MINISTRY OF JUSTICE
Administrative Council for Economic Defense - CADE
Commissioner Victor Oliveira Fernandes

Appeal No. 08700.009932/2024-18

Appellant:	Apple Inc. and Apple Services LATAM LLC.
Legal representatives:	Barbara Rosenberg, Luiz Antonio Galvão, André Luís Menegatti, Bruna Prado de Carvalho and Luís Bernardo Coelho Cascão.
Interested parties:	Ebazar.com.br Ltda. and Mercado Pago Instituição De Pagamento Ltda.
Legal representatives:	Marcela Mattiuzzo and Ana Valéria Fernandes
Rapporteur:	Commissioner Victor Oliveira Fernandes

DECISION

COMMISSIONER VICTOR OLIVEIRA FERNANDES' OPINION

PUBLIC VERSION

SUMMARY: APPEAL. ADMINISTRATIVE PROCEEDINGS. INTERIM MEASURE. ABUSE OF DOMINANT POSITION. APPLE INC. AND APPLE SERVICES LATAM LLC. DIGITAL MOBILE ECOSYSTEM. APPLICATION DISTRIBUTION MARKET. IOS OPERATING SYSTEM. *ANTI-STEERING* CLAUSES. MANDATORY USE OF APPLE'S PAYMENT SYSTEM (IAP). RESTRICTIONS ON APP DISTRIBUTION. ANTI-COMPETITIVE DISCRIMINATION. TYING. APPEAL DISMISSED.

1. Appeal filed against the Interim Measure imposed by the General Superintendence against Apple, which ordered the suspension of provisions in its terms and conditions that restrict the ability of developers to operate within the iOS ecosystem.
2. The conduct at issue concerns: (i) preventing the distribution of third-party digital goods and services in native apps; (ii) imposing the mandatory use of Apple's in-app purchase mechanism (IAP) for digital content and services

consumed within the app, reinforced by the implementation of Anti-Steering Provisions that prohibit developers from informing iOS users about alternative purchasing mechanisms outside of the app.

3. Definition of the relevant product and geographic markets as: (i) non-licensable smart mobile operating system iOS; (ii) provision to developers of platforms for the distribution of apps to iOS users; (iii) provision of payment processing systems for in-app purchases on iOS; and (iv) distribution of digital goods and services on iOS devices, all with a national geographic scope.
4. Establishment of Apple's dominant position in the markets concerned, with gatekeeper power in the iOS mobile ecosystem, due to its ability to unilaterally set the rules of operation and conditions of competition for app developers.
5. Exclusionary incentives in smart mobile digital ecosystems manifest themselves in a particular manner, extending beyond the traditional framework of the Single Monopoly Profit Theory. Two fundamental categories of leverage have been identified: (i) offensive leverage, where Apple exploits its monopoly power in the market for the provision to developers of platforms for the distribution of apps to iOS users to extend dominance to adjacent markets, even if this temporarily sacrifices the maximization of ecosystem value; and (ii) defensive leverage, where the restrictions imposed aim to prevent complementors (developers) from disintermediating the central platform or creating alternative distribution channels that could threaten Apple's monopolistic position.
6. With regard to discriminatory conduct, the assessment establishes that: (i) Apple imposes differentiated conditions on developers in an arbitrary and non-transparent manner; (ii) its dominant position allows for inconsistent application of the App Store Review Guidelines; and (iii) there are risks of preferential treatment for Apple's proprietary apps, which are not subject to the same restrictions imposed on third-party developers.
7. Concerning the tying arrangements, the assessment determines: (i) the separability between the App Store and IAP, evidenced by the existence of independent demand for payment processing services and the fact that 84% of developers do not use IAP; (ii) contractual coercion through the License Agreement and the App Store Review Guidelines, reinforced by mechanisms for monitoring and sanctioning developers; (iii) potential foreclosure effects in the payment processing market; and (iv) intra-product discrimination between categories of developers, with a disproportionate impact on those monetising services via recurrent digital content transactions, resulting in consumer surplus extraction.
8. The appellant's objective justifications that the restrictions were necessary to ensure privacy and security within the ecosystem were rejected, as Apple applies inconsistent exceptions to its own rules for certain categories of apps, such as those selling physical goods or services or "reader apps", without demonstrably compromising security.

9. The presence of the likelihood of infrigmenet (*fumus boni iuris*) is confirmed by the substantial evidence of abuse of dominant position, and the urgency to prevent serious and irreparable harm (*periculum in mora*) by the risk of irreparable harm to competition should the conduct persist during the administrative proceedings, thereby maintaining artificial barriers to entry in potentially competitive markets.
10. A period of 90 (ninety) days has been established for the implementation of the remedies set out in the SG Order Instituting Administrative Proceedings No. 24/2024, taking into account the technical complexity of the necessary changes to the iOS ecosystem, while rejecting the allegation of reverse *periculum in mora*.
11. Appeal admissible and dismissed.

TABLE OF CONTENTS

1. INTRODUCTION

1. This is a Appeal filed by Apple, Inc. and Apple Services Latam, LLC. (jointly, "Apple" or "Appellant") (SEI 1481201), against SG Order Instituting Administrative Proceedings No. 24/2024 of November 25, 2024 (SEI 1476083), which adopted an Interim Measure against Apple and ordered the initiation of Administrative Proceedings, within the scope of Proceeding No. 08700.009531/2022-04, under the following terms:

> I accept Technical Note No. 63/2024/CGAA11/SGA1/SG/CADE (SEI 1475850) and, pursuant to paragraph1 of art. 50 of Law No. 9.784/99, I integrate its reasons into this decision, including as its motivation. My decision is based on the grounds set out in the aforementioned Technical Note:
>
> For the initiation of an Administrative Proceeding, pursuant to articles 13, V, and 69 et seq. of Law No. 12.529/11/c. article 146 et seq. of CADE's Internal Regulations, against Respondents A pple Inc. and Apple Services LATAM LLC. , in order to investigate the conduct that may be classified as illicit under items III, IV, VIII and XVIII of paragraph3º of art. 36/c items I, II and IV of the *caput of* the same article of Law no. 12.529/11, in the form of article 69 et seq. of Law no. 12.529/2011.
>
> For the granting of an Interim Measure to stop the anti-competitive effects of the practice under investigation, ordering the Respondent, under penalty of a daily fine of R$ 250,000.00 (two hundred and fifty thousand reais) to:
>
> I - refrain, until the final decision on the merits by this antitrust authority, from applying clauses 3.3.1 "*c*", 3.3.9 "*a*", 7.2 and 7.6 of the *Apple Developer Program License Agreement*, as well as clause 1.1. of its Annex 2, and clauses 3.1.1 and 3.1.3 of the *App Store Review Guidelines*, thereby allowing, among other things, that:
>
> (a) developers who wish to market goods and services, whether physical or digital, proprietary or from third parties, to be consumed in the app itself or in third-party apps, can inform their users about other ways of acquiring the products they market, increasing transparency and the level of information provided to consumers.
>
> (b) developers who wish to market goods and services, whether physical or digital, proprietary or from third parties, to be consumed in the app itself or in a third-party app, may insert buttons, external *links* or other calls *to action* in their own apps that allow interested users to access other ways of acquiring the marketed products than just *in-app* purchases;
>
> (c) developers who wish to market goods and services, whether physical or digital, proprietary or from third parties, to be consumed in the app itself or in a third-party app, may contract and make use of other *in-app*

> purchasing systems to offer their consumers other options for processing transactions carried out in apps;
>
> (d) developers can choose to distribute their native applications for the iOS system through other tools and mechanisms than exclusively the Apple App Store, in particular measures to enable sideloading and the inclusion of native application stores alternative to the Apple App Store, enabling consumers to choose the way they deem most convenient to acquire the applications they want; and
>
> (e) developers who wish to distribute their applications on the Apple App Store may contract the distribution services of said app store without the need to simultaneously contract Apple's IAP system, even if such applications include the commercialization of digital goods and services.
>
> II - refrain from issuing any clauses that have as their object or are capable, even indirectly, of producing totally or partially effects similar to those of the clauses indicated above until the final decision on the merits by this antitrust authority;
>
> III - provide the Brazilian market, within 20 (twenty) days, with mechanisms and tools to make available, in the national territory, additional options for distributing apps and payment processing systems, thus enabling the realization of the scenario described in items "a", "b", "c", "d" and "e" of the determination in item (I) above;
>
> IV - within 5 (five) calendar days of the publication of this decision in the Federal Official Gazette, publish the full content of this decision regarding the granting of the Interim Measure on its website, and, within the same period, officially notify in writing the developers of applications for the iOS operating system of the full content of this decision;

2. On December 4, 2024, the Appeal was assigned to my Rapporteurship, according to the certificate of the 321st Ordinary Distribution Session, published in the Federal Official Gazette on December 5, 2024 (SEI 1483013), in accordance with the provisions of article 213 and article 215, paragraph 3 of RICADE.

3. On December 10, 2024, Decision Order No. 26/2024/GAB4/CADE (SEI 1486747) was issued, which acknowledged the Appeal as having met its admissibility requirements. This same order determined, on the basis of article 217 of RICADE, the opening of a period of 5 (five) calendar days, counting from the publication of the order in the Federal Official Gazette, for the interested party, if it wished, to submit counter-appeals to the Appeal. The order was published in the DOU on 16.12.2024 (SEI 1488715) and was ratified by the Plenary at the 241st Ordinary Trial Session, held on 11.12.2024 (SEI 1490670).

4. According to Decision Order No. 26/2024, this appeal was received without suspensive effect, under the express terms of art. 84, paragraph 2, of Law 12.529/2011, which states that "a decision adopting a Interim Measure may be appealed voluntarily to the Full Bench of the Court, within 5 (five) days, **without suspensive effect**" (emphasis added).

5. On November 27, 2024, during the 204th Ordinary Trial Session, the Plenary unanimously approved Decision Order No. 28/2024/GAB4/CADE (SEI 1490670), which was regularly published in the Federal Official Gazette of November 28, 2024 (SEI 1488715).

6. On 23.12.2024, Mercado Livre submitted its counter-appeal to the Appeal, in a timely manner (SEI 1493457), in which it requested that CADE dismiss the Appeal, in order to fully maintain the Interim Measure granted by SG-CADE.

1.1. COMPLAINT AND APPEALED DECISION

7. The appealed SG Order Instituting Administrative Proceedings No. 24/2024 (SEI 1476083) was based on Technical Note No. 63/2024/CGAA11/SGA1/SG/CADE (SEI 1475850), issued within the scope of the current Administrative Proceeding No. 08700.009531/2022-04, which investigates Apple's alleged abuse of a dominant position in the market for the distribution of apps for iOS devices.

8. The process was initiated following a complaint lodged on 05.12.2022 by E.bazar.com.br.Ltda. and Mercado Pago Instituição de Pagamento Ltda. (entities jointly referred to as "Mercado Livre", "Meli" or "Complainant") (SEI 1157256). Subsequently, on December 6, 2022, a Preparatory Administrative Inquiry Procedure was opened, by means of SG Order Opening Preparatory Procedure No. 53/2022 (SEI 1158171).

9. On January 12, 2023, the SG opened an Administrative Inquiry, pursuant to SG Order IA No. 2/2023 (SEI 1175546), which accepted Technical Note No. 4/2023/CGAA11/SG/CADE (SEI 1175546).

10. During the course of the IA, Apple made its views known on several occasions, including in response to letters from SG-CADE[1] . The SG also conducted a market test, sending more than fifty letters to app developers and owners, as well as as *smartphone* manufacturers offering their products and/or services in Brazil.

[1] For example: SEI 1173682, SEI 1183741, SEI 1186498, SEI 1326740, SEI 1381477, SEI 1326740, SEI 1381477.

11. Mercado Livre also submitted new statements in the case file[2] . It is noteworthy that, on October 31, 2023, Meli filed a statement with a request for a Interim Measure (SEI 1303675), requesting that Apple allow the marketing of third-party digital goods and services on the iOS system and, alternatively, that it authorize the communication of information about its benefits and services and the possibility of providing links to users.

12. Also, on November 20, 2024, Match Group, Inc. submitted a spontaneous statement in the case file (SEI 1475625), which included a technical note called "Competitive concerns related to the Apple App Store".

13. On 13.01.2025, after filing this Appeal and converting the IA into an Administrative Proceeding, Apple presented its Administrative Defense (SEI 1500772).

14. On 19.02.2025, CADE held a Public Hearing to discuss competition aspects of the digital ecosystems related to Apple's iOS and Google's Android operating systems for mobile devices (referred to hereafter simply as the "Public Hearing"). Complainants from the business sector - including Apple - civil society and academia were heard. In addition, written contributions were provided, which were attached to Case No. 08700.001047/2025-71.

1.2. FILING OF WRIT OF MANDAMUS NO. 1097967-08.2024.4.01.3400

15. On December 2, 2024, the same date on which the Appellant filed this Appeal before CADE, Apple filed a writ of mandamus against an act by CADE's General Superintendent. The Appellant requested the immediate suspension of the effects of SG Order Instituting Administrative Proceedings No. 24/2024 until the end of the administrative proceedings.

16. On December 4, 2024, in the context of Civil Writ of Mandamus No. 1097967-08.2024.4.01.3400, the judge of the 14th Civil Court of the Judicial Section of the Federal District granted the request for a preliminary injunction, ordering the suspension of the Interim Measures determined and specified in item 2 of the SG Order (item determining the granting of a Interim Measure). Thus, the court decision took place on the same date that the case was distributed to my Office. According to the court decision:

> In this case, *fumus boni iuris* is evidenced by the disproportionate nature of the Interim Measure imposed by CADE. A reading of the Order Instituting Administrative Proceedings No. 24/2024 shows that the obligations established are not merely conservative or instrumental in nature, but imply the adoption of measures that significantly and structurally alter the applicant's business organization prior to the due process of administrative law.

[2] For example: SEI 1313306, SEI 1303674.

> Among the elements demanded is the order for the impetrant to: a) allow, within 20 days, app developers to distribute their products through alternative stores and include external payment systems directly on iOS; and b) widely publicize the changes on its official channels, under penalty of a daily fine of R$250,000.00.
>
> The measure imposed by CADE is disproportionate and unnecessary at the current stage of the administrative process. As highlighted in Technical Note 63/2024, the purpose of the Interim Measure is to preserve the conditions of competition while the process continues.
>
> However, the changes required go beyond this purpose, imposing measures that, in practice and for an uncertain period of time, amount to a final decision, without there having been a thorough analysis of the allegations and evidence.
>
> Furthermore, the lack of direct competitors in the iOS ecosystem, recognized by CADE itself, weakens the argument of urgency in implementing the changes. The technical complexity of the changes and the global regulatory impacts of similar decisions in other countries, such as the European Union, reinforce the need for these changes to be discussed in greater depth.
>
> As for the *periculum in mora*, this stems from the imposition of obligations to comply immediately, under penalty of a daily fine of R$250,000.00, which, in addition to being disproportionate, represents the legal ceiling for infringements of a competitive nature. This penalty, coupled with the short deadline of 20 days for implementing complex technological changes, creates an imminent risk of irreparable harm, both economic and to the impetrant's reputation.
>
> Furthermore, the Interim Measure was imposed without any demonstration of urgency or concrete risk to the market that would justify its adoption in an early and exceptional manner. The administrative investigation that gave rise to the case had already been going on for 18 months without any significant changes, which reinforces the lack of *periculum in mora for* the contested act and shows the need for such severe measures against a business model that has been practiced globally for years. (emphasis in original)

17. In the first instance court's view, therefore, the Interim Measure imposed by CADE would be disproportionate, setting obligations that would not be merely conservative or instrumental in nature, altering Apple's business organization in a "sensitive and structural" way. Furthermore, the fact that the administrative process has been going on for 18 months shows that there is no risk of delay.

18. CADE filed an interlocutory appeal against the decision granting the injunction in favor of Apple. In Interlocutory Appeal No. 1004244-13.2025.4.01.0000, Judge Pablo Zuniga Dourado, of the Federal Regional Court of the First Region, partially granted CADE's request for suspensive effect, to re-establish the validity of the Interim Measure

applied to Apple, setting a deadline of 90 (ninety) days for the measures determined in item "2" of the Order of Inquiry No. 24/2024 to be implemented.

19. This decision considered that the thesis defended by CADE was plausible, since Apple was also being investigated for restricting the freedom of app developers to choose payment systems and the distribution of their products in the iOS ecosystem, which could characterize an abuse of a dominant position.

20. On March 17, 2024, the court of first instance handed down a judgment in the writ of mandamus, granting Apple's request on the grounds explained in the decision granting the preliminary injunction. The ruling acknowledged that it would not be illegal for the content of the Interim Measure "to take on a form equivalent to that of the penalties imposed at the end of the administrative process", but reaffirmed that the measure would be disproportionate.

21. Thus, security was granted to determine the suspension of the Interim Measures determined and specified in item "2" of the order initiating PAD n. 24/2024, issued by CADE's General Superintendence on 25/11/2024, until the final decision on the merits to be issued by CADE in the case.

22. On May 7, 2025, Judge Pablo Zuniga granted a request for suspensive effect to the appeal filed by CADE, in order to re-establish the effects of the preliminary injunction granted in Interlocutory Appeal No. 1004244-13.2025.4.01.0000. Thus, through the joint action of the Specialized Federal Prosecutor's Office (PFE/Cade) and the Federal Regional Prosecutor's Office of the 1st Region (PRF1), the Interim Measure applied by SG-Cade was re-established, with a deadline of 90 (ninety) days being set for the measures determined to be implemented.

1.3. APPEALS AND COUNTER-APPEALS

23. Apple's appeal requests that the Court completely revoke the Interim Measure and, in the alternative, that the measure be reformed to "make its terms proportionate and the deadlines for compliance feasible".

24. Apple initially argues that the Interim Measure violates due process and the Law of Introduction to the Norms of Brazilian Law (LINDB). It claims that the Interim Measure was determined together with the initiation of administrative proceedings, and that, during the administrative investigation phase, the SG did not formally accuse Apple of any antitrust violation. Therefore, the Appellant would not have had the opportunity to present its arguments properly before the Interim Measure was imposed.

25. In addition, Apple believes that the "innovative" interpretation adopted by the SG would violate the LINDB, which, in its article 23, states that "The administrative, supervisory or judicial decision that establishes a new interpretation or orientation on a rule of indeterminate content, imposing a new duty or a new condition of right, must provide for a transitional regime when indispensable for the new duty or condition of right to be fulfilled in a proportional, equitable and efficient manner and without prejudice to the general interests."

26. It also claims that the Interim Measure anticipates the effects of a decision before the conclusion of the investigation and even the opportunity for Apple to present its defense. The disproportionality of the measure is also evidenced by the fact that the SG's decision is much broader than the one initially requested by Mercado Livre.

27. In addition, the Appellant claims that there is no *fumus bonis iuris*, since the SG's decision would be unprecedented, based on definitions and theories of harm never before used by CADE. This lack of precedents on the subject would not allow us to conclude that the conduct under analysis would be an antitrust infringement. Furthermore, the measure would destabilize the iPhone's global business model, which has been applied for 15 years without any competitive questioning in Brazil, making it a less secure, private and protected product.

28. Apple also brings up statements from Mercado Libre that would corroborate that the company's policies and guidelines do not cause harm to competition, as Mercado Libre would have launched new services in compliance with such policies and would have shown positive performance in the market.

29. The Appellant refutes that there is a *periculum in mora*, since the SG has not proven the supposed concrete risk to the market arising from Apple's policies. In addition, repeats that Apple's practices have been ongoing for several years and that app developers are thriving with their business model. There would be a reverse *periculum*, because in order to comply with the SG's command, it would be necessary to implement relevant changes to current policies, which would impact Apple and developers. Furthermore, even if it were possible to undo the effects of the measure, there would be risks to Apple's reputation and to the security of the system.

30. In addition, the Appeal argues that the adjustments made by Apple within the European Union, to comply with the MAD, are not made within the framework of a competitive process, but of a regulation.

31. Apple also argues that the SG's order would be unreasonable, with a vague text and uncertainties regarding its commands, which would require clarification. Furthermore, the changes would require complex technical changes in an unrealistic

timeframe. It also claims that the Interim Measure could harm users and developers. One example would be allowing sideloading, which would substantially change the *design of* the iPhone, not only impacting the Apple Store, and would bring security risks if the corresponding security measures were not implemented.

32. Finally, for Apple, the Interim Measure would be disproportionate by imposing obligations that go beyond the objectives sought by the SG and Mercado Livre's original request.

33. In its counterclaims, Mercado Livre (SEI 1493457) argued that there is no correlation between the success of the company's business model, in markets other than the one under investigation, and the absence of anti-competitive conduct. Furthermore, it refuted allegations that, because Apple's commercial policies have been in place for years, they would be exempt from antitrust scrutiny.

34. Mercado Livre defended the maintenance of the Interim Measure. Firstly, it stated that the Interim Measure decision does not violate due process or the LINDB, and is in line with the authority's best practices. It reinforces that, according to Article 84 of Law No. 12,529 and CADE's Internal Regulations, the Interim Measure can be granted at any stage of the administrative investigation. Furthermore, it believes that there is no doubt about the analysis criteria used by CADE to analyze unilateral conduct, and that there is no need to speak of non-compliance with the LINDB.

35. With regard to *fumus bonis iuris*, Mercado Livre claims that the procedural investigation would have proven that Apple has a monopoly in the iOS application distribution market, practicing conduct that harms the most diverse developers operating in the market, without justifications to support the lawfulness of the practice. As for the periculum in mora, he emphasized the complexity of the functioning of the markets under analysis, which would justify a prolonged procedural instruction. If the SG had issued an agile decision, the Applicant could argue that it would not have had sufficient opportunities to comment.

36. As for expanding the scope of the Interim Measure, Mercado Livre stressed that the antitrust authority would not be bound by the request made in its Complaint, since CADE proceedings are not merely disputes between private individuals - an understanding reinforced by Court precedents. It also stressed that if the Court were to restrict the Interim Measure, the remedies requested by Mercado Livre should be maintained.

37. Meli also argued that there was no reverse *periculum in mora in* the case, especially given the experiences of other jurisdictions that have implemented similar measures. He also stated that "Apple has a repeated practice of not complying with

administrative or judicial orders and of adopting measures that are known to be insufficient to comply with legal obligations". It mentioned, for example, investigations opened by the European Commission in April and June 2024 to investigate Apple's actions that might not comply with the DMA.

2. APPLE'S ALLEGATIONS OF PROCEDURAL SHORTCOMINGS

38. The Appeal (SEI 1481201) argues that the Interim Measure (i) curtails Apple's rights to due process of law and a broad defense; (ii) would be at odds with the Law of Introduction to the Rules of Brazilian Law (LINDB - enacted by Decree-Law No. 4,657 of 1942); and (iii) would anticipate the effects of an uncertain future decision. Apple claims to have been the target, at a preliminary stage of the administrative process, of an unfounded and disproportionate decision.

39. Article 84 of Law No. 12.529/2011 leaves no doubt that CADE (Reporting Commissioner or General Superintendent) can adopt an Interim Measure in the course of an Administrative Inquiry to investigate violations of the economic order. There is therefore no need to think that such an imposition would only be appropriate during an Administrative Proceeding.

40. Nor does the claim that the Appellant was unable to exercise its right to a full defense merit support. Over the course of the more than two years that elapsed between the initiation of the procedure and the issuance of the contested decision, Apple presented several statements in the case file and had the opportunity to meet with Complainants of the General Superintendence to present its defensive arguments.

41. It does not appear that the SG would have adopted an "innovative" interpretation that would require a transitional regime, under the terms of article 23 of the LINDB, as argued by the Appellant. As well reinforced by the decision handed down by the Federal Regional Court of the 1st Region, Apple's practices have been investigated (and sanctioned) in several jurisdictions, "which demonstrates the plausibility of the thesis defended by CADE". Furthermore, as will be discussed throughout this vote, the infringements imputed to the Appellant (such as anti-competitive discrimination and tie-in sales) are traditionally known to Brazilian competition law.

42. It should be clarified that the mere fact that these infractions are possibly being perpetrated in markets affected by high technological dynamism should not change the essence of the application of the rule, especially when there is robust evidence of harm to the economic order. Otherwise, there would be a real obstruction of the exercise of the general power of caution legally attributed to CADE in the context of digital markets.

43. As for the claim that [the] “Interim Measure essentially anticipates the effects of the decision before the conclusion of the investigation” (SEI 1481201, paragraph 63), it should be noted that the purpose of this institute is to prevent, by ordering the immediate cessation of the practice, (i) irreparable harm or harm that is difficult to repair to the market, or (ii) that may render the final result of the process ineffective, as stated in art. 84 of Law No. 12.529/2011. Thus, the contested decision complies with the legal command and is justified by the need to prevent the prolongation of the conduct under investigation from making the market concentration scenario irreversible

44. Furthermore, as argued by SG-CADE and confirmed by the judge of the Federal Regional Court of the 1st Region, the Interim Measure discussed here does not have an irreversible character, but only imposes adjustments to the Appellant's business model, which can be reversed if there is a decision in favor of Apple at the end of the process.

3. MOBILE DIGITAL ECOSYSTEMS

45. Prior to the examination of the substantive contentions presented by Apple, it is incumbent upon this Court to establish a foundational semantic framework regarding the operational structure of mobile digital ecosystems. To do this, it will be described how design decisions and governance rules in these ecosystems open up or restrict spaces for competition in various interrelated economic activities. This theoretical framework is useful for uncovering the economic rationality of the commercial practices adopted by Apple and subsequently assessing their compatibility with Article 36 of Law 12.529 of 2011.

3.1. The notion of "ecosystem" as framework for competition law analysis

46. The term "ecosystems" comes from the field of strategic management, where it was introduced as a biological metaphor explaining the interrelationships between organizations and economic activities[3] . The notion of ecosystems has become strongly influential in academic circles of competition law[4] as a "new" explanatory lens for the

[3] MOORE, J. F. Business ecosystems and the view from the firm. *The Antitrust Bulletin*, v. 51, n. 1, p. 33, 2006 (describing ecosystems as "*an economic community supported by a foundation of interacting organizations and individuals - the organisms of the business world*"). In the last 20 years, the term has become widespread in both academic and applied discussions on strategy, appearing alongside other related concepts such as business models, platforms, coopetition, multilateral markets, networks, technological systems, supply chains and value networks. For a comprehensive overview of the conceptual evolution, see ADNER, Ron. Ecosystem as Structure : An Actionable Construct for Strategy. *Journal of Management*, v. 43, n. 1, p. 39-58, 2017.

[4] See JACOBIDES, Michael G.; LIANOS, Ioannis. Ecosystems and competition law in theory and practice. *Industrial and Corporate Change*, v. 30, n. November, p. 1199-1229, 2021 ; Organization for Economic Cooperation and Development (OECD). Competition Economics of Digital Ecosystems. OECD Roundtables on Competition Policy Papers. 2021. Available at: https://www.oecd.org/en/publications/competition-economics-of-digital-ecosystems_5145fce1-en.html; CRANE, Daniel A. Ecosystem Competition and the

competitive dynamics of digital markets in which large technology companies exploit business models based on multiple layers of intermediation. Beyond its theoretical usefulness, the notion of ecosystems has concretely influenced recent antitrust investigations, including CADE's decision-making practice[5].

47. In simplified terms, digital ecosystems can be understood as networks of interdependent and non-hierarchical economic actors[6] that offer digital products with varying degrees of complementarity based on modular technologies[7] and that constantly interact in business relationships aligned with the co-creation of value[8]. The big technology companies have channeled their investments into implementing "consumer ecosystems" or "multi-product ecosystems", where constellations of complementary digital products or services offered by third parties orbit around a central platform[9].

48. The formation of ecosystems addresses externalities intrinsic to the problems of creating value in cooperative relations of co-specialized investment[10]. By defining technological design solutions and operating rules, the agent that controls the "central platform" establishes a real "governance arrangement", from which a "relational architecture of collaboration" is established through coordination mechanisms. Examples of this are the definitions of how product development resources work (such as APIs and

Antitrust Laws. *Nebraska Law Review*, v. 98, n. 2, p. 412-424, 2019 and CAFFARRA, Cristina; GAWER, Annabelle; JACOBIDES, Michael G. Mapping Antitrust Onto Digital Ecosystems. *CPI Anitrust Chronicle*, v. 1, p. 1-10, 2024 . For a discussion focusing on Brazilian competition law, see RENZETTI, Bruno Polonio. Conglomerate Mergers and Digital Ecosystems: a new theory for structure control in Brazil. PhD Thesis, University of São Paulo, 2023, p. 83

[5] See FERNANDES, Victor Oliveira; FLORES DA CUNHA, Marcella. Theories of Harm for Digital Mergers - Note by Brazil. *Written contribution from Brazil submitted for Item 8 of the 140th OECD Competition Committee meeting on June 14-16*, 2023, p. 1-18, 2023; ZINGALES, Nicolo; RENZETTI, Bruno. Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience. *World Competition*, v. 45, n. 4, p. 473-510, 2022.

[6] IANSITI, M.; LEVIEN, R. The keystone advantage: What the new dynamics of business ecosystems mean for strategy, innovation, and sustainability. Boston: Harvard Business Press, 2004, p. 8; AUTIO, E.; THOMAS, L. Innovation ecosystems. In: The Oxford handbook of innovation management. Oxford: Oxford University Press, 2014. p. 204-288 and JACOBIDES, M. G.; CENNAMO, C.; GAWER, A. Towards a theory of ecosystems. *Strategic Management Journal*, v. 39, n. 8, p. 2264, 2018.

[7] SUBRAMANIAM, M. Digital ecosystems and their implications for competitive strategy. *Journal of Organization Design*, v. 9, n. 12, p. 3, 2020 (" *ecosystems become digital when their underlying interdependencies are propelled by digital technologies and associated data connectivity*").

[8] ADNER, Ron. Ecosystem as Structure : An Actionable Construct for Strategy. *Journal of Management*, v. 43, n. 1, p. 39-58, 2017, p. 42 ("the ecosystem is defined by the alignment structure of the multilateral set of partners that need to interact in order for a focal value proposition to materialize) ; JACOBIDES, M. G.; CENNAMO, C.; GAWER, A. Towards a theory of ecosystems. *Strategic Management Journal*, v. 39, n. 8, p. 2257, 2018 ("*the ecosystem concept is intended to capture the link between a core product, its components, and its complementary products/services ('complements'), which jointly add value for customers*").

[9] FLETCHER, A. Digital competition policy: are ecosystems different? *Submission to the 134th meeting of the OECD Competition Committee*, p. 2, Dec. 2020.

[10] JACOBIDES, M. G.; CENNAMO, C.; GAWER, A. Externalities and complementarities in platforms and ecosystems: From structural solutions to endogenous failures. Research Policy, v. 53, n. 1, p. 104906, 2024, p. 9 ("*the relative merits of ecosystems as an organizational structure relates to their ability to tackle the need for coordination in the presence of modularity*").

SDKs), the standardized rules for accessing and using the central platform's resources, among others[11].

49. The economic logic of ecosystems has relevant implications for antitrust policies. Firstly, ecosystems are characterized by new forms of internal competition, manifested as "vertical competition" between products that are not directly substitutable[12] . This phenomenon calls into question the centrality of the notion of the "market" in antitrust analysis, since the delimitation of spaces of substitutability where competitive forces mutually constrain each other becomes complex, as does the apprehension of anti-competitive effects in interconnected economic activities[13].

50. Secondly, there is a strengthening of economic dependencies between the complementors and the central platform orchestrator, the latter being able to unilaterally alter the conditions of competition in the various adjacent markets[14] . While orchestration is crucial for coordination in the ecosystem, design and governance decisions can generate functional and distributive failures, resulting in a loss of value for all participants and hindering innovation[15] . The framing of these decisions under competition laws blurs the boundaries between the exclusionary and exploitative nature of abusive conduct.

51. For these reasons, digital ecosystems cross-cut the normative dimension of competition policy beyond antitrust analysis, compressing it between (*i*) dynamic competition approaches[16] , which favor the intrinsic superiority of the private order of governance and (*ii*) regulatory approaches (rigid or semi-flexible), which aim to encapsulate the ontological varieties of the economic power of large digital platforms in targeted state prohibitions[17] . In the Brazilian legal system, this tension conflicts with the

[11] JACOBIDES, M. G.; CENNAMO, C.; GAWER, A. Externalities and complementarities in platforms and ecosystems: From structural solutions to endogenous failures. *Research Policy*, v. 53, n. 1, p. 104906, 2024, p. 9.
[12] CRANE, D. A. Ecosystem competition and the antitrust laws. *Nebraska Law Review*, v. 98, n. 2, pp. 412-424, 2019 ("*ecosystem competition among firms that are not horizontally related do have important consequences for consumer welfare, and hence should be a proper subject of antitrust scrutiny*")
[13] CARBALLA-SMICHOWSKI, B.; DUCH-BROWN, N.; GOMEZ-LOSADA, A.; MARTENS, B. When 'the' market loses its relevance: an empirical analysis of demand-side linkages in platform ecosystems. JRC Digital Economy Working Paper 2021-07. Sevilla: European Commission, 2021.
[14] CUTOLO, D. and KENNEY, M. Platform-Dependent Entrepreneurs: Power Asymmetries, Risks, and Strategies in the Platform Economy. *Academy of Management Perspectives*, Vol. 35, No. 4, 2021.
[15] JACOBIDES, Michael G.; CENNAMO, Carmelo; GAWER, Annabelle. Externalities and complementarities in platforms and ecosystems: From structural solutions to endogenous failures. *Research Policy*, v. 53, n. 1, p. 104906, 2024.
[16] PETIT, N.; TEECE, D. J. Innovating Big Tech firms and competition policy: favoring dynamic over static competition. Industrial and Corporate Change, v. 30, n. 5, p. 1-31, 2021.
[17] LIANOS, Ioannis; ELLER, Klaass Hendrik; KLEINSCHMITT, Tobias. Towards a Legal Theory of Digital Ecosystems. *Center for Law, Economics and Society Research Paper Series: 1/2024*, v. 1, n. 1, p. 1-79, 2024 (arguing that digital ecosystems demand a legal approach that transcends both the "rhetoric of the natural order", which presumes the superiority of private governance tools developed by dominant companies, and the "rhetoric of power", which, although it correctly identifies power asymmetries in these environments, can be excessively reductionist. Overcoming this dichotomy, the authors propose approaching ecosystems as

multiple meanings of the constitutional mandate to repress the abuse of economic power (art. 173, paragraph 4, of the Federal Constitution) and conflagrates alternative visions of the interpretation of the regime of infractions of the economic order in Law 12.529/2011.

3.2.Mobile digital ecosystems: components and governance rules

52. "Mobile digital ecosystems" are ecosystems organized around offering digital products and services on mobile devices with internet access (such as *smartphones* and *tablets*). Its main components involve, in addition to the mobile devices themselves: (*i*) the pre-installed operating system, whose function is to administer and manage the available resources, (*ii*) the native applications, which are *software* designed specifically for that operating system and which offer additional functionalities for the operating systems in which they operate, as well as (*iii*) the application stores, which are *marketplaces* where mobile device users can *download* native applications created by developers. The multiple interactions between these interdependent players make the dynamics of this organization co-evolving, making it difficult to predict the impact of individual actions on systemic results[18].

53. Currently, the two main mobile ecosystems available are controlled by Apple and Google. In the case of Apple, its ecosystem runs on devices manufactured by the company itself (such as iPhones and iPads), on which the Apple iOS operating system *software* is pre-installed. Apple's ecosystem is commonly described as a "*walled* garden" model, since it is a vertically integrated and "closed" ecosystem in which Apple has tight control over many aspects of the user experience[19].

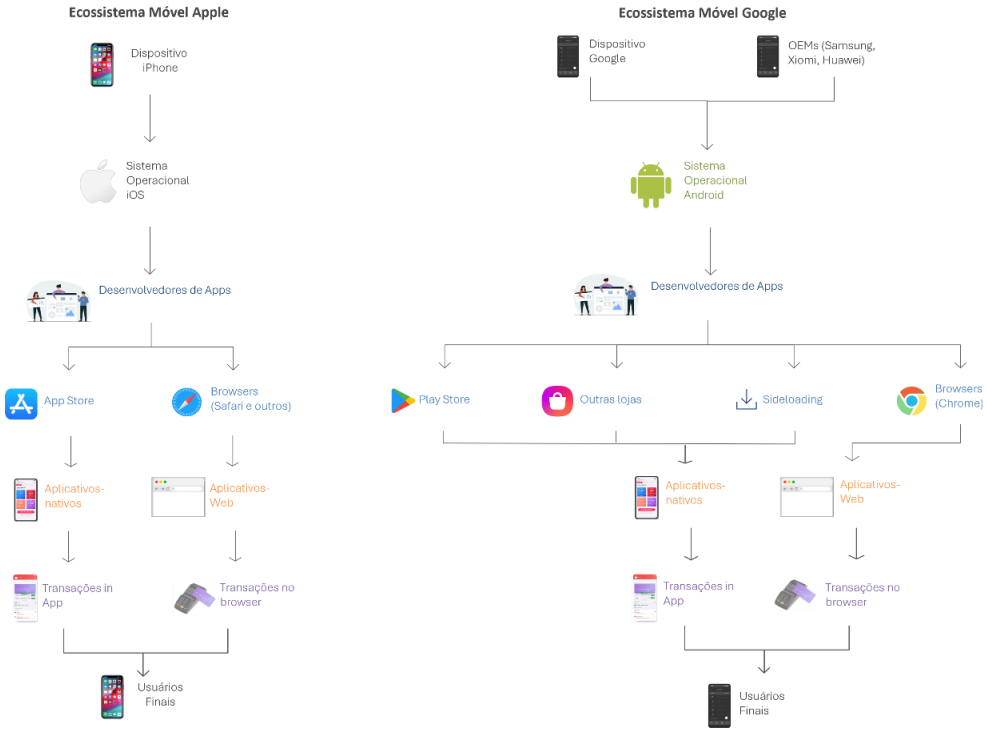
54. In the case of Google, its ecosystem is organized around the Android operating system, which is pre-installed both on mobile devices manufactured by Google itself and on devices manufactured by licensed third parties such as Samsung, Huawei and others (OEMs). Due to various characteristics that will be discussed in more detail below, Google's ecosystem is commonly described as "open". The figure below illustrates the layers of options and relationships between the different links that make up the iOS and Android ecosystems:

Figure 1 . Illustration of the Apple and Google mobile digital ecosystems

complex adaptive social systems, recognizing their evolutionary nature and the need for a comparative institutional analysis).

[18] MARTINEZ, Alba Ribera. Mobile Ecosystems: an intellectual entelechy but a necessary model. *CPI Anitrust Chronicle*, v. 1, n. 1, p. 1-7, 2025.

[19] EUROPEAN COMMISSION. Case AT.40437 - Apple - App Store Practices (music streaming). Brussels, 2024, § 100.



Source: Prepared by Cabinet 4

55. For the purposes of this vote, it is appropriate to explain how the governance rules of these two mobile digital ecosystems (in terms of technological *design* and commercial conditions) differ in at least three relevant parameters: (*i*) licensing of the operating system; (*ii*) rules for distributing applications and (*iii*) the use of means of payment in transactions carried out within applications.

3.2.1 Licensing of operating systems

56. The basis of mobile digital ecosystems is the operating system. In Google's case, Android is an *open-source* operating system published by Google, so anyone can access and modify it. In addition, Google establishes licensing agreements with other mobile device manufacturers (such as Samsung, Huawei and others) who pre-install the Android system on their devices. Google seeks to maintain control over the standardization of Android through "anti-fragmentation" agreements and prohibitions on the distribution of versions incompatible with the established requirements.

57. The source code for Apple's iOS operating system is *closed source*, which means that its content and code are not published or directly available to app developers[20] . In addition, the company does not license the iOS system to other mobile device

[20] To enable third-party developers to develop applications, Apple provides specific tools, notably Xcode, Swift and TestFlight. APPLE. Xcode. Available at: https://developer.apple.com/xcode/; APPLE. Swift. Available at: https://www.apple.com/br/swift/ and APPLE. TestFlight. Available at: https://developer.apple.com/testflight/.

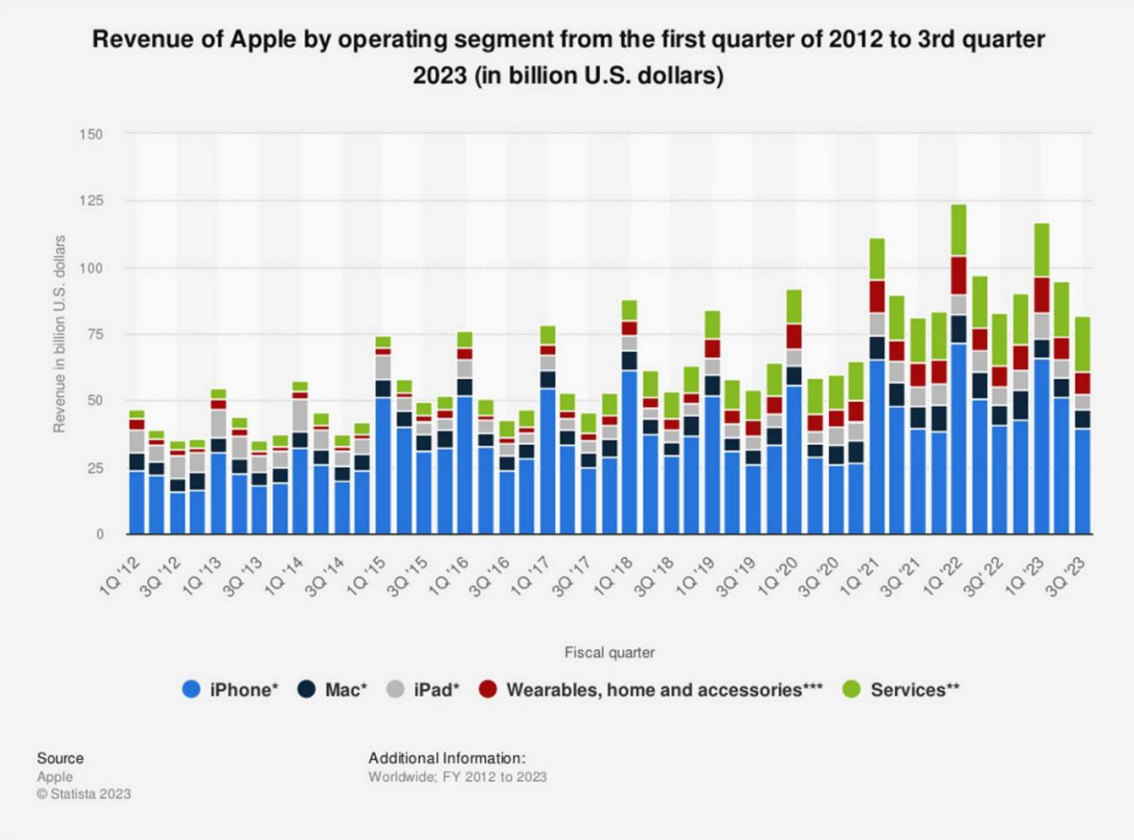
manufacturers, nor does it allow consumers to install alternative operating systems on their devices. This means that the iOS operating system is only available on *hardware* manufactured by Apple itself, such as iPhones and iPads.

58. The decision whether or not to license the operating system significantly shapes the strategies for exploiting ecosystems. Apple focuses on selling high-priced premium *hardware*, focusing on privacy and security aspects in the use of its mobile devices, while Google prioritizes an open ecosystem with free or low-cost services monetized through advertising and user data[21] . The objectives are therefore relatively different: while Apple strengthens its ecosystem to charge higher prices for its *hardware* and services, Google seeks to massify its user base to sell consumer attention through advertising space .[22]

59. The differences in these strategies have a direct impact on the composition of the companies' financial results. While Apple earns around 80% of its global revenue from the sale of mobile devices, in the case of Google, around 90% of its revenue comes from the sale of advertisements[23] . In recent years, Apple's share of revenue from services such as the App Store, Apple Pay and its apps (Apple Music, Apple Books, Apple TV+) has been growing, but it still represents significantly less than revenue from *hardware* sales:

Figure2 . Apple's revenue by operating segment from the first quarter of 2012 to the third quarter of 2023 (in billions of US dollars)

[21] AUSTRALIAN COMPETITION & CONSUMER COMMISSION. *Digital platform services inquiry - Interim report No. 2 - App marketplaces*. Canberra, 2021, p. 138; EUROPEAN COMMISSION. Case AT.40437 - Apple - App Store Practices (music streaming). Brussels, 2024, § 104.
[22] THE NETHERLANDS AUTHORITY FOR CONSUMERS & MARKETS. *Market study into mobile app stores.* Amsterdam, 2019, p. 38.
[23] These figures are based on companies' global turnover in 2021, cf. COMPETITION & MARKETS AUTHORITY. *Mobile ecosystems - Market study final report*. London, 2022, p. 20.



Source: EUROPEAN COMMISSION. Case AT.40437 - Apple - App Store Practices (music streaming). Brussels, 2024, paragraph 102

60. As will be discussed, these differences in the companies' strategies and business models are reflected in the different choices of architecture for their respective ecosystems. This is especially noticeable in the way companies enable the distribution of applications developed by third parties to attract consumers and add value to their own digital services.

3.2.2 Distribution of applications developed by third parties

61. Android and iOS operating systems run apps, *software* that provides additional functionality to mobile devices and their operating systems. It is possible to distinguish between "native apps" - apps written to run on a specific operating system - and "web-based apps" - created with web technologies and running within *browsers* such as Google Chrome, Mozilla Firefox, Safari and Opera, similar to any website.

62. Although theoretically the same content can be available in a native app and a web-based app, market investigations conducted by foreign authorities have shown that web apps do not exert significant competitive pressure on native apps in the Apple

ecosystem due to a set of strategically imposed technical and functional restrictions[24] . With the exception of pre-installed apps (which are already loaded onto the device itself), users can access native apps, in theory, via two different routes: (*i*) sideloading and (*ii*) obtaining the app via app stores.

3.2.2.1 Sideloading

63. Sideloading, also known as sideloading, consists of the mobile device user downloading an application directly from an external source outside of an app store, such as a website or via a peer-to-peer transfer. The most common form of sideloading is downloading from mobile *browsers*.

64. This type of operation is allowed in the Android ecosystem[25] . In the Apple ecosystem, on the other hand, it is prohibited by the company's terms of use. Although it is technically possible for an Apple user to install applications outside the App Store by unlocking the iOS operating system (a procedure known as "jailbreaking"), this alternative requires advanced technical knowledge, constitutes violation of the contractual terms established by the device manufacturer and potentially compromises the device's layers of protection . [26]

65. However, at present, even in the Android ecosystem, sideloading is not widely adopted by users, mainly because this process requires them to modify the device's security settings, face multiple verification procedures and deal with potentially discouraging security alerts[27] . Because of these difficulties, few developers choose to make their apps available for sideloading[28].

[24] In this sense, the Japanese competition authority's report, published in 2023, indicated that, in Japan, 65.3% of iOS users and 79.3% of Android users exclusively use native apps for messaging services, and similar figures for other services. Only 28.4% of developers offer the same services via web apps. (THE JAPAN FAIR TRADE COMMISSION. *Market Study Report on Mobile OS and Mobile App Distribution*, 2023, p. 82-91).
[25] *Sideloading* on Android devices consists of installing applications via ".APK" files obtained outside the Google Play Store.
[26] AUSTRALIAN COMPETITION & CONSUMER COMMISSION. *Digital platform services inquiry - Interim report No. 2 - App marketplaces.* Canberra, 2021, p. 28 . Apart from *jailbreaking*, Apple offers only two limited exceptions to its closed system: *TestFlight*, which allows app testing with a few invited users, and the Enterprise Program, which authorizes companies to create in-house apps for their employees. However, none of these options serve as a real alternative for ordinary consumers to install apps outside the App Store. (COMPETITION & MARKETS AUTHORITY. *Mobile ecosystems - Market study final report.* London, 2022, p. 110).
[27] On Android versions 7.0 or earlier, the user needs to activate the "Unknown sources" option in the security settings, accepting a warning about vulnerabilities. On Android versions 8.0 or higher, there is a per-app permission model, where the user receives a notification when trying to download an .APK file, needing to specifically authorize that app for installation. In both cases, the process temporarily disables layers of system protection, potentially increasing the device's exposure to security risks. (THE NETHERLANDS AUTHORITY FOR CONSUMERS & MARKETS. *Market study into mobile app stores.* 2019, p. 46).
[28] THE JAPAN FAIR TRADE COMMISSION. *Market Study Report on Mobile OS and Mobile App Distribution*, 2023, p. 81.

66. As will be discussed in due course in this vote, the definition of sideloading rules in mobile ecosystems is the subject of intense controversy among economic agents. On the one hand, orchestrators argue that sideloading can compromise the integrity of operating systems, since there is a risk of users downloading malicious applications containing malware.

67. In an official document, Apple points out, for example, that Android devices that allow sideloading have 15 to 47 times more malware infections than the iPhone[29] . On the other hand, some authorities consider that sideloading could be an effective channel for competitive pressure on app stores, and that security concerns could be addressed by less invasive means of protection[30].

68. At the moment, however, even in the Android ecosystem where it is allowed, sideloading is not widely used by users. One of the possible reasons for this is that this operation requires the user to change the security settings of the device, go through various verification processes and contend with security warnings that may discourage them from downloading. Discovering new apps then becomes significantly more difficult outside the app stores.

3.2.2.2 App stores

69. App stores are digital "marketplaces" made up of "online services and related applications that are dedicated to allowing users to download, install and manage a wide range of diverse applications from a single point on the smartphone interface"[31] . They function as true platforms that mediate between mobile device users and application developers for that ecosystem. In this way, they benefit from indirect network effects, as the increase in the number of apps available makes the store more attractive to mobile users .[32]

70. In the Android ecosystem, the Google Play Store predominates, with other alternative stores coexisting to a lesser extent and depending on the manufacturer, such as the Galaxy App Store (Samsung), the App Gallery (Huawei) or Aptoide. In the judgment of the Google Android case in 2018, the European Commission concluded that, although there are alternative stores, the Google Play Store is by far the most used option

[29] APPLE. *Building a Trusted Ecosystem for Millions of Apps: A threat analysis of sideloading.* Cupertino: Apple Inc., October 2021.
[30] COMPETITION & MARKETS AUTHORITY. *Mobile ecosystems - Market study final report.* London, 2022, p. 303.
[31] EUROPEAN COMMISSION. Commission decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099 - Google Android). Brussels, July 18, 2018, § 86.
[32] BOSTOEN, Friso; MÂNDRESCU, Daniel. Assessing Abuse of Dominance in the Platform Economy: a Case Study of App Stores. *European Competition Journal*, v. 1, n. 1, p. 1-61, 2020, p. 14.

by consumers of Android devices, accounting for more than 90% of app downloads on these apps in the period from 2011 to 2016 . [33]

71. As mentioned, on Apple's iOS, apps can only be downloaded via the App Store. Exceptionally in the European Union, as of 2023, Apple began to allow the distribution of apps via third-party app stores, in order to comply with the provisions of the *Digital Markets Act* (DMA). Currently, in Europe, at least six app stores have set themselves up as alternatives to the App Store. These new stores adopt different business models (charging for direct distribution, subscriptions or free distribution) and focus on different application profiles (games, utilities, corporate applications and others)[34].

72. In order for developers to make their apps available in app stores, they need to adhere to the store owner's terms and conditions of use. These terms and conditions of use mainly involve comprehensive requirements relating to security, performance, business, design and legal compliance. For distribution on the App Store, all developers, regardless of the business model adopted, are required to sign the "Apple Developer Program License Agreement"[35] , which provides for an annual fee of USD 99.00. This amount is charged as a requirement for participation in the development program and represents a "fixed cost" for access to the iOS ecosystem.

73. In the case of Google Play, the initial process requires developers to accept the terms of the "Google Play Developer Distribution Agreement"[36] and make a one-off payment of USD 25 as a platform registration fee. This fee structure is detailed in Google's official documentation, which clarifies which developers are subject to service fees and which modalities are available[37] . It is worth noting that all these fees are independent of the commissions subsequently applied to commercial transactions carried out through the applications, which follow specific rules on each platform.

74. To ensure that developers meet all these requirements, the stores use what are known as "review processes". Developers submit their apps or updates for review, and

[33] EUROPEAN COMMISSION. Commission decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement (AT.40099 - Google Android). This decision notes that several factors place the Google Play Store as the main distribution channel in the ecosystem, in particular the fact that this store is pre-installed on all Android devices and the fact that it brings together a greater number of apps and the most popular apps among users.
[34] See Section 8.3 of this vote.
[35] APPLE. Contracts and guidelines for Apple developers. Available at: https://developer.apple.com/br/support/terms/ . Accessed on: April 20, 2025.
[36] GOOGLE. Developer account registration fee. Available at: https://support.google.com/googleplay/android-developer/answer/112622. Accessed on: August 1, 2024.
[37] GOOGLE. Who is subject to the service charge. Available at: https://support.google.com/googleplay/android-developer/answer/11131145?hl=pt-BR#zippy=%2Cquem-est%C3%A1-sujeito-%C3%A0-taxa-de-servi%C3%A7o.

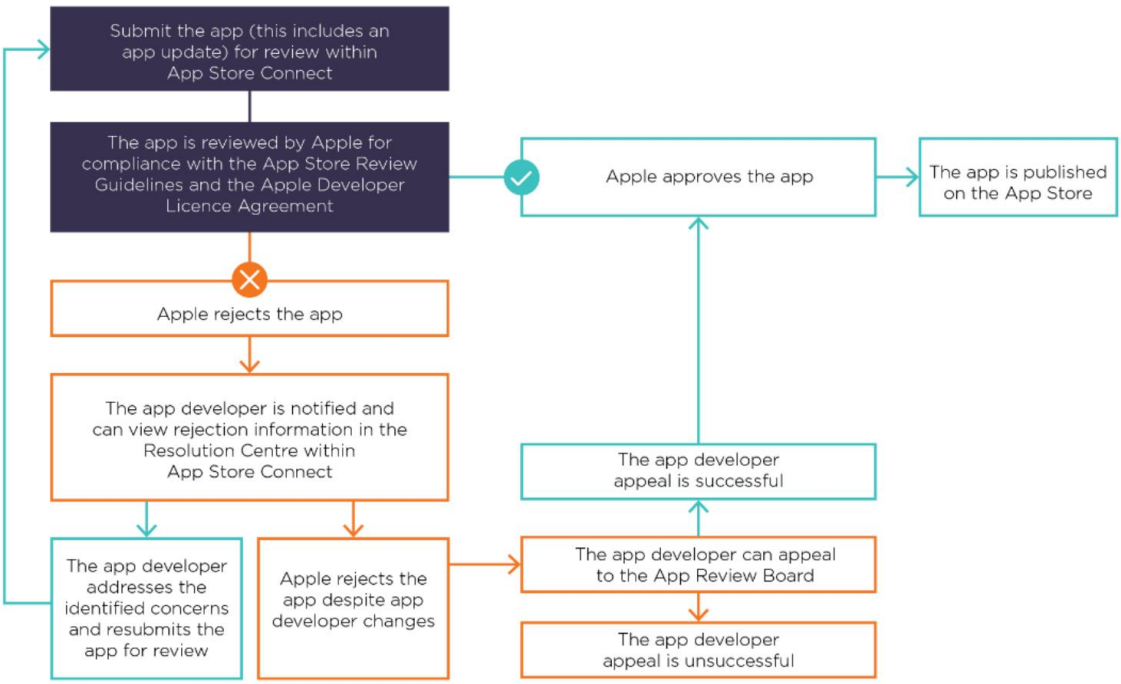
Apple or Google teams examine the app versions according to their respective guidelines. Based on this evaluation, the app versions are approved or rejected and, if approved, the app is made available to users in the corresponding store. In the event of rejection, developers can still "appeal". The application of the review guidelines covers various factors - technical performance and stability, permitted content and age restrictions, monetization and advertising methods, security and data protection, as well as privacy and information collection.

75. As pointed out in the report on mobile digital ecosystems by the Australian authority[38] , Apple reports that it evaluates, on average, around 100,000 app submissions, including updates, per week. The company employs a manual review process to ensure compliance with App Store guidelines and the Apple Developer Program License Agreement. Approximately 50% of apps are reviewed within 24 hours and more than 90% within 48 hours of submission. A CNBC report indicated that an Apple reviewer can make a decision on whether to accept, reject or withhold an app in just a few minutes, and many apps are considered simple and can be evaluated quickly.

76. When an app submission is rejected by the App Store Review Team, the developer is informed via App Store Connect about the reasons for the rejection and how to resolve the issue. According to Apple, developers who disagree with a decision can appeal to the App Review Board, to get the decision overturned. The figure below, drawn up by the ACCC, illustrates the App Store review process.

Figure 3 . Apple's Review Process

[38] AUSTRALIAN COMPETITION & CONSUMER COMMISSION. Digital platform services inquiry - Interim report No. 2 - App marketplaces. Canberra, 2021, p. 49.



Source: AUSTRALIAN COMPETITION & CONSUMER COMMISION. Digital platform services inquiry - Interim report No. 2 - App marketplaces, Canberra, 2021, p. 50.

77. In the context of market investigations conducted by foreign authorities, some developer testimonies that raise problems in the application of the guidelines by the stores[39] . The CMA report, for example, raises concerns that review processes may increase Apple and Google's ability to impose unfair commercial requirements on app developers, including possible discrimination between app developers, without proper transparency[40].

78. As explained by the Mercado Livre Complainant in a petition attached to the case file (SEI 1157256), the Apple App Store review process consists of a structured system that all apps and their updates must go through before being made available to users. Initially, developers submit their apps through the App Store Connect platform, where

[39] The Australian Competition and Consumer Commission (ACCC) report, for example, highlights testimonies from developers frustrated by the inconsistent interpretation of Apple and Google store guidelines. Developers have reported that rejected apps are often approved when they are simply resubmitted and analyzed by another reviewer, demonstrating the arbitrariness of the process. (AUSTRALIAN COMPETITION & CONSUMER COMMISION. *Digital platform services inquiry - Interim report No. 2 - App marketplaces*, Canberra, 2021, p. 51-52).

[40] COMPETITION & MARKETS AUTHORITY. *Mobile ecosystems - Market study final report*, London, 2022, p. 317. In the same vein, see GERADIN, Damien; KATSIFIS, Dimitrios. The Antitrust Case against the Apple App Store. *Journal of Competition Law and Economics*, v. 17, n. 3, p. 503-585, 2021, p. 512. ("*both Apple and Google have been criticized for applying their guidelines in an unpredictable, arbitrary, and discriminatory fashion, which in turn disrupts the ability of app developers to run their business properly*").

they upload both the app's code and its metadata. This process includes an automated review phase followed by a manual assessment by Apple's review team. The review process is outlined below:

79. Although Apple indicates that the average review time is approximately 24 hours, in practice, developers such as Mercado Libre report experiences of 3 to 4 working days to complete the process. Also according to developers, the obstacles in this process tend to be particularly significant in frequent update cycles.

3.1.2.3 Processing transactions within applications (in-app purchases)

80. When users of Android or iOS mobile devices make purchases within the apps themselves (*in-app* purchases), they need to use systems to process these payments. Under the terms and conditions currently in force in Brazil for the Apple and Google app stores, transactions made within apps downloaded from their respective stores are required, as a rule, to be processed by their own payment systems, namely In-app Purchase (IAP)[41] and Google Play Billing (GPB)[42] . The use of these systems, in turn, involves charging fees per transaction.

81. Historically, both Apple and Google charged a standard fee of 30% on *in-app* payments for digital goods and services. This rate was reduced to 15% on subscriptions after the first year. In response to growing regulatory and developer pressure, the companies have introduced programs with reduced rates for small businesses. Apple launched the "*App Store Small Business Program"* in January 2021[43] , offering a reduced commission of 15% for developers with annual revenue of less than $1 million. Similarly, Google announced in March 2021 that it would reduce its commission to 15% on each developer's first million dollars in annual revenue[44].

[41] App Store Review Guidelines, Section 3.1.1 "If you want to unlock features or functionality in the app (for example: subscriptions, in-game currency, game levels, access to premium content, or unlocking a full version), you must use the in-app purchase. Apps cannot use their own mechanisms to unlock content or functionality, such as license keys, augmented reality bookmarks, QR codes, cryptocurrencies and cryptocurrency wallets, etc." (APPLE. *App Review Guidelines*. Available at: https://developer.apple.com/support/downloads/terms/app-review-guidelines/App-Review-Guidelines-20240913-Portuguese-Brazil.pdf.)

[42] "Except in cases permitted by the payment policy, purchases that require the use of the Google Play billing system are as follows, among others: Digital items, such as virtual coins, extra lives, more game time, characters, avatars and complementary items; Subscription services, such as fitness, games, dating, education, music, video and other content; App content or features, such as an ad-free version or new features unavailable in the version without financial costs" (GOOGLE. Understanding Google Play's payment policy. Available at: https://support.google.com/googleplay/android-developer/answer/10281818?hl=pt-BR. Accessed on: April 20, 2025.

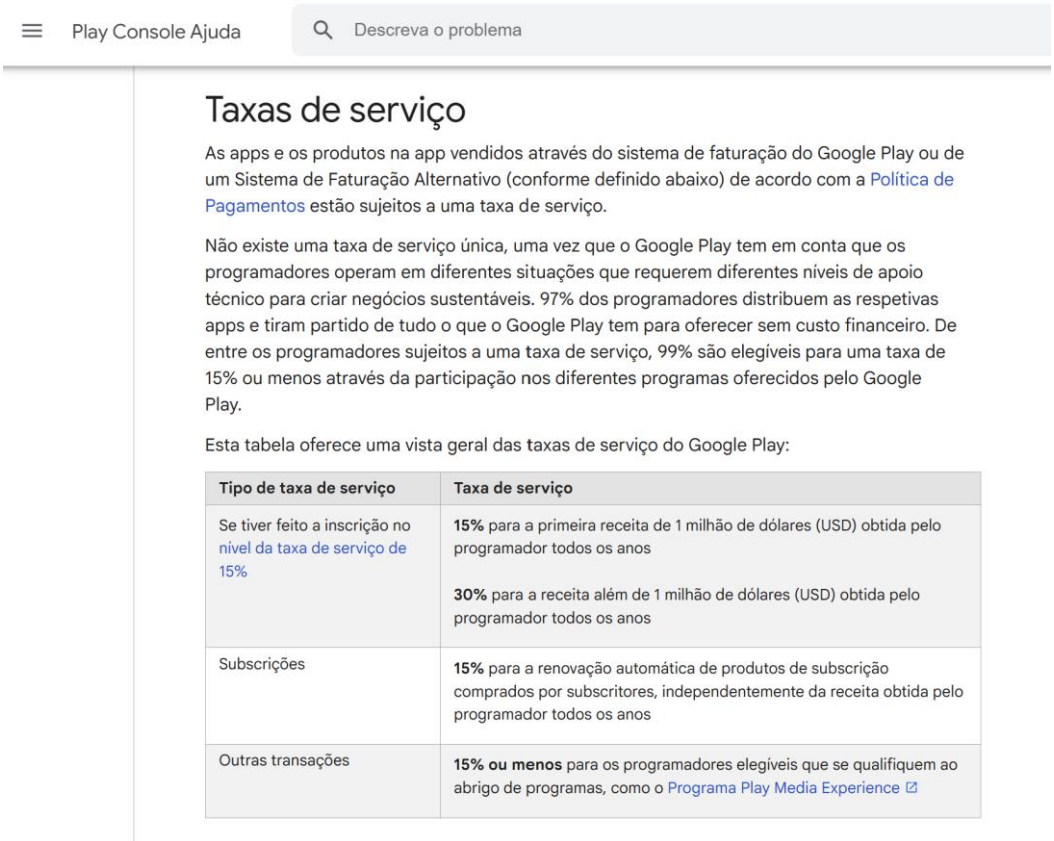
[43] APPLE. App Store Small Business Program. Available at: https://developer.apple.com/app-store/small-business-program/. Accessed on: April 20, 2025.

[44] GOOGLE. Understanding Google Play's payment policy. Available at: https://support.google.com/googleplay/android-developer/answer/10281818?hl=pt-BR. Accessed on: 20 Apr. 2025

82. Currently, for almost all jurisdictions except the European Union, the collection of fees complies with the following rules. In the case of the Google Play Store, only developers of paid apps or who offer "digital" products and *software* are subject to a service fee[45] . For "developers enrolled at the 15% service fee level", the fee is "on the first USD 1 million of annual revenue generated by the developer"; and "on profits that exceed the annual revenue of USD 1 million generated by the developer".

83. For subscriptions, there is a 15% charge "for subscription products with automatic renewal purchased by subscribers, regardless of the revenue generated by the developer each year". Finally, for "other transactions", there is a 15% fee "for qualified developers who participate in programs such as the Play Media Experience Program". The image below, taken from the official Google Play website, explains the incidence of these fees:

Figure 4 . Service charges on Google Play



Source: https://support.google.com/googleplay/android-developer/answer/112622?sjid=6258912568926432199-SA

[45] GOOGLE. Service fees. Available at: https://support.google.com/googleplay/android-developer/answer/112622?sjid=6258912568926432199-SA. Accessed on: 20 Apr. 2025

84. Google Play also reports that in India and South Korea, developers who offer alternative billing systems are entitled to a 4% commission rate[46] . These exceptions are due to legal and regulatory requirements in these jurisdictions[47] . Similarly, in the European Union, following the implementation of the Digital Markets Act (DMA), the Google Play Store announced an equal 4% reduction in its commission rate for developers who choose to use alternative payment systems[48].

85. In the case of the App Store, the fee policy for *in-app* transactions is detailed in Appendix 2 of the *Apple Developer Program License Agreement*[49] . Free apps or apps whose business model depends exclusively on advertising or the marketing of physical goods and services are exempt from commission fees.

86. Item 3.4 of Exhibit 2 provides that, "in the case of sales of Licensed Applications to End Users, Apple "shall be entitled" to a commission "equal to thirty percent (30%) of all prices to be paid by each End User". For auto-renewing subscription purchases "made by customers who have accumulated more than 1 year of paid subscription service within a Subscription Group", the commission rate becomes "fifteen percent (15%) of all prices to be paid by each End User for each subsequent renewal". There are also special rules for certain types of application such as so-called "*reader* apps", as will be discussed in due course in this vote .[50]

87. Apple emphasizes the role of the mandatory use of its IAP payment system in guaranteeing the security and quality of the user experience in its ecosystem. It also maintains that IAP offers a simplified and secure shopping experience through advanced technologies such as one-click purchases, facial recognition (Face ID) and digital recognition (Touch ID), facilitating fast transactions without the need to re-enter payment data.

88. In addition to policies on charging commission fees, another crucial matter in the app store guidelines applicable to developers concerns the conditions under which developers can inform app users about offers of their services available on other channels outside the apps themselves.

---

[46] GOOGLE. Service fees. Available at: https://support.google.com/googleplay/android-developer/answer/112622?sjid=6258912568926432199-SA . Accessed on: 20 Apr. 2025
[47] These foreign legal and regulatory initiatives will be explored in detail in section x of this vote.
[48] GOOGLE. Offer an alternative billing system for users in the European Economic Area (EEA) Available at: https://support.google.com/googleplay/android-developer/answer/12348241?sjid=6258912568926432199-SA . Accessed on: 20 Apr. 2025
[49] APPLE. Appendix 2 of Apple's Developer Agreements and Guidelines. Available at: https://developer.apple.com/br/support/terms/. Accessed on: April 20, 2025. Available at: https://developer.apple.com/support/downloads/terms/schedules/Schedule-2-and-3-20240610-Portuguese-Brazil.pdf
[50] See Section 6.

89. Considering that mobile device users can choose to transact with developers outside the respective apps, the terms and conditions of use of the Apple and Google app stores in general provide for so-called "*anti-steering* clauses", provisions that prohibit developers from informing, guiding or facilitating consumers to discover payment options available in other sales channels outside the app.

90. Broadly speaking, *anti-steering* restrictions can include prohibiting links to external payments, prohibiting the mention of alternative payment options, preventing the disclosure of price differences between channels and limiting information on how to purchase content outside the app.

91. As will be discussed in more detail in other sections of this vow, in the Apple ecosystem, the core of the restrictions is found in Section 3.1.1 of the App Store Review Guidelines, which explicitly states: "Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchase mechanisms other than in-app purchases."

92. This ban prevents developers from including interactive elements such as buttons or links that could direct users to alternative payment methods, such as websites where the same services can possibly be purchased at lower prices. The Google Play Store also has similar clauses.

3.2.3. Possible harms to competition and consumers

93. The conditions of competition between mobile digital ecosystems have been the subject of intense scrutiny by defense authorities around the world. Over the last six years, in jurisdictions such as the United States[51] , the United Kingdom[52] , the Netherlands[53] , Australia[54] , South Africa[55] and Japan[56] , economic studies, market investigations and other publications have been produced which have systematically mapped the structure of these ecosystems, the market power of their orchestrators and the main challenges by app developers in the face of the rules imposed in operating systems and app stores.

[51] U.S. HOUSE OF REPRESENTATIVES. SUBCOMMITTEE ON ANTITRUST. Investigation of Competition in Digital Markets. Majority Staff Report and Recommendations, p. 1-450, 2020.
[52] COMPETITION & MARKETS AUTHORITY. *Mobile ecosystems - Market study final report*, London, 2022.
[53] THE NETHERLANDS AUTHORITY FOR CONSUMERS & MARKETS. *Market study into mobile app stores.* Amsterdam, 2019.
[54] AUSTRALIAN COMPETITION & CONSUMER COMMISSION. *Digital platform services inquiry - Interim report No. 2 - App marketplaces*, Canberra, 2021.
[55] SOUTH AFRICA. Competition Commission South Africa. Online Intermediation Platforms Market Inquiry. Final Report and Decision. 2023.
[56] THE JAPAN FAIR TRADE COMMISSION. *Market Study Report on Mobile OS and Mobile App Distribution*, Tokyo, 2023.

94. In a very convergent way, these documents raise concerns about the low levels of competition in the ecosystems dominated by Apple (iOS/App Store) and Google (Android/Play Store). They also point out that the significant economic power of these companies stems from their ability to unilaterally define and impose on third parties the rules of participation in multiple markets. Added to this is the presence of economic characteristics of digital markets that favor monopoly power, such as network effects, economies of scope and high barriers to entry.

95. Although an exhaustive analysis of the multiple international reports is beyond the scope of this vote, at least three points of concern emerge that are intrinsically related to the present process.

96. Firstly, the reports diagnose a lack of effective competition at the mobile app distribution stage. They point out that, due to the significant user base already within the Apple or Google ecosystems, competition between iOS and Android is extremely limited[57] . Nor do alternative app stores and limited sideloading options exert significant competitive pressure[58] . The exclusivity of the App Store on Apple devices, in turn, gives the company the power of a monopoly position over iOS app developers, who become totally dependent on this distribution channel.

97. Secondly, since Apple and Google act simultaneously as orchestrators and as service providers in various layers of the mobile ecosystems (in particular by providing their own apps and means of payment), these companies would engage in a kind of "conflict of interest". This is because they could be able to change and impose the rules of the ecosystems in order to benefit their own interests, deteriorating competition through strategies of " self-preferencing" or discrimination against third parties .[59]

98. Thirdly, the reports emphasize that *anti-steering* rules and the terms for charging for transactions within apps (such as the 30% rule), in addition to distorting competition, harm consumers, since they are prevented from finding out about more favorable payment options outside the apps and still bear costs passed on from the developers of the orchestrators' store commission fees[60].

[57] THE NETHERLANDS AUTHORITY FOR CONSUMERS & MARKETS. *Market study into mobile app stores.* Amsterdam, 2019, pp. 38-39.
[58] THE JAPAN FAIR TRADE COMMISSION. *Market Study Report on Mobile OS and Mobile App Distribution.* 2023, p. 93.
[59] COMPETITION & MARKETS AUTHORITY. *Mobile ecosystems - Market study final report*, London, 2022, pp. 184-186; AUSTRALIAN COMPETITION & CONSUMER COMMISION. *Digital platform services inquiry - Interim report No. 2 - App marketplaces*, Canberra, 2021, pp. 57-60.
[60] AUSTRALIAN COMPETITION & CONSUMER COMMISSION. *Digital platform services inquiry - Interim report No. 2 - App marketplaces*, Canberra, 2021, pp. 79-83.

99. The findings identified by these various international reports have prompted regulatory and legislative responses worldwide, which clearly demonstrates the transformative impact of competition advocacy activities. As will be examined in more detail in the following section of this decision, these investigations and reforms have, within their respective legal frameworks, substantially reshaped the operating boundaries of smart mobile ecosystems, particularly Apple's ecosystem.

4. INTERNATIONAL PRECEDENTS CONCERNING THE APPLE APP STORE

100. Apple's policies and terms governing its App Store and its in-app purchase mechanism (IAP) have been subject to competitive assessment and regulatory initiatives globally. Throughout these proceedings, several submissions from Mercado Livre (SEI 1440826) and entities such as Match Group (SEI 1475625) have drawn parallels between the practices described in the Complaint and those examined in international cases.

101. To establish objective parameters for legal comparability, this section examines, in a non-exhaustive manner, how Apple's App Store commercial practices have been scrutinized in foreign jurisdictions and what remedies have been imposed on Apple.

4.1 Epic Games v. Apple (District Court for the Northern District of California, USA)

102. In the United States, in August 2020, Epic Games filed a lawsuit against Apple before the District Court for the Northern District of California, alleging, in summary: (i) restriction on transactions in the iOS app distribution and iOS in-app payments markets; (ii) *tying*, generated by the integration of the App Store into Apple's IAP; and (iii) maintenance of a monopoly. The lawsuit was essentially motivated by three provisions contained in Apple's *Developer Program License Agreement* (DPLA):

> i) Distribution restriction: Developers can only distribute apps on iOS through the App Store - in the case of Epic Games, it could not make the Epic Games Store available to users;
>
> ii) IAP requirement: Developers must use Apple's IAP to process in-app payments - either at the time of *download* (for paid apps) or for in-app purchases - and Apple applies a commission of 30% of the revenue earned;
>
> iii) *Anti-steering* provision: Developers may not communicate to users about payment methods outside the app, either through certain mechanisms such as links or buttons within the app or through emails, for example, that encourage users to use payment methods other than Apple's IAP.

103. On September 10, 2021, District Court Judge Yvonne Gonzalez Rogers issued a decision in which she summarily rejected Epic Games' claims that Apple had violated Sections 1 and 2 of the Sherman Act, but confirmed that the company had violated California's *Unfair Competition Law* by imposing the anti-steering clauses on app developers in the App Store[61] . The ruling ordered Apple, within 90 days, to make the necessary changes to allow developers to direct users to external payment options in their apps.

104. It is important to note that the acquittal of the conduct under Sections 1 and 2 of the *Sherman Act* did not prevent the Court from analyzing competitive issues when applying California law. In this sense, the excerpts below consolidate the Court's main conclusions on the anti-competitive nature of the practices imputed to Apple:

> The evidence presented showed anti-competitive effects and excessive operating margins under any regulatory measure. The lack of competition has resulted in a decrease in information, which has also resulted in a decrease in innovation in relation to the profits made. Costs for developers are higher because competition is not pushing the commission rate. As described, the commission rate that drives excessive margins has not been justified.
>
> Apple's own records reveal that two of the three "most effective marketing activities for retaining existing users" in the United States, and therefore increasing revenues, are "*push* notifications" (#2) and "email outreach" (#3). Apple not only controls these channels, but also acts anti-competitively by preventing developers from using them for Apple's own unrestricted gain.
>
> As previously explained, Apple uses anti-targeting provisions that prohibit apps from including "buttons, external links or other calls to action that direct customers to purchase mechanisms other than in-app purchase" and from "encouraging users to use a purchase method other than in-app purchase", either "within the app or through communications sent to touchpoints obtained from in-app account records (such as email or text)".
>
> Thus, developers cannot communicate lower prices on other platforms, either within iOS or to users obtained from the iOS platform. Apple's general policy also prevents developers from informing users of their 30% commission.
>
> (...) In the context of technology markets, the open flow of information becomes even more critical. As explained above, information costs can create a *lock-in* for platforms, since users have no information about the lifetime costs of an ecosystem. Users may also lack the ability to attribute costs to the platform rather than the developer, which further

[61] UNITED STATES. United States District Court Northern District of California. Epic Games, Inc. v. Apple Inc. Case No. 4:20-cv-05640-YGR. Judge: Yvonne Gonzalez Rogers. Judgment of September 10, 2021.

> prevents them from making informed choices. In these circumstances, the ability of developers to provide information across platforms is crucial. Although Epic Games has not met its burden of demonstrating actual blocking on this record, the Supreme Court has recognized that such information costs can create the potential for anticompetitive exploitation of consumers. *Eastman Kodak*, 504 U.S. at 473-75, 112 S. Ct. 2072. (emphasis added)[62].

105. On April 24, 2023, the U.S. Court of Appeals for the Ninth Circuit rejected Epic Games' appeal, largely upholding the district court's decision, including its finding that Apple's anti-orientation policy was illegal under California law. [63] On January 16, 2024, the US Supreme Court denied the *writ of certiorari*, failing to hear both Epic Games' appeal and Apple's appeal against the Court of Appeals' decision.

106. On April 30, 2025, District Court Judge Yvonne Gonzalez Rogers issued a new ruling, this time finding that Apple had failed to comply with the obligations imposed by that 2021 ruling. The judge concluded that "Apple deliberately chose not to comply with this Court's preliminary injunction. It did so with the express intention of creating new anti-competitive barriers"[64]. The decision found that Apple mainly adopted two new measures intentionally designed to undermine the Court's previous orders, namely: (*i*) it imposed a new 27% commission on purchases made through external links, even for transactions that took place outside the app and (*ii*) it restricted the way developers could communicate with users about alternative payment options, including limiting the placement of links or buttons leading to external payment sites and the use of "warning screens". Therefore, for Judge Rogers, "Apple, despite knowing its obligations under the injunction, frustrated the goals of the injunction and continued its anticompetitive conduct with the sole purpose of maintaining its revenue stream."[65].

4.2 *Department of Justice* (DoJ) v. Apple (District Court for the Northern District of California, USA)

107. In March 2024, the U.S. Department of Justice ("DOJ") filed an antitrust lawsuit against Apple for monopolizing or attempting to monopolize the smartphone market, in violation of Section 2 of the *Sherman Act*. The lawsuit filed with 16 state and district attorneys general is based on Apple's alleged exclusionary conduct that makes it difficult

[62] UNITED STATES. United States District Court Northern District of California. Epic Games, Inc. v. Apple Inc. Case No. 4:20-cv-05640-YGR. Judge: Yvonne Gonzalez Rogers. Judgment of September 10, 2021.
[63] UNITED STATES. Court of Appeals (9th Circuit). Epic Games, Inc. v. Apple, Inc., No. 21-16506; No. 21-16695. Appeal from the United States District Court for the Northern District of California. Judge: Yvonne Gonzalez Rogers. 14.11.2022, San Francisco, California.
[64] UNITED STATES. United States District Court, N.D. California. Epic Games, Inc. v. Apple Inc. Case No. 4:20-cv-05640-YGR. Order Granting Epic Games, Inc.'s Motion to Enforce Injunction. Judgment of April 30, 2025.
[65] UNITED STATES. United States District Court, N.D. California. Epic Games, Inc. v. Apple Inc. Case No. 4:20-cv-05640-YGR. Order Granting Epic Games, Inc.'s Motion to Enforce Injunction. Judgment of April 30, 2025.

for American users to switch mobile devices, undermines innovation in applications, products and services, and imposes extraordinary costs on developers, merchants and consumers. This action, however, is still pending judgment by the US judiciary.

108. Among some of the anti-competitive conduct charged against Apple by the DoJ, the following stand out: (i) blocking innovative applications that would make it easier for users to switch between competing smartphone platforms; (ii) suppressing cloud streaming services that would allow consumers to enjoy high-quality video games and other cloud-based applications without relying on expensive smartphone hardware; (iii) a reduction in the quality, innovation and security of cross-platform messaging services, which enable users to communicate with different platforms and devices, while maintaining consumers' dependence on iPhones; (iv) a reduction in the functionality of non-Apple smartwatches; and (v) the limitation of tap-to-pay functionality to its own digital wallet[66] .

4.3 Market study into mobile app stores by *Autoriteit Consumet & Markt* (Netherlands)

109. In the Netherlands, the competition authority *Autoriteit Consumet & Markt* ("ACM"), in April 2019, published the report of its "*Market study into mobile app stores*", designed to reflect on the process involved in the insertion of apps by developers into app stores and what influences these app stores' choice of which apps will be offered to consumers.

110. The study concluded that developers depend on app stores to reach mobile users, and in most cases there are no alternatives to Apple's App Store and Google's Play Store. This would, at least in theory, make it possible for Apple to set unfair conditions for developers, even having incentives to favor its own apps.[67]

111. On the same occasion, in April 2019, the ACM opened an investigation against Apple to, among other things, assess whether the company was violating the prohibition on abuse of dominance, for example by giving preferential treatment to its own apps.[68] In August 2021, the ACM ruled that Apple was abusing its dominant position by imposing unreasonable conditions on dating app providers relating to the use of its IAP service and *anti-steering* clauses. It therefore ordered Apple to change the rules of the Dutch App

[66] UNITED STATES DEPARTMENT OF JUSTICE. Justice Department sues Apple for monopolizing smartphone markets. Available at: https://www.justice.gov/archives/opa/pr/justice-department-sues-apple-monopolizing-smartphone-markets. Accessed on: Mar. 31, 2025.
[67] AUTORITEIT CONSUMENT & MARKT (ACM). Report - Market study into mobile app stores. The Hague: ACM, 2019. Available at: https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf. Accessed on: 01 Apr. 2025.
[68] AUTORITEIT CONSUMENT & MARKT (ACM). ACM launches investigation into abuse of dominance by Apple in its App Store. Available at: https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store. Accessed on: 01 Apr. 2025.

Store to allow developers of dating apps to use alternative means of payment to Apple's IAP. In addition, these developers must be able to make mention of these payment methods available outside the apps. The decision was as follows:

> The ACM concludes that Apple abuses its dominant position by imposing unreasonable contractual conditions on dating app providers. The conditions relating to the IAP service and anti-steering, which only apply to providers who offer digital content or services in their apps for a fee, harm these dating app providers in two ways.
>
> Firstly, with these conditions, Apple restricts the freedom of choice of dating app providers regarding the processing of payments for the digital content and services they sell. Dating app providers cannot have these services processed by another payment system, nor can they make reference in their apps to payment options outside the app. [suspended]. In addition, as Apple does not give access to data about customers who have made purchases, app providers are also unable to contact users of their apps directly for customer service purposes. Dating app providers are unable to deal with any issues relating to billing, cancellations and refunds directly with their customers because they don't have access to the necessary data. In addition, it becomes much more difficult for dating app providers to do background checks, which is of great importance to dating app providers considering security, age checks and malicious users.
> [suspended]
>
> The ACM also assessed the objectives that Apple says it is pursuing with these conditions, and whether the conditions are necessary and proportionate to that pursuit. These objectives are the ability to commercially exploit the App Store, [suspended], and the protection of quality, privacy and security. ACM states that Apple can also achieve these objectives in other, less harmful ways.
>
> As the conditions are detrimental to dating app providers and are not necessary for the objectives Apple claims to pursue, the ACM comes to the conclusion that the conditions are unreasonable and that Apple therefore abuses its dominant position[69] .

112. Thus, the decision handed down in August 2021 formally recognized that the conditions imposed by Apple on relationship app developers constitute an abuse of a dominant position. This conclusion not only substantiated the determination for Apple to modify its rules in the Dutch App Store, allowing alternative payment methods, but also highlighted how the restrictions related to the IAP system and *anti-steering* clauses significantly compromise commercial freedom and the direct relationship between developers and their customers.

[69] AUTORITEIT CONSUMENT & MARKT (ACM). Summary of decision on abuse of dominant position by Apple. The Hague: ACM, 2021. Available at: https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf. Accessed on: 01 Apr. 2025.

4.4 Investigation by the Japan Fair Trade Commission (Japan)

113. In October 2016, Japan's antitrust authority, the Japan Fair Trade Commission ("JFTC"), launched an investigation against Apple[70] . The suspicions were that Apple was violating its competition law, the *Antimonopoly Act*, by restricting commercial activities, such as the sale of digital content, of companies that distribute their apps on the App Store - which, consequently, are subject to Apple's policies (*App Store Review Guidelines*).

114. The investigation focused on the imposition of the use of Apple's IAP on developers, coupled with *anti-steering* clauses, and on reports from developers that Apple's guidelines contained ambiguous articles and that the process for reviewing and rejecting apps was unclear. The conclusion was that the mandatory use of Apple's IAP would prevent consumers from benefiting from possible price reductions, while the App Store Review Guidelines could have a restrictive effect on new entry or investment.

115. In September 2021, the JFTC closed its investigation after Apple committed to allowing developers to include *links* in their reading, music *streaming* and similar apps, as well as revising its app review guidelines, with the aim of clarifying the terms of the *App Store Review Guidelines* and increasing the transparency of the process, sending a report on the progress of its efforts to the authority once a year for a period of three years.

116. It should be noted that, shortly after the case was closed, Apple released a statement saying that it would apply globally the changes to the App Store regarding *reader apps* that had been agreed with the JFTC:

> Apple today announced an update to the App Store that closes an investigation by the Japan Fair Trade Commission (JFTC). The update will allow developers of "reader" apps to include a link in the app to their website so that users can set up or manage an account. Although the agreement was made with the JFTC, Apple will apply this change globally to all reading apps in the store. Reading apps provide previously purchased content or content subscriptions for digital magazines, newspapers, books, audio, music and video.[71]

117. Apple's decision to globally apply the changes negotiated with the Japanese authority, transcending the jurisdictional boundaries of the JFTC, in itself attests to the need for global coordination of the remedies designed for the App Store, in order to harmonize its policies on a worldwide scale.

[70] JAPAN FAIR TRADE COMMISSION (JFTC). Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Apple Inc. Available at: https://www.jftc.go.jp/en/pressreleases/yearly-2021/September/210902.html. Accessed on: 01 Apr. 2025.

[71] APPLE INC. Japan Fair Trade Commission closes App Store investigation. Available at: https://www.apple.com/newsroom/2021/09/japan-fair-trade-commission-closes-app-store-investigation/. Accessed on: 01 Apr. 2025.

4.5 Case AT.40437 - *App Store* practices (European Union)

118. In the European Union, meanwhile, in June 2020, an investigation was opened by the European Commission to examine whether Apple's rules for developers regarding the distribution of apps in the App Store violated Article 102 of the Treaty on the Functioning of the European Union (TFEU). Although the investigation initially covered both the imposition *of anti-steering* clauses and the mandatory imposition of IAP, the final decision focused on the latter conduct. The case was launched following a Complaint from Spotify, a music *streaming* service company, and an e-book/audiobook distributor about the impact of the App Store rules on competition, specifically in relation to these sectors[72].

119. On 04.03. 2024, the European Commission issued a final decision, concluding, in summary, that Apple abused its dominant position in the market for the distribution of music streaming apps for iOS users by imposing anti-steering clauses that prevent app developers (such as Spotify) from informing users within their apps about alternative and potentially cheaper subscription options available outside the app. A violation of Article 102(a) TFEU was found:

> (825) [W]ith the Anti-Targeting Provisions, Apple imposes unfair commercial terms on music streaming service providers, since (i) the Anti-Targeting Provisions are unilaterally imposed by Apple on music streaming service providers; (ii) they prevent them from properly informing iOS users about the options available to purchase music streaming subscriptions outside the app, in accordance with read-only and cross-platform rules, and from allowing them to effectively exercise those options, which is detrimental to the interests of iOS users, and (iii) they are not necessary for the achievement of a legitimate aim and are in any event disproportionate.
>
> (826) The Commission therefore concludes that Apple has imposed unfair trading conditions within the meaning of Article 102(a) of the Treaty on providers of music streaming services by means of the *Anti-steering* Provisions, which are detrimental to the interests of iOS users[73] (free translation) .[74]

120. As a result of this investigation, the European Commission fined Apple more than 1.8 billion euros in March 2024. In addition, as a remedy to remedy the competition violations, it ordered Apple to remove the anti-steering provisions from the relevant terms and conditions governing the use of the App Store by music streaming service providers.

[72] EUROPEAN COMMISSION. Antitrust: Commission opens investigations into Apple's App Store rules. Available at: https://ec.europa.eu/commission/presscorner/detail/es/ip_20_1073. Accessed on: 31 Mar. 2025.
[73] EUROPEAN COMMISSION. Decision in case AT.40437 - Apple - App Store practices (music streaming). Case C/2024/3556. 2024
[74] EUROPEAN COMMISSION. Decision in case AT.40437 - Apple - App Store practices (music streaming). Case C/2024/3556. 2024, §§ 825-826.

121. More specifically, it was clarified that Apple could no longer prohibit: the use of hyperlinks, "buy buttons" or external links that direct users to purchase methods outside the app; the use of emails to users triggered by actions within the app; and the use of any other method that effectively informs users about prices and purchase options outside the iOS app.

4.6 Implementation of the *Digital Markets Act* (European Union)

122. On September 5, 2023, Apple was designated as a *gatekeeper* under the *Digital Markets Act* (DMA). The designation covered the company's following main platform services: the mobile operating system (iOS), the App Store, Safari[75] and iPadOS[76] . From then on, as provided for in art. 3 (10) of the law, a period of six months began for the company to adapt its services to the obligations of articles 5 to 7 of the DMA.

123. Some of the conducts discussed in this Appeal were substantially affected by some of these regulatory obligations. In relation to *anti-steering* rules, Article 5 (4)[77] established that *gatekeepers* must allow, free of charge, commercial users to communicate and offer their products and services to end users through multiple channels. This provision therefore ensures that commercial users can promote differentiated offers both on the *gatekeeper*'s central platform services (CPS) and on alternative channels, so that contracts with end users can be concluded in the same way, regardless of whether the *gatekeeper*'s services are used. The obligation is also related to the objective explained in Recital 40 of the DMA .[78]

[75] Safari is the web browser developed by Apple and used on its devices such as the iPhone, iPad and Mac. Cf. https://www.apple.com/safari/. Accessed on: 17 Apr. 2025.
[76] iPadOS is the operating system developed by Apple specifically for iPads (Apple tablets). Cf. https://www.apple.com/ipados/. Accessed on: 17 Apr. 2025.
[77] Article 5 Obligations of Gatekeepers (...) "4. The gatekeeper must allow corporate users, free of charge, to communicate and promote offers, including under different conditions, to end users acquired through its main platform service or through other channels, and to conclude contracts with these end users, regardless of whether they use the gatekeeper's main platform services for this purpose".
[78] Recital (40) "In order to avoid further strengthening their dependence on the gatekeepers' core platform services and to promote multi-homing, corporate users of those gatekeepers should be free to promote and choose the distribution channel they consider most appropriate to interact with any end-users that those corporate users have already acquired through the core platform services provided by the gatekeeper or through other channels. This should apply to the promotion of offers, including through a business user's software application, and to any form of communication and conclusion of contracts between business users and end users. An acquired end user is an end user who has already entered into a commercial relationship with the business user and, where applicable, the gatekeeper has been directly or indirectly remunerated by the business user for facilitating the business user's initial acquisition of the end user. These commercial relationships may be paid or free, such as free trials or free service levels, and may have been entered into on the gatekeeper's main platform service or through any other channel. On the other hand, end users should also be free to choose the offers of these business users and enter into contracts with them through the gatekeeper's main platform services, if applicable, or through a direct distribution channel of the business user or another indirect channel that this business user uses."

124. With regard to the requirement to use Apple's payment system (IAP), Article 5(7)[79] prohibits *gatekeepers* from requiring developers to use payment systems for in-app purchases in order to offer their services in the ecosystem. Finally, the DMA brought in relevant provisions regarding the distribution of apps on operating systems controlled by *gatekeepers*. In particular, article 6(4) opened up the possibility of installing alternative app stores to those maintained by the mobile ecosystem controllers:

> Article 6
> Obligations of guardians which may be specified in more detail in article 8
>
> 4. The gatekeeper must allow and technically enable the installation and effective use of third-party software applications or software application stores that use or interoperate with its operating system, and allow such software applications or software application stores to be accessed by means other than the relevant services of that gatekeeper's core platform. The gatekeeper must not, where applicable, prevent downloaded third-party software applications or software application stores from prompting end users to decide whether to set that downloaded software application or software application store as their default. The gatekeeper should technically allow end users who decide to set the downloaded software application or software application store as default to easily make this change.
>
> The access controller shall not be prevented from taking, to the extent strictly necessary and proportionate, measures to ensure that third-party software applications or software application stores do not jeopardize the integrity of the hardware or operating system provided by the access controller, provided that such measures are duly justified by the access controller.
>
> In addition, the *gatekeeper* should not be prevented from applying, to the extent that they are strictly necessary and proportionate, measures and settings other than the default settings, allowing end users to effectively protect security in relation to third-party software applications or software application stores, provided that such measures and settings other than the default settings are duly justified by the *gatekeeper*.
>
> (...) (12) The *gatekeeper* shall apply fair, reasonable and non-discriminatory general access conditions for commercial users to its software application stores, online search engines and online social networking services listed in the designation decision pursuant to Article 3(9).

[79] Article 5 Obligations *of Gatekeepers* (...) 7. The gatekeeper shall not require end users to use, or business users to use, to offer or interoperate with an identification service, a web browser engine or a payment service, or technical services that support the provision of payment services, such as payment systems for in-app purchases, of that gatekeeper in the context of services provided by business users using the services of the main platform of that gatekeeper.

125. On 07.03.24, after the legal deadline for adapting the DMA had passed, Apple submitted its compliance report to the European Commission. As summarized by the authority itself, in order to comply with Article 5(4) of the DMA, Apple would have adopted the following measures:

> a) Apple will allow external links within commercial user software applications ("app") downloaded from the App Store via clickable URL, but will charge a 17% commission fee (10% for subscriptions after their first year) on transactions for all digital content purchases made within 7 days of an external link, for the lifetime of the user's use of the app;
>
> b) The link provided by the commercial user in its application may only direct the end user to the commercial user's website, which will open in a new window in the device's default browser (i.e. no web view);
>
> c) Apple will provide commercial users with two mutually exclusive options to adhere to the respective commercial terms in the EU. Commercial users must either adhere to the new commercial terms in effect since March 7, 2024 (which allow external links within the app under certain strict conditions) or adhere to the commercial terms prior to March 7, 2024 (which do not allow external links within the app);
>
> d) Apple will limit the ability to provide external links within a commercial user's application only to those commercial users who have not opted to offer Apple's *in-app* payment system mechanism.
>
> Additionally, in order to offer its app through the App Store in the EU and benefit from the options offered by Regulation (EU) 2022/1925, including by Article 5(4) of that Regulation, a commercial user must agree to and not be in breach of the latest version of the Apple Developer Program License Agreement ("DPLA"), the separate Apple Developer Agreement, which, among other things, requires enrollment in the Apple Developer Program and adherence to the Alternative Terms Addendum for Apps in the EU. Apple also reserves the right to terminate enrollment in its Developer Program, which would consequently exclude any commercial user from offering an app through the App Store. .[80]

126. Apple's implementation of these new measures has generated mixed reactions among app developers in the European Union. Although the company has introduced significant changes to its policy - including allowing sideloading, alternative app stores and third-party payment systems - the developer community has expressed substantial reservations about the conditions imposed on these new features[81].

127. In response to some of this criticism, in May 2024 Apple made further changes to its Terms of Use in order to exempt "non-revenue" developers from the Basic Technology

[80] https://ec.europa.eu/competition/digital_markets_act/cases/202417/DMA_100109_233.pdf
[81] https://www.theverge.com/24051818/apple-app-store-dma-eu-developer-response.

Fee (BTF). The company established two main exemptions: firstly, a total exemption for developers of free apps without monetization, specifically benefiting students and non-commercial developers; secondly, a three-year grace period for developers with global revenue of less than 10 million euros, even if they exceed the limit of 1 million annual installations[82].

128. On 25.03.2024, the European Commission opened a non-compliance investigation against Apple into whether or not the company's new terms and conditions of use would violate Article 5 (4) of the DMA, in addition to Recital 40[83] . The focus was on assessing rules relating to user choice: whether (i) Apple's rules were to any extent restricting and limiting, including by imposing fees, developers from freely communicating to users and promoting offers for out-of-app purchases; (ii) the design of the *web* browser choice screen was preventing users from fully exercising their right to choose within Apple's ecosystem; and (iii) Apple's new fee structure and other terms and conditions for alternative app stores and sideloading were in breach of the purpose of the obligations under the DMA.[84]

129. On 23.06.2024, the European Commission published preliminary results of the investigation opened in March. The initial conclusions were that Apple was in breach of the DMA, as its terms of use for developers did not yet allow developers to freely redirect their consumers to other distribution channels, and the process is done through "*link-outs*", with links that redirect users to web pages, with the imposition of various restrictions by Apple. In addition, it was felt that the fees charged by Apple went beyond what was necessary to remunerate its service of facilitating the initial acquisition or attraction of new users through the App Store, charging developers fees even for purchases made by users through the *link-out* process.[85]

130. At the same time, the European Commission launched a new investigation into Apple's compliance with the DMA, regarding Apple's so-called "*Core Technology Fee*". This is a fee that imposes a charge of 0.50 euros per app installed on developers of alternative app stores or third-party apps, the long user journey to download and install alternative app stores on iPhones and, finally, the eligibility requirements for developers to offer alternative app stores or distribute apps directly from the *web*.[86]

[82] https://www.theverge.com/2024/5/2/24147225/apple-ios-iphone-ipad-core-technology-fee-eu
[83] EUROPEAN COMMISSION. Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689. Accessed on: 31 Mar. 2025.
[84] EUROPEAN COMMISSION. Commission opens non-compliance investigations against Alphabet, Apple and Meta under the Digital Markets Act. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1689. Accessed on: 31 Mar. 2025.
[85] EUROPEAN COMMISSION. Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act. Accessed on: 31 Mar. 2025.
[86] EUROPEAN COMMISSION. Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act.

131. On April 22, 2025, the European Commission concluded that Apple had violated its *anti-steering* obligation under the DMA, fining the company 200 million euros. As stated in the authority's *press release*[87] , it was understood that, due to restrictions imposed by Apple, developers would not be able to fully benefit from the advantages arising from distribution channels outside the App Store. Consumers, similarly, would not be able to access these more advantageous offers, as Apple would prevent developers from informing users of them directly. As part of the decision, the Commission ordered Apple to remove the technical and commercial restrictions on *steering* and to refrain from perpetuating conduct in breach of the DMA in the future.

132. On the same occasion, the European Commission took the preliminary view that Apple had failed to comply with the DMA's obligation to allow third-party app stores on the iOS system, as well as apps to be downloaded directly from a browser. According to the Commission, developers who wish to use different distribution channels are discouraged from doing so because of the existence of *the Apple Core Technology Fee*.

133. Apple would also have introduced excessively strict qualification requirements, hindering developers' ability to distribute their apps through alternative channels. Finally, Apple would have made app installation excessively costly and confusing for end users by using these alternative app distribution channels. [88]

4.7. Assessment of comparative precedents: similarities and differences with the Brazilian case

134. By examining the various international antitrust cases, it is evident that they do not necessarily address the same set of practices, nor have they been analyzed through the framework of comparable legislation. The table below summarizes the principal international investigations against Apple and their respective remedies imposed by competition authorities or courts:

[87] EUROPEAN COMMISSION. Commission finds Apple and Meta in breach of the Digital Markets Act. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1085.
[88] EUROPEAN COMMISSION. Commission closes investigation into Apple's user choice obligations and issues preliminary findings on rules for alternative apps under the Digital Markets Act. https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1086.

Table 1 . Comparison of international precedents against Apple

Jurisdiction	Conduct under investigation	Legal provisions violated	Remedies/Imposed Orders
European Union (Case AT.40437)	Imposition *of anti-steering* clauses	Article 102 (a) TFEU (abuse of dominant position); DMA	*"It is necessary to order Apple to bring the single and continuous infringement described in Section 9 to an end without undue delay. For this purpose, Apple should remove the Anti-steering Provisions from the relevant terms and conditions governing the use of Apple's App Store by music streaming service providers, namely from the Guidelines and from Schedule 2 to the Licence* Agreement"[89] .
The Netherlands	Imposition *of anti-steering* clauses and a ban on the use of third-party payment systems.	Dutch Competition Act (Abuse of Dominant Position)	*"ACM orders Apple to put an end to the violation established by ACM. Apple must adjust its conditions in such a way that, with regard to their dating apps that they offer in the Dutch App Store, dating-app providers are able to choose themselves what market participant they want to process the payments for digital content and services sold within the app. [suspended], and, in addition, they must have the ability to refer within the app to other payment systems outside the* app"[90] .

[89] EUROPEAN COMMISSION. Decision in case AT.40437 - Apple - App Store practices (music streaming). Case C/2024/3556. 2024, § 871.
[90] AUTORITEIT CONSUMENT & MARKT (ACM). Summary of decision on abuse of dominant position by Apple. The Hague: ACM, 2021,§ 20. Available at: https://www.acm.nl/sites/default/files/documents/summary-of-decision-on-abuse-of-dominant-position-by-apple.pdf.

Jurisdiction	Conduct under investigation	Legal provisions violated	Remedies/Imposed Orders
United States	Apple's *anti-steering* rules prevented developers from directing users to alternative payment methods. US courts considered this anti-competitive, but did not consider Apple a monopolist in general.	California's Unfair Competition Law	*"Apple Inc. and its officers, agents, servants, employees, and any person in active concert or participation with them ("Apple"), are hereby permanently restrained and enjoined from prohibiting developers from (i) including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-app Purchasing [("IAP")] and (ii) communicating with customers through points of contact obtained voluntarily from customers through account registration within the* app"[91] .

Source: Prepared by GAB4

135. In its Appeal (SEI 1481200), Apple argued that there is no consensus in foreign decisions, and that each jurisdiction has its own legal basis, so CADE could not simply seek to reproduce these decisions without observing the local context:

> Although similar discussions are taking place in other jurisdictions, there is absolutely no consensus. Each jurisdiction is trying to understand these markets, especially considering the characteristics of each location, its market conditions and the legislation and regulation in force. The SG simply refers to the different jurisdictions, without detailing the particularities of Brazil, and uses the new interpretation to impose the Interim Measure. (SEI 1481200, p. 15)
>
> This administrative procedure is a formal investigation subject to Brazilian law. CADE cannot simply import what other jurisdictions say and imitate its foreign counterparts without complying with the LDC and other applicable laws, especially considering that foreign market dynamics differ (and considerably) from Brazil. (SEI 1481200, p. 29)

136. It is evident that CADE shall not transpose the conclusions of international investigations. Such an approach would not be inherently coherent, since, as previously noted, the various cases reported address different types of conduct in light of concerns that are not necessarily identical. By way of illustration, while the European Union and the United States have focused on the lawfulness of Anti-Steering Provisions from the perspective of "unfair trading conditions" under article 102(a) TFUE, jurisdictions such

[91] UNITED STATES. United States District Court Northern District of California. Epic Games, Inc. v. Apple Inc. Case No. 4:20-cv-05640-YGR. Judge: Yvonne Gonzalez Rogers. Judgment of September 10, 2021.

as the Netherlands and Japan have examined whether the imposition of rules requiring the use of in-app purchase mechanisms would constitute an abuse of dominant position more closely aligned with an anti-competitive foreclosure approach.

137. This recognition, however, should not suggest isolationism. Dialogue with international precedents can be valuable, particularly for refining antitrust analytical methodologies typically employed by CADE (such as defining relevant markets and substantiating theories of harm). Moreover, understanding the remedies imposed in foreign jurisdictions and subsequent debates concerning Apple's compliance is especially instructive for this Brazilian authority to anticipate defensive arguments and implementation alternatives.

138. Nonetheless, this does not diminish the distinctiveness of the Brazilian case. Firstly, unlike the European and US cases, this investigation is characterized by its systematic assessment of App Store policies. It evaluates the potential anti-competitive effects generated by the combined imposition of Anti-Steering Provisions, the IAP obligation and the prohibition on marketing third-party digital goods. This approach considers that these policies reinforce each other to foreclose the smart mobile digital ecosystem.

139. Secondly, this investigation is founded exclusively on the application of the Brazilian legal framework. Although Apple's practices assume a global dimension, they must nevertheless comply with the constitutional prohibition of abuse of economic power (Article 173, paragraph 4 of the Federal Constitution) and with the provisions of the Competition Law (Law 12.529/2011). Thus, within the context of international debates concerning the role of competition law in the digital economy, the present case fundamentally represents the unequivocal manifestation of national sovereignty.

5. LIKELIHOOD OF INFRINGEMENT (*FUMUS BONI IURIS)*

140. This vote seeks to analyze only whether the Interim Measure issued by the SG is based on the legal requirements authorizing such a measure. Under the terms of article 84 of Law 12.529/2011, the use of interim measures is allowed "when there is an indication or well-founded fear that the defendant, directly or indirectly, causes or may cause irreparable or difficult-to-repair harm to the market, or renders the final result of the proceedings ineffective".

141. CADE's case law has traditionally referred to the normative criteria of likelihood of infringement (*fumus boni iuris*) and urgency to prevent serious and irreparable harm (*periculum in mora*). The present section of this decision examines the subject matter addressed in the Complaint and in the decision subject to appeal in order to assess whether

there is a prima facie case in the allegations of infringements of competition law attributed to the Appellant.

142. *Fumus boni iuris* is essentially the probability of a substantial right, and does not require exhaustive proof of the existence of a material right at risk for the purposes of granting urgent relief. According to the proceduralist doctrine of Humberto Theodoro Júnior[92] , it is enough to demonstrate, *prima facie,* the possibility of exercising the right of action and that the fact narrated, in theory, ensures a favorable merit provision, supported by reasonable elements of conviction, in order to configure the requirement authorizing summary measures.

143. The consolidated case law of the CADE Court corroborates this interpretation, making a clear distinction between *fumus boni iuris* and the actual production of evidence, linking it to the plausibility of the legal thesis presented. In this sense, Commissioner Gustavo Augusto emphasized that the requirement is essentially legal in nature, and is resolved through a judgment of the probability of the thesis and the factual plausibility of the allegations, in light of the available probative material, in a summary and not exhaustive cognition:

> *Fumus boni iuris* is not related to the evidence in the case file and in fact refers to the plausibility of the law, i.e. the legal thesis. At this point, what is required is that the thesis defended is in line with the majority legal position. (SEI 1143027)
>
> [The requirement of *fumus boni iuris is* met, because there is, at least in a perfunctory examination, a smoke of good law. This is an essentially legal requirement, resolved by a judgment of the probability of the thesis and the factual plausibility of what is alleged, in light of the evidence available so far, which is done by the judge in a summary and not exhaustive manner. (SEI 1142784) .[93]

144. CADE has associated *fumus boni iuris* with the presence of sufficient evidence that a certain conduct is causing or is likely to cause the anti-competitive effects set out in Law 12.529/2011, legitimizing injunctive intervention to protect the community from potential harm to the market[94] . Thus, the existence of sufficient evidence that a certain conduct has or may have anti-competitive effects is enough for CADE to intervene.

145. In the light of this normative standard, we proceed to analyze the specific case by means of a summary cognition judgment, examining the constituent elements of the

[92] THEODORO JÚNIOR, Humberto. Course in Civil Procedural Law: Volume I. 56th ed. Rio de Janeiro: Forense, 2015, p. 807
[93] Voluntary Appeal No. 08700.007547/2022-74 (AMBEV S.A.). Reporting vote by Board Member Gustavo Augusto.
[94] Voluntary Appeal No. 08700.006317/2020-26 (Globo Comunicação e Participações S.A.), Reporting Opinion of Board Member Mauricio Oscar Bandeira Maia.

alleged infraction. It should be reiterated that, at this procedural stage, we are not looking for exhaustive evidence or absolute legal certainty, but rather to assess the plausibility of the theses presented.

5.1. THE CONDUCTS SUBJECT TO THE DECISION

146. On 5 December 2022, Mercado Livre submitted a Complaint (SEI 1157257) to CADE's General Superintendence alleging that Apple was abusing its dominant position in the market for the provision to developers of platforms for the distribution of apps to iOS users by imposing on developers of apps for digital goods and services "a series of restrictions on in-app purchases, which have the purpose and/or effect of preventing or limiting the entry of Apple's competitors into these markets" (SEI 1157257, paragraph 5). Two principal categories of restrictions imposed by Apple on developers were identified:

> One of the restrictions is the prohibition on Developers offering digital goods or services that will be used outside their own app. In other words, Apple prohibits any Developers from distributing third-party digital goods and services. This prohibition, which does not apply to Apple itself, makes it impossible for an app developed to run on the iOS system to offer third-party digital content.
> (...)
> It is worth mentioning that this Complaint also denounces a second restriction related to the sale of digital content in apps. This restriction, which complements the conduct mentioned above and which also aims to displace competitors or inhibit their entry into the market, consists of obliging Developers who sell digital goods or services in apps to only use Apple's payment processing system. This obligation - coupled with the prohibition on redirecting app buyers to websites where these obligations do not apply - not only constitutes tying, but is also discriminatory against those who sell digital goods and content (since it does not apply to those who sell physical goods) and, given the artificially high commissions that Apple charges when Developers use the payment processor in question, results in an undue increase in costs for Developers who compete with Apple. (emphasis added) (SEI 1157256, p. 3-5)

147. The facts set out by Mercado Livre, throughout the submissions presented in this Appeal and in the Administrative Inquiry, can be summarised in the following timeline:

Figure5 . Timeline of conduct alleged by Meli - part 1
[ACCESS RESTRICTED TO THE FREE MARKET, APPLE AND CADE]
Source: Prepared by GAB4, based on information from Mercado Livre[95]

[95] SEI 1157254, 1157257, 1303675 and 1303675.

Figure6 . Timeline of conduct alleged by Meli - part 2
[ACCESS RESTRICTED TO THE FREE MARKET, APPLE AND CADE]
Source: Prepared by GAB4, based on information from Mercado Livre[96]

148. The Court will now examine the two conducts raised in the Complaint.

5.1.1 Prohibiting the distribution of third-party digital goods and services in native applications

149. As outlined above, any updates to the functionality of apps distributed on the App Store are subject to Apple's approval during the so-called app review process. As part of this procedure, the App Store Review Team scrutinises whether the versions of the app that developers wish to submit comply with the Guidelines.

150. The complainant claims to have encountered difficulties arising from Apple's policies regarding the distribution of third-party digital goods since 2019, [ACCESS RESTRICTED TO MERCADO LIVRE AND CADE].

Figure7 . Offer of *gift cards* by Mercado Pago [RESTRICTED ACCESS TO THE FREE MARKET, APPLE AND CADE]

Figure8 . Apple message rejecting the update [RESTRICTED ACCESS TO THE FREE MARKET, APPLE AND CADE]

151. In 2020, Mercado Livre reported difficulties in including information that users of Mercado Livre's loyalty programme would receive discounts for subscribing to the streaming services HBO GO and Disney+. Apple is said to have presented different rejections to the app update. Initially, it alleged that the app would include "buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase". In 2021, following objections from the complainant, Apple presented the justification that the service allowed users to purchase digital content or services for use outside the app.

Figure9 . [ACCESS RESTRICTED TO THE FREE MARKET, APPLE AND CADE]

Figure10 . Apple messages rejecting the update (2020 and 2021) [ACCESS RESTRICTED TO THE FREE MARKET, APPLE AND CADE]

152. In July 2022, Mercado Livre incorporated, in its iOS apps, the functionality to acquire level six of the loyalty programme and its associated benefits, including discounts

[96] SEI 1157254, 1157257, 1303675 and 1303675.

or one hundred percent bonuses on third-party video streaming subscriptions, in an integrated and direct manner in its iOS apps. According to the complainant, Apple rejected the update on the grounds that it included digital products that would be used outside the app, which would be prohibited by the App Store Review Guidelines.

Figure11 . [ACCESS RESTRICTED TO THE FREE MARKET, APPLE AND CADE]

Figure12 . Message from Apple about rejection of the update (2022) [RESTRICTED ACCESS TO THE FREE MARKET, APPLE AND CADE]

153. Subsequently, in August 2022, after having its appeal against Apple's rejection decision dismissed, Mercado Livre recounts having proposed to Apple a new version of its app, which replaced the direct purchasing functionality of level six of its loyalty programme with information advising users of the possibility of purchasing the benefits on the Mercado Livre website. It then provided a link in the apps that directed users to the website. Apple again rejected this proposal on the basis of the Anti-Steering Provisions:

Figure13 . [ACCESS RESTRICTED TO THE FREE MARKET, APPLE AND CADE]

Figure14 . Message from Apple about rejection of the update (2022) [RESTRICTED ACCESS TO THE FREE MARKET, APPLE AND CADE]

154. The complainant recounts that it appealed this decision on the App Store Connect platform, but that Apple upheld the decision (SEI 1157256, p. 12). In a submission subsequent to the Complaint, Mercado Livre also recounts that, in 2023, Apple would have requested "the removal of Mercado Play [streaming platform] from the app, given that it allegedly involves: (i) the use of third-party licenses to use content; and (ii) access to digital content acquired outside the app without the possibility of acquiring that same digital content through the app, with the subscription through the website at Level 6 of the Mercado Livre loyalty programme being an example used by Apple in this regard" (SEI 1303675).

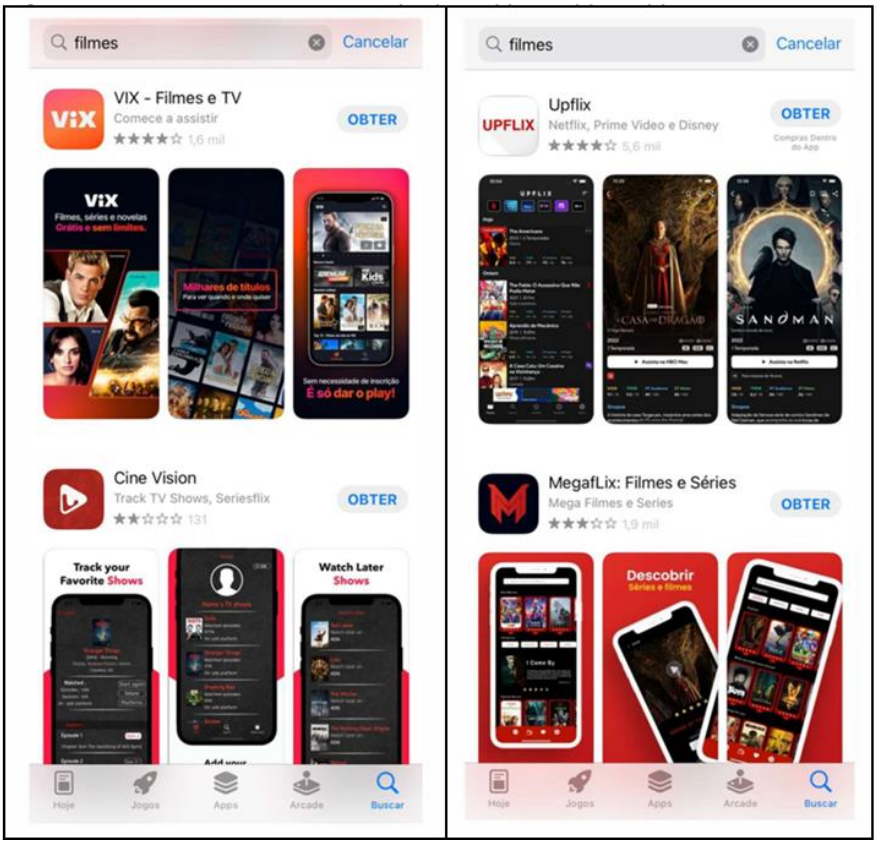
Figure15 . Message from Apple about rejection of the update (2023) [RESTRICTED ACCESS TO THE FREE MARKET, APPLE AND CADE]

155. According to the account, after Mercado Livre objected, Apple approved the requested updates. In this context, Mercado Livre explains that it was compelled to decide, on several occasions, to eliminate in-app offers of digital goods in order to

maintain its apps on iOS or to remove its apps entirely from Apple's ecosystem - [ACCESS RESTRICTED TO MERCADO LIVRE AND CADE].

156. The complainant argues that Apple is currently the only entity that can distribute digital content offered outside its own apps on iOS. According to the complainant, Apple does this in two ways: (i) as a distributor of apps within the App Store; and (ii) through its proprietary apps, which distribute third-party digital goods. Taking the case of streaming videos as an example, the complainant provided an example of situation (i) with the case of searching for the term "movie" in the App Store:

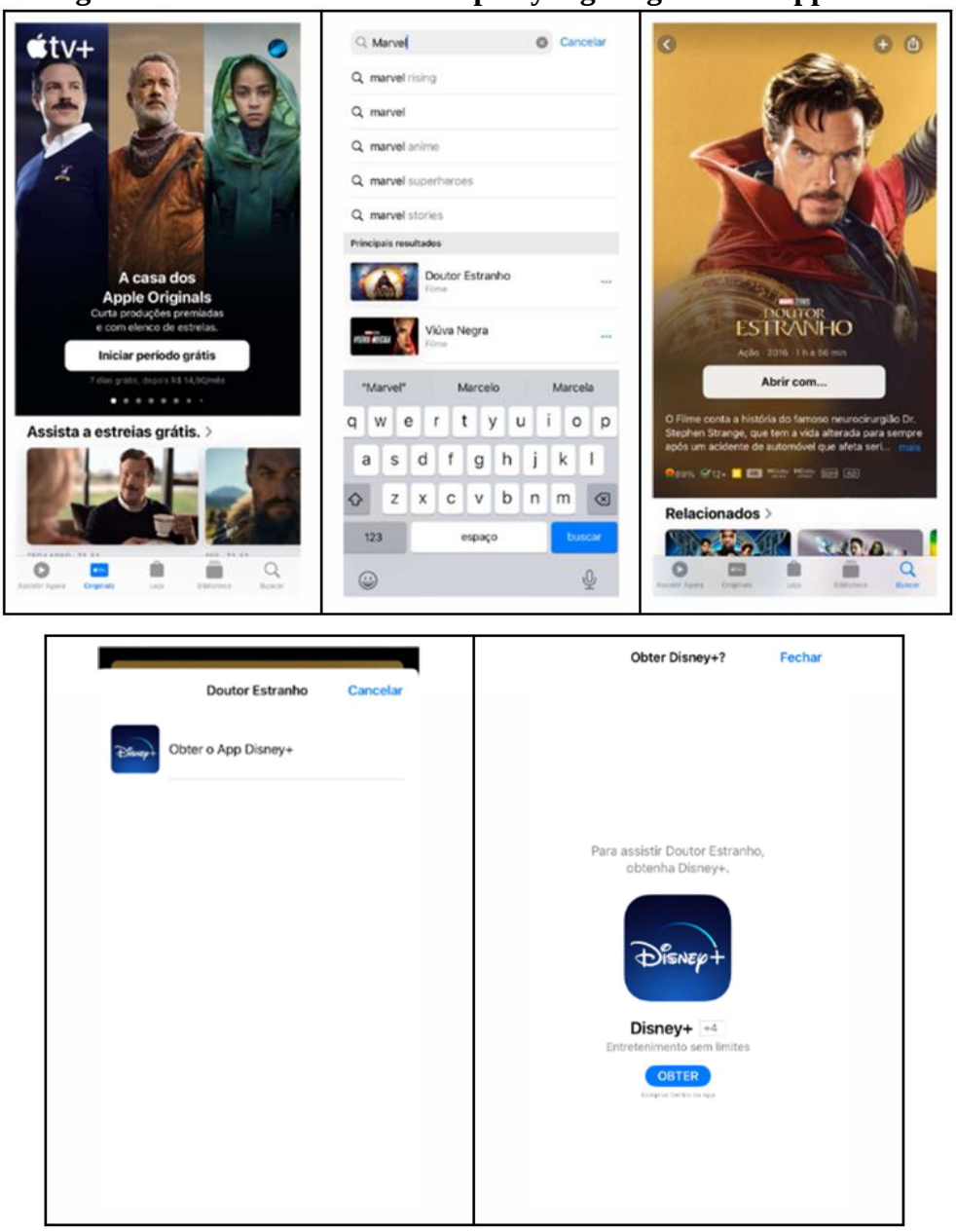
Figure16 . Distribution of movie apps in the App Store



Source: Complaint (SEI 1157257)

157. With regard to the second situation described, the complainant found that Apple distributes third-party digital content through its Apple TV app, which comes pre-installed on iOS devices and directly indexes and distributes Apple's own video streaming services and those of third parties, such as HBO Max, Disney+, Amazon Prime, etc.

Figure17 . Distribution of third-party digital goods on Apple TV



Source: Complaint (SEI 1157257)

158. In light of the above, the complainant stated that the anti-competitive practices implemented by Apple could be summarized as follows: (i) "the anti-competitive exclusion, in the iOS ecosystem, of economic agents that, like Mercado Livre, compete or may compete with Apple in the distribution and/or marketing of third-party digital services, such as video streaming" and "the anti-competitive exclusion, in the iOS ecosystem, of a distribution and/or marketing channel used by Apple's competitors in the provision of digital services, such as video streaming". (SEI 1157256, p. 13)

159. In all the rejections of updates to the Mercado Libre app mentioned above, Apple mentions non-compliance with clause 3.1.1 of the App Store Review Guidelines - guidelines governing the review of apps in the Apple App Store. Excerpts from this clause are transcribed below:

> **3.1.1 *In-app* purchases:**
>
> If you want to unlock features or functionality in your app (for example: subscriptions, in-game currency, game levels, access to premium content or unlocking a full version), you must use *in-app* purchases. Apps may not use their own mechanisms to unlock content or functionality, such as license keys, augmented reality bookmarks, QR codes, cryptocurrencies and cryptocurrency wallets, etc. Apps and their metadata may not include buttons, external links or other calls to action that direct customers to purchase mechanisms other than *in-app* purchases, except as set out *in* section 3.1.3(a).
>
> (...) Digital gift cards, certificates, vouchers and coupons that can be redeemed for digital products or services can only be sold in your app using *in-app* purchase. Physical gift cards that are sold in an app and then sent to customers may use payment methods other than *in-app* purchase. (SEI 1186498 - sworn translation attached by Apple on 06.02.2023)

160. In the current version of the App Store Review Guidelines:

> 3.1.1 *In-app* Purchase:
>
> If you want to unlock features or functionality within your app, (by way of example: subscriptions, in-game currencies, game levels, access to premium content, or unlocking a full version), you must use *in-app* purchase. Apps may not use their own mechanisms to unlock content or functionality, such as license keys, augmented reality markers, QR codes, cryptocurrencies and cryptocurrency wallets, etc.
> (...)
> Digital gift cards, certificates, vouchers, and coupons which can be redeemed for digital goods or services can only be sold in your app using *in-app* purchase. Physical gift cards that are sold within an app and then mailed to customers may use payment methods other than *in-app* purchase.[97]

161. As the Complainant itself acknowledges, the Guidelines do not expressly mention the distribution of third-party content. However, for Mercado Livre, the provision that the paid unlocking of features or functionality can only occur within the application approved for operation effectively implies, in practice, the prohibition of a business model that involves the distribution of third-party digital content. (SEI 1157256, paragraph 62).

[97] Cf. https://developer.apple.com/app-store/review/guidelines/. Accessed on 09.05.2025.

162. There is also the obligation to use Apple's in-app purchase mechanism (IAP) and the Anti-Steering Provisions which, in Mercado Livre's view, would exclude other economic agents from processing payments for all integrated in-app purchases of digital goods and services that take place within an app in the iOS ecosystem. This aspect is examined in detail in the following section.

5.1.2. Mandatory use of the Apple payment system (IAP)

163. Mercado Livre also denounced a second set of alleged anti-competitive practices, which concern the mandatory use of Apple's IAP and *anti-steering* clauses:

> In addition, Mercado Libre also denounces in this Complaint a second set of practices related to the sale of digital content in apps, which are complementary to those indicated above and which also have the aim of diverting competitors or inhibiting their entry into the market. This set of practices is fundamentally linked to the obligation that Apple imposes on Developers selling digital goods or services to use only Apple's payment processing system.
>
> This obligation - together with the prohibition on redirecting app buyers to sites where these obligations do not apply - is not only discriminatory against those who sell digital goods and content (since it does not apply to those who sell physical goods), but also, given the artificially high fees (ranging from 15% to as much as 30%) that Apple charges for the use of the payment processor in question, results in an undue increase in costs for Developers who compete with Apple. (SEI 1157256, p. 13)

164. The conduct described stems from the rules and Guidelines established by Apple in its Terms and Conditions ("T&C"), more specifically, in certain clauses of the following documents: (i) the Apple Developer Program License Agreement[98] , including Schedules 2 and 3 of the Apple Developer Program License Agreement; and (ii) the App Review Guidelines[99] , already mentioned, which establish the guidelines for reviewing applications in the Apple App Store.

165. In this regard, it should be clarified that the License Agreement is a contract of adhesion, pre-defined by Apple and non-negotiable, which defines the contractual obligations for the use of Apple's software and services and the distribution of apps, while the Guidelines are a "living document" that has been unilaterally updated by Apple many times and sets out detailed conditions that apps must meet to be approved or maintained in the App Store. In essence, the former governs relations between developers and Apple, while the latter deals with the app's compliance with the App Store standards.

[98] Available at: https://developer.apple.com/support/terms/apple-developer-program-license-agreement/. Accessed on 15.04.2024.
[99] Available at: https://developer.apple.com/app-store/review/guidelines/. Accessed on 15.04.2024.

166. On November 25, 2024, CADE's General Superintendence ("SG") presented its Technical Note No. 63/2024 (SEI 1475850), in which it summarized the Complainant's allegations regarding the anti-competitive practices attributed to Apple as follows:

> In short, the Complainant argues that Apple is adopting anti-competitive practices aimed at excluding, in the iOS ecosystem, agents that compete or could compete with Apple in the distribution and/or commercialization of third-party digital services.
>
> Such practices would derive from the application of Apple's Terms and Conditions (T&C) for Developers and would result, according to the Complainant, in (i) a prohibition on developers offering third-party digital services in their own apps and (ii) an obligation on developers offering integrated *in-app* purchases of digital goods and/or services to use only Apple's "In-App Purchasing API" for payment processing.
>
> It would therefore be a non-horizontal restrictive practice, and it would be necessary to identify the markets of origin and target of the alleged anti-competitive conduct, as well as assessing the relationship between them (i.e. whether they are complementary or vertically related).

167. During its analysis, SG-CADE delimited which clauses of Apple's Terms and Conditions it considers capable of generating the potential market closure raised by the Complainant. As for the *Apple Developer Program* License Agreement, SG-CADE referred to clauses 3.3.1 "c", 3.3.9 "a", 7.2 and 7.6, as well as clause 1.1. of its Annex 2, which are transcribed below:

> 3.3.1 APIs, Functionality and User Interface
> (...)
> C. Additional Features or Functionalities
> Without Apple's prior written approval or as permitted under Section 3.3.9(A)(In-App Purchase API), an Application may not provide, unlock or enable additional features or functionality through distribution mechanisms other than the App Store, Custom App Distribution or TestFlight.
> (...)
> 3.3.9 Transactions and Tickets
> A. Purchase API within the App
> All use of the In-App Purchase API and related services shall be in accordance with the terms of this Agreement (including the Program Requirements) and Annex 2 (Additional Terms for Use of the In-App Purchase API).
> (...)
> 7. Distribution of Applications and Libraries
> Personalized:
> Apps developed pursuant to this Agreement for iOS, iPadOS, macOS, tvOS, visionOS or watchOS may be distributed: (1) via the App Store, if selected by Apple, (2) via ad hoc distribution pursuant to Section 7.3 and (3) for beta testing via TestFlight pursuant to Section 7.4. Apps

developed for iOS, iPadOS, macOS and tvOS may also be distributed through Custom App Distribution, if selected by Apple. Apps for macOS may also be distributed separately as described in this Agreement.
(...)
7.2 Appendix 2 and Appendix 3 for Paid Licensed Applications; Receipts
If Your App qualifies as a Licensed App and You intend to charge end users a fee of any kind for Your Licensed App or within Your Licensed App through the use of the Purchase API within the App, You must enter into a separate agreement (Exhibit 2) with Apple and/or an Apple Subsidiary before any commercial distribution of Your Licensed Application occurs through the App Store or before any commercial delivery of additional content, features or services for which You charge a fee to end users may be authorized through the use of the In-App Purchase API in Your Licensed Application. If You wish Apple to subscribe to and distribute Your App for a fee through Custom App Distribution, You must enter into a separate agreement (Exhibit 3) with Apple and/or an Apple Subsidiary before such distribution may occur. If You enter into (or have previously entered into) Exhibit 2 or Exhibit 3 with Apple and/or an Apple Subsidiary, the terms of Exhibit 2 or Exhibit 3 shall be deemed incorporated into this Agreement by this reference.
(...)
7.6 No Other Authorized Distributions under this Agreement
Except for the distribution of Licensed Apps available for free through the App Store or the Distribution of Custom Apps in accordance with Sections 7.1 and 7.2, the distribution of Apps for use on Registered Devices as set forth in Section 7.2 (Ad Hoc Distribution), the distribution of Apps for beta testing through TestFlight as set forth in Section 7.4, the distribution of Libraries in accordance with Section 7.5, the distribution of Tickets in accordance with Schedule 5, the delivery of Safari Push Notifications on macOS, the distribution of Safari Extensions on macOS, the distribution of Applications and libraries developed for macOS and/or as otherwise permitted herein, no other distribution of programs or applications developed with Apple Software is authorized or permitted hereunder. In the absence of a separate agreement with Apple, You agree not to distribute Your App for iOS, iPadOS, tvOS, visionOS or watchOS to third parties via other distribution methods or allow others to do so. You agree to distribute Your Covered Products only in accordance with the terms of this Agreement.
(...)
Annex 2 (of the Contract)
Additional Terms for Use of the Purchase API within the App
1. Use of the Purchase API within the App
1.1 You may use the In-App Purchase API only to allow end users to access or receive content, functionality or services that You make available for use in Your App (e.g. digital books, additional game levels, access to a peer-to-peer map service). You may not use the

> Purchase API within the App to offer goods or services to be used exclusively outside Your App.[100]

168. Thus, Apple's contract establishes that apps can only offer additional functionalities or carry out transactions through the use of the Purchase API within the App and with distribution approved by Apple, such as through the App Store, *TestFlight* or Custom App Distribution. Any other form of unlocking features or charging outside of these channels requires express authorization and specific contracts (Appendices 2 and 3). Paid apps or apps with internal charges require an additional contract with Apple before distribution. Apart from the exceptions described, such as beta testing and *ad hoc* distribution, any other form of distribution is prohibited and adherence to the terms of the contract is mandatory.

169. Regarding the *App Store Review Guidelines*, SG-CADE mentioned clauses 3.1.1 and 3.1.3, which it extracted from the sworn translation (SEI 1186498) attached by Apple on 06.02.2023, in the following terms:

> 3.1.1 *In-app* purchases:
> If you want to unlock features or functionality in your app (for example: subscriptions, in-game currency, game levels, access to premium content or unlocking a full version), you must use *in-app* purchases. Apps may not use their own mechanisms to unlock content or functionality, such as license keys, augmented reality bookmarks, QR codes, cryptocurrencies and cryptocurrency wallets, etc. Apps and their metadata may not include buttons, external links or other calls to action that direct customers to purchase mechanisms other than *in-app* purchases, except as set out *in* section 3.1.3(a).
> (...)
> Digital gift cards, certificates, vouchers and coupons that can be exchanged for digital products or services can only be sold in your app using *in-app* purchase. Physical gift cards that are sold in an app and then sent to customers can use payment methods other than *in-app* purchase.
> (...)
> 3.1.3 Other Purchase Methods: The following apps may use purchase methods other than *in-app* purchases. Apps in this section may not, within the app, encourage users to use a purchase method other than *in-app* purchase, except as set forth in 3.1.3(a). Developers may send out-of-app communications to their user base about purchase methods other than *in-app* purchase.
>
> 3.1.3(a) Reader Apps: Apps can allow a user to access content or subscriptions to content that has been previously purchased (specifically: magazines, newspapers, books, audio, music and video). Reader Apps can offer account creation for free levels and account management functionality for existing customers. Reader Apps developers may request an external link account entitlement to provide

[100] Available at: https://developer.apple.com/support/downloads/terms/apple-developer-program/Apple-Developer-Program-License-Agreement-20241206-Portuguese-Brazil.pdf. Accessed on May 12, 2025.

> an informational link in their application to a website that the developer owns or is responsible for, for the purpose of creating or managing an account.
>
> 3.1.3(b) Multiplatform Services: Apps that operate on multiple platforms may allow users to access content, subscriptions or features purchased in your app on other platforms or on your website, including consumable items in cross-platform games, provided that these items are also available as *in-app* purchases in the app.
>
> 3.1.3(c) Corporate Services: If your application is sold directly by you only to organizations or groups for their employees or students (for example, professional databases and classroom management tools), you may allow corporate users to access previously purchased content or subscriptions. Consumer, single-user or family sales must use *in-app* purchase.
>
> 3.1.3(d) Person-to-Person Services: If your app allows the purchase of real-time person-to-person services between two individuals (e.g. tutoring students, medical consultations, real estate visits or fitness training), you can use purchase methods other than *in-app* purchase to receive these payments. One-to-few and one-to-many real-time services must use *in-app* purchase.
>
> 3.1.3(e) Out-of-App Goods and Services: If your app allows people to purchase physical goods or services that will be consumed outside of the app, you must use purchase methods other than *in-app* purchases to receive those payments, such as Apple Pay or a traditional credit card.
>
> 3.1.3(f) Free standalone applications: Free apps that act as a standalone complement to a paid web-based tool (e.g. VOIP, cloud storage, email services, web hosting) do not have to use *in-app* purchasing, as long as there are no in-*app* purchases or calls to action for out-of-app purchases.
>
> 3.1.3(g) Advertising Management Apps: Apps with the sole purpose of allowing advertisers (people or companies advertising a product, service or event) to buy and manage advertising campaigns in different types of media (television, outdoor, websites, apps, etc.) do not have to use *in-app* purchasing. These apps are intended for campaign management purposes and do not display the ads themselves. Digital purchases for content that is experienced or consumed in an app, including the purchase of ads to display in the same app (such as "impulse" sales for posts in a social media app) must use *in-app* purchasing."

170. Section 3.1.1 of the Guidelines, read in conjunction with the exceptions provided for in Section 3.1.3, establishes the restriction that there be no distribution by App Store applications of third-party digital goods or services - this was the provision mentioned in Apple's communication to Mercado Livre, which requested the removal of promotions for third-party streaming services.

171. According to the text of Section 3.1.1, in order to unlock features or functionality within an app - such as subscriptions, in-game currencies, game levels or access to premium content - the use of in-app purchase is mandatory. It is prohibited to use alternative mechanisms such as license keys, QR codes, cryptocurrencies or external links that direct customers to purchasing mechanisms other than in-app purchase (Anti-Steering Provisions), with the exception of reader apps (Section 3.1.3(a)). Digital gift cards and coupons for digital content must also be sold via in-app purchase, while physical cards can use other payment methods.

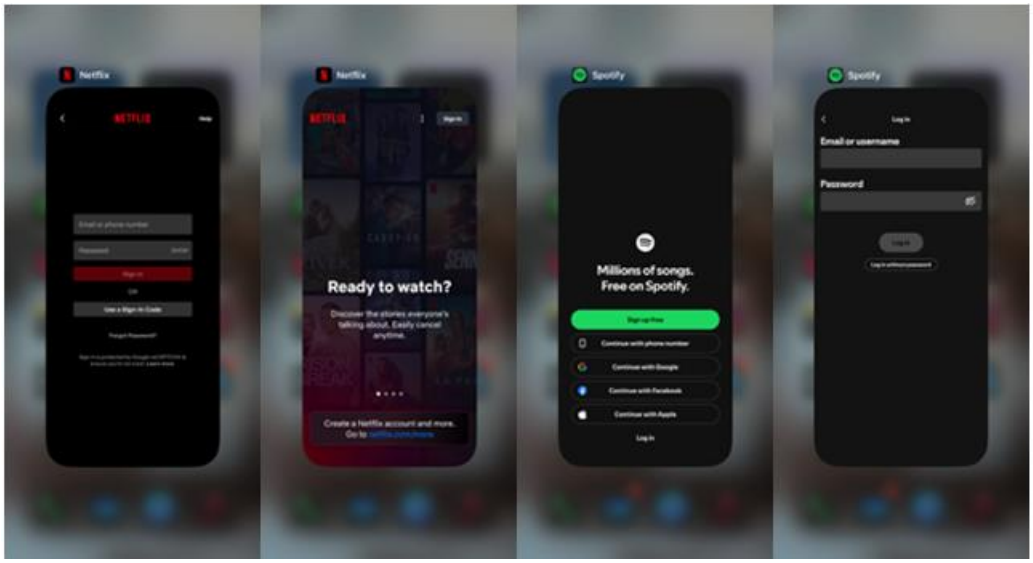
172. Section 3.1.3, also suspended under the SG's Interim Measure, provides for exceptions allowing the use of alternative payment methods in specific situations. This includes the case of reader apps (such as those for magazines, newspapers, books, audio, music, and video), which can include an informational link for managing accounts outside the app. It should be noted that Apple argues in its Appeal (SEI 1481201) that if Section 3.1.3(a) is suspended, these apps will cease to function. This is because the rule also states that the user can access previously purchased content or content subscriptions and allows the link-out for creating and managing accounts[101].

173. Other exceptions provided for in Section 3.1.3 are as follows: (b) multiplatform services may allow users to access content, subscriptions, or features they have acquired elsewhere, provided these items are also available as in-app purchases within the app; (c) enterprise services aimed exclusively at organisations may allow access to directly purchased content; (d) person-to-person real-time services (such as classes or consultations) may use external payments; (e) purchases of physical goods or services must always use methods other than in-app purchase; (f) free applications complementary to paid web-based tools are exempt from in-app purchase, provided they do not include calls to action; and (g) apps for advertising management, aimed at advertisers, also do not need to use the system, provided they do not commercialise content displayed in the app itself.

174. As stated by Apple (SEI 1500769), applications such as Netflix and Disney+ (video streaming) and Spotify (music streaming) have the option for their users to sign in and use a subscription purchased through a different channel (such as a browser), through the provisions of Sections 3.1.3(a) (reader apps) and 3.1.3(b) (multiplatform services):

Figure18 . Screenshots of Netflix and Spotify homepage on iPhone

[101] Cf. https://developer.apple.com/support/reader-apps/. Accessed on 17.04.2025.



Source: Apple's Defense in the Administrative Proceeding (SEI 1500769)

175. In adopting the Interim Measure (SEI 1475850), SG-CADE ordered, among other things, that Apple ceases to apply, until the final decision on the merits, the aforementioned clauses of its Apple Developer Program License Agreement and App Store Review Guidelines.

176. However, it should be noted that the App Review Guidelines have undergone changes since February 2023, when Apple provided Cade with a sworn translation of its guidelines. In a consultation carried out at the beginning of April 2025[102] , this Office noted that Section 3.1.1 had been amended and a new Section 3.1.1(a) had been inserted:

> 3.1.1 *In-app* Purchase:
> If you want to unlock features or functionality within your app, (by way of example: subscriptions, in-game currencies, game levels, access to premium content, or unlocking a full version), you must use *in-app* purchase. Apps may not use their own mechanisms to unlock content or functionality, such as license keys, augmented reality markers, QR codes, cryptocurrencies and cryptocurrency wallets, etc.
> (...)
> 3.1.1(a) Link to Other Purchase Methods: Developers may apply for entitlements to provide a link in their app to a website the developer owns or maintains responsibility for in order to purchase digital content or services. Please see additional details below.
>
> StoreKit External Purchase Link Entitlements: apps on the App Store in specific regions may offer *in-app* purchases and also use a StoreKit External Purchase Link Entitlement to include a link to the developer's website that informs users of other ways to purchase digital goods or services. Learn more about these entitlements. In accordance with the

[102] APPLE INC. App Store Review Guidelines. Available at: https://developer.apple.com/app-store/review/guidelines/. Accessed on: 04 Apr. 2025.

> entitlement agreements, the link may inform users about where and how to purchase those *in-app* purchase items, and the fact that such items may be available for a comparatively lower price. The entitlements are limited to use only in the iOS or iPadOS App Store in specific storefronts. In all other storefronts, apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than *in-app* purchase.
>
> Music Streaming Services Entitlements: music streaming apps in specific regions can use Music Streaming Services Entitlements to include a link (which may take the form of a buy button) to the developer's website that informs users of other ways to purchase digital music content or services. These entitlements also permit music streaming app developers to invite users to provide their email address for the express purpose of sending them a link to the developer's website to purchase digital music content or services. Learn more about these entitlements. In accordance with the entitlement agreements, the link may inform users about where and how to purchase those *in-app* purchase items, and the price of such items. The entitlements are limited to use only in the iOS or iPadOS App Store in specific storefronts. In all other storefronts, streaming music apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than *in-app* purchase.
>
> If your app engages in misleading marketing practices, scams, or fraud in relation to the entitlement, your app will be removed from the App Store and you may be removed from the Apple Developer Program.

177. It should be noted that Section 3.1.1 contains the Anti-Steering Provisions and prohibits developers from including buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase. ("Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase, except as set forth in 3.1.3(a)", in the version of the sworn translation submitted to CADE in February 2023 - SEI 1186498).

178. The new version of the agreement contains Section 3.1.1(a), which creates exceptions to the Anti-Steering Provisions. The provision allows, with Apple's formal authorisation (through so-called "entitlements"), certain apps to include an informational link directing users to the developer's website, where information on alternative purchasing mechanisms can be provided, including at potentially lower prices. Entitlements are limited to specific regions ("specific storefronts")[103].

179. In this context, the *StoreKit External Purchase Link Entitlement* is a generic permission that allows any app with digital purchases to include a discrete link informing

[103] According to Apple, the storefront refers to a regional version of the Apple App Store ("The storefront information tells you the device's App Store region"). Cf. https://developer.apple.com/documentation/storekit/skpaymentqueue/storefront. Accessed on 15.04.2025.

about alternative ways to purchase outside the App Store. To the best of this Office's knowledge, Apple allows the use of this clause in the US (following the decision in Epic Games v. Apple), the European Union (seeking to comply with the DMA) and South Korea (in response to changes in the Telecommunications Business Act) .[104]

180. The Music Streaming Services Entitlement is exclusive to music streaming apps and offers broader permissions, including purchase buttons and the collection of emails to direct users to external websites for commercial purposes. The provision applies to the European Economic Area and was a result of the European Commission's decision in Case AT.40437 - Apple App Store Practices (music streaming).[105]

181. Subsequently, in a new consultation made in May 2025, further amendments were made in response to the most recent court decision in the United States, by Judge Yvonne Gonzalez Rogers, on 30 April 2025[4]. The most up-to-date version of Sections 3.1.1 and 3.1.3 of the App Store Review Guidelines, which were suspended by the SG's Interim Measure, is transcribed in full (the sections concerning the United States, amended following the aforementioned decision, are highlighted):

> 3.1 Payments
>
> *In-app* Purchase:
>
> If you want to unlock features or functionality within your app, (by way of example: subscriptions, in-game currencies, game levels, access to premium content, or unlocking a full version), you must use *in-app* purchase. Apps may not use their own mechanisms to unlock content or functionality, such as license keys, augmented reality markers, QR codes, cryptocurrencies and cryptocurrency wallets, etc.
> Apps may use *in-app* purchase currencies to enable customers to "tip" the developer or digital content providers in the app.
> Any credits or in-game currencies purchased via *in-app* purchase may not expire, and you should make sure you have a restore mechanism for any restorable *in-app* purchases.
> Apps may enable gifting of items that are eligible for *in-app* purchase to others. Such gifts may only be refunded to the original purchaser and may not be exchanged.
> Apps distributed via the Mac App Store may host plug-ins or extensions that are enabled with mechanisms other than the App Store.
> Apps offering "loot boxes" or other mechanisms that provide randomized virtual items for purchase must disclose the odds of receiving each type of item to customers prior to purchase.
> Digital gift cards, certificates, vouchers, and coupons which can be redeemed for digital goods or services can only be sold in your app

[104] Cf. https://developer.apple.com/support/storekit-external-entitlement-us/; https://developer.apple.com/support/alternative-payment-options-on-the-app-store-in-the-eu/; https://developer.apple.com/support/storekit-external-entitlement-kr/. Accessed on 15.04.2025.
[105] Cf. https://developer.apple.com/support/music-streaming-services-entitlement-eea/. Accessed on 15.04.2025.

using *in-app* purchase. Physical gift cards that are sold within an app and then mailed to customers may use payment methods other than *in-app* purchase.

Non-subscription apps may offer a free time-based trial period before presenting a full unlock option by setting up a Non-Consumable IAP item at Price Tier 0 that follows the naming convention: "XX-day Trial." Prior to the start of the trial, your app must clearly identify its duration, the content or services that will no longer be accessible when the trial ends, and any downstream charges the user would need to pay for full functionality. Learn more about managing content access and the duration of the trial period using Receipts and DeviceCheck.
Apps may use *in-app* purchase to sell and sell services related to non-fungible tokens (NFTs), such as minting, listing, and transferring. Apps may allow users to view their own NFTs, provided that NFT ownership does not unlock features or functionality within the app. Apps may allow users to browse NFT collections owned by others, provided that, except for apps on the United States storefront, the apps may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than *in-app* purchase.

3.1.1(a) Link to Other Purchase Methods: Developers may apply for entitlements to provide a link in their app to a website the developer owns or maintains responsibility for in order to purchase digital content or services. *These entitlements are not required for developers to include buttons, external links, or other calls to action in their United States storefront apps*. Please see additional details below.

StoreKit External Purchase Link Entitlements: apps on the App Store in specific regions may offer *in-app* purchases and also use a StoreKit External Purchase Link Entitlement to include a link to the developer's website that informs users of other ways to purchase digital goods or services. Learn more about these entitlements. In accordance with the entitlement agreements, the link may inform users about where and how to purchase those *in-app* purchase items, and the fact that such items may be available for a comparatively lower price. The entitlements are limited to use only in the iOS or iPadOS App Store in specific storefronts. In all other *storefronts, except for the United States storefront, where this prohibition does not apply*, apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than *in-app* purchase.

Music Streaming Services Entitlements: music streaming apps in specific regions can use Music Streaming Services Entitlements to include a link (which may take the form of a buy button) to the developer's website that informs users of other ways to purchase digital music content or services. These entitlements also permit music streaming app developers to invite users to provide their email address for the express purpose of sending them a link to the developer's website to purchase digital music content or services. Learn more about these entitlements. In accordance with the entitlement agreements, the link may inform users about where and how to purchase those *in-app*

purchase items, and the price of such items. The entitlements are limited to use only in the iOS or iPadOS App Store in specific storefronts. In all other storefronts, streaming music apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than *in-app* purchase.
If your app engages in misleading marketing practices, scams, or fraud in relation to the entitlement, your app will be removed from the App Store and you may be removed from the Apple Developer Program.

3.1.3 Other Purchase Methods: The following apps may use purchase methods other than *in-app* purchase. Apps in this section cannot, within the app, encourage users to use a purchasing method other than *in-app* purchase, *except for apps on the United States storefront and as set forth in 3.1.1(a) and 3.1.3(a)*. Developers can send communications outside of the app to their user base about purchasing methods other than *in-app* purchase.

3.1.3(a) "Reader" Apps: Apps may allow a user to access previously purchased content or content subscriptions (specifically: magazines, newspapers, books, audio, music, and video). Reader apps may offer account creation for free tiers, and account management functionality for existing customers. Reader app developers may apply for the External Link Account Entitlement to provide an informational link in their app to a web site the developer owns or maintains responsibility for in order to create or manage an account. *This entitlement is not required for developers to include buttons, external links, or other calls to action in their United States storefront apps*. Learn more about the External Link Account Entitlement.[106]

3.1.3(b) Multiplatform Services: Apps that operate across multiple platforms may allow users to access content, subscriptions, or features they have acquired in your app on other platforms or your web site, including consumable items in multi-platform games, provided those items are also available as *in-app* purchases within the app.

3.1.3(c) Enterprise Services: If your app is only sold directly by you to organizations or groups for their employees or students (for example professional databases and classroom management tools), you may allow enterprise users to access previously-purchased content or subscriptions. Consumer, single user, or family sales must use *in-app* purchase.

3.1.3(d) Person-to-Person Services: If your app enables the purchase of real-time person-to-person services between two individuals (for example tutoring students, medical consultations, real estate tours, or fitness training), you may use purchase methods other than *in-app* purchase to collect those payments. One-to-few and one-to-many real-time services must use *in-app* purchase.

3.1.3(e) Goods and Services Outside of the App: If your app enables people to purchase physical goods or services that will be consumed

[106] Cf. https://developer.apple.com/app-store/review/guidelines/. Accessed on 13.05.2025.

> outside of the app, you must use purchase methods other than *in-app* purchase to collect those payments, such as Apple Pay or traditional credit card entry.
>
> 3.1.3(f) Free Stand-alone Apps: Free apps acting as a stand-alone companion to a paid web based tool (e.g. VoIP, Cloud Storage, Email Services, Web Hosting) do not need to use *in-app* purchase, provided there is no purchasing inside the app, or calls to action for purchase outside of the app.
>
> 3.1.3(g) Advertising Management Apps: Apps for the sole purpose of allowing advertisers (persons or companies that advertise a product, service, or event) to purchase and manage advertising campaigns across media types (television, outdoor, websites, apps, etc.) do not need to use *in-app* purchase. These apps are intended for campaign management purposes and do not display the advertisements themselves. Digital purchases for content that is experienced or consumed in an app, including buying advertisements to display in the same app (such as sales of "boosts" for posts in a social media app) must use *in-app* purchase.

182. In any case, the current version of the App Store Review Guidelines maintains the general rule prohibiting Anti-Steering Provisions for other regions, for which there are no exceptions ("In all other storefronts, except for the United States storefront, where this prohibition does not apply, apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase").

183. In light of all the above, it can be concluded that the conduct that gave rise to Mercado Livre's Complaint concerns the distribution of digital goods and services in the iOS ecosystem. From the provisions contained in Apple's rules and guidelines imposed on developers, it can be established that the two principal practices under investigation are: (i) the prohibition on the distribution of third-party digital content; and (ii) the mandatory use of Apple's in-app purchase mechanism (IAP), reinforced by the existence of Anti-Steering Provisions.

184. One must realize that the two conducts are intrinsically related. As reported by Mercado Livre, Apple rejected its versions of applications that provided users with access to the benefits of its loyalty programme, initially by offering digital goods to be used outside its applications and, following modifications, by the inclusion of links to its website.

185. In this context, the imposition of the Anti-Steering Provisions must be examined as an integral part of the provision in Apple's Guidelines that requires the use of its proprietary IAP, subject to commission fees of 15% and 30%, depending on the circumstances, as set out in Schedule 2 to the License Agreement, which concerns fee-

based apps. For the purposes of this investigation, the various terms and conditions governing the App Store cannot be assessed as autonomous conduct: indeed, they mutually reinforce the anti-competitive risks observed in Apple's mobile ecosystem.

5.2. RELEVANT MARKETS

186. The definition of the relevant market is a methodological tool that must always be adapted to the particularities of the problematic issue at hand. Especially in the case of unilateral conduct, these delimitation choices are deeply dependent on the theories of harm and the potential anti-competitive effects discussed[107] .

187. The complexities involved in defining relevant markets in mobile digital ecosystems were acutely felt in the foreign cases involving *App Store* policies and narrated in Section 4 of this vote. In the European Commission case (Case AT.40437), for example, the authority defined three affected relevant markets: (i) *smart* mobile devices; (ii) the supply to developers of platforms for the distribution of music streaming applications to iOS users[108] ; and (iii) the supply of music streaming services. It should be noted that the Commission identified different markets in relation to the mobile device itself and users of the iOS operating system .[109]

188. In the US case of *Epic Games, Inc. v. Apple Inc.*, the decision of the District Court for the Northern District of California defined a single relevant target market, namely the mobile games distribution market (i.e. distribution of games on iOS and Android smartphones and tablets). In this case, therefore, the Court held that Apple's iOS distribution channel would face significant competition from other forms of game distribution on mobile devices - such as via Android's *Google Play Store.*

189. There is therefore a lack of consensus between these main foreign precedents. In each investigation, the delimitations of the relevant market sought to fit the particularities of the facts investigated. For this reason, it would not be appropriate to simply transpose them to the present case.

[107] EBEN, Magali. The antitrust market does not exist: the search for objectivity in a teleological process. Revista de Defesa da Concorrência, v. 12, n. 2, 2024, p. 46.
[108] Regarding market (ii), the European Commission's definition focused specifically on the developer-facing side of Apple's App Store; a market distinct from the consumer-facing side of the App Store, where users would deal with different services offered, prices, and terms and conditions. On this point, the decision relied above all on the Google Android precedent (Case AT.40099), where it was concluded that application stores for Android operating systems would constitute a separate relevant market, in which stores for non-licensable systems, such as the App Store, would not compete.
[109] EUROPEAN COMMISSION. Decision in case AT.40437 - Apple - App Store practices (music streaming). Case C/2024/3556. 2024.

190. The Complainant maintains that "Apple would be adopting anticompetitive practices aimed at excluding, in the iOS ecosystem, agents that compete or may compete with Apple in the distribution and/or commercialization of third-party digital services" (SEI 1475988, paragraph143). In addition, Apple's conduct would erect artificial barriers to entry "in markets related to (and dependent on) the iOS system, hindering agents interested in providing app distribution services and digital goods and services from entering the market, in addition to making it impossible for app developers to contract and make available to users alternative systems for processing *in-app* purchases." (SEI 1475988, paragraph 373).

191. Unlike the European and US cases, which focused primarily on the anti-steering provisions of the app store, the investigation conducted by the Superintendence-General has a broader goal. It focuses on the restrictive effects on competition generated by the simultaneous imposition of (*i*) a ban on the marketing of third-party digital goods and services and (*ii*) an obligation to use the IAP for in-app purchases, obligations that are reinforced by *anti-steering* clauses, but whose anti-competitive effects cannot be abstractly separated.

192. Moreover, although the present investigation was initiated by specific allegations from an app developer, the issue at hand concerns how Apple's App Store policies affect developers as a whole, irrespective of the segments of digital content offered. In this context, a more comprehensive assessment is necessary to examine how the Guidelines restrict the multiple dimensions of lateral and hierarchical competition in the ecosystem.

5.2.1. Specific considerations on market definition in digital ecosystems

193. Defining the relevant market in digital ecosystems entails notable complexities[110]. The dimensions of intra-platform competition suggest that the actions of orchestrators and complementors transcend fixed market boundaries. The traditional criterion of demand substitutability is insufficient to capture the dynamics of "coopetition" between the multiple players involved[111] . App stores and developers cooperate in the app ecosystem, but at the same time compete for the revenue generated by this cooperation: the commissions fees paid for app downloads and in-app purchases.

[110] CRANE, Daniel A. Defining Relevant Markets in Digital Ecosystems. *Journal of Law & Innovation*, v. 7, n. 1, p. 10-26, 2024 and ROBERTSON, VIKTORIA H.S.E. Antitrust market definition for digital ecosystems. Concurrences, Paris, n. 2, p. 5, 2021.
[111] STYLIANOU, Konstantinos; CARBALLA-SMICHOWSKI, Bruno. *'Market' definition in ecosystems*. Journal of Antitrust Enforcement, Oxford, p. 1-35, 2024. Available at: https://doi.org/10.1093/jaenfo/jnae046. Accessed on: April 30, 2025.

194. Under a complementarity network methodology[112] proposed by the authors, for instance, instead of segmenting the layers by autonomous relevant markets, it would be more appropriate to understand the ecosystem's coopetition dynamics by measuring the flow of traffic between apps, technical interdependencies via SDKs and APIs, and commercial relations between developers and Apple. These measures would reveal the intensity of the connections between the App Store and other elements of the ecosystem, such as iOS, Apple's smart mobile devices, the company's proprietary services and payment systems.

195. Another possible approach would be to adapt frameworks such as *cluster* markets or aftermarkets[113] . In the European Union, these tools have opened up space for the development of a *multilayered* market delimitation approach, with multiple competitive dynamics taking place at the same time.

196. As previously examined, mobile digital ecosystems involve three main products (i) mobile devices; (ii) operating systems; and (iii) applications. The major operating systems are Apple's iOS and Google's Android. The former is a closed system - i.e. whose source code is not available to the public and only the developer company can make modifications, distribute the system and control which applications are allowed - and is not licensable, used exclusively on Apple-branded devices. Meanwhile, Android is an open system, which can be licensed for use on devices from various mobile device manufacturers.

197. In this context, in Brazil, for a user of an Apple smart mobile device to access apps other than those pre-installed on the device, they must utilise the only app store available on iOS, the Apple App Store. In order to conduct transactions within app stores (purchasing an app, for example) and to make purchases within apps (in-app purchase or IAP), it is necessary to use payment processing systems. It is evident, therefore, that the design of the digital ecosystem on Apple's smart mobile devices is a closed structure.

198. In its submissions, Apple states that the design of the iPhone, the iOS operating system and the App Store prioritises "consistent performance and high levels of security and privacy" (SEI 1481201, paragraph 1). Conversely, it is recognised that this ecosystem has undergone modifications in certain jurisdictions, due to legal (judicial or regulatory) orders aimed at addressing alleged anti-competitive practices arising from this model.

[112] STYLIANOU, Konstantinos; CARBALLA-SMICHOWSKI, Bruno. *'Market' definition in ecosystems*. Journal of Antitrust Enforcement, Oxford, p. 1-35, 2024. Available at: https://doi.org/10.1093/jaenfo/jnae046. Accessed on: April 30, 2025.
[113] ROBERTSON, VIKTORIA H.S.E. Antitrust market definition for digital ecosystems. *Concurrences*, Paris, n. 2, p. 5, 2021. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3844551. Accessed on: 30 Apr. 2025.

199. SG-CADE focused its analysis on the tying theory of harm, examining how Apple potentially leverages its monopoly power into adjacent markets for the distribution of apps and payment systems. This approach justifies the segmentation between source and target markets adopted by the Superintendence. However, in order to explore complementary theories of harm, this vote examines the various markets potentially affected by the conduct without rigidly adhering to such segmentations. This is based on the recognition that, for the reasons set out above, the traditional definitions of relevant markets are of limited use in fully understanding the anti-competitive effects on ecosystems.

5.2.2. Product dimension

5.2.2.1. Smart mobile operating systems

200. Based on the insights derived from international precedents, there are at least three fundamental controversies concerning the appropriate definition of the relevant market in relation to mobile app stores and related markets. Firstly, whether it would be possible to assess competition in the distribution of apps as an extension of competition in the smart mobile device market itself (smartphones and tablets), as contended by the Appellant in its submissions in the Administrative Inquiry case file. Secondly, whether the app distribution market should be considered a single two-sided market (intermediating between users and developers) or whether there are distinct markets for each side of the platform (the developer facing side and the consumer facing side). Thirdly, whether there is a separate market for in-app payment processing or whether such transactions correspond to a functionality intrinsic to the distribution of apps. All three points will be examined below.

201. Throughout the course of investigation, the Appellant contended that Apple did not hold a dominant position in Brazil, since "the number of Apple devices (i.e. iPhones and iPads) represents much less than 20% of the total number of smart mobile devices (smartphones and tablets) in Brazil, and even less of the total number of users of digital services" (SEI 1173682). In other words, the definition of the relevant market suggested by the Appellant encompasses the smart mobile device market as a whole, comprising smartphones and tablets manufactured by various players.

202. This thesis is equivalent to stating that competition between OEMs would be an adequate proxy for evaluating competition between app stores - as the Appellant states in its defence in the administrative inquiry, "Apple's smart mobile devices and its OS have essentially the same market share" (SEI 1500772, paragraph 73).

203. Conversely, the SG concluded that the appropriate definition would be, at the origin, the market for non-licensable smart mobile operating system iOS. This definition

is similar to the one proposed by Mercado Livre (SEI 1157256), which argued that the market in which the conduct originated would be the market for smart mobile operating systems; in which Apple's iOS being non-licensable would not compete with Android, due to the fact that the former is not licensable.

204. As it is a two-sided market, the SG appropriately examined the substitutability of operating systems from the perspective of the different agents involved, namely: (i) the manufacturers of smart mobile devices (OEMs), who need to include an operating system in their devices so that they can actually benefit from the functionalities inherent to a smartphone; (ii) the developers of apps for operating systems, who must take into account the specific characteristics of each operating system when developing their apps to be subsequently distributed to users; and (iii) the users of operating systems, who actually use the systems included in their smart mobile devices in their daily lives, consuming the different goods and services related to them (i.e. smartphones, apps, mobile phone data plans, etc.). (SEI 1475988, paragraph 153)

205. For mobile device manufacturers, it would not be possible to address substitutability between licensable and non-licensable systems. Unlike the Android system, the iOS system has historically only been available for Apple devices. With regard to app developers, the SG conducted a comprehensive procedural investigation. Firstly, the responses to the market test indicated that there were significant differences in the programming of apps for the Android and iOS operating systems:

> Warner (SEI 1217798):
> "Yes, since iOS and Android are different operating systems, there are inherent differences in programming specific applications for each of these systems, since their respective programming languages and code bases are not the same.
> As a rule, WBD tries to make the functionalities/features and overall consumer experience of its mobile apps substantially similar across all the operating systems on which they are made available (iOS and Android).
> However, there may be specific particularities **[ACCESS RESTRICTED TO CADE]**."
>
> Spotify (SEI 1218220):
> "(...) the actual *software* development process that Spotify uses to develop its mobile apps is similar on both iOS and Android. However, from an app development point of view, Spotify's Android and iOS apps are different, written in different development languages by different engineers, and much of the infrastructure to support these operating systems differs.
> Although there may be slight differences in functionality between Spotify apps on different operating systems, Spotify tries to make the experience similar from the end consumer's perspective"
> Picpay (SEI 1218260):

> "There are substantial differences between the two platforms. The programming language used is different. The equipment needed by developers is different. The licenses for developers and the application distribution model (internal and external) are different. The professionals used for development are also different. There are a few similarities, **[ACCESS RESTRICTED TO CADE]**.
> There are numerous differences in the applications developed for the two companies, most of which are categorized by technological, contractual and marketing aspects.
>
> As for the technological aspects, each of these operating systems is developed using different tools. In Picpay's case, it develops Android using **[CADE RESTRICTED ACCESS]**, while iOS is developed using **[CADE RESTRICTED ACCESS]**. In addition, these operating systems offer different APIs and *hardware* restrictions. As an example, **[CADE RESTRICTED ACCESS]**. Thus, *software* architectural designs for iOS may not be possible for Android. Another example is the **[CADE RESTRICTED ACCESS]** Thus, such differences between these various APIs prevent some functionalities from being available for both platforms.
>
> Looking at contractual aspects, relevant differences are also observed. Given the model of charging and selling products imposed by the Apple ecosystem **[RESTRICTED ACCESS TO CADE]**
> Finally, market aspects also impact the products developed for each of the platforms. **[ACCESS RESTRICTED TO CADE]**. Thus, some functionalities that can be executed without problems on one platform end up not having the expected performance on others."

206. Other answers provided by SG indicate that it is not trivial to migrate applications between the two operating systems:

> iFood (SEI 1209274):
> "To the best of iFood's understanding, the process of migrating an application developed from one operating system to another is not simple, since only small parts of the code are shareable. The rest of the code needs to be developed from scratch. One way to facilitate the development of multiplatform code is to use the 'Flutter' program, but migration efforts between systems are still needed."
>
> OLX (SEI 1218245):
> "Programming for Android and iOS is substantially different in terms of programming languages, operating system resources available on each platform and tools for building, testing, publishing and monitoring application metrics. Although there are mechanisms aimed at creating some level of programming compatibility between the platforms, these tools **[ACCESS RESTRICTED TO CADE].**
> Supporting different platforms requires extra personnel costs, with specialized knowledge of each platform. Given the scope and complexity of these systems and development processes, it is not common to find professionals who are proficient in building

> applications for the different operating systems. In fact, these are not "application versions", but different applications that each require specialized professionals to build and maintain correctly.
> In light of this market demand, OLX Brasil has invested considerable resources in developing the applications available on these systems, which require constant improvement to ensure efficient and safe navigation for its users. To this end, OLX Brasil has teams of developers directly contracted to work on monitoring and updating the technology used in these applications."
>
> 99 Technologies (SEI 1218120):
> "This type of migration is not so simple. After developing an application for one operating system, migrating to the other involves a series of fairly substantial modifications or even rewriting the application's code, right from its initial programming phase.
> The reason for this is that, as mentioned, each operating system has its own programming language, development environment and software library optimized for a specific operating system. For example, Android uses Java or Kotlin as its programming language, while iOS uses Swift or Objective-C. These languages have different syntaxes and data structures that are not commonly compatible with each other.
> In addition, as also mentioned, the user interface and user experience on each operating system is different, which means that an app designed for one operating system may not work on another. An app developed for iOS, for example, may use specific iOS user interface elements that are not available on Android, and vice versa.
> There are some development tools, such as React Native, Flutter and Xamarin, which allow developers to write code and then port it to different operating systems. These tools use a common programming language that can be compiled and optimized for different operating systems. Although they are useful tools that can save developers time, they come with some *trade-offs* in terms of performance and integration with operating systems."

207. The investigation carried out by the SG did not make it possible to conclude whether or not there would be significant differences in costs to develop applications for each operating system. Some answers, such as those from [**CADE RESTRICTED ACCESS**] and Devio, indicate that the iOS operating system would have higher costs.

208. In addition, the SG concluded from the responses to the instruction that it is common for developers to seek to develop applications for both operating systems, in order to reach specific iOS and Android users. Some of the responses in this regard were:

> **[ACCESS RESTRICTED TO CADE]**
>
> Bytedance Brasil (SEI 1209227):
> "In TikTok's view, it's common practice for all major app developers to create apps for iOS and Android, as these two customer bases make up practically the entire mobile phone audience in countries like Brazil. There may be some small or simpler apps that are developed for a single operating system for financial reasons or that start on one operating

> system with plans to expand to the other, but TikTok has been available on iOS and Google's Android since launch."
>
> Spotify Brazil (SEI 1218220):
> In Spotify's view, it's in developers' interest to create apps and make them available on different operating systems. (...)
> However, there are significant costs associated with developing applications for different operating systems.

209. In this context, the responses to the letters also indicated that not even a 5-10% increase in app programming costs would lead a developer to abandon a particular operating system:

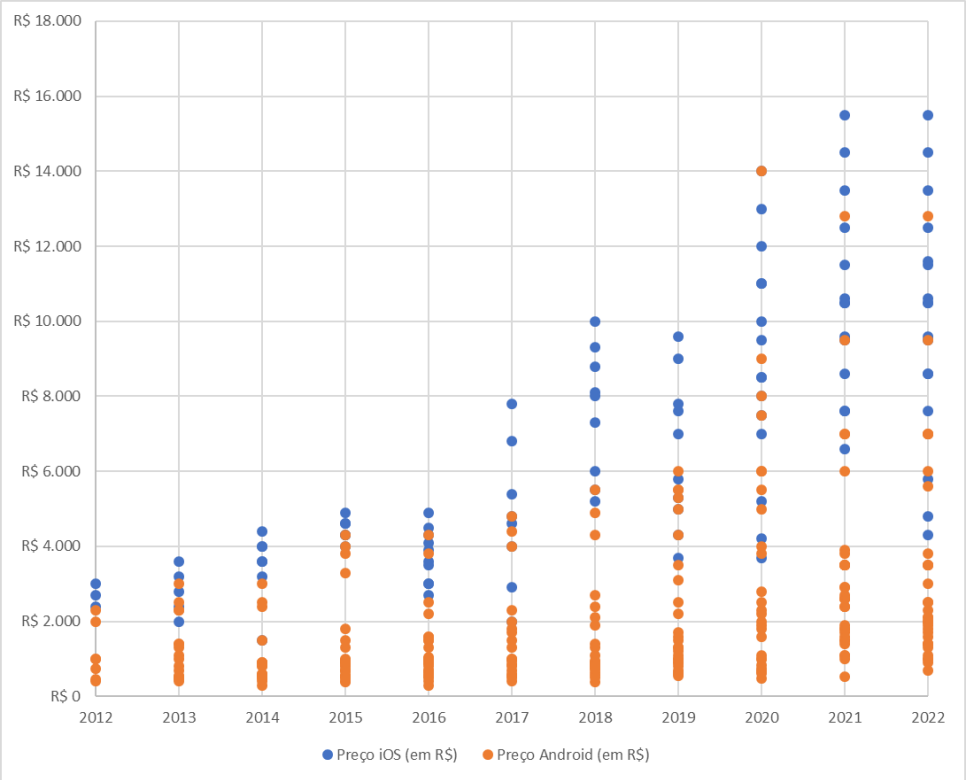
> Telegram (SEI 1209278):
> "It doesn't seem like a viable alternative for Telegram to forgo the development of applications and the user base of one operating system and proceed exclusively with another operating system.
> **[ACCESS RESTRICTED TO CADE]**
>
> **[ACCESS RESTRICTED TO CADE]**
>
> **[ACCESS RESTRICTED TO CADE]**
>
> Globoplay (SEI 1219591)
> "Developing apps only for iOS wouldn't be an alternative, given that the user base of the Android operating system is very significant.
>
> Similarly (...), developing apps only for Android would not be an alternative either, given that the user base of the iOS operating system is very relevant."
>
> **[ACCESS RESTRICTED TO CADE]**

210. Thus, the SG established that (i) there are significant differences in the development and programming of native apps for the iOS and Android systems; (ii) the migration of apps between the two systems is not straightforward; and (iii) it is common practice for developers to develop apps for both Android and iOS, since if they did not, they would forego access to a significant portion of potential users and consumers. It would therefore not be possible to consider iOS and Android as substitutes.

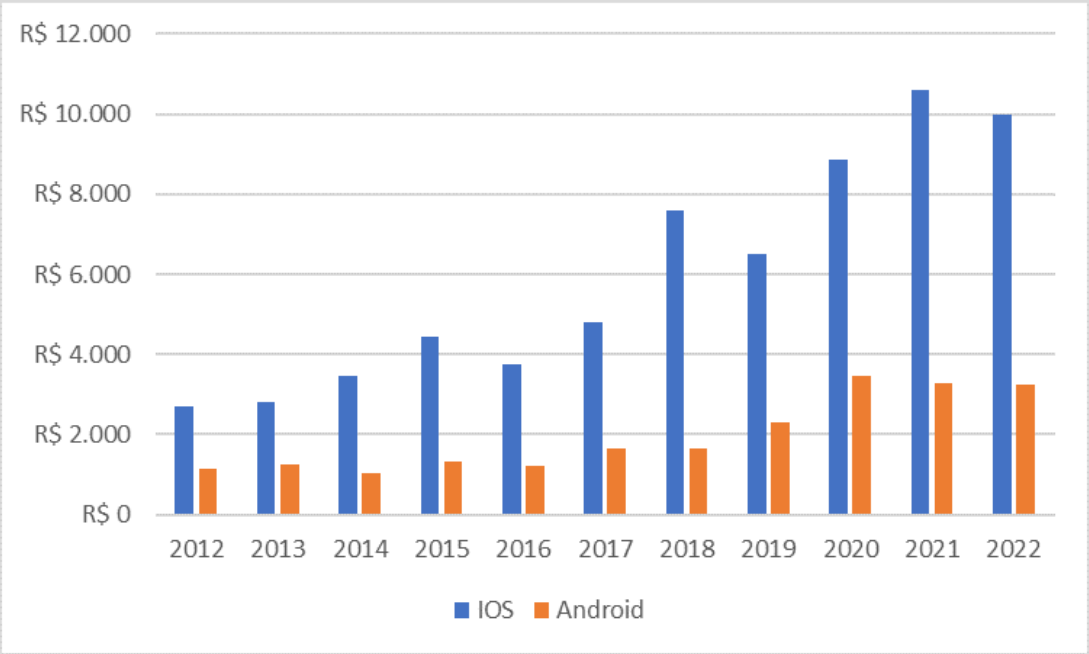
211. Finally, from the users' perspective, the Appellant's thesis assumes that consumers' choices in app store transactions are informed, more broadly, by competition between the different smartphone options. However, as appropriately noted by the SG, the choice of operating system is linked, at least in part, to the smart mobile device on which it is installed. In Apple's case, as mentioned, the iOS operating system is for the exclusive use of the smart mobile devices manufactured by the company (iPhones, iPads).

212. Consequently, considering that there are significant differences in the prices of the hardware carrying Android and iOS devices, there would be no substitutability from the users' perspective. In Brazil, devices with the Android operating system have a significantly lower average price range than iPhones, smartphones equipped with iOS (see graphs below).

Graph 1 . Price dispersion (in R$) of smartphones with Android and iOS operating systems launched in Brazil - 2012 to 2022



Graph 2 . Evolution of the average price (in R$) of *smartphones* with Android and iOS operating systems launched in Brazil - 2012 to 2022



Source: SEI 1475850

213. Furthermore, there are significant switching costs involved in porting data between different operating systems. The investigation conducted by the SG reveals that single-homing is the predominant practice among users of smart mobile operating systems, due not only to the high costs of acquiring the devices, but also to consumers' preference for smart devices that are compatible with each other, which reinforces the lock-in effect with each new purchase.

214. Both Apple and Google have developed mechanisms and tools to facilitate the portability of information between different operating systems, as evidenced by the "Switch to Android" and "Move to iOS" apps, available on the App Store and Google Play Store respectively. However, the significant difference in average price between devices with the Android operating system (R$3,238.00 in 2022) and those with iOS (R$9,970.00 in 2022) indicates that only a portion of consumers can afford to replace Android with iOS. This economic disparity constitutes a barrier to switching between ecosystems, despite companies' efforts to facilitate the transfer of data between platforms.

215. Several of the developers interviewed concurred with this assessment, among whom the SG highlighted mobile game developers, most of whom perceive greater purchasing power among users of Apple's system:

> Ubisoft (SEI 1259657):
> They are two very different profiles. The average purchasing power of the los system user is higher.
>
> QUbyte (SEI 1252985):

> Yes, there is! iOS gamers are more likely to invest in Premium games (paying once for the game) than Android gamers. They prefer free games and don't care if the game shows advertisements inside.
>
> **[ACCESS RESTRICTED TO CADE]**
>
> AVL Aplicativos-Wildlife (SEI 1257744):
> Based on Wildlife Studios' experience, there are differences in the consumption profiles of users of the lOS and Android operating systems. These differences can be attributed to various factors:
> **[ACCESS RESTRICTED TO CADE]**

216. In the same vein, several participants in the Public Hearing on competition in digital ecosystems for mobile devices, held by CADE on February 19, 2025, reiterated their understanding that iOS users have different profiles and the costs of switching between operating systems are considerably high:

> Abranet:
> "Although Android accounts for the majority of devices, these users (...) have a socio-economic profile that is quite different from that of Apple users. Apple devices, as everyone knows, tend to be premium devices, and therefore they don't compete directly with most Android devices. The purchasing power of an average iOS user, so to speak, tends to be much higher than the average purchasing power of an Android user, which makes this iOS user particularly attractive and particularly relevant precisely for app developers, who are the ones engaged in the process of thinking about and producing the content, goods and services that are going to be offered through the apps."[114]
>
> Zetta:
> "Consumers hardly move between platforms and developers don't have many options. What we see is that there is no effective competitive pressure between devices that run on Android or iOS, either because of the different profile of consumers or because of the costs, both monetary and non-monetary, of migrating from one platform to another. This is what is known as *single-homing*, so users choose a platform and stick with it." [115]
>
> FGV Rio:
> "The consumer could potentially switch, change devices, but (...) we have the problem of significant switching costs, portability, readaptation in the ecosystem, including interoperability issues, which

[114] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. *Public hearing: competition aspects of digital ecosystems for mobile operating systems*. Available at: <https://www.youtube.com/watch?v=ehpGbkb8reA>. Accessed on: 15 Apr. 2025.
[115] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. *Public hearing: competitive aspects of digital ecosystems for mobile operating systems*. Available at: <https://www.youtube.com/watch?v=ehpGbkb8reA>. Accessed on: 15 Apr. 2025.

> provide for the effective portability, for example, of WhatsApp conversations from one ecosystem to another." [116]

217. It is worth noting that certain academic literature, in accordance with the European Commission's findings in Case AT.40437 - Apple App Store Practices (music streaming), suggests that app store markets can be considered as secondary markets (aftermarkets). In this case, the primary market would be smart mobile operating systems, where the acquisition of a durable good takes place[117]. This approach is not without its critics. For some authors, the application of the aftermarket theory may not be appropriate for the context of app stores, due to the specific characteristics of digital markets and the nature of mobile platforms[118].

218. In any event, regardless of whether we conceptualise the App Store as an aftermarket, it does not appear plausible that, in the event of a price increase or deterioration in the quality of Apple's App Store services, consumers would be able to respond in a timely manner by switching app stores. The fact is that, under the current model in force in the Brazilian jurisdiction, Apple imposes the exclusivity of its App Store on the iOS system and prohibits the practice of sideloading - consequently, consumers would be compelled to incur significant costs in changing smart mobile devices if they wished to access mobile apps through alternative channels.

219. In a similar vein, see the European Commission's decision in Case AT.40437 - Apple App Store Practices (music streaming):

> (500) First of all, the relevant question is not to determine the time interval that would make Apple's conduct profitable, but to assess whether consumers could and would react to the deterioration of app conditions within a reasonable timeframe. In the case of smart mobile devices, it is unrealistic to expect consumers to react before the moment they replace their smart mobile device at the end of its life cycle (of at least 2 to 3 years), given the high costs of smart mobile devices and the fact that they have already made their investment and their desire to use them for as long as possible, unless performance deteriorates. (p. 148)

220. In this context, and in addition to the SG's sound considerations, in our view, the definition of the relevant market proposed by Apple would only be appropriate if two

[116] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. *Public hearing: competitive aspects of digital ecosystems for mobile operating systems*. Available at: <https://www.youtube.com/watch?v=ehpGbkb8reA>. Accessed on: 15 Apr. 2025.
[117] Jacobides, Michael G. What Drives and Defines Digital Platform Power? A framework, with an illustration of App dynamis in the Apple Ecosystem. *London Business School (& Evolution Ltd), White Paper*, April 19, 2021, pg 18.
[118] YUN, John M. *App Stores, Aftermarkets & Antitrust*. Arizona State Law Journal, v. 53, p. 1283-1327, 2021. Available at: https://ssrn.com/abstract=3942570. Accessed on: 16.04.2025.

necessary conceptual premises were valid: (i) that significant and non-transitory increases in the commission fees charged by the App Store generate substantial switching by both developers and end users; and (ii) that these demand responses occur in the same proportion as the responses caused by OEM price increases. The arguments above demonstrate that both premises appear factually erroneous and not particularly reflective of the Brazilian economic reality.

221. It should also be noted that the definition of the relevant market formulated by the SG was corroborated by experts and complainants from the business sector heard by CADE in the context of the Public Hearing on digital ecosystems related to the iOS and Android operating systems, held by CADE on 19 February 2024. As Professor Nicolo Zingales, representing the Getúlio Vargas Foundation Law School (FGV-Rio), stated at the time:

> A fundamental character is the dependence of developers or commercial partners on the value-orchestrating platform. So, in this sense, the market analysis carried out in the United Kingdom, Japan and the European Union was right to define that there are two markets, one for the Apple app store and one for the Android app store, because developers need to be on both at the same time.
>
> Now, if we go to the consumer side, the consumer could potentially switch, change devices, but (...) we have the problem of significant switching costs, portability, readaptation in the ecosystem, including interoperability issues, which provide for effective portability .[119]

222. For these reasons, this Decision concurs with the SG-CADE's definition that the market of origin of the conduct, at least in preliminary analysis, can be defined as the market for smart mobile operating systems, on a national scale. The "target" markets could be identified as: (i) the market for the provision to developers of platforms for the distribution of apps to iOS users; (ii) the market for payment processing systems for in-app purchases for iOS; and (iii) the market for the distribution of digital goods and services on iOS devices.

5.2.2.2. Distribution of apps for the iOS operating system

223. The SG defined a market for the provision to developers of platforms for the distribution of apps to iOS users, in which it determined that there was no dispute about the fact that the Apple App Store was the only app store available for downloading native apps on the iOS system. Furthermore, this system would not permit sideloading (defined

[119] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. *Public hearing: competition aspects of digital ecosystems for mobile operating systems*. Available at: <https://www.youtube.com/watch?v=ehpGbkb8reA>. Accessed on: 28 Apr. 2025.

by the SG as "downloading the app from the internet or uploading it directly via a transfer from another device"[120]). As such, the market would consist solely of Apple's App Store.

224. Several of the considerations regarding the operating system market also explain the competitive dynamics, since there is a direct relationship between these two markets - in Apple's ecosystem, apps can only be downloaded through the Apple App Store, on the iOS system. As Mercado Livre states, there is "an intrinsic and currently indissoluble relationship between the operation and distribution of applications and the operating system they are about" (SEI 1157257, paragraph 16), in the Apple ecosystem.

225. The definition proposed by the SG considers the app distribution market to consist of a single market with two sides, intermediating between users and developers. The Court considers that the option of addressing a single or multiple market depends on the existence, or absence, of symmetries in the demand responses from the various user groups based on changes in factors such as price, supply or quality of intermediation[121].

226. As examined in the section above, the evidence indicates that there is no substitutability, from the perspective of app developers, between the iOS mobile system (with its exclusive app store) and Android (which can accommodate several stores), principally because of the different profile of users accessing the two ecosystems. Furthermore, for consumers who access Apple's App Store, there are significant costs involved in switching to another app store, as this would necessitate changing smart mobile devices and operating systems.

5.2.2.3.Payment processing systems for in-app purchases

227. A third relevant market identified by SG-CADE concerns the market for payment processing systems for in-app purchases for iOS. The SG observed that Apple imposes the obligation to use its IAP only on developers who distribute digital goods and services in-app, as well as those who distribute their fee-based apps through the App Store. Thus, if Apple's own system does not oblige (or authorise) the use of the IAP system for the purchase of physical goods through apps, it is reasonable to conclude that payment processing and the app store are separate services. There would be IAP providers who would not necessarily also be involved in app distribution.

228. Apple contested this characterization of payment processing for iOS as a marketplace. For the Appellant, its IAP would be more than a payment processor because, as part of Apple's commercial system, it would ensure the quality of the user experience, with significant benefits for privacy and security.

[120] It's worth noting that Apple's proposed definition of *sideloading* also involves *downloading* apps from third-party stores, not just direct downloads (SEI 1481201, § 134).
[121] FERNANDES, V. O. *Direito da concorrência das plataformas digitais*: entre abuso de poder econômico e inovação. São Paulo: Thomson Reuters Brasil, 2022, p. 246.

229. From the developers' perspective, these benefits of the system would translate into increased app sales; therefore, the IAP would constitute more than a simple payment processing system. The Appellant also contends that the IAP is used exclusively in connection with the App Store, and that there is no demand from users for an IAP separate from the distribution of apps on iOS.

230. On this latter point, it should be noted - as will be examined below - that there is a clear demand from developers for alternative payment methods for use in their applications. This is, for example, one of Mercado Livre's complaints. Nor does Apple's claim that "developers are free to use the App Store and distribute apps and content (including digital content) for use in iOS apps without using the IAP, taking advantage of the exceptions and programmes implemented by Apple" (SEI 1500769, paragraph 222) appear persuasive.

231. As examined in the conduct delimitation section of this decision, payment via Apple's IAP is the only option available to developers who enable in-app purchases of digital goods and services, apart from a few exceptions specifically provided for in Apple's regulations. Given that the payment service is distinct from those offered by the App Store, it is possible to question whether payment processing for iOS would form part of a broader relevant market - an aspect that could be explored in greater depth in a supplementary inquiry.

232. In any case, on these grounds, without prejudice to further investigation and considering the specific characteristics of the conduct at issue, the market for payment processing systems for in-app purchases should be defined in the case under analysis.

5.2.2.4. Distribution of digital goods and services on iOS devices

233. Finally, the SG identified a market for the distribution of digital goods and services. Based on the investigation conducted, the authority concluded that, from the developers' perspective, the distribution of digital services via the web is substantially different from distribution via native apps. Although both serve the same purpose - i.e., providing the digital good or service to the consumer - generally, native apps offer greater functionality and a superior user experience.

234. The SG's assessment was based on the market test, in which all developers maintained that distribution via web-based apps has fewer functionalities, more limitations and an inferior user experience when compared to distribution via native apps.

235. On the subject, **[ACCESS RESTRICTED TO CADE]**:

[**ACCESS RESTRICTED TO CADE**]

236. Other developers have detailed the limitations of web browsers that make them less than a perfect substitute for native applications:

[ACCESS RESTRICTED TO CADE]

[ACCESS RESTRICTED TO CADE]

Microsoft (SEI 1259151):
[ACCESS RESTRICTED TO CADE]
The CMA concluded that "[t]he development and use of web apps is substantially lower compared to native apps, and this is reinforced by the restrictions on web app functionality within the Apple ecosystem (...)"
[ACCESS RESTRICTED TO CADE]

[ACCESS RESTRICTED TO CADE]

237. There were also developers who, although they did not delve into the differences between the two distribution methods, pointed out the inferiority of the web browser:

[ACCESS RESTRICTED TO CADE]

Walt Disney Co. Brazil (SEI 1259030):
"TWDC has no information on the practices of third parties. In relation to its own streaming services, **[CADE RESTRICTED ACCESS]**."

238. The SG also referred to the OECD's assessment from 2012, noting that "it is common for websites to suggest to users that they download dedicated applications instead of accessing the content via a browser when a user accesses their site. Some sites even require their users to access it via a dedicated application, no longer offering access via a browser".

239. As with the payment processing system segment, SG-CADE indicated that the definition of this third market was intended to guide the analysis of the conduct at issue, without prejudice to this definition being reviewed in future opportunities.

240. With regard to this third market, it is worth noting that the definition of the relevant market adopted by the SG differs from the approach adopted, for example, in Case AT.40437 - Apple App Store Practices (music streaming) (European Commission) and Epic Games v. Apple (United States). As noted above, in the Brazilian case, there is debate concerning the rule prohibiting the distribution of third-party digital content, which applies, at least in theory, to all app distributors operating in the Apple App Store - and not just to retail providers, for example, as is the case with the Mercado Livre complainant.

241. In this regard, for the purposes of the preliminary assessment of the conduct in the Appeal, the Court considers that the definition proposed by SG-CADE (market for the distribution of digital goods and services on iOS devices, without any type of segmentation) is appropriate.

5.2.3. Geographical dimension

242. With regard to the geographic dimension, there are significant differences in the regime adopted by the iOS system and the other related markets, depending on the jurisdiction, including due to antitrust and regulatory discussions related to the conduct under examination. In this context, SG-CADE proposed the adoption of a national geographic relevant market.

243. Therefore, on a conservative basis, and considering the instrumental nature of the definition of the relevant market, the national definition is adopted, without prejudice to the adoption of another segmentation on a different occasion.

5.2.4. Conclusion on the relevant market

244. As examined above, the definition of the relevant market in digital ecosystems has specific characteristics in relation to the analysis traditionally conducted for other markets. The iOS ecosystem analysed in this case comprises several layers, in which various players interact and there are multiple competitive relationships, and in which the analysis of substitutability cannot always provide satisfactory information about competitive dynamics.

245. It does not appear possible to evaluate competition in app distribution as an extension of competition in the smart mobile device market itself (smartphones and tablets). For the reasons set out in section 5.2.2.1, the markets are substantially different for end users and app developers. Moreover, the evidence presented indicates that the app distribution market should be considered a single market with two sides (i.e., users and developers), since there is insufficient evidence that app transactions correspond to a separate functionality from app distribution.

246. In this context, and in an instrumental manner, the Court has adopted the same markets defined by SG-CADE in Technical Note 63 (SEI 1475988), with the exception that no distinction is made, a priori, between the market of origin and the target markets of the conduct, in order to allow for the exploration of different theories of harm.

247. Therefore, for the purposes of analysing the conduct at issue, the following relevant markets are defined: (i) non-licensable smart mobile operating system iOS; (ii) provision to developers of platforms for the distribution of apps to iOS users; (iii)

payment processing systems for in-app purchases for iOS; and (iv) the market for the distribution of digital goods and services on iOS devices, all of which are nationwide.

5.3. ABUSE OF DOMINANT POSITION

248. Although Article 36 of Law 12.529/2011 establishes an open typology of infringements of competition law, the authority should, whenever possible, seek to categorize the facts based on established normative categories of abuse of dominant position. As previously argued in earlier decisions, the Court considers that this categorical approach is fundamental in order to clarify that the "rule of reason" used in Brazilian law should, in reality, be viewed as an umbrella concept that encompasses different legal tests and substantive criteria for analyzing the lawfulness of unilateral practices, which vary according to the category of abuse of dominant position adopted[122].

249. In the present case, the SG's Technical Note No. 4/2023 considered that "the central 'antitrust problem' consists of the intentional imposition of artificial barriers aimed at preventing the entry and development of competitors in the markets for the provision to developers of platforms for the distribution of apps to iOS users, the distribution of digital goods and services on iOS and payment processing systems" (SEI 1175536).

250. As highlighted above, the competition concerns raised in the Complaint against Apple are not unprecedented, but reflect issues extensively discussed in academic literature and in decisions by international authorities. These sources raise various categories of abuse under which the App Store's practices can be analyzed, such as refusal to deal, margin squeeze, self-preferencing, tying, and other categories of exploitative abuse[123].

251. Considering the regulatory framework of Law No. 12.529/2011 and CADE's case law, it is appropriate to structure the analysis of this case based on two principal categories of abuse: (i) anti-competitive discrimination and (ii) tying arrangements. It should be noted that delineating the boundaries between these categories can be particularly complex and fluid, given the characteristics of digital markets that sometimes blur the distinctions between product design and business models. Rigor requires that each of

[122] In this regard, see, for example, my Voting Opinion in Voluntary Appeal 08700.005936/2022-65 (SEI 1144189) and in Administrative Proceeding 08700.001831/2014-27 (SEI 1150946).
[123] BORGOGNO, Oscar; COLANGELO, Giuseppe. Platform and Device Neutrality Regime: The New Competition Rulebook for App Stores ? *The Antitrust Bulletin*, v. 67, n. 3, p. 451-494, 2022, p. 477-489 (discussing the framing of the App Store rules, both under the rules of European Community law and under the rules of US law, in the categories of *refusal to deal*, *margin squeeze*, *tying* and *discrimination*); BOSTOEN, Friso; MÂNDRESCU, Daniel. Assessing Abuse of Dominance in the Platform Economy: a Case Study of App Stores. *European Competition Journal*, v. 1, n. 1, p. 1-61, 2020, p. 22-46 (under the rules of European law, it applies the categories of discriminatory leveraging, essential facilities, margin squeeze, *unfair terms and conditions* and *tying*) and KOTAPATI, Bapu et al. The Antitrust Case Against Apple. Yale University, Thurman Arnold Project, Paper Series: Paper 2, May 2020 ("*explores several potential antitrust claims against Apple - namely tying, essential facilities, refusal to deal and monopoly leveraging*").

these categories be related to the conduct at issue, the respective definitions of relevant markets and the theories of harm considered.

252. In any case, before examining the legal tests applicable to these normative categories, Apple's dominant position in the app distribution market will be assessed, followed by a discussion of the incentives for adopting exclusionary strategies within its smart mobile digital ecosystem.

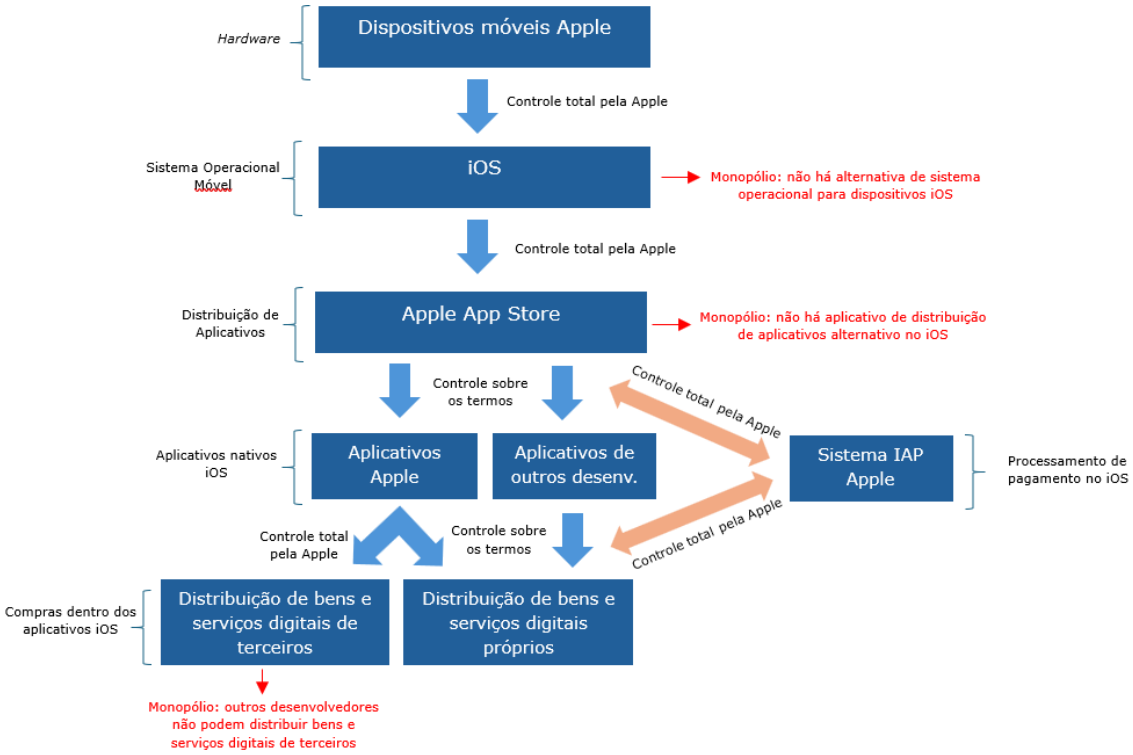
5.3.1. Apple's market power in the provision to developers of platforms for the distribution of apps to iOS users

253. In its assessment of the dominant position in the market where the conduct originated, SG-CADE directly addressed Apple's claims that the Appellant did not hold a dominant position, since it had a share of less than 20% in mobile devices in Brazil - specifically, [0-10%] [**ACCESS RESTRICTED TO APPLE**] in smartphones and [0-10%] [**ACCESS RESTRICTED TO APPLE**] in tablets.

254. Apple's argument was rejected because, as examined above, the relevant market in which the conduct originated was defined as the non-licensable smart mobile operating system iOS, in which Apple is a monopolist. In this context, the investigation conducted by the SG demonstrated that the profile of iOS users differs from Android consumers, as they are less price-sensitive and more likely to make in-app purchases. It therefore concluded that Apple held a dominant position in the national market for the non-licensable smart mobile operating system iOS.

255. With regard to the target markets, the SG emphasized that the very design of Apple's ecosystem would be a determinative factor for the Appellant to leverage its position in other markets. This is because the company is able to determine, in the SG's words, "all the rules and conditions of competition in the markets related to its iOS system, including in which markets it will act as a monopoly and in which markets it will allow competitors to operate, and under what conditions" (SEI 1475988, paragraph 296). The diagram below, prepared by the SG, illustrates this point:

Figure19 . Apple's iOS Ecosystem



Source: Prepared by SG-CADE (SEI 1475988)

256. In light of these elements, the Court notes that the normative concept of market power in Brazilian competition law (Article 36, paragraph 2, of Law 12.529/2011) has at its core a factual situation: the ability to unilaterally or coordinately alter market conditions. The provision prescribes a presumption of dominant position when the undertaking in question "controls 20% (twenty percent) or more of the relevant market, and this percentage may be altered by CADE for specific sectors of the economy".

257. Article 36, paragraph 2, of Law 12.529/2011 establishes a quantitative presumption of dominance and not necessarily a de minimis criterion for assessing abusive conduct. This latter interpretation should be avoided especially when economic power is projected onto new forms of competition restriction, as is discussed, for example, in the context of markets characterized by network effects and high barriers to entry[124].

258. As explained in the opinion I wrote in IA 08700.001797/2022-09 (SEI 1189742), in antitrust investigations involving the business models of digital platforms, the analysis of market shares becomes an unreliable indicator for assessing market power[125].

[124] See my vote in Administrative Inquiry No. 08700.001797/2022-09 (SEI 1189742).
[125] HOVENKAMP, H. J. Antitrust and Platform Monopoly. *The Yale Law Journal*, v. 130, n. 1, p. 1952-2050, 2021, p. 1959 ("*traditional market-definition and market-share measurements can be particularly unreliable in cases involving digital platforms*").

259. The tendency to view the relationship between two or more markets under the horizontal-vertical binomial has been increasingly abandoned in the face of the emergence of new reticular structures of digital ecosystems. As noted by Jacobides and Lianos: "the definition of the relevant market focuses on substitutability, and the metric used to measure market power (market-share) is not capable of considering the issues raised by intra-ecosystem competition, where the relevant issue is not substitutability through horizontal rivalry, but competition for the emerging rents of complementary services"[126]. In the same vein, Frederic Jenny points out that "the market share that an ecosystem operator has in a given relevant market (and the existence of barriers to entry in that market) may not be an indicator of its market power"[127].

260. Especially when it comes to conduct that restricts competitors' access to secondary markets that are linked to the primary market in which the dominant platform operates, this situation of dominance is significantly affected[128]. In this regard, recent reports on competition policy in digital markets have introduced new concepts that seek to capture the specific characteristics of the economic power of platforms resulting from the strategic position occupied by the agent in a given value network (*Machtpositionen von Plattformen*) [129]. These new concepts take on different terminologies, such as bottleneck power [130], intermediation power ("*Intermediationsmacht*") [131], strategic market status[132] and unavoidable trading partner[133].

[126] JACOBIDES, M. G; LIANOS, I. Ecosystems and competition law in theory and practice. *Industrial and Corporate Change*, v. 30, n. November, p. 1199-1229, 2021, p. 1212.
[127] JENNY, F. Competition Law and Digital Ecosystems: Learning To Walk Before We Run. *SSRN Electronic Journal*, n. March, p. 1-47, 2021, p. 8-9.
[128] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). The Evolving Concept of Market Power in the Digital Economy. *OECD Competition Policy Roundtable Background Note*, p. 1-48, 2022, p. 8.
[129] BMWI. *Ein neuer Wettbewerbs rahmen für die Digitalwirtschaf:* Bericht der Kommission Wettbewerbsrecht 4.0. 2019. pp. 31-32.
[130] STIGLER COMMITTEE ON DIGITAL PLATFORMS. *Stigler Committee on Digital Platforms Final Report*. Chicago: Stigler Center for the Study of the Economy and the State. 2019. pp. 105-106 (the report stresses that bottleneck power describes a situation in which, on the free side of the platform, consumers are mainly single-homing and dependent on only one service provider, which makes it difficult or impossible for other service providers to reach the same consumers, even if the agents on the other side of the platform, such as advertisers, are multi-homing).
[131] SCHWEITZER, H. et. al. Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen. *Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie (BMWi) - Projekt Nr. 66-17*, pp. 66-74, 2018 (The authors propose the concept of "intermediation power" as the market power that arises from the dependence that consumers have on an intermediary agent capable of offering listings and classifications of offers that are most useful to the consumer. In such cases, a considerable part of the transaction volume depends on the intermediary's macthing ("*erheblicher Teil des Umsatzes von einem "fairen" Matchmaking durch den Informationsintermediär abhängen*").
[132] FURMAN, J. et. al. *Unlocking digital competition:* report of the digital competition expert panel. London: 2019. p. 41.
[133] CRÉMER, J.; DE MONTJOYE, Y. A.; SCHWEITZER, H. *Competition policy for the digital era*. Brussels: European Commission Final Report, 2019. p. 49.

261. This broader concern with the platforms' market power is justified because the potential anti-competitive effects of unilateral conduct may not be limited to what would be called the "target market". Even if it does not have a significant market share in a given adjacent market, the orchestrating platform can adopt strategies to prevent future attacks by complementary agents on the main market[134].

262. Thus, even if the SG were to reach different conclusions regarding Apple's market share in all the markets concerned (of origin and target), it must be acknowledged that the dynamics of exercising market power in ecosystems differ from those of the markets traditionally examined by competition law. In this case, there are indications that Apple's actions, as a structurer of the ecosystem, can prevent the entry and participation of agents that would exert competitive pressure on its performance in the target markets.

263. In this regard, Mercado Livre (SEI 1440826) argues that Apple's arguments about its supposed lack of market power have already been rejected by several competition authorities.

264. As previously examined, the European Commission concluded in Case AT.40437 - Apple App Store Practices (music streaming) that Apple has significant market power in the iOS app distribution market through the App Store. The Commission stated that Apple acts as the exclusive gatekeeper for the iOS ecosystem, controlling developers' access to its user base through unilateral rules, such as the mandatory use of its IAP and the Anti-Steering Provisions. According to the Commission, this dominant position is reinforced by the high switching costs faced by users to migrate to another operating system, which significantly reduces the possibilities of substitution and contributes to Apple's market power in this segment.

265. The conclusions adopted in the aforementioned CMA study on mobile ecosystems[135], for example, is consistent with the SG's arguments. It states that there is limited competition between mobile devices with iOS, which predominates in higher-priced devices, and Android, which is more prevalent in sales of lower-priced devices. It also emphasized the existence of switching costs for consumers to switch between devices with Android and iOS operating systems.

266. With regard to market power, the CMA concluded that Apple and Google have substantial market power (i) in mobile operating systems, which have limited competition between them and significant barriers to entry for rivals; and (ii) in the distribution of native applications, in which the Apple App Store has a monopoly on downloads made

[134] STIGLER COMMITTEE ON DIGITAL PLATFORMS. *Stigler Committee on Digital Platforms Final Report.* Chicago: Stigler Center for the Study of the Economy and the State, 2019. pp. 72-73.
[135] COMPETITION AND MARKETS AUTHORITY (CMA). Mobile ecosystems market study final report. London: CMA, 2022. Available at: https://www.gov.uk/government/publications/mobile-ecosystems-market-study-final-report. Accessed on: 01 Apr. 2025.

on the iOS system. From the developers' perspective, to forego operating in one of the app stores would be to forego significant revenues.

267. The Netherlands Authority for Consumers and Markets (ACM) has also concluded that Apple has significant market power in the distribution of iOS apps, particularly in relation to dating apps such as Match Group. In its 2021 decision, the ACM found that Apple exercises a position of dominance by imposing unbalanced commercial conditions, such as requiring the exclusive use of its payment system within apps and prohibiting alternative payment methods.

268. The authority pointed out that developers have no viable alternatives for reaching iOS users, since the App Store is the only possible distribution channel, which gives Apple a position of control and structural dependence on developers. This position allowed Apple to impose terms which, according to the ACM, constitute an abuse of market power.

269. The ACCC also found that Apple, like Google, has significant market power in the supply of mobile operating systems in Australia. The authority recognized the costs involved in switching between operating systems, which involve, in addition to changing handsets, the cost of the consumer becoming familiar with the Android system's features. From the developers' perspective, the Australian body also determined that making the app available in both stores would be a commercial imperative. As such, "the only meaningful prospect of competition between the App Store and the Play Store is for nascent applications that have not chosen a mobile operating system. As also noted above, this competition is likely to be limited"[136].

270. Although the positions of international authorities are not binding on CADE, the conclusions reached by the UK CMA, the Dutch ACM and the Australian ACCC substantially corroborate the Court's analysis, demonstrating international convergence in identifying the significant market power exercised by Apple and its potential anti-competitive effects on the mobile application ecosystem.

271. For all these reasons, and in the light of Article 36, paragraph 2, of Law 12.529/2011, the Court concludes that Apple, by structuring its ecosystem in such a way as to restrict competition in the target markets, has market power in the form of the ability to unilaterally alter the conditions of competition in the markets related to its smart mobile digital ecosystem.

[136] AUSTRALIAN COMPETITION AND CONSUMER COMMISSION. *Digital platform services inquiry - March 2021 interim report*. Canberra, 2021. Available at: https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry%20-%20March%202021%20interim%20report.pdf. Accessed on: 22 Apr. 2025.

5.3.2. Exclusionary incentives in Apple's mobile digital ecosystem

272. In its Complaint, Mercado Livre raised several competition concerns that could be attributed to the conducts under investigation, including: (i) "undue foreclosure of current and potential competitors in the distribution of third-party digital goods and services"; (ii) "elimination of competitors' distribution channels in favour of Apple's economic gain in the digital goods and services markets"; (iii) "raising rivals' costs"; (iv) "discriminatory conduct"; (v) "disintermediation of the relationship between the Developer and its customer"; and (vi) "tying arrangements".

273. Before moving on to the stage of identifying theories of harm, it is worth clarifying some particularities of theories of harm in digital ecosystems. As discussed in Section 3 of this decision, the organization of ecosystems addresses externalities inherent in a cooperative venture.

274. For this reason, the central platforms that orchestrate such arrangements, as a rule, benefit not only from the presence of economic agents in adjacent markets, but also from competition between them, since the supply of services by "complementors" tends to increase the utility of the ecosystem as a whole. In this scenario, it could be questioned whether the economic agent who controls the central platform has any incentive to exclude third parties in adjacent markets[137].

275. There is a dilemma about the profitability of open ecosystem designs *vis-à-vis* closed ones[138] . In Apple's case, it could be argued that Apple does not even have an incentive to hinder competition between apps, given that the diversity and quality of apps in the App Store increase the value of the iPhone, boosting hardware sales. Therefore, excluding popular apps would make iPhones less attractive compared to other smartphones, potentially reducing Apple's turnover[139].

[137] The thesis that the exclusion of complementors would not be economically rational is elegantly developed in FARRELL, Joseph; WEISER, Philip J. Modularity, Vertical Integration and Open Access Policies towards a Convergence of Antitrust and Regulation in the Internet Age. *Harvard Journal of Law & Technology*, v. 17, n. 1, p. 83-134, 2003.
[138] In reality, the degree of openness or closure reveals itself more as a gradual measure of spectrum than as closed concepts. (CENNAMO, Carmelo; ZHU, Feng. Toward a Better Understanding of Open Ecosystems: Implications for Policymakers. Harvard Business School Working Paper, November 2023).
[139] This line of argument, by the way, has already been defended by the company in the digital ecosystem market investigation carried out in the Netherlands. As stated in the competition authority's report: "Apple indicated to ACM that it would not be rational to discriminate unfairly against third-party apps. If the third-party app offers better quality, Apple has no incentive to prevent it in any way. Apple explained that it wants to have the most popular apps available on its platform for consumers to use on their devices. After all, Apple derives the vast majority of its revenue from devices and therefore wants to offer the best possible services to its users. That's why it treats all developers equally, including competing apps". (THE NETHERLANDS AUTHORITY FOR CONSUMERS & MARKETS. *Market study into mobile app stores*, 2019, p. 83-84). In the same vein, cf.

276. Although this argument may be persuasive, the recent competition law literature has consolidated explanations based on economic theory that emphasize the incentives for exclusionary practices by ecosystem orchestrator's in adjacent markets. Particularly when the orchestrator manages to overcome the expansion phases of the platform and comes to occupy a position of entrenched dominance, the benefits of closing the ecosystem may exceed the benefits of increasing the attractiveness of the ecosystem through the presence of new complementors. For the purposes of this decision, it is particularly pertinent to understand offensive and defensive leverage strategies between the multiple layers of the smart mobile digital ecosystem.

5.3.2.1 Offensive leverage

277. Firstly, exclusionary incentives can be present when the central platform acts as a competitor in the vertically related market. In these situations, the gains from the marginal growth of the vertically integrated subsidiary's sales in the downstream market may exceed the losses in the upstream market.

278. Offensive leverage can be pursued through measures to favor the offer of complementary products controlled by the same undertaking that controls the central platform, a strategy that has been generically labelled in the literature as "self-preferencing[140]". Self-preferencing can occur through platform design choices (such as default options, recommendation systems, access rules to application programming interfaces, etc.) or through other exclusionary practices, such as refusal to deal, margin squeeze, bundling and tying arrangements, among others[141].

279. In the context of mobile digital ecosystems, the orchestrator can act simultaneously in the distribution of apps (through app stores) and in offering its own apps. This is the case with Apple, for example, when the company offers its own apps (such as Apple Music, Apple TV+ and others) that compete with third-party apps (for example, Spotify, HBO+ and others).

280. Under this setting, it can be profitable for Apple to impair the performance of competing apps in order to leverage its dominant position from the primary market (distribution) to the multiple adjacent markets (apps or payment processing)[142]. Such exclusion could even be facilitated by arbitrarily applying the App Store's terms and

[140] TODD, P. Digital platforms and the leverage problem. *Nebraska Law Review*, v. 98, n. 2, pp. 493-494, 2019; and BOSTOEN, F.; MÂNDRESCU, D. Assessing abuse of dominance in the platform economy: a case study of app stores. *European Competition Journal*, v. 1, n. 1, pp. 17-18, 2020.
[141] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). *Abuse of Dominance in Digital Markets*. Paris: OECD Publishing, 2020.
[142] This concern is widely mapped in the competition authorities' reports on mobile ecosystems, cf. COMPETITION & MARKETS AUTHORITY. *Mobile ecosystems - Market study final report*, London, 2022, pp. 184-186; AUSTRALIAN COMPETITION & CONSUMER COMMISION. *Digital platform services inquiry - Interim report No. 2 - App marketplaces*, Canberra, 2021, pp. 57-60.

conditions of use. Apple could, for example, impose contractual restrictions on independent developers that do not apply to its own apps, distorting competition.

281. The offensive leverage harm theory is capable of covering a large part of the allegations brought by Mercado Livre in its Complaint. Critics of Apple's policies suggest that the imposition of the 30% fee on payment processing for *in-app* transactions may be aimed precisely at increasing the costs of rivals, since apps developed by Apple itself would not have to pay this fee[143].

282. Another possible adverse consequence of the IAP fee policy would be the creation of barriers to entry for other independent app developers, since they would have to be able to bear these costs for all transactions eligible under the Apple Store rules. As stated by the Complainant, "many of the Developers that offer integrated *in-app* sales of Digital Goods and are therefore impacted by this commission are also Apple's current or potential direct competitors in various digital product and/or service markets, e.g., video streaming" (SEI 1157259, paragraph 152).

283. In addition, concerns are raised that, by imposing the use of its payment system, Apple may have access to competitively sensitive information from current or potential competing third-party applications. On this point, the Complainant states that "through the imposition of its In-App Purchasing API, Apple contractually positions itself as a marketing and distribution agent for apps and digital services offered by Developers in general, such as video streaming. From this position, Apple collects and processes transactional data specific to each purchase and subscription made by the user." (SEI 1157259, paragraph 171).

284. The access to competitively sensitive information can therefore enable offensive leverage. The perception that a particular developer is making a profit from selling digital services could even motivate Apple to decide to enter adjacent markets. From the perspective of dynamic competition, the fear of opportunistic entry by the orchestrator can even negatively affect the incentives for innovation on the part of complementors[144].

5.3.2.2 Defensive leverage

285. Secondly, incentives for exclusion can be present even when the central agent does not act as a vertically integrated competitor in adjacent markets. The rationale for exclusion in this hypothesis is more sophisticated. It is based not on the pursuit of profits

[143] GERADIN, Damien; KATSIFIS, Dimitrios. The Antitrust Case against the Apple App Store. *Journal of Competition Law and Economics*, v. 17, n. 3, p. 503-585, 2021, p. 569.
[144] CUSUMANO, Michael; GAWER, Annabelle; YOFFIE, David. The Business of Platforms. New York: Harper Business, 2019. p. 86-87.

in the target market (offensive leverage), but on the need to preserve the monopoly position in the home market (defensive leverage) . [145]

286. In the operation of the multiple layers of an ecosystem, the central platform can constantly face the risk of lateral entry by complementors creating competitive pressure on the main market[146] . The orchestrator may face the threat of complementary product and service providers in adjacent markets being able to directly reach users on the other side of the central platform, thus "disintermediating" [147] . In these hypotheses, "the exclusion of *downstream* companies by a central platform can also generate strategic benefits, in particular the (additional) blocking of consumers and the creation of barriers to entry to protect *upstream* market power[148].

287. In digital markets, where the presence of strong network effects and economies of scale and scope often create real "economic moats", the defensive leverage strategy can serve to reinforce and make insurmountable the barriers around the monopolized market[149] . Understanding this is especially useful in this case. It helps explain why there may be economic rationality in the various exclusionary conducts at issue, even though Apple, in principle, does not act as a direct competitor of Mercado Libre in the sale of physical or digital goods and services.

288. The provision in the App Store's terms and conditions of use that developers are prohibited from offering third-party digital services in their *apps* can be understood as a practice aimed at safeguarding Apple's monopoly position in the distribution of apps on the iOS system.

289. As pointed out in the Complaint, "by rejecting updates to Mercado Libre apps, Apple excludes in various ways all Developers who wish to participate (and thus compete with Apple) [in] the distribution of digital goods and/or services" (SEI 1157259, paragraph 109). Still in the words of the Complainant, "what Apple clearly intends is to prevent any alternative mechanism for distributing digital goods and services from

[145] CARLTON, Dennis W.; WALDMAN, Michael. The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries. *The RAND Journal of Economics*, v. 33, n. 2, p. 194-220, 2002, p. 195 ("*tying can be used to preserve a monopoly position in the tying (primary) mark*").
[146] PETIT, N. *Big tech and the digital economy:* the moligopoly scenario. Oxford: Oxford University Press, 2020. p. 91.
[147] AUTORITÉ DE LA CONCURRENCE; COMPETITION AND MARKETS AUTHORITY - CMA. The Economics of Open and Closed Systems, p. 1-37, 2014, parag. 3.25. ("*a dominant platform may seek to exclude rivals on the component markets because these competitors could threaten to enter the core business market*"); STIGLER COMMITTEE ON DIGITAL PLATFORMS. *Stigler Committee on Digital Platforms Final Report*. Chicago: Stigler Center for the Study of the Economy and the State, 2019. pp. 72-73.
[148] BOSTOEN, Friso. *Abuse of Platform Power: Leveraging Conduct in Digital Markets under EU Competition Law and Beyond*, Paris: Concurrences, 2023, p. 107.
[149] ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). Monopolization, Moat Building and Entrenchment Strategies. *Background note by the Secretariat*, v. 3, p. 1-46, 2024, p. 17.

gaining traction - and thus exerting competitive pressure on distribution through the App Store itself" (SEI 1157259, paragraph 110).

290. It should be noted that, in addition to the App Store, Apple distributes digital goods and services through its own apps. The example recounted in the Complaint is the "Apple TV" app, which comes pre-installed on iOS devices, and which indexes and distributes, in addition to Apple's own *streaming* services, the digital content of third parties such as HBO Max, Disney+, Amazon Prime, etc. In these cases, "users can access the content of these third parties and Apple TV will direct them to the respective app so that they can subscribe to the service or purchase the content, as the case may be". (SEI 1157259, paragraph 110).

291. Thus, the theory of defensive leverage harm fits the accusatory narrative that "Apple's practice of preventing access to the App Store to all Developers who distribute or may distribute third-party digital goods and/or services, therefore, has the clear purpose and effect of unduly excluding and discriminating against current and potential competitors, as well as limiting the emergence of new entrants, in order to maintain control (and a monopoly) over the distribution of these goods and services in general" (SEI 1157259, paragraph 129).

5.3.3. Unlawful discrimination

292. The first applicable category of abuse of a dominant position can be broadly defined as unlawful or anti-competitive discrimination. Although differential treatment of business partners can be an ancillary element of various categories of unilateral conduct (such as refusal to contract, margin squeezes, exclusivity agreements, conditional discounts and others), Brazilian competition law considers discrimination to be an autonomous type of infringement, as provided for in article 36, paragraph 3, item X, of Law 12.529/2011:

> Art. 36. Acts in any form that have as their object or may produce the following effects, even if they are not achieved, constitute an infringement of the economic order, regardless of guilt: (...)
>
> Paragraph 3º. The following conducts, in addition to others, insofar as they constitute the hypothesis set forth in the main body of this article and its subsections, characterize an infringement of the economic order: (...)
>
> X - discriminate against buyers or suppliers of goods or services by setting different prices or operating conditions for the sale or provision of services;

293. The imposition of differentiated contracting conditions does not constitute an infringement *per se*, mainly because of the possible efficiencies associated with price discrimination. In addition to establishing market power, it must always be ascertained whether the agent has not only the capacity, but also the incentive to adopt discriminatory practices[150] . Furthermore, particularly when there is no competitive relationship between vertically integrated undertakings (a hypothesis known as secondary line discrimination), there is a tendency for the authorities to be more cautious in condemning discriminatory practices. In these cases, it is necessary to demonstrate that the discrimination creates, at least potentially, an appreciable distortion of competition in the markets in which the buyers or suppliers operate.[151]

294. Even if subject to an effects-based approach, this Court has previously held that discriminatory practices are capable of "obstructing the entry of new competitors as well as excluding competitors from the market"[152]. In previous cases, CADE has established that unlawfulness depends on several factors, such as (i) the holding of a dominant position in the relevant market of origin; (ii) the existence of even potential harm to free competition arising from discrimination and (iii) the absence of objective justifications[153].

295. Anti-competitive discrimination attracts renewed interest in digital markets[154] . As the platforms that orchestrate ecosystems become indispensable intermediaries for companies to reach consumers, the relationship of economic dependence can lead to potentially unfair and anti-unfair treatment of the central agent.

[150] Administrative Proceeding 08700.002600/2014-30 (Companhia de Gás de São Paulo - Comgás and Petróleo Brasileiro S.A), vote-rapporteur by Board Member Paulo Burnier da Silveira (SEI 0635931).
[151] This requirement is emphasized, for example, in the European jurisprudence of Article 102 (c) of the TFEU. See EUROPEAN UNION. General Court (Fifth Chamber). Judgment of September 9, 2009. Case T-301/04, Clearstream Banking AG and Clearstream International SA v Commission of the European Communities. European Court Reports, 2009, p. II-3155 and EUROPEAN UNION. Court of Justice. Judgment of April 19, 2018. Case C-525/16, MEO - Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência.
[152] Administrative Process No. 08012.001099/1999-71 (Steel Placas Indústria e Comércio Ltda. and Comepla Indústria e Comércio and others) Reporting vote by Board Member Carlos Emmanuel Joppert Ragazzo. In the case, it was observed that "the collection of the aforementioned fee for the sealing service would not be illegal per se, since the company should be remunerated for the service provided (since the price of its license plate included the value of the service). What is unacceptable is charging a higher amount for the same service without any economic justification, which the company has failed to prove" (SEI 0013518, p. 154).
[153] See, for example, Administrative Proceeding No. 08012.011881/2007-41 (Companhia de Gás de São Paulo - Comgás and Petróleo Brasileiro S.A., White Martins Gases Industriais Ltda. and GNL Gemini e Comercialização e Logística de Gás Ltda.), vote-rapporteur of Counselor Paulo Burnier da Silveira (SEI 0277837), judged on 7.12.2016, condemnation).
[154] ROBERTSON, V. H. S. E. Antitrust law and digital markets: a guide to the European competition law experience in the digital economy. *SSRN Electronic Journal*, pp. 14-16, 2020; and ALEXIADIS, P.; DE STREEL, A. Designing an EU intervention standard for digital platforms. *EUI Working Papers RSCAS 2020/14*, v. 1, n. 1, p. 10; 15-17, 2020. In the context of US law, see HANLEY, D. A. How self-preferencing can violate section 2 of the Sherman Act. *CPI Anitrust Chronicle June*, v. 1, n. 1, pp. 1-2, 2021.

296. Given that multiple traditional categories of abuse can be invoked in such situations, it is useful to resort to classifications. A tripartite division subdivides (i) the favoring of affiliates of the central platform in adjacent markets (self-preferencing)[155] ; (ii) the priority treatment of some business partners to the detriment of their competitors (pure sideline differentiation) and (iii) the conditioning of business terms to benefit the controller of the central platform in other related markets (hybrid differentiation) . [156]

297. CADE analyzed allegations of differentiated treatment on platforms in the judgment of Administrative Proceeding No. 08012.010483/2011-94. The rapporteur's vote by former member Mauricio Oscar Bandeira Maia analyzed the accusation of "privileged positioning"[157] , investigating whether *Google* had taken advantage of its dominant position in the relevant general search market "to be able to push a new product in another relevant market, namely price comparison (thematic search)"[158] . As found in this case, it is understood that, under the terms of art. 36 of Law no. 12.529/2011, at least in theory, it is possible to configure an infringement of the economic order by the differentiated treatment of commercial partners by the central agent of the platform.

5.3.3.1 Conduct at issue: arbitrary imposition of restrictions on third-party distribution

298. The Complaint's narrative is permeated by allegations of discriminatory treatment by Apple, particularly due to the App Store rules which, simultaneously, (i) prohibit independent apps from distributing third-party digital goods and services and (ii) prohibit developers from informing iOS users about the possibility of purchasing digital goods and services outside the app.

299. As mentioned in Section 5.1.1, Mercado Livre maintains that Apple has inconsistently and arbitrarily applied these prohibitions, especially in the app review process. According to the complainant, the anti-competitive effect of this would be the "undue foreclosure, discrimination and exclusion of competitors in the distribution of third-party digital goods and services". Also according to the Complainant:

[155] As we have already pointed out in an academic context, we believe that the label "self-preference" says very little about the substantive aspect of this type of abuse (FERNANDES, V. O. *Direito da concorrência das plataformas digitais*: entre abuso de poder econômico e inovação. São Paulo: Thomson Reuters Brasil, 2022. p. 238). COLOMO, P. I. Self-preferencing: yet another epithet in need of limiting principles. World Competition, v. 43, n. 4, pp. 417-446, 2020 ("*self-preferencing may be misleading as a legal category insofar as it may obscure the true issues underpinning a case and may lead to the use of the same legal test for the assessment of practices that are fundamentally different*"). Therefore, in the present case, "self-preference" is not treated as an autonomous category of abuse, but as a qualification of the practice of anti-competitive discrimination.
[156] This classification is proposed in GRAEF, I. Differentiated treatment in platform-to-business relations: EU competition law and economic dependence. *Yearbook of European Law*, v. 0, n. 0, pp. 1-52, 2019.
[157] Administrative Proceeding No. 08012.010483/2011-94. Reporting vote of Board Member Maurício Oscar Bandeira Maia (SEI nº 0632170), 2019. § 177.
[158] Administrative Proceeding No. 08012.010483/2011-94. Reporting vote of Board Member Maurício Oscar Bandeira Maia (SEI nº 0632170), 2019, § 347.

> 110. This exclusion is generated because in the process of reviewing all apps, Apple identifies those that - like Mercado Libre - wish to distribute and/or market digital goods and services *in-app*, preventing them from doing so. So, based on the T&Cs, more specifically the application of Rule No. 1, Apple's review team rejects this version of the apps, preventing versions of its apps that include such functionalities from being made available on the App Store and therefore downloaded by users until the situation is corrected. Apple's clear intention is to prevent any alternative distribution mechanism for digital goods and services from gaining traction - and thus exerting competitive pressure on distribution through the App Store itself.

300. The Complainant also claims that these practices directly harm him, since "Apple has not only systematically vetoed all of Mercado Libre's attempts to effectively compete in the distribution of third-party digital goods and services (including, for example, video streaming)", but has also prohibited the company from offering, through the app, enrollment in level 6 of Meli's loyalty program, which entitles the user to access subscriptions to Disney's video streaming services with a 100 percent bonus.

301. Additionally, the complainant points out that Apple distributes third-party digital content not only through the App Store, but also through its proprietary apps (such as Apple TV). As already examined in Section 5.1.1, through its own app, which comes pre-installed on iOS devices, Apple TV directly indexes and distributes Apple's own video streaming services and those of third parties - such as HBO Max, Disney+, Amazon Prime etc.

302. According to the complainant, this possibility of distributing third-party digital content in its proprietary apps would give Apple "an irreplicable competitive advantage", since it "substantially prevents access to the marketing of digital content on iOS by independent, non-integrated distributors". In the Complainant's words, Apple would be imposing a foreclosure of distribution alternatives for providers of digital goods and services (such as video streaming apps):

> 136. From this perspective, in order to access iOS users, providers and distributors of digital services, for example video streaming, are financially dependent on Apple, since they have no choice but to offer their apps directly through the App Store, paying the supracompetitive commissions imposed by Apple and handing over part of the commercial relationship they hold and the data from such transactions to an incumbent with whom they compete or could potentially compete directly, through AppleTV+. (...)
>
> 143. In this way, by discriminating against competitors, limiting the emergence of new entrants and feeding back its dominant position, Apple has been eliminating other alternative distribution channels for digital content and services in the Apple Store. Developers have no choice but

> to comply with the following anti-competitive restrictions: (i) eliminating the distribution of third-party services and content, otherwise their apps will not appear to iOS users; (ii) agreeing to the use of the Apple API for in-app purchases, and being prevented from redirecting their customers to sites where these commissions and disintermediation do not apply; (iii) paying high fees to Apple; (iv) making confidential transactional data available as a result of the use of the Apple API.

303. At the current stage of the proceedings, in a typical assessment of non-exhaustive cognition, the Court considers that it is necessary to evaluate, based on the evidence collected thus far, what potential competitive harm can be attributed to the various discriminatory practices imputed to the Appellant.

304. At least on a precautionary basis, this decision considers it possible to analyze the practices imputed to Apple from the three perspectives of differentiated intra-platform treatment that reinforce each other. Treating them as separate acts of discrimination is a purely theoretical exercise to facilitate understanding of the possible anti-competitive effects in each relevant market, while acknowledging the integrative aspects of the ecosystem under examination.

5.3.3.2 Potential anti-competitive effects

5.3.3.2.1 Creating barriers to entry in the market for the distribution of third-party digital goods and services for iOS (hybrid discrimination)

305. Under the hybrid differentiation hypothesis, it can be said that the arbitrary imposition of clauses prohibiting the marketing of third-party goods and services by independent apps creates artificial barriers to entry in the main market for the distribution of digital products (or distribution of iOS apps).

306. As mentioned above, the main theory of harm applicable here would be the creation of a defensive leverage mechanism. If Apple were to open up the possibility for third-party apps (such as Mercado Libre) to offer third-party goods and services, it is possible that, to some extent, these apps would become substitutes (albeit imperfect ones) for the App Store's own app distribution service.

307. In this case, the investigation carried out by the SG gathered significant evidence that the arbitrary imposition of App Store clauses is not restricted to an isolated situation, but represents a systematic practice that has a significant impact on market competitiveness.

308. In this sense, in response to the SG's letters, **[ACCESS RESTRICTED TO CADE]**.

309. **[ACCESS RESTRICTED TO CADE]**.

[ACCESS RESTRICTED TO CADE].

310. Also noteworthy are the testimonies gathered in the contributions to the Public Hearing on Mobile Digital Ecosystems, in which developers from various economic sectors chorused the alleged obstructions imposed by Apple on the distribution of third-party content. Zetta, for example, stated in its written contribution that:

> [This combination of consumers' lack of mobility and developers' dependence on having to offer their apps on both platforms allows Apple to impose very rigid restrictions on developers, allows it to create - and indeed sometimes does create - artificial barriers to third-party products and services that may compete within its digital ecosystem. (SEI 1520733, Doc. 16)

311. Corroborating all this evidence, the analysis conducted by the SG thus far confirms that Apple systematically employs its own rules to restrict and, in certain situations, completely block updates to iOS apps that enable the offering of third-party goods and services.

5.3.3.2.2. Restricting competition between developers (second-line discrimination)

312. Discriminatory practices can also distort competition between developers, even in app markets where Apple is not a competitor. Mercado Libre argues that it would face a significant anti-competitive disadvantage in competition with other *players* such as Amazon which, because they are vertically integrated, are able to offer *premium* subscription services such as Prime.

313. To clarify the facts, it should be noted that Mercado Livre already offers its customers a loyalty programme called Meli+. At "level 6" of this loyalty programme, the subscriber has access to a benefit of accessing subscriptions to Disney+ video streaming services at no additional cost. Mercado Livre's complaint is that Apple does not allow users to purchase Level 6 of Meli+ directly in the app, on the grounds that this digital service involves third-party content (in this case, Disney+).

314. The Complainant maintains that the possibility of offering a *premium* subscription program that entitles the subscriber to access *streaming* services (such as Disney+) would be fundamental **[ACCESS RESTRICTED TO MERCADO LIVRE AND CADE]** (SEI 1157256, paragraph 113). Also according to the Complaint:

[RESTRICTED ACCESS TO THE FREE MARKET AND CADE].

315. To demonstrate this claim, Mercado Libre presents data that would prove that *in-app* purchases are the main channel used by Mercado Libre users to access the company's services. **[ACCESS RESTRICTED TO MERCADO LIVRE AND CADE]**

316. **[ACCESS RESTRICTED TO MERCADO LIVRE AND CADE]**

[ACCESS RESTRICTED TO MERCADO LIVRE AND CADE]

317. In light of the elements gathered in the case file thus far, the complainant's allegations cannot be summarily dismissed. This decision acknowledges that a more definitive finding on the existence of competitive distortions in the adjacent markets in which the native apps operate depends on supplementing the evidentiary investigation. It would be necessary to examine, for example, whether the alleged differentiated treatment confers competitive advantages to Mercado Livre's rivals, distorting competition on the merits to an appreciable degree for the application of Article 36, paragraph 3, item X, of Law 12.529/2011.

318. However, at this stage of the proceedings, it can be observed that the solidification of a relationship of dependence on developers in markets subject to strong network effects - even if it does not reach the level of indispensability - can give rise to arbitrary imposition of the terms and conditions of use of the App Store, which is manifested through processes of non-transparent review of app updates.

5.3.3.2.3. Securing competitive advantage for Apple's proprietary apps (self-preferencing)

319. Also in the context of the allegations of discrimination, the Complaint suggests that the App Store's terms and conditions are imposed in such a way as to benefit Apple's own apps (such as Apple TV, Apple Music, among others). It is therefore an allegation of " self-preferencing" in the mobile ecosystem, which would have the effect of closing the market or increasing the costs of rival developers who offer native apps that compete with Apple's own apps.

320. In addition to the allegations made in the Complaint, the procedural investigation carried out by the SG collected evidence corroborating these allegations of self-favoritism. **[CADE RESTRICTED ACCESS]**, which competes with Apple in **[CADE RESTRICTED ACCESS]**, claimed that abusive practices in the iOS ecosystem significantly restrict competition.

321. The central thesis of **[CADE RESTRICTED ACCESS]** is that the anti-steering clauses and the imposition of the use of IAP do not apply to Apple Music. Therefore, competitors like **[CADE RESTRICTED ACCESS]** would face a dilemma: raise prices

to cover Apple's fee and lose competitiveness, absorb the cost despite narrow margins, or disable in-app purchases. **[ACCESS RESTRICTED TO CADE]**

[ACCESS RESTRICTED TO CADE]

322. Similar allegations were also corroborated during CADE's Public Hearing. FS Security's written testimony, for example, argues that Apple has restrictive application approval policies that directly impact its area of operation:

> The rules for approving applications follow strict and often non-transparent criteria, which creates uncertainty for third-party developers and limits access to functionalities that are essential for innovation.
>
> In the specific case of Apple, its app approval policies are even more restrictive than those of Google. Cybersecurity applications often face difficulties in being validated and made available on the App Store, even when they are fully compliant with regulations such as the LGPD and digital security best practices.
>
> Under the argument of protecting the user experience and ensuring system security, Apple rejects essential functionalities for digital security solutions, such as running continuously in the background and monitoring potentially suspicious activity in other applications. Meanwhile, similar functionalities remain accessible for Apple's own applications, characterizing the privileging of proprietary solutions, which reduces the diversity of offers in the market and creates an asymmetrical competitive environment. (SEI 1520733, Doc. 26).

323. These practices would have the effect of impairing competition and restricting the promotion of alternatives, while Apple's own apps do not face the same costs arising from these bans. This situation could also discourage innovation on the part of the app developers themselves, harming users by raising prices and limiting access to promotions and special offers.

5.3.4 Tying

324. Article 36, paragraph 3, item XVIII, of Law 12.529/2011, sets out as an example of an infringement of the economic order the practice of "making the sale of one good conditional on the acquisition of another or the use of a service, or making the provision of a service conditional on the use of another or the acquisition of a good".

325. Since Resolution No. 20 of June 9, 1999, CADE has recognized that "the anti-competitive effects of this conduct are related to the transfer ('*leveraging*') of market power from one product to another, abusively increasing profits to the detriment of purchasers and, ultimately, the consumer, while at the same time promoting the 'blocking'

of the downstream segment (in general, distribution) to actual and potential competitors (increasing barriers to entry)."[159] .

326. On the other hand, CADE's case law also recognizes possible efficiencies arising from the joint sale of products. As well as helping to increase the quality of products, tying can reduce the impact of double profit margins and enable economies of scale and scope arising from joint production or distribution.

5.3.4.1 Conduct under investigation: tying the iOS app distribution service with the *in-app* transaction processing service

327. The "walled garden" architecture of Apple's mobile ecosystem could theoretically be framed on several tying practices: between devices (iPhone) and the iOS operating system[160] ; between iOS and the App Store; between iOS and various peripherals produced by the company (such as chargers, headphones, etc.), as well as between the App Store and the *in-app* transaction processing service . [161]

328. For the purposes of this case, and in a summary judgment, only this last relationship is adopted as the focus of investigation. In this layer, the Appellant would adopt a bundled sale of its app distribution service (main product) with the payment processing service for *in-app* transactions (subordinate product). As described in the Complaint, Apple imposes on certain app developers "the joint sale of the app distribution service and digital services of the App Store and the payment processing service carried out by IAP" (SEI 1157256, paragraph 185).

329. As described in Section 3.2, the App Store constitutes the only distribution channel for iOS applications, and its usage guidelines subject all developers of applications to an approval process that imposes the exclusive use of the proprietary *In-app* Purchasing (IAP) system for all digital content transactions. The use of IAP, in turn, is remunerated by a compulsory commission of 30% on digital transactions.

330. The 30% "fee" is implemented as an automatic deduction from the total value of the transaction. When the user of an iOS mobile device (such as the iPhone) makes a

[159] Resolution no. 20, of June 9, 1999. Provides, in a complementary manner, for the administrative process, under the terms of art. 51 of Law no. 8.884/94. Federal Official Gazette, Brasília, DF, June 30, 1999. Repealed by CADE Resolution 45 of March 28, 2007, published in the DOU of April 12, 2007.
[160] JONES, Alison; SUFRIN, Brenda; DUNNE, Niamh. *EU Competition Law: Text, Cases, and Materials.* New York: Oxford University Press, 2023, p. 488 ("*an example [on technical tying] would be the Apple operating system, iOS, which is only avalilable preinstalled within certain Apple devices, primarily iPhones*").
[161] BOSTOEN, Friso; MÂNDRESCU, Daniel. Assessing Abuse of Dominance in the Platform Economy: a Case Study of App Stores. *European Competition Journal*, v. 1, n. 1, p. 1-61, 2020, p. 40-43 and KOTAPATI, Bapu et al. The Antitrust Case Against Apple. Yale University, Thurman Arnold Project, Paper Series: Paper 2, May 2020, p. 13 ("*Apple expressly conditions the distribution of in-app digital goods on the use of IAP through the App Store rules, which forbid alternative payment mechanisms*").

payment within the app, the purchase is automatically processed by IAP and Apple retains 30% of the amount. So, for example, in a R$30.00 (thirty reais) transaction for a subscription to a music app, R$9.00 (nine reais) is retained by Apple. In this way, the bundling strategy discussed here allows Apple to capture a substantial portion of the revenue generated by developers in its iOS ecosystem.

331. The theories of harm outlined above, in turn, must be analyzed in depth based on legal tests supported by CADE's decisional practice. In general, it can be considered that the framework for analysing tying in Brazilian competition law includes the following elements: (i) a dominant position in the tying market; (ii) the existence of two or more separate products that are sold together; (iii) coercion that imposes compulsory contracting of the tied products and (iv) the occurrence of anti-competitive effects, even if potential[162].

5.3.4.2. Dominant position in the iOS app distribution market

332. As far as the first requirement is concerned, it is a condition of the illegality that the agent implementing the tying has at least a dominant position in the market for the main product, since it is from there that the leverage is sought. Dominance in the subordinate product market, on the other hand, is not required. In this case, as already discussed above, Apple is considered to have a monopoly on the market for the distribution of iOS apps from the App Store.

5.3.4.3 Separability between the App Store (main product) and the IAP (subordinate product)

333. With regard to the second requirement, CADE's decisional practice recognizes that "we will only be faced with a potential tying arrangement when the main product and the tied product are considered distinct, i.e. when there is demand for the two products separately"[163] .

334. This assessment is generally based on the so-called "separability test", according to which the definition of whether there is a single product or more than one product depends on the existence of a significant demand for the "subordinate" product that is

[162] In a similar vein, see Preliminary Investigation n. 08700.005025/2007-07 (Tribunal de Contas da União - TCU, and Aceco Produtos para Escritório e Informática Ltda.), Reporting Judge: Ricardo Machado Ruiz, 24.6-.010, Reporting opinion of Ricardo Ruiz ("tie-in sales require the analysis of some requirements for proper characterization: (a) the existence of two separate products and/or services; (b) the existence of some element of coercion; (c) the existence of a dominant position in the main or conditioning market; (d) the characterization of anti-competitive effects, whether in the secondary/conditioning market or in the main market").
[163] Administrative Proceeding No. 08012.002917/2002-91 ("PTI v Target and another"). Reporting vote by former Commissioner Ana Frazão. DOU of 04.08.2015 (SEI 0085144).

independent of the demand for the "main product"[164] . The primary function of this test is to filter out cases where it is very likely that the economies of scale of joint supply are more evident, thus avoiding the risk of false positives.

335. Discussions about the separability of the components of Apple's mobile ecosystem are really central to the present case[165] . In its various submissions on the record, the Appellant maintains that Apple's IAP is not a stand-alone product, but a feature inherent in the distribution service provided by the App Store as an app store (core product). In its own words:

> 53. Contrary to MELI's claims, IAP is not a payment processing service provider that competes with Pay-Pal, Mercado Pago, Pag Seguro, Adyen or the like, nor is it a separate service that is sold 'bundled' with the App Store, but rather a part of it. Payment processors (or billing services) do not provide any of the tools, technologies, services and business opportunities that Apple offers to developers. The commission from Apple is compensation for the App Store in general - including the various business opportunities that the App Store offers. (SEI 1173682)

336. Thus, Apple maintains that IAP is merely "a *checkout* system" for the app store, that it does not constitute "a product to be marketed separately" and that "there is no independent and separate consumer demand for IAP" (SEI 1173682 paragraph 116-121).

337. The question of whether the app store and the IAP are separate products or not was explored by Technical Note 63/2024/CGAA11/SGA1/SG/CADE (SEI 1475850) with regard to the definition of relevant markets. As noted earlier in this decision, the SG took the view that the Respondent's own justifications for charging differently according to the nature of the product (physical or digital) show that these are essentially different

[164] The origin of the separability test is generally related to the classic US *Jefferson Parish* case of 1984, in which the Supreme Court decision pontificated that "*the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items*" (UNITED STATES. Supreme Court. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 1984). In European law, a similar approach is adopted by the guidance document on abuse of a dominant position: "Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would buy or would have bought the tying product without also buying the tied product from the same supplier, thus allowing the autonomous production of both the tying and the tied product" (EUROPEAN UNION. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, p. 7-20, 2009, parag.51 "). It should be noted that a draft of a new Guide to Abuse of Dominance in the European Union is currently under public consultation, but does not propose any substantive changes on this point.

[165] It should be noted that, in *Epic v. Apple*, one of the arguments invoked by the California Court to dismiss allegations of violation of the Sherman Act was that Apple's IAP "cannot be bought or sold, but is integrated within iOS devices". The decision simply concluded that "IAP is only one component of the full suite of services offered by iOS and the App Store" (UNITED STATES. United States District Court Northern District of California. Epic Games, Inc. v. Apple Inc. Case No. 4:20-cv-05640-YGR. Judge: Yvonne Gonzalez Rogers. Judgment of September 10, 2021).

services. In addition, it pointed out that the fact that IAP system providers do not need to distribute applications and can limit themselves to processing transactions would prove commercial separability (SEI 1475850, paragraph 211-213).

338. This decision finds that the conclusions drawn by the General Superintendence are not only correct, but can also be reinforced by additional grounds. At the outset, it should be clarified that the mere fact that the App Store and IAP are tied together as a result of design choices in the technical architecture of Apple's ecosystem, in and of itself, does not preclude an infringement of competition law. Indeed, even innovative technological solutions can have anti-competitive effects[166]. Indeed, "digital platforms can harm competition by making changes to their products' software codes that prevent independent developers of complementary products or services from operating" [167].

339. Technological design solutions can be especially instrumentalized to prevent or hinder the compatibility or interoperability of third-party services complementary to the platform's main product. When this is done to favor a linked complementary product of the system controller itself, the normative category of tying becomes applicable . [168]

340. Therefore, as with "physical" products, the separability test for digital products should not be based on functional links or even technological complementarity, but on examining demand for the bundled services.

341. From the perspective of demand-side, a first indication of the separation between the App Store and the IAP refers to the chronology and launch of these services. As set out by the complainant in the Appeal (SEI 1481200, paragraphs 2-3), Apple opened the iPhone platform to third-party app development and launched the App Store in 2008. The following year (2009), it began to allow developers to use the IAP as a software module (API) if they wished to sell digital content in their applications.

[166] ORDOVER, J. A.; WILLIG, R. D. An economic definition of predation: pricing and product innovation. *The Yale Law Journal*, v. 91, n. 1, p. 8, 1981 ("*even genuine innovations-new products that in some ways are superior to existing products in the eyes of both engineers and consumers-are in some circumstances anticompetitive*"). In the same vein, cf. JACOBSON, J.; SHER, S.; HOLMAN, E. Predatory innovation: an analysis of Allied Orthopedic v. Tyco in the Context of section 2 Jurisprudence. *Loyola Consumer Law Review*, v. 23, n. 1, p. 1, 2010.
[167] FERNANDES, V. O. *Direito da concorrência das plataformas digitais*: entre abuso de poder econômico e inovação. São Paulo: Thomson Reuters Brasil, 2022, p. 339. In the same vein, SCHREPEL, T. Predatory innovation: the definite need for legal recognition. *SMU Science and Technology Law Review*, v. 21, n. 1, p. 22, 2018 (predatory innovation is defined as "*the modification of a technological platform and the technical design of a product-which are aimed at removing the compatibility of third party technologies with those of a dominant firm, or at impairing competing technologies operations*"); and NEWMAN, J. Anticompetitive product design in the new economy. *Florida State University Law Review*, v. 39, n. 3, p. 683, 2012.
[168] HOVENKAMP, H. Antitrust and the design of production. *Cornell Law Review*, v. 103, n. 5, p. 1194, 2018 and NEWMAN, J. Anticompetitive product design in the new economy. *Florida State University Law Review*, v. 39, n. 3, p. 716, 2012.

342. However, it was not until three years later, in February 2011, that Apple announced that IAP could (or should) be used for recurring subscription charges for apps distributed through the App Store. This meant that, for approximately three years, developers of applications such as Spotify, Netflix and others who intended to offer subscription plans could collect the respective payments without using Apple's payment processing service.

343. A second complementary - and possibly decisive - piece of evidence that there are autonomous demands can be derived from the very structure of the App Store's revenue composition. As explained by the Appellant (SEI 1173682, paragraphs 43-44), the 30% commission fee for mandatory use of the IAP is only actually charged to a small proportion of developers who distribute their apps on the App Store. According to Apple "developers of approximately 84% of the applications currently available on the App Store do not pay any commission to Apple, a percentage that applies homogeneously worldwide" (SEI 1173682, paragraph 44, ii).

344. This is because, as discussed in section 5.1, Apple's terms and conditions of use exempt several apps from the 30% commission fee - such as those that sell goods and services considered "physical", as well as those that fall under the "reader apps" exception. The finding that 84% of developers who contract the tying product (App Store application distribution service) do not contract the tied product (IAP) is a strong indication that the demands for each of these services are entirely independent

345. As a third piece of complementary evidence, the very claims of developers who are dissatisfied with the requirement to contract IAP denote a separate demand for the tied product. As extensively diagnosed in reports and market studies conducted in foreign jurisdictions, a number of independent developers have called for changes to App Store policies that would ensure that they can contract third-party transaction processing services outside the Apple ecosystem[169].

346. From the investigation carried out by the SG, it can be seen that complaints of this nature are being sought by app developers operating in Brazil. In particular, Epic Games and The Walt Disney Company have expressed an interest in offering alternative payment methods, without the obligation to use Apple's IAP system:

> [**ACCESS RESTRICTED TO CADE**]

> [**ACCESS RESTRICTED TO CADE**]
> **[CADE RESTRICTED ACCESS]** sought to use its own payment system within the **[CADE RESTRICTED ACCESS]** apps**,** but this was not possible because Apple's T&Cs state that Apple's IAP must be

[169] See section 3.2.3 of this vote.

> used. The **[CADE RESTRICTED ACCESS]** app update has already been blocked because it included a link to a web page where consumers could buy streaming subscriptions. Apple indicated that this practice violated its app update policies.

347. Still regarding the separability of products, it should be noted that in jurisdictions where Apple has adjusted App Store fee structures to comply with new legislation, the company has started to segregate the amounts that are charged specifically for processing IAP payments.

348. In the European Union, for example, after the DMA rules came into force, Apple began to segregate the fees charged for *in-app* transactions. Under the new "Terms for Distribution and Alternative Payments in the EU" released by the company in August 2024, the "payment processing fee", which is charged for using IAP, is not confused with the "commission fee", which is charged for distributing apps on the Apple Store. As highlighted in the company's official document:

> The alternative commercial terms for iOS and iPadOS apps in the EU have three main elements:
>
> - **Reduced commission** - iOS and iPadOS apps in the App Store will pay a reduced commission of 10% (for the vast majority of developers and for subscriptions after the first year) or 17% on digital goods and services transactions, regardless of the payment processing system selected;
>
> - **Payment processing fee** - iOS and iPadOS apps in the App Store can use App Store payment processing for an additional 3% fee. Developers can use a payment service provider within their app or direct users to a website to process payments without any additional fee from Apple;
>
> - **Core Technology Fee (CTF)** - For very high volume iOS and iPadOS apps distributed via the App Store and/or alternative distribution, developers will pay €0.50 for each first annual install over one million. According to the alternative commercial terms for EU apps, Apple estimates that less than 1% of developers would pay a Basic Technology Fee on their EU apps[170].

349. In other words, not only is it possible to separate the products, but Apple itself, for the purposes of complying with the DMA, has started to allocate a specific 3% fee separately for the purposes of remuneration for the linked service.

[170] APPLE. Update on apps distributed in the European Union. Apple Developer, [s.d.]. Available at: https://developer.apple.com/support/dma-and-apps-in-the-eu/. Accessed on: 28 Apr. 2025.

350. For all the reasons set out above, it follows that the *in-app* payment system (IAP) and the App Store distribution platform constitute autonomously identifiable products, unequivocally satisfying the requirement of separability.

5.3.4.4 Contractual or technological coercion

351. The third normative requirement concerns the enforceability of tying. It must be demonstrated that the consumer is in some way compelled or at least strongly directed to purchase the goods together. Coercion can even materialise through the granting of discounts that make the joint purchase of products highly attractive[171]. In any event, if there is a genuine possibility of purchasing the products separately, there is no basis to establish unlawfulness.

352. In this case, as examined above, the sale of tied products is remunerated by a 30% commission fee on in-app transactions. Therefore, in order to guarantee the effectiveness of this strategy for capturing developers' revenue, it is crucial for Apple to prevent users from conducting transactions for developers using alternative payment methods (such as Pix, PayPal, MercadoPago or others). To prevent this from happening, Apple establishes various technical and contractual mechanisms that manifest the enforceability of the anti-competitive tying.

353. In addition to creating technological barriers integrated into the design of iOS that render alternative distribution channels unfeasible, the provisions of the License Agreement expressly prohibit the contracting of alternative payment processing systems for transactions involving digital goods, under penalty of exclusion of the developer from the App Store.

354. As a demonstration of the binding nature of these contractual provisions, one can cite the notable case of Epic Games, which triggered the US lawsuit described in Section 4.1 of this decision. On 14 August 2020, Epic Games implemented a "hotfix" (hidden update) in the Fortnite app that, when activated, allowed users to purchase V-Bucks (the game's virtual currency) directly from Epic Games, bypassing the IAP and consequently avoiding the 30% commission fee charged by Apple. In response, Apple promptly removed Fortnite from the App Store, alleging violation of the developer agreement (License Agreement) and, on 28 August 2020, terminated Epic Games' developer account on the App Store.

355. In addition to the immediate prohibitions on the use of alternative payment processes, Apple also seeks to prevent developers from "circumventing" the mandatory use of IAP by informing consumers about alternative purchase channels. At this point,

[171] Administrative Proceeding no. 08012.002096/2006-06. Reporting vote by Board Member Ana de Oliveira Frazão (SEI 0054450).

the Anti-Steering Provisions in the License Agreement, in addition to enabling a strategy of anti-competitive discrimination, reinforce the binding nature of tying.

356. As discussed in detail in Section 5.1.1, these provisions expressly prohibit developers from informing, directing or even alluding to the existence of alternative transaction channels outside the Apple ecosystem. In this respect, they function as a veritable "informational barrier" that prevents economic arbitrage by the consumer. By prohibiting buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than in-app purchase, it ensures that even consumers willing to bypass the IAP system remain uninformed about potentially cheaper options available through external channels.

357. Finally, it should be noted that coerciveness is further reinforced by rigorous mechanisms for monitoring app design choices, through the App Store review process. As highlighted in Technical Note No. 63/2024/CGAA11/SGA1/SG/CADE (SEI 1475850) "Apple has not limited itself to including such prohibitions in its Terms & Conditions, and it is certain that the Respondent has developed monitoring mechanisms and tools to effectively prevent users of smartphones with the iOS operating system from being able to access developers' applications that do not comply with the determinations it has imposed, rejecting them at source during the update review process."

5.3.4.5 Potential anti-competitive effects

358. In order to conduct a rigorous investigation into the allegation of tying, the above factual narrative must be examined under theories of harm that rationally explain the potential anti-competitive risks of Apple's practice. In a summary assessment typical of this procedural phase, the Court considers that there are at least two theories of harm that can be developed from the perspective of tying.

5.3.4.5.1 Closing the payment processing market (intra-platform exclusion)

359. The first applicable theory of tying harm consists of Apple's offensive leverage with exclusionary effects in the "target" payment processing market (intra-platform exclusion). From this perspective, Apple would be offensively leveraging its market power from the market for the provision to developers of platforms for the distribution of apps to iOS users (market of origin). By preventing iOS app developers from contracting competing payment processing providers (such as PagSeguro, MercadoPago, PayPal, Rede, Stone and many others), the tying strategy could raise the costs of these rivals or create barriers to entry.

360. It is a classic harm theory of tying that is widely discussed in economic literature. Contrary to the prescriptions of the "*Single Mono*poly *Profit* Theory", various "post-

Chicago" models show that offensive leverage can be economically rational when, for whatever reason, the monopolist is unable to perfectly extract all consumer surplus or when the market for the tied product is not perfectly competitive[172].

361. Several recent studies have also modeled the conditions under which closing tied markets through tying can be profitable on digital platforms. In this sense, Eisenmann, Parker and Van Alstyne[173] explain that the tying of products by the central platform can neutralize competitors' defensive discounting strategies in the "target" market, as customers with a high valuation for both products are forced to migrate to the bundle. This triggers a self-reinforcing cycle driven by network effects, where the migration of users to the bundler's linked product continues to attract more users, accelerating the decline of rivals in the "target" market and creating a "spiral effect".

362. In addition, authors such as Padilla, Perfins and Piccolo [174] establish that ecosystem orchestrators may have an incentive to exploit their installed user base and exclude competitors in adjacent markets, particularly when demand growth for the primary product (device) is slow. Consumers can be harmed by exclusion if the monopolist's tied service is inferior to those of third-party developers, and this risk becomes more pronounced as demand for smart mobile devices (hardware) becomes saturated.

363. In order for these theories of harm to be properly explored in the specific case, it would be appropriate to supplement the information contained in the case file with a more detailed analysis of the competitive conditions in the potential payment processing market. It would be crucial to examine the market foreclosure capacity of the conduct imputed to the Appellant in light of the competitive dynamics of the target segment.

5.3.4.5.2. Intra-product discrimination of iOS app developers

364. In addition to the risks of foreclosure discussed above, tying could have anti-competitive effects in the form of the direct extraction of surplus from consumers (iOS

[172] Strictly speaking, the validity of the Single-Profit Monopolist Theory only holds when the bundled products are sold in fixed proportions and the market for the subordinate product is perfectly competitive and subject to economies of scale. The weaknesses of these assumptions were uncovered mainly in WHINSTON, Michael D. Tying, Foreclosure, and Exclusion. *The American Economic Review*, v. 80, n. 4, p. 837-859, 1990. In the same vein, see SALOP, Steven. *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*. In: PITOFSKY, Robert (org.). How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust. Oxford: Oxford University Press, 2008. p. 145.

[173] EISENMANN, Thomas; PARKER, Geoffrey; VAN ALSTYNE, Marshall W. Platform Envelopment. *Strategic Management Journal*, v. 920, p. 1270-1285, 2011.

[174] PADILLA, Jorge A.; PERKINS, Joe; PICCOLO, Salvatore. Self-Preferencing in Markets with Vertically Integrated Gatekeeper Platforms. *The Journal of Industrial Economics*, v. LXX, n. June, p. 371-395, 2022.

app developers). Under this theory, it could be considered that Apple's strategy enables it to charge supra-competitive prices for the distribution of apps on iOS, by setting the price of the tied products at a higher level.

365. As discussed in the recent competition law literature, tying practices can harm social welfare, even when they don't involve closing down target markets - at substantial levels. Based on works such as those by Elhauge[175] , Nalebuff[176] and Economides[177] , it is possible to contemplate at least three ways of extracting consumer surplus by tying products:

(i) intra-consumer price discrimination, when tying is used to capture additional value that individual buyers attribute to the initial (inframarginal) units of a product over and above the price they pay for subsequent units;

(ii) price discrimination between products, when the company has market power over both the tying and the tied product and the practice forces consumers with heterogeneous preferences to buy the package at a single price, and

(iii) intra-product price discrimination via *metering*, which is based on the use of the tied product as an indirect indicator of the value that different consumers attribute to the tying product, allowing for imperfect price discrimination, creating allocative inefficiencies.

366. The notion that buyer discrimination strategies can be embedded in product bundling in an anti-competitive manner is not really foreign to CADE's decisional practice. As discussed in the judgment of Administrative Proceeding No. 08012.001099/1999-71, when discrimination does not occur through discounts, but rather through the "imposition of surcharges and/or difficulties for consumers of competing companies", this is conduct that "only raises costs for consumers, and it is not possible to justify this practice on the grounds that the discrimination in question would increase the number of consumers benefiting"[178] .

[175] ELHAUGE, Einer. Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory. *Harvard Law Review*, v. 123, n. 2, p. 397-481, 2009 and ELHAUGE, Einer. Rehabilitating Jefferson Parish: Why ties without a substantial foreclosure share should not be per se legal. *Antitrust Law Journal*, v. 80, n. 3, p. 463-520, 2016.
[176] ELHAUGE, Einer; NALEBUFF, Barry. The Welfare Effects of Metering Ties. *The Journal of Law, Economics, & Organization*, v. 33, n. 1, p. 68-104, 2016.
[177] ECONOMIDES, Nicholas. Tying, Bundling, and Loyalty/Requirement Rebates. *in*: *Research Handbook on the Economics of Antitrust Law*, Cheltenham, UK: Edward Elgar, 2013, p. 121-144.
[178] Administrative Proceeding No. 08012.001099/1999-71 (Steel Placas Indústria e Comércio Ltda. and Comepla Indústria e Comércio and others) Reporting vote by Board Member Carlos Emmanuel Joppert Ragazzo (SEI 0013518, p. 154). In the case, it was observed that "the collection of the aforementioned fee

367. This nature of anticompetitive harm is fully captured by a consumer welfare standard focused on consumer surplus, as adopted by Brazilian Competition Law (Law 12.529/2011[179]). As highlighted by Elhauge, "if the consumer welfare standard adopted by antitrust law is used correctly, the current presumption [of illegality] [of tying by the monopolist] is clearly correct, as economic theory establishes that unjustified tying with tied market power generally harms consumer welfare under any neutral assumption about the distribution of buyer preferences"[180] (free translation).

368. From the perspective of the theory of harm of discrimination via metering, Apple's practice of obligatorily tying the IAP to the distribution of apps in the App Store can be seen as a strategy of intra-product discrimination. In these terms, bundling would function as a "*metering* strategy", where developers with different intensities of use of the payment system are charged differently, creating second-degree price discrimination.

369. The tying strategy would allow Apple to extract value disproportionately from developers who rely more heavily on *in-app* transactions, significantly distorting the efficient operating conditions of the market and creating allocative inefficiencies that negatively impact innovation, quality and the variety of apps available to consumers.

370. This scenario of price discrimination can be deduced from the following information provided by Apple on the charging of IAP. As mentioned earlier in this vote, the Respondent explained that 84% of developers who contract the main product (App Store application distribution service) do not contract the linked product (IAP). This is because the vast majority of developers either monetize their services through advertising, sell physical goods or, for some reason, fall within the exceptions to the IAP charge. This data alone suggests a strong price discrimination strategy embedded in tying.

371. Across the wide range of native apps that are distributed on the App Store, the imposition of the 30% commission fee tends to impose higher costs on categories of developers who monetize their services through successive transactions of digital content. This is a business model typically adopted by streaming apps (through monthly subscriptions) and, even more so, by digital gaming apps.

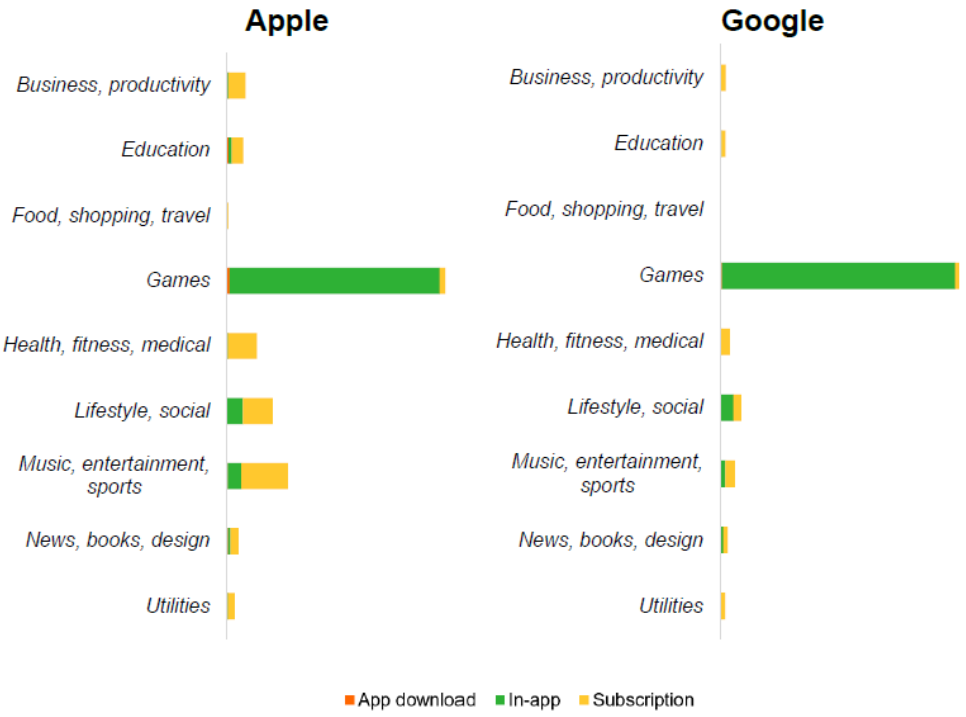
for the sealing service would not be illegal per se, since the company should be remunerated for the service provided (since the price of its license plate included the value of the service). What is unacceptable is charging a higher amount for the same service without any economic justification, which the company has failed to prove."

[179] The choice of this normative standard stems from the interpretation of art. 88, § 6, of Law 12.529/2011, which requires that claims of efficiencies involve passing on a relevant part of the resulting benefits to consumers.

[180] ELHAUGE, Einer. Rehabilitating Jefferson Parish: Why ties without a substantial foreclosure share should not be per se legal. *Antitrust Law Journal*, v. 80, n. 3, p. 463-520, 2016, p. 490.

372. The disproportionate impact of the IAP levy on certain specific categories of developers was elucidated by the CMA *in* its "*Appendix H: Apple's and Google's in-app purchase rules*" of the Final Report on Mobile Digital Ecosystems. In the UK in 2021, mobile games accounted for more than half of Apple's IAP revenues, mainly because they rely on individual *in-app* purchases and are classified as "digital" content, as indicated in the graph below:

Chart3 . Apple net IAP revenue and Google Play service fee revenue by app category in the UK in 2021



Source: "*Appendix H: Apple's and Google's in-app purchase rules*" from the CMA's Final Report on Mobile Digital Ecosystems.

373. Although this data were collected in another jurisdiction, there are strong indications in the case file that this distortion is manifested in Brazil, as can be seen in the statements of market agents consulted by the SG. It is for no other reason that app developers who rely more heavily on *in-app* transactions have signaled their interest in either launching their own means of payment processing or creating their own app stores. In this regard, the following statements stand out:

> [**ACCESS RESTRICTED TO CADE**]
> Due to Apple's *in-app* purchasing rules, [**CADE RESTRICTED ACCESS**] cannot offer alternative payment methods or allow its users to take advantage of the benefits that may have through [**CADE RESTRICTED ACCESS**] must also adapt to Apple's refund grace periods (60 days) versus shorter standards, increasing the potential for

> fraud. [**CADE RESTRICTED ACCESS**] is also limited in its ability to offer promotions, as they require additional investment of resources for *in-app* purchases on Apple's operating system. In addition, [**CADE RESTRICTED ACCESS**] is limited in its ability to issue refunds. Also, due to the 30% fee that Apple charges on all in-app purchases, [**CADE RESTRICTED ACCESS**]'s payment processing costs on iOS are approximately six times higher than payment processing costs on desktop web browsers, and about twice as high as Android's costs. This cost has remained constant over time, since [**CADE RESTRICTED ACCESS**]'s entry into the App Store in [**CADE RESTRICTED ACCESS**], and any upfront costs Apple may have had in relation to checks or integrations would have already been recouped. **If** [**CADE RESTRICTED ACCESS**] **didn't have to pay the commission for *in-app* purchases, or if it paid a lower commission, it could share a greater amount of** [**CADE RESTRICTED ACCESS**]'s **profit**. (emphasis added)
>
> [**ACCESS RESTRICTED TO CADE**]
>
> [**ACCESS RESTRICTED TO CADE**]
> **[CADE RESTRICTED ACCESS]** sought to use its own payment system within the **[CADE RESTRICTED ACCESS]** apps, but this was not possible because Apple's T&Cs state that Apple's IAP must be used.
> The **[CADE RESTRICTED ACCESS]** app update has already been blocked because it included a link to a web page where consumers could buy streaming subscriptions. Apple indicated that this practice violated its app update policies.

374. In light of the elements presented, this Decision concludes that there is strong plausibility in the contention of the unlawfulness of the tying practiced by Apple through the imposition of the IAP. The analysis of economic data and the submissions made by market participants demonstrates that this practice constitutes a sophisticated strategy of intra-product discrimination that disproportionately extracts value from specific developers, notably those of games and streaming applications.

375. This practice not only harms developers by imposing excessive costs, but also negatively affects innovation incentives and the variety of apps available to end users, constituting an infringement of competition law subject to intervention.

5.3.5. Defenses based on objective justifications

376. In its Appeal (SEI 1481200), Apple claimed that, since the launch of the iPhone in 2007, the iOS operating system has been deliberately designed to restrict third-party *software*. According to it, "the choice of this *design* is intended to improve the user experience by prioritizing consistent performance and high levels of security and privacy" (SEI 1481200).

377. It said that, in 2008, it opened up the iPhone platform so that third-party developers could access Apple's proprietary *Software* Development Kit and iOS *Application Programming Interfaces* ("APIs"), but conditioned this access on rules that ensured that all third-party applications were reviewed and approved by Apple.

378. Also in 2008, it reported having launched the App Store, setting a commission of 30% on the sale of third-party developer *software* to users, the same as that charged to this day. *In* 2009, it introduced *in-app* purchase and payment functionality called "*In-app Purchase*" ("IAP"), so that developers could sell digital content and resources in their apps.

379. Against this backdrop, Apple argued that since the design of its App Store, shortly after the iOS operating system appeared, it has had in mind the guarantee of a safe, reliable and secure place for users. To this end, it has always made the offer of third-party applications conditional on agreement with a clear set of guidelines, which, according to Apple, are the company's own differential:

> These measures serve to keep Apple's platform as secure as possible, which was - and still is - one of Apple's main differentiators from competing platforms. Apple's policies are lawful and justifiable. This is true of the iPhone: iOS was designed from the outset to limit the download of unverified software in order to protect the system and users from malware. This approach has resulted in significantly fewer intrusions on the iPhone compared to competitors, which is expected by users when purchasing Apple products. (SEI 1481200, pp. 20-21)

380. In this sense, it opposes the Interim Measure because it believes that the determinations of CADE's SG would end up redesigning the iPhone system, making it less secure, private and protected. As a result, it claimed that its global business model, applied for at least 15 (fifteen) years without competition questions in Brazil, would end up destabilized.

381. Based on this argument, Apple also argues that there is no *periculum in mora* to grant an Interim Measure:

> There is no *periculum in mora*. As demonstrated, Apple has fundamentally applied the same secure and private design for the iPhone and the same business model for the App Store for over fifteen years, with the only changes to the commission model being to benefit developers. (SEI 1481200, p. 8)

382. On the contrary, Apple argued for the existence of a *reverse periculum*. This is because, according to the company, the implementation of the Interim Measure would lead to significant and extremely costly changes, with non-trivial technical changes that

would impact not only Apple, but also developers and end users, and would be difficult to reverse. Among the points raised were the high investments required and the risks to the integrity and reputation of the system.

383. As for the costs of implementing the changes, Apple claimed that they would not only be high, but also difficult to recover, and that it would be difficult to estimate the amount of revenue that would be lost. On the developers' side, they could also end up incurring high costs to change their products, with the risk that the decision could be reversed by the CADE Court in a future decision.

384. As for the impact on the ecosystem, he argued that the integrated solution between *hardware* and *software*, which prevents the *download* of unverified third-party *software*, is exactly what sets it apart from its competitors. Thus, the consistency it delivers and which is expected by users would only be possible because of the guidelines imposed on developers and the review carried out by Apple, which provide better functioning applications and, therefore, greater confidence in the platform.

385. Apple also mentioned several times that allowing sideloading, a consequence of applying the Interim Measure in the manner determined, would be an important example of a change in the *design of* the iPhone that would bring significant harm to the security of the devices:

> As far as users are concerned, security is of paramount importance, as has been explained on several occasions. Therefore, Apple would need to carefully inform iOS users about the risks of some of the measures imposed.
>
> As an example, it's worth mentioning the reference to sideloading in the SG's decision (even though MELI didn't even request this point in the Interim Measure). This is an extremely important topic for device security. Sideloading essentially involves the possibility of downloading the app via direct downloads or third-party app stores. Sideloading exposes users to various malware and its implementation would require careful adjustments to current policies to mitigate the risk to users. The specialized articles confirm that, although sideloading can bring advantages, it should be approached with extreme caution. This is especially true in Brazil, where cybercrime is growing exponentially. (SEI 1481200, pp. 31-32)

386. He also said that competitors who allow sideloading have had to adopt a series of specific measures to protect users, as is the case with Google's Android system. Thus, applying such a change in the way determined by CADE's SG, without combining it with security tools to be thought out and developed, could undermine security as a pillar of the Apple ecosystem and remove from users the option of choosing a closed but more secure system, according to the company.

387. On February 19, 2025, CADE held a Public Hearing to discuss competition aspects of digital ecosystems for mobile operating systems, which was attended by Apple, represented by its Legal Director for Latin America and Canada, Pedro Pace. On this occasion, Apple raised many points that converge with those presented in its Appeal.

388. Initially, the company Complainant stressed that its aim was to offer products that would improve the lives of both users and developers. Thus, its devices, which seamlessly integrate *hardware*, *software* and services, would promote greater security, protection and privacy for users, which, according to Apple, would also benefit developers:

> Our integrated model and privacy and security protections provide Brazilians with a differentiated option in a very competitive market. An alternative that not only protects users, but also creates an environment in which software developers can thrive and grow.
>
> (...) Developers also benefit from the trust that users have in Apple. All apps available on the App Store go through an expert app review process. Malware and other threats are also identified. This way, users know they can safely and confidently install and explore apps from new or lesser-known developers. The trust promoted by Apple's careful App Review helps smaller or lesser-known developers to expand their user base and compete on a level playing field with large companies.[181]

389. During the Public Hearing, Apple reinforced the importance of its rigorous application review processes in substantially reducing risks to users. In this context, it once again mentioned the possible harm resulting from the practice of sideloading, as determined both by the DMA in the European Union and by the Interim Measure of CADE's SG:

> For example, certain commercial practices required under *ex ante* regulation, in particular the imposition of sideloading and unrestricted interoperability, increase the privacy and security risks for users. Apple will no longer be able to review apps downloaded from the web or the third-party app store in the same way it does with apps available on the App Store. The review of apps by people and not just algorithms is crucial to checking for privacy and security threats, as it analyzes what apps actually do, rather than just what they say they do. This is all to prevent malicious or harmful apps from reaching users. Without the centralized distribution of the App Store and the human review of apps, Apple cannot offer its users the same guarantees of security, privacy and protection. Apple also cannot provide important user protections for apps downloaded outside the App Store, including parental controls, which help keep children safe in the online environment, and relevant

[181] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. *Public hearing: competitive aspects of digital ecosystems for mobile operating systems*. Available at: <https://www.youtube.com/watch?v=ehpGbkb8reA>. Accessed on: 15 Apr. 2025.

> information about the uses and data and privacy risks offered by such apps.[182]

390. In addition, he pointed out that the harm is not limited to users, but also affects developers, who will have to deal with a loss of revenue as a result of the greater number of pirated apps. He pointed out that small developers would be among those most affected, as users would have less incentive to explore new apps, as they would no longer trust the ecosystem:

> Sideloading also poses real risks for developers. Apple is unable to protect them from cracked, fake and pirated apps, which puts developers' hard-earned intellectual property at risk. What's more, without the security, privacy and protection of the App Store, users may be less inclined to explore and download new apps, especially harming up-and-coming Brazilian developers who could otherwise achieve better results using our ecosystem.[183]

391. In short, Apple argues that the clauses *on anti-steering*, the use of its IAP as a payment processor and the ban on the sale of digital goods by third parties are essential to maintaining the security and privacy of its system. This closed system, according to the company, is one of its main differentiators and attractive to users and developers, as it enables the smooth running of a cohesive and reliable ecosystem, as it was designed in 2008.

392. With all due respect, I believe that the defenses and justifications presented do not deserve to prosper. At least in a summary judgment, it is possible to verify that they are permeated by strong inconsistencies. The privacy and security concerns raised by Apple become frustratingly empty when one analyzes the various exemptions given by the App Store to specific categories of applications or transactions.

393. Apple's distinction between apps that sell "digital" goods or services and those that sell "physical" goods or services, for example, is deeply artificial and devoid of any coherent principles. To the extent that Apple already allows several apps that offer "physical" goods or services to use their own in-app payment solutions, the claim that the imposition of the IAP is aimed at safeguarding the safety and security of transactions is unfounded.

394. With regard to Apple's claim that it does not charge commission on transactions relating to "physical" goods or services because it is not in a position to verify whether

[182] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. *Public hearing: competitive aspects of digital ecosystems for mobile operating systems*. Available at: <https://www.youtube.com/watch?v=ehpGbkb8reA>. Accessed on: 15 Apr. 2025.
[183] ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE. *Public hearing: competitive aspects of digital ecosystems for mobile operating systems*. Available at: <https://www.youtube.com/watch?v=ehpGbkb8reA>. Accessed on: 15 Apr. 2025.

the transaction actually took place or whether the goods/services were delivered, I believe that this logic does not hold up either. Apple also exempts from the "30% fee" so-called "*reader apps*", which also allow the purchase of digital goods and services.

395. The fact that these apps are not charged indicates that there is nothing special about the "digital" goods or services consumed on the device that would justify an IAP obligation for other digital apps. Corroborating this diagnosis is the fact that the reader app exception seems to have been applied inconsistently and arbitrarily.

5.4. CONCLUSIONS ON THE LIKELIHOOD OF INFRIGMENT

396. As extensively discussed in the previous sections and summarized in the table below, based on the two normative categories of "anti-competitive discrimination" and "tying", it is possible to outline different theories of harm that can be captured under art. 36 of Law 12.529 of 2011.

Table2 . Summary of normative categories of abuse of dominance and theories of harm

Normative categories of abuse	Anti-competitive conduct	Theories of harm	Relevant markets	Potential effects of anticompeitivos
Anti-competitive discrimination	1. arbitrary imposition of bans on distribution of third-party digital goods and services 2. Inconsistent application of application review guidelines in the App Review process	1. self-preferencing: favoring Apple's own applications over competitors. 2. Hybrid discrimination: creating barriers to entry in the digital goods distribution market. 3. Pure sideline discrimination: distortion of competition between developers.	Source market: non-licensable mobile operating system iOS Target markets: Distribution of apps for iOS and Distribution of digital goods and services on iOS	1. Closing alternative distribution channels to Apple's current and potential competitors 2. Anti-competitive disadvantage for developers who cannot distribute third-party digital content. 3. Restriction of the diversity of applications available to users. 4. Artificial maintenance of the app distribution monopoly
Bundled sales	1. Linking the application distribution service (App Store) with the *in-app* transaction	1. Closure of the payment processing market for iOS. 2. Intra-product discrimination via metering: use of IAP as a metering mechanism to	Market of origin: iOS app distribution (App Store). Target market: payment	1. exclusion of alternative payment service providers in the iOS ecosystem. 2. Extraction of consumer surplus mainly from application

Normative categories of abuse	Anti-competitive conduct	Theories of harm	Relevant markets	Potential effects of anticompeitivos
	processing service (IAP). 2. Reinforcement of tying through *anti-steering* clauses that prevent informing users about alternative payment methods	disproportionately extract value from certain developers.	processing systems	developers who rely on successive transactions (games, streaming);

397. It should be noted that these hypotheses are established here in a mere summary cognizance judgment, typical of the present procedural phase. In the judgment on the merits of the Administrative Proceeding, it will be up to this Court to assess whether there is sufficient evidence to overcome the standards of proof for demonstrating anti-competitive effects in each of the theories of harm and categories of abuse of dominant position outlined.

6. URGENCY TO PREVENT SERIOUS AND IRREPARABLE HARM (*PERICULUM IN MORA*)

398. The urgency to prevent serious and irreparable harm (*periculum in mora*) consists of potential harm, an objectively ascertainable risk that the process will not be useful to the interest demonstrated by the party. Thus, the party must demonstrate a well-founded fear that there will be a change in the factual situation that could jeopardize the effectiveness of the relief if it waits for the normal course of the proceedings to be completed. [184]

399. As former Judge Paula Farani de Azevedo Silveira pointed out, for the purposes of Article 84 of Law 12.529/2011, the danger of delay must be understood in its collective dimension, since "the danger of injury must not only affect the agent requesting the measure, but the market as a whole, affecting competition and consumer welfare".

400. Apple argued (SEI 1481201) that because its policies for the mobile ecosystem have been in force for "several years", there would be no danger of delay. It complemented this line of argument with the fact that the present case has only been going on for two years, with Mercado Livre requesting a Interim Measure only one year ago.

401. Contrary to what the Appellant claims, the SG substantiated the existence of a *periculum in mora*:

[184] THEODORO JÚNIOR, Humberto. *Curso de Direito Processual Civil:* Volume I. 56th ed. Rio de Janeiro: Forense, 2015, p. 806.

> 408. Evaluating the entire content of the information and documents contained in the case file, this requirement is deemed to be present, insofar as the conduct practiced by Apple, which is the subject of this investigation, is capable of causing irreparable harm or harm that is difficult to repair, not only to app developers, who are currently prevented from distributing a wider range of digital products and services; but also to iOS users who, day after day, as long as these restrictive policies are in force, are deprived of access to a more diversified offer of goods, digital services, functionalities and benefits, which could be offered in a scenario of broad competition in the affected markets.
> 409. In this context, it should be noted that maintaining the conduct practiced by Apple, in a scenario of non-intervention by this antitrust authority, would tend to aggravate the current scenario of non-competition and solidify the artificial barriers to entry imposed by the Respondent, which prevent new agents from being able to rival it in the markets for the distribution of applications, the distribution of digital goods and services and payment processing systems, in which it currently enjoys a monopolistic position.
> 410. After all, the continuation of such conduct, in a scenario of already manifest interest on the part of different agents to offer services capable of rivaling those currently offered only by Apple, makes it impossible for such players to enter the market, thus materializing the risk of eliminating competitors. We therefore conclude that the periculum in mora requirement has been met. (SEI 1475988)

402. The Federal Regional Court of the First Region has also recognized, especially in the judgment of Interlocutory Appeal No. 1004244-13.2025.4.01.0000, that there is urgency in implementing the changes adopted by the Interim Measure:

> On this point, I would point out that the defendants' argument that there is no urgency in implementing the changes because Apple's business model has existed for years does not hold water. The closed structure of iOS and the limitations imposed on the commercialization of apps by third parties are precisely the factors that justify the preventive action of the antitrust authority, since maintaining them without any intervention could jeopardize the entry of new competitors and make it impossible for competition to recover in the sector.

403. There is no reverse *periculum*, an argument also raised by Apple. There are no indications that the various changes in Apple's business model to comply with decisions in other jurisdictions, described throughout this Opinion, are causing irreparable risks to the business model.

404. For all these reasons, it is concluded that the Interim Measure would not be imposing an excessive and disproportionate burden on Apple, but only protecting an urgent situation, which involves possible severe harm to competition in the market. In the

event of a change of understanding in the judgment on the merits of this case, Apple may return to the terms and conditions previously in force in Brazil.

405. For these reasons, I find that there is a *periculum in mora* if the conduct under investigation is allowed to continue to be practiced by Apple, while there is no reverse danger.

7. REMEDIES: DESIGNING PRO-COMPETITIVE INTERVENTIONS IN APPLE'S SMART MOBILE DIGITAL ECOSYSTEM

406. Throughout this Decision, and in accordance with the SG's conclusions in Technical Note No. 63 (SEI 1475988), it has been established that there are well-founded indications that Apple is engaging in anti-competitive conduct, with negative effects on markets related to the iOS ecosystem.

407. Even in a preliminary assessment, the design of an effective remedy to address the competition concerns identified in this case must focus on three principal pillars:

> (i) Removal of Anti-Steering Provisions to permit developers to include buttons, external links, or other means of informing the user and directing them to purchasing mechanisms other than in-app purchase;
>
> (ii) Unbundling of the payment processing service for in-app transactions from Apple's IAP, allowing the use of alternative payment mechanisms; and
>
> (iii) Enabling the distribution of apps on the iOS operating system through alternative channels to Apple's App Store.

408. These principles are precisely reflected in the measures imposed by SG-CADE in its Interim Measure decision. In this context, this decision merely presents certain clarifications, in order to address any questions concerning the parameters of the contested decision, taking into account issues raised by the Appellant itself, as well as insights that can be derived from international experience.

7.1. Removal of anti-steering provisions

409. The Anti-Steering Provisions prevent app developers in the Apple ecosystem from informing iOS users about alternative purchasing mechanisms, outside the Apple ecosystem, for subscription or paid features of the app. Apple imposes these provisions, set out in the terms and conditions in force in Brazil (License Agreement and App Store Review Guidelines), through its monopolistic position in the market for the provision to

developers of platforms for the distribution of apps to iOS users. With regard to the Anti-Steering Provisions, the SG's Interim Measure determines that Apple must now permit:

> "(a) developers who wish to market goods and services, whether physical or digital, proprietary or from third parties, to be consumed in the application itself or in third-party applications, can inform their users about other ways of acquiring the products they market, increasing transparency and the level of information provided to consumers"; and
>
> (b) "developers who wish to market goods and services, whether physical or digital, proprietary or from third parties, to be consumed in the app itself or in a third-party app, can insert buttons, external links or other calls to *action* in their own apps that allow interested users to access other ways of acquiring the marketed products than just *in-app* purchases".

410. As examined above, Apple has already been required to remove Anti-Steering Provisions in the European Union and the United States, which resulted in amendments to the App Store Review Guidelines. In the first jurisdiction, it was determined that the changes implemented by Apple were not sufficient to address the concerns raised under the DMA. This is because, it is reported, Apple implemented restrictions that prevented developers from adequately informing consumers of alternative and cheaper offers. The Commission therefore ordered Apple to remove these technical and contractual restrictions[185].

411. In the United States, the District Court for the Northern District of California also found that Apple had violated its September 2021 judgment, in which it prohibited Apple from preventing or restricting app developers from including steering mechanisms (in other words, "including in their apps and metadata buttons, external links or other calls to action that direct customers to purchasing mechanisms other than in-app purchase"[186]).

412. In her most recent decision of 30 April 2025, Judge Yvonne Gonzalez Rogers imposed more specific orders on Apple, after concluding that Apple had deliberately failed to comply with the court order. [187] As such, she applied restrictions to Apple's conduct, definitively:

[185] EUROPEAN COMMISSION. Commission finds Apple and Meta in breach of the Digital Markets Act. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1085. Accessed on: 23 Apr. 2025.
[186] Cf. https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/epic-games-v-apple/Epic-v.-Apple-20-cv-05640-YGR-Dkt-813-Injunction.pdf. Accessed on May 11, 2025.
[187] According to the decision, "Apple's conduct violates the injunction. The non-compliance was far from 'technical or *de minimis*. Apple's lack of adequate justification, knowledge of the economic infeasibility of its compliance program, motive to protect its illegal revenue stream and institute a new de facto anticompetitive structure, and then reverse-engineer a justification to offer the Court cannot in any universe, real or virtual, be viewed as the product of good faith or a reasonable interpretation of the Court's orders."'

Accordingly, for the reasons set forth herein, and upon good cause shown, the Court **PERMANENTLY RESTRICTS AND OBLIGATES** Apple Inc. and its officers, agents, servants, employees, and anyone in active concert or participation with them, from:

1. Impose any commission or fee on purchases consumers make outside of an app and, as a consequence, there is no reason to audit, monitor, track or require developers to report purchases or any other activity consumers make outside of an app;
2. Restricting or conditioning the style, language, formatting, quantity, flow or placement of links to purchases outside an application by developers;
3. Prohibit or limit the use of buttons or other calls to action, or otherwise condition the content, style, language, formatting, flow or placement of such devices for purchases outside of an application;
4. Exclude certain categories of applications and developers from gaining access to the link;
5. Interfering with consumers' choice to enter or exit an application by using anything other than a neutral message informing users that they are going to a third-party site [75]; and
6. Restricting a developer's use of dynamic links that take consumers to a specific product page in a logged-in state, rather than a statically defined page, including restricting applications that transmit product details, user details or other information that refers to the user intending to make a purchase.

Because these are restrictions on the specific actions Apple took to violate this Court's Injunction, and because they do not require any affirmative action on Apple's part, the **INJUNCTION IS IMMEDIATELY EFFECTIVE**. The Court will not consider a request for a stay, given the repeated delays and the seriousness of the conduct.

[75]The Court pre-authorizes the "dialogue" version of Apple's screen in advance so as not to hinder the progress of developers:

(p. 63); and "Apple sought to maintain a revenue stream worth billions in direct defiance of this Court's injunction." (p. 2). (p. 2).
Cf. UNITED STATES. *Epic Games, Inc. v. Apple Inc.* Contempt Order. U.S. District Court for the Northern District of California, Case No. 4:20-cv-05640-YGR, Apr. 30, 2025. Available at: https://s3.documentcloud.org/documents/25924283/epic-v-apple-contempt-order.pdf. Accessed May 11, 2025.

CX-520.39 (middle example); see Feb. 2025 Tr. 1333:25-1334:17, 1335:10-16 (Onak).

413. In light of international precedents, there appears to be a substantial risk that Apple will implement technical or informational obstacles that could create friction in the user experience, undermining the effectiveness of the competition remedy. For this reason, the Court considers it appropriate to clarify that, for the purposes of complying with the Interim Measure issued by the SG, the Appellant is prohibited from employing solutions that create technical or contractual obstacles to directing users to alternative purchasing mechanisms, such as: intimidating warning screens ("scare screens"); imposing fees on external purchases; monitoring transactions outside the application; restrictions on the style, language, formatting or positioning of links and buttons for alternative payments; selective exclusion of developers from access to the functionality; interference in the user experience with non-neutral messages; or limitations on the use of dynamic links that transmit product or user information.

414. Any mechanism that undermines the objective of ensuring that developers can clearly inform iOS users about alternative payment methods and that consumers can access them without significant difficulties will be considered non-compliance, subjecting Apple to the penalty of a daily fine in the amount of R$250,000.00 (two hundred and fifty thousand reais), as established in the decision subject to appeal. It should be noted that this amount, set at the ceiling of Article 39 of Law 12.529/2011, is proportionate to the Appellant's significant economic capacity.

7.2.Unbundling the payment processing service for *in-app* transactions

415. The unbundling of the payment processing service for in-app transactions is expressly provided for by SG-CADE, which ordered Apple to allow:

> "(c) developers who wish to market goods and services, whether physical or digital, proprietary or third-party, to be consumed in the app itself or in a third-party app, may contract and make use of other *in-app* purchasing systems to offer their consumers other options for processing transactions carried out in apps;" and
>
> "(e) developers wishing to distribute their applications on the Apple App Store may contract the distribution services of such

> application store without the need to simultaneously contract Apple's IAP system, even if such applications include the commercialization of digital goods and services."

416. In its Appeal, Apple (SEI 1481201) states that the SG's measure to entirely suspend clause 3.1.3 of the *App Store Review Guidelines*, beyond *in-app* purchases, in specific situations, would be excessive and disproportionate. This is because this clause, while imposing the mandatory use of IAP for sales of digital goods, also provides for exceptions that allow the use of alternative payment methods. This clause provides, for example, for the case of reader apps (such as those for books, music or video), which may include an informative link for managing accounts outside the app. Thus, the Appellant argues that, in the event of a total suspension of clause 3.1.3(a), such apps will cease to function.

417. With regard to the above argument, it would be possible to understand that, once the rule requiring payments with Apple's IAP was abolished, it would not even be necessary to have specific provisions in the *App Review Guidelines* to regulate exceptions to the rule. In any case, for the purposes of complying with this determination, it is permissible for Apple to adapt the wording of the contractual clauses, rather than excluding them altogether, as long as the substance of the Interim Measure is preserved: the impossibility of unilaterally imposing on developers the mandatory contracting of Apple's IAP for *in-app* transactions.

418. In addition, under the terms of the Interim Measure issued by the SG, Apple must also allow users to freely contract and make use of alternative payment processing systems to the IAP. Compliance with this determination seems to be even easier in Brazil, where a public payment processing infrastructure operates, the Pix system, which is operated by the Central Bank of Brazil and regulated by BCB Resolution No. 1, of August 12, 2020.

419. This obligation can be met, for example, by making it possible for the developer to display a QR Code in their app for payment by the user via the Pix System. In fact, Apple already allows this type of payment for sales of physical goods within applications, as illustrated in the figure below:

Figure20 . Payment by PIX - *in-app* sales of physical goods

Source: *printscreen* on the Amazon iPhone app

420. By way of further clarification, it is not unknown that "the 30% fee" currently charged by Apple is allegedly intended to remunerate not only the use of the IAP, but also the App Store app distribution service itself. Therefore, compliance with the Interim Measure in Brazil will require the Appellant to revise its App Store fee policies, unbundling the price components related to payment processing from those related to app distribution. In making this adjustment, however, Apple shall not be able to impose supracompetitive fees on developers for purchases made using external *links*, otherwise the spirit of this decision will be distorted[188].

7.3. Allowing alternative app distribution channels (third-party app stores and sideloading)

421. Under the terms of the Interim Measure, Apple must also allow "(*d*) developers to choose to distribute their native applications for the iOS system through other tools and mechanisms than exclusively the Apple App Store, in particular measures to enable sideloading and the inclusion of native application stores alternative to the Apple App

[188] It should be noted that this expedient was used by Apple in the US and was censured in due course by Judge Yonne Rogers' decision in 2025. See Section 4.1 of this opinion.

Store, enabling consumers to choose the way they deem most convenient to acquire the applications they want."

422. As stated in this Decision, apps on the iOS system can currently only be downloaded via the App Store. In this scenario, the creation of alternative distribution channels is a crucial component of the package of remedies. Without this obligation, even the order to undo the tying would either be innocuous or would require CADE to take atypical institutional action.

423. As pointed out in the previous section, in order to untie the distribution services via the App Store and the IAP, Apple will necessarily have to segregate the prices charged for each of these services. If Apple's monopoly on app distribution were perpetuated through the exclusivity of the App Store, Apple could continue to charge supra-competitive prices for the core service. In the end, CADE would have to arbitrate the prices charged by the monopolist, which is typical of a regulatory body and outside the regime of Law 12.529/2011.

424. Price controls, however, become unnecessary when antitrust intervention takes on the structural aspect of breaking down barriers to entry, enabling competition in the iOS app distribution link itself. As new distributors enter the ecosystem, the fees charged by the App Store will naturally come under competitive pressure, at least in the medium to long term.

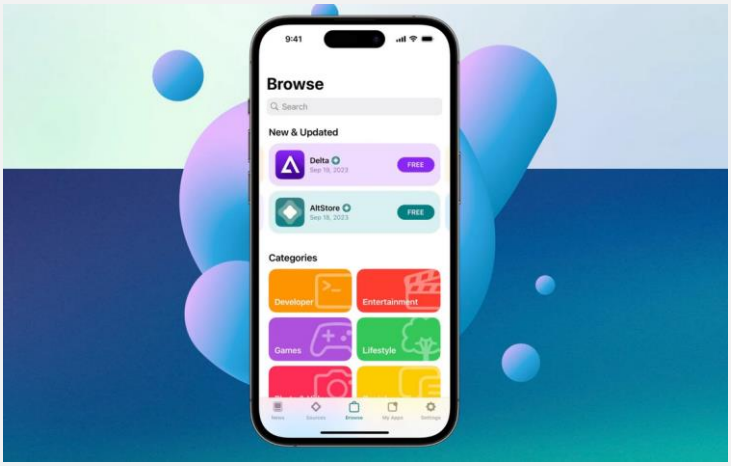
425. In addition, the entry of alternative stores also tends to increase the variety of apps available in the ecosystem, encouraging innovation on the part of developers. In the European Union, for example, at least 6 (six) new stores have been launched on iOS systems. They adopt different business models (charging for direct distribution, subscriptions or free distribution) and focus on different application profiles (games, utilities, corporate applications and others). The table below briefly summarizes the main characteristics of these alternative stores.

Table 4 - Alternatives to Apple's App Store in the European Union

The implementation of DMA in the European Union has allowed new app stores to emerge in the Apple ecosystem as an alternative to the traditional App Store. Although the process of adapting to the DMA is gradual and still subject to non-compliance procedures opened by the European Commission, some alternative stores are already up and running, or at least have announced plans to launch for the iOS operating system. Based on information in the specialized press[189] , it is possible to get an idea of the business models of these new stores.

AltStore PAL

AltStore PAL, developed by Riley Testut, stands out for its decentralized distribution model and focus on applications that would not usually be approved in the original App Store. Its main differentiator is that it offers Delta, an emulator for Nintendo games (including NES, SNES, N64 and pre-Switch portable consoles), and Clip, a clipboard manager that operates constantly in the background.



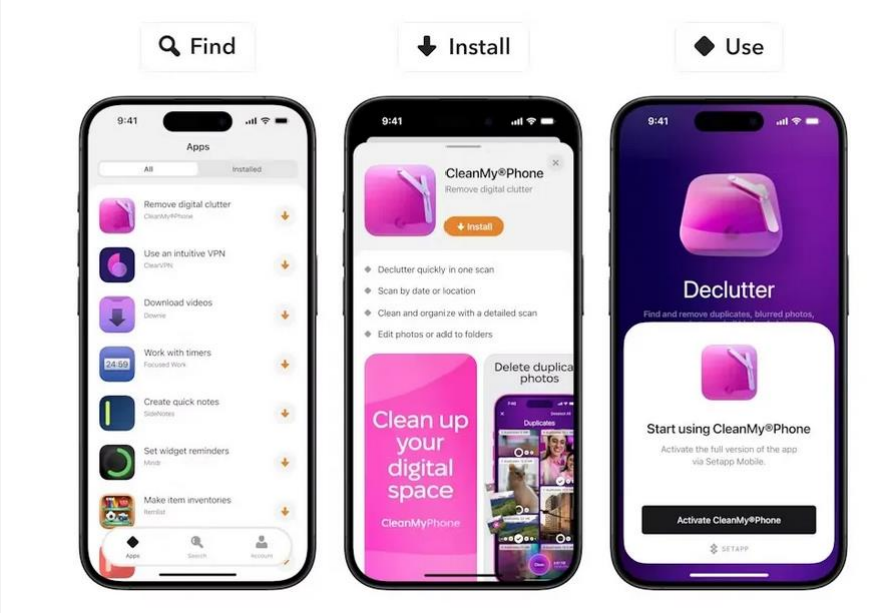
Unlike the traditional App Store, the AltStore uses a system of "sources", which are URLs provided by developers containing JSON files with application metadata. This allows for a more open and independent distribution, although it does make the process a little more complex for ordinary users. Other popular apps available include UTM (to run Windows and other systems), OldOS (a recreation of iOS 4), and torrent apps such as iTorrent.

Setapp Mobile

Setapp Mobile, from MacPaw, brings to iOS the subscription model already established on other platforms. What sets it apart is that it offers dozens of high-quality apps under a single recurring payment, without ads or additional in-app purchases. The store is integrated into

[189] All the information and images used to create this table were taken from the following articles on The Verge website: https://www.theverge.com/24100979/altstore-europe-app-marketplace-price-games and https://www.theverge.com/news/628860/skich-ios-app-store-third-party-gaming.

Setapp's existing subscription plans ("Power User" and "AI Expert") or available through a new "iOS Advanced" plan.



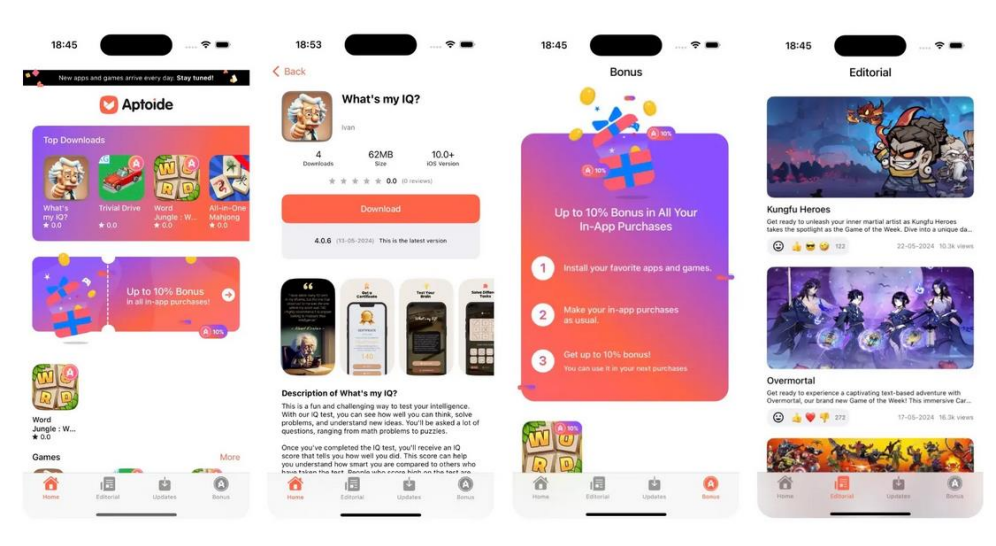
This alternative store focuses on curated premium apps, although it doesn't include big names like Facebook, Uber or Netflix. The subscription model positions it as an option for users who value quality and simplicity in accessing multiple apps without worrying about micropayments.

Epic Games Store

Epic Games has finally brought its popular Fortnite game back to the iOS ecosystem, more than four years after it was removed from the official App Store. In addition to Fortnite, the store offers other titles such as Rocket League Sideswipe and Fall Guys, with continued expansion of the catalog planned.
Epic's differential lies in its exclusive focus on games and its broad distribution strategy - in addition to its own store, the company is making its games available on other alternative platforms, such as AltStore PAL (which it supports through subsidies) and Aptoide. This approach demonstrates an effort to maximize availability after years of exclusion from the Apple ecosystem.

Aptoide

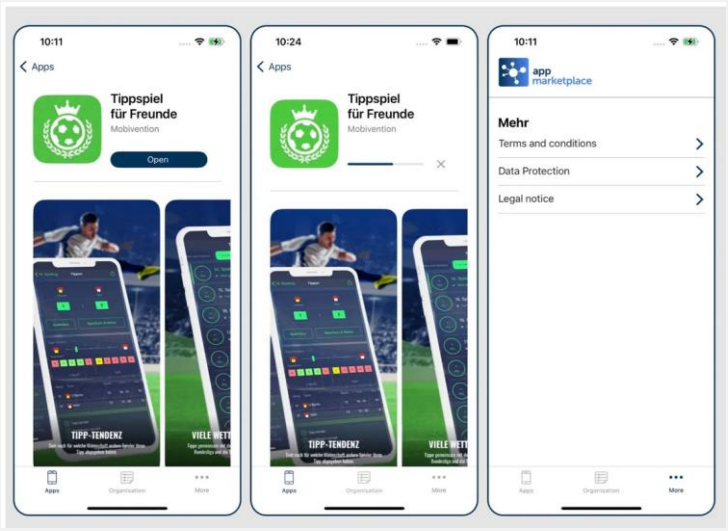
Aptoide, the Lisbon-based company known for its alternative to Google Play, now offers its open source solution for iOS as well. Its main focus is games, and the company differentiates itself by carrying out security checks on all the apps available.



An important differentiator in Aptoide's business model is that, unlike other stores, it doesn't charge users to cover the CTF fee paid to Apple. Instead, it applies a commission of 10% to 20% on in-app purchases, depending on whether they were generated by the marketplace itself or not. Aptoide already has more than 430 million users across all platforms (Android, web, car and TV).

Mobivention Marketplace

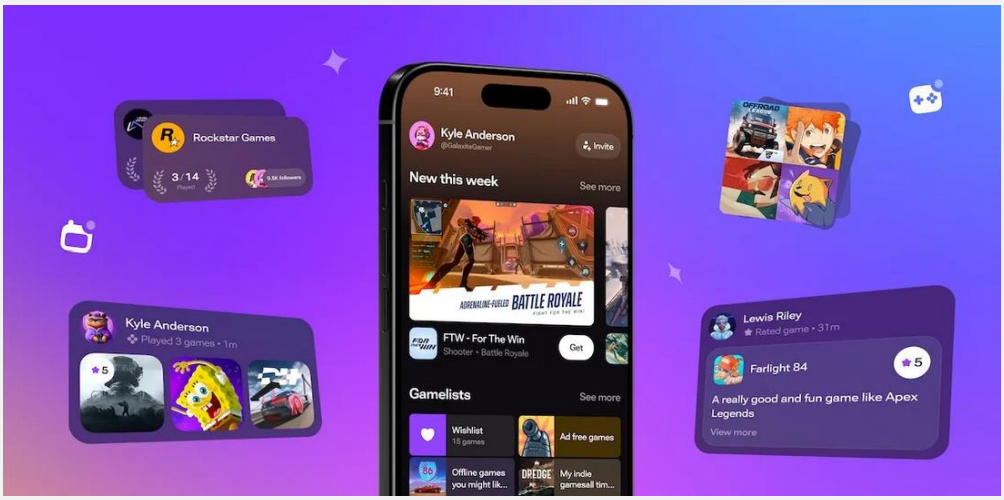
Mobivention takes a completely different approach, focusing exclusively on the B2B business segment. Its differential lies in allowing companies to distribute internal applications used by employees, which cannot or should not be published in Apple's official App Store.



In addition to basic distribution, Mobivention offers the development of customized application stores for companies wishing to have their own exclusive environment for corporate applications. Larger companies can even license Mobivention's technology to further customize their marketplace according to specific needs.

Skich

Skich stands out for its innovative approach to app discovery. Its distinguishing feature is the Tinder-inspired interface, where users swipe right to "match" with apps they might like. The platform also allows users to create playlists and see which apps their friends are using, incorporating social networking elements into the discovery experience.



The store will replace Skich's existing app and will take a 15% commission on all purchases. Unlike the other alternatives already established, Skich is still in the process of attracting developers and filling out its catalog.

426. In addition to alternative app stores, apps can also be distributed through sideloading operations. This practice offers greater flexibility to developers and consumers, making it possible to circulate apps that don't need to go through review processes or pay commissions to app stores.

427. However, as discussed in Section 6.3.5 of this opinion, there may be relevant technical concerns about the security risks associated with sideloading. Unlike the Android ecosystem, Apple has never authorized sideloading of apps on the grounds that this type of download introduces significant security risks to the iOS ecosystem.

428. Apple argues that its centralized distribution approach, exclusively through the App Store, allows it to implement rigorous verification and analysis processes that protect users from malware, fraudulent apps and other cyber threats[190] . From this perspective,

[190] APPLE. *Building a Trusted Ecosystem for Millions of Apps: A threat analysis of sideloading.* Cupertino: Apple Inc., October 2021.

allowing sideloading could compromise the integrity of the ecosystem, exposing sensitive consumer data and potentially undermining the trust users place in the platform . [191]

429. This Decision acknowledges that imposing sideloading solutions can be made compatible with safeguarding security mechanisms that do not make the iOS ecosystem inappropriately vulnerable to cyber threats.

430. In the EU experience, for example, to make the DMA rules compatible with the security concerns involved in sideloading, Apple has implemented a complex system with multiple layers of protection. The company has introduced a notarization process that performs security checks on third-party applications, identifying known malware, although these analyses are more superficial than the full App Store reviews[192] . In addition, Apple has implemented restrictions on APIs, limiting how apps installed via sideloading interact with iOS core systems to prevent security breaches. Access to sensitive features such as NFC payments and FaceID has been especially restricted to mitigate potential risks .[193]

431. Apple has also adopted geographical limitations, restricting sideloading only to users in the European Union through the "*countryd*" system, which verifies location using Apple ID and device settings[194] . Companies that wish to create alternative app stores must go through a rigorous approval process, including submitting a €1 million credit line to cover potential liabilities. In addition, Apple has implemented user-oriented measures, such as mandatory warnings about the risks of sideloading during the first installations, warning of possible malware and data privacy issues.

432. Of course, these safeguards are not immune to criticism. However, they suggest that Apple has sought to address the security risks involved in sideloading. It is clear that the design of a sideloading behavioral remedy represents a regulatory challenge of considerable complexity. The obligation to implement such a measure requires a careful analysis that balances, on the one hand, the competitive benefits of opening up the ecosystem and, on the other, preserving adequate levels of security for end users.

433. Therefore, at this procedural stage of the Interim Measure, it would be premature and methodologically inappropriate to establish *ex ante* the definitive set of appropriate technical safeguards for the implementation of sideloading in the iOS ecosystem. The most prudent course is to establish general principles to guide the obligation, delegating the precise conformation of the protective measures to a collaborative and supervised process during the compliance phase of the precautionary measure. This process should be technically monitored by this authority and possibly by independent experts, ensuring

[191] APPLE. *Building a Trusted Ecosystem for Millions of Apps: a threat analysis of sideloading*. Cupertino: Apple Inc., October 2021.
[192] Cf. https://developer.apple.com/support/dma-and-apps-in-the-eu/. Accessed on May 13, 2025.
[193]Cf. https://developer.apple.com/support/dma-and-apps-in-the-eu/. Accessed on May 13, 2025.
[194] Cf. https://developer.apple.com/support/dma-and-apps-in-the-eu/. Accessed on May 13, 2025.

that the competition objectives are achieved without unduly compromising the security and privacy of users.

8. CONCLUSION

434. For all the above reasons, this Decision **acknowledge the Appeal and, on the merits, dismiss it,** in order to fully maintain the Interim Measure issued by SG Order Instituting Administrative Proceedings No. 24/2024.

435. In the exercise of the general power of caution provided for in article 84 of Law No. 12,529/2011, and especially considering the content of the court decisions handed down in Writ of Mandamus No. 1097967-08.2024.4.01.3400 and in related lawsuits, I set a deadline of 90 (ninety) days from the publication of this decision for the implementation of the determinations set out in SG Order Instituting Administrative Proceedings No. 24/2024.

436. It is the Decision.

VICTOR OLIVEIRA FERNANDES
Commissioner