apple Inc.* (on behalf of developers). Both cases allege that Apple has abused its dominant position in the iOS app distribution market, but they approach the harm from different perspectives and represent different affected groups²⁵. Both claims combine the follow-on and stand-alone approaches, as they are based on specific theories of harm and partially based on the decisions of regulators across Europe.

A. Consumer Claims: *Dr. Rachael Kent v Apple Inc*

The consumer claim led by Dr. Rachael Kent seeks approximately £1.5 billion in damages on behalf of an estimated 19.6 million UK consumers who made purchases through the App Store. The theory of harm in this case is based on how Apple's practices ultimately harm end users through exclusionary and exploitative abuses:

1. Exclusionary Abuses Leading to Consumer Harm

The consumer claim alleges that Apple has engaged in exclusionary and exploitative practices that restrict competition and ultimately harm consumers through distribution restrictions, tying, anti-steering, unfair and excessive pricing.

a. App Distribution Restrictions and walled garden

Apple prohibits the distribution of iOS apps through any channel other than the App Store, creating a closed ecosystem that eliminates competition in app distribution. This restriction is central to establishing both the relevant market definition and Apple's dominance within it. This "closed ecosystem" approach is not only pivotal to defining the relevant market in competition law cases but also underpins Apple's dominance and according to the claimants, the resulting consumer and developer harms²⁶.

25. <https://www.catribunal.org.uk/cases/14037721-dr-rachael-kent>.

26. Evinger, Jake, *Walled Gardens & Forbidden Apples: Software Access Amid Antimonopoly Resurgence* (July 26, 2024). *Richmond Journal of Law and Technology*, Volume XXI, Issue 1

Apple's "walled garden" philosophy, rooted in the integration of hardware and software, has led to a tightly controlled ecosystem. The claimant affirms that this approach is marketed as ensuring security and a seamless user experience, while it stifles competition and innovation. In practice, developers and consumers are locked in, with no alternative means of distributing or accessing apps on iOS devices. This lock-in effect increases user reliance on Apple's products and services, making it difficult for consumers to switch to alternative platforms or for developers to reach iOS users without consenting to Apple's terms. The lack of power of developers can deter developers from innovating in favour of Apple's apps and services.

Competing app stores and payment processors are excluded, preventing rivals from entering the market. Developers often pass Apple's commission fees onto consumers, resulting in higher app and in-app purchase prices. The lack of alternative distribution channels means consumers have fewer choices and pay more for digital goods and services.

On the hardware side, Apple's ecosystem encompasses a suite of devices—iPhones, iPads, MacBooks, Apple Watches, and accessories—integrated with proprietary operating systems (iOS, macOS, watchOS) and a range of services (iCloud, Apple Music, App Store). The company's vertical integration ensures that hardware and software are designed in tandem, allowing features like Handoff, AirDrop, and Universal Clipboard to work seamlessly across devices. The App Store acts as a gatekeeper, with Apple controlling which applications are available and enforcing strict guidelines for developers.

The closed nature of Apple's ecosystem restricts user freedom, limiting the ability to customize devices or use third-party software and services not sanctioned by Apple. Interoperability with non-Apple products is often constrained, and users face challenges when attempting to switch to alternative platforms.

Developers must adhere to Apple's strict guidelines and pay commission fees to distribute apps via the App Store, which some argue stifles innovation and competition. The claimants contend that Apple's practices amount to monopolistic behaviour, using its control over the ecosystem to disadvantage rivals and limit consumer choice.

b. Tying Abuse

Apple requires that all payments on the App Store from iOS device users to developers must be processed through Apple's payment processing services, preventing competition in payment processing. This tying arrangement forces consumers to use Apple's payment system exclusively.

Apple's App Store rules historically mandated that any app offering digital goods or subscriptions on iOS must use Apple's in-app purchase (IAP) system.

(forthcoming), Available at SSRN: <https://ssrn.com/abstract=4946889> or <http://dx.doi.org/10.2139/ssrn.4946889>.

Developers were prohibited from integrating alternative payment processors within their apps and from even linking users to external payment sites. This meant that developers could not offer or advertise cheaper payment methods within their apps. Consumers were forced to use Apple's payment system, with no alternative for in-app transactions.

By tying app distribution (where Apple is dominant) to its proprietary payment service, Apple foreclosed the market for payment processing on iOS. Competing payment providers were locked out, and developers had no choice but to use Apple's system. This lack of competition enabled Apple to set commission rates (typically 30%) without market constraints. The tying arrangement resulted in several forms of consumer harm, including higher prices, reduced choice, and a poorer user experience.

The claimants also base their claims on decisions of regulators and courts in the EU, Netherlands, and the US, which have found this tying practice to be abusive:

The European Commission found that Apple's restrictions on payment processing and anti-steering rules violated competition law, ordering Apple to open up its system to third-party payment providers and to allow developers to inform users about alternative payment options²⁷.

The Dutch Competition Authority (ACM) and Court of Rotterdam ruled that Apple's tying of payment processing for dating apps was an abuse of dominance and imposed fines until Apple allowed alternative payment options²⁸.

US Courts: Following Epic Games' litigation, Apple was required to allow apps to link to external payment sites, though it initially sought to retain a commission on such transactions²⁹.

2. Exploitative Abuses Affecting Consumers

a. Excessive and Unfair Pricing

Apple imposes a commission of typically 30% on all app purchases and in-app transactions, which the claim alleges is excessive and unfair. The theory of harm suggests that this commission is substantially passed on to consumers in the form of higher app prices. A central element of the consumer claim is that developers pass on a significant portion of Apple's 30% commission to end users, resulting in artificially inflated prices for apps and in-app purchases. The claim argues that in a competitive market, these prices would be substantially lower.

The fee of Apple applies to:

27. CASE AT.40437 – Apple – App Store Practices (music streaming) ec.europa.eu/competition/antitrust/cases1/202419/AT_40437_10026012_3547_4.pdf.

28. Rechtbank Rotterdam, 16.6.2025, ROT 23/5690 & ROT 23/6570, Apple, ACM.

29. <https://techcrunch.com/2025/05/02/apple-changes-us-app-store-rules-to-let-apps-redirect-users-to-their-own-websites-for-payments/>.

- Initial app purchases (for paid apps)
- In-app purchases of digital goods and services
- Subscription payments (reducing to 15% after the first year)

In recent years, Apple has introduced modifications to this structure, including reduced rates of 15% for small businesses earning less than \$1 million annually through the App Store Small Business Program. The standard 30% commission remains in place for most major developers and transactions.

b. Anti-steering provisions

Apple's anti-steering provisions prevent app developers from informing users about alternative, often cheaper, ways to purchase subscriptions or content outside of the App Store ecosystem. This means developers cannot direct users to their websites or other payment methods that avoid Apple's commission fees. By prohibiting developers from advertising cheaper options, Apple ensures that consumers are unaware of more affordable alternatives. As a result, consumers are "locked in" to purchasing via the App Store, where prices are typically higher due to Apple's commission (up to 30%), which developers often pass on to consumers. Additionally, some users may abandon purchases altogether due to the cumbersome process of searching for external options, resulting in non-monetary harm such as a degraded user experience.

3. Pass on to consumers

According to the consumer claim, developers, lacking alternative distribution channels due to Apple's closed ecosystem, are forced to pass a significant portion of Apple's commission onto consumers. The claimant asserts that developers increase their app prices to maintain profit margins in response to Apple's commission. The commission creates a price floor below which developers cannot profitably operate, reducing price competition and maintaining artificially high prices. Some developers charge higher prices on iOS than on other platforms to account for Apple's commission, directly demonstrating the pass-through effect³⁰.

The primary evidence supporting the theory is that Apple's commission is based on price differentials and developer behaviour.

Price differentials: Music streaming services like Spotify have historically charged higher subscription fees (€12.99 vs €9.99) for subscriptions purchased through iOS apps compared to those purchased directly on their websites, with the difference approximately matching Apple's commission.

30. See also: the DMA proceedings of the EC against Apple: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1086 and proceedings in the US Supreme Court *Apple v. Pepper*: the Court recognized consumers' standing to sue Apple directly over App Store commissions, implicitly acknowledging the potential for pass-through harm.

Developer Behaviours: When faced with Apple's commission, developers typically respond in one of three ways, all of which can harm consumers:

- Raise prices to cover the commission
- Absorb the commission but reduce investment in app quality
- Remove in-app purchase functionality entirely, reducing convenience for users³¹.

4. Quantifying Consumer Harm

The UK claim alone represents approximately 19.6 million consumers who may have been overcharged for app purchases and in-app transactions. The estimated damages in the UK claim amount to approximately £1.5 billion, representing the alleged overcharges that have been passed on to consumers. While the exact pass-through rate varies by app category and developer, economic experts have estimated that a significant portion of Apple's commission is passed on to consumers, with some analyses suggesting rates of 50-90% for specific app categories³².

Apple has contested the claim on the certification phase and on the passing on to consumers on several grounds, such as the value that it provides through the App Store, the freedom of choice of developers and the limited impact of the commission on the market since 85% of the apps on the App Store pay no commission.

B. Developer Claims: Dr. Sean Ennis v. Apple Inc

The developer claim led by Dr. Sean Ennis seeks up to £785 million in damages on behalf of approximately 13,000 UK-based iOS app developers³³. The theory of harm in this case focuses on how Apple's practices directly impact app developers by charging excessive and unfair commissions, as well as limiting their choice in the payment processing system.

The claim alleges that Apple's commission structure is unfair as a pricing system because it "fails to recognise the true economic value contributed by app developers". It places a disproportionate burden on certain developers. Only about 16% of developers on the App Store pay any commission at all, creating an

31. See CAT Ruling, 5.4.2023, Rachael Kent vs. Apple [https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20\(Experts\)%20\(FINAL\).pdf](https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20(Experts)%20(FINAL).pdf).

32. See CAT Ruling, 5.4.2023, Rachael Kent vs. Apple [https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20\(Experts\)%20\(FINAL\).pdf](https://www.catribunal.org.uk/sites/cat/files/2023-04/2023.04.05_1403_Kent%20v%20Apple_Ruling%20(Experts)%20(FINAL).pdf).

33. See Cat Ruling 18.10.2024 Dr. Sean Ennis vs. Apple, <https://www.catribunal.org.uk/sites/cat/files/2024-10/16017723%20Dr%20Sean%20Ennis%20v%20Apple%20Inc%20and%20Others%20-%20Judgment%20%2018%20Oct%202024.pdf>.

inequitable distribution of costs. This commission is inescapable for developers who need to monetise their apps.

This structure is also foreclosing competition in the processing of payments and alternative app stores. Additionally, the commission reduces the resources for innovation and investment in new apps or features, harming the app ecosystem.

C. Common elements and potential conflicts of interest between the two claims

The theories of harm in both the consumer and developer claims against Apple in the Competition Appeal Tribunal revolve around Apple's control of the iOS app ecosystem and the resulting market power. While the consumer claim focuses on pass-on effects and higher prices for end users, the developer claim emphasizes direct financial harm and unfair business conditions for app creators. Both claims ultimately challenge the same fundamental practices: Apple's exclusive control over iOS app distribution, the mandatory use of Apple's payment processing, and its 30% commission structure. The Competition Appeal Tribunal (CAT) acknowledged that trying these cases separately could lead to conflicting rulings on shared issues like market definition or dominance, or legal questions such as excessive pricing³⁴. Despite this, the CAT declined to merge the trials, as the developer's claim was filed two years after the consumer's claim, and the two classes experienced harm in different ways. This reduces the direct conflict but makes the calculation of the passing on more complex.

Apple contended that Ennis's class contained internal conflicts (e.g., developers with varying commission rates or vulnerability to defences), but the CAT dismissed this, stating:

“A class representative's duty is not to pursue different claims [...] but to prosecute collective proceedings in a way that furthers the interests of the group as a whole”

While overlapping legal issues (market definition, dominance, overcharge) create a risk of inconsistent rulings, they do not constitute a *conflict of interest*. The claims target distinct groups (consumers versus developers) and seek redress for different types of harm. The CAT permits both to proceed independently, prioritising the timely resolution for Kent's class while managing inconsistency risks through evidence sharing and staggered trials.

34. CAT 18.111601/7/7/23; 1403/7/7/21 Dr Sean Ennis v Apple Inc and Others; Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd - Ruling [2024] CAT 64 | 8 Nov 2024.

VI. PRESUMPTIONS AND PRIVATE ENFORCEMENT IN ABUSE OF DOMINANCE CASES

The assessment of the damage is usually based on the difference hypothesis. The claimant will have to compare the market with a counterfactual scenario that does not involve infringement. Abuse can cause primary and secondary damages. Additionally, it can cause damages different from a price overcharge, such as loss of profit resulting from exclusivity, discounts, or self-preferencing. In many cases, the damage is caused upstream and downstream, but also to competitors. In exclusionary abuses, the primary harm is the market exit or marginalisation of competitors, thus a loss of profit in most cases. Secondary harm or consequential damages may also arise. Direct partners, such as game or application developers, may charge their customers excessive prices imposed by the platform. The harm in these cases is suffered by the other side of the market where the exploitative conduct occurs.

These two cases demonstrate that proving harm can be challenging, if not impossible, depending on the position within the value chain. While harmed businesses can access sophisticated legal solutions and economic assessments, even in individual or group actions, consumers still rely on a functioning opt-out collective claim system to access justice. This type of claim typically requires third-party funding to assess whether the harm was passed on to consumers and to cover potential adverse costs.

Courts have developed presumptions about the harm in cartel cases. This presumption is expressly recognised in Article 17 (2) of the Damages Directive 2014/104. However, such a presumption only applies to cartels.

Another critical difference is the absence of a deviation problem in cases of abuse. Cartels risk instability due to the incentive for members to lower prices to gain market share secretly. Abuses, however, are carried out by a single dominant firm, eliminating this risk and making the harmful effects more stable and enduring.

Additionally, abusive practices can cause long-term structural market damage, particularly in industries with network effects (e.g., the described cases against Google Shopping and Apple App Store). Unlike cartels, where price effects typically last for about a year, abuses can suppress competition for years, delaying the recovery of marginalised competitors.

Given these factors, abuses pose at least the same, if not greater, damage potential than cartels. As such, damages claims are necessary both from a legal policy perspective and under the principle of effectiveness to ensure fair market competition.

Under the current regime, claimants must prove the harm and its quantification, limiting enforcement to jurisdictions with businesses that have a high volume of commerce affected by the conduct, as well as jurisdictions that permit collective actions on an opt-out basis for both companies and consumers. In Europe, in the absence of a Europe-wide opt-out collective action proceeding, consumers in some jurisdictions will have access to a judicial remedy, as seen in the Netherlands

and Portugal. In contrast, other consumers, domiciled in countries where opt-out is not possible, such as Germany and France, will likely remain uncompensated. This asymmetry harms not only consumers but also the principle of effectiveness of EU Law

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