

Comments to the Public Consultation launched by the European Commission on Case DMA.100204 SP-APPLE-ARTICLE 6(7)

– SUBMITTED BY IUS OMNIBUS –

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I. IUS OMNIBUS

Ius Omnibus ("Ius"), with registered office at Second Home Lisboa, Mercado da Ribeira, Av. 24 de Julho, 1200-479 Lisbon, Portugal, is a non-profit association, created in March 2020, with the purpose of promoting and defending the rights and interests of consumers in the European Union. It is a consumer protection association registered with and recognized by the Portuguese Government, and by the European Commission as Qualified Entity pursuant to Directive (EU) 2020/1828, having filed several class actions within the scope of consumer protection.

Ius Omnibus's interest in participating in this public consultation lies in its compromise with ensuring optimal consumer protection in digital environments. The views of developers and companies requesting interoperability with features from Apple's operating systems will likely not grasp consumers' shared worries about supply and product quality. Distribution issues rooted in restraints to interoperability eventually harm Apple end users and unfairly limit its digital well-being.

II. The public consultation

The European Commission (EC) has opened a public consultation procedure inviting comments on the proposed measures for requesting interoperability with Apple's iOS and iPadOS operating systems in case DMA.100204-SP-Apple-Article 6(7). The EC is consulting interested third parties on whether the proposed measures are sufficient pursuant to art. 8(6) of Regulation 2022/1925 (DMA).

In particular, the Commission seeks views on the technical aspects of the measures, as well as comments should the measures not be deemed adequate. In the following, Ius Omnibus focuses mainly on the following questions:

- Are the proposed measures on communication and feedback allowing adequate developers' involvement in the process?
- Would the proposed process ensure a fair treatment of the requests and accountability for Apple's decisions?

- Are the proposed measures adequate to ensure that the request process delivers interoperability solutions that are effective and future-proof?
- How can a specific measure be improved in order to establish a fair, transparent and predictable process conducive to effective interoperability?

III. Comments

First, Ius Omnibus welcomes the swift application of the DMA after its entry into force as well as the present public consultation and workshops for interested parties. This type of regulatory dialogue with stakeholders, including consumer associations, regulators and gatekeepers is necessary to ensure an effective and consistent enforcement of the DMA.

However, we observe that the proposed measures do not tackle one of the main aspects directly affecting consumers: **restrictions imposed in the distribution of apps and content**. The measures do not address distribution problems and foreclosure of the ecosystems, which ultimately affects consumers. Our contribution follows two objectives:

1. Eliminate barriers and restriction to the distribution of apps due to a faulty and abusive interoperability design, and
2. Allow consumers to take control over their devices and be free to decide for themselves the apps and software to be installed in them.

Ius Omnibus is aware of the complexity of ideating an interoperability regime and acknowledges Apple's existing request-based process as a viable starting point. However, this approach carries several issues on transparency and discretion given to the gatekeeper, which can make the sought interoperability ineffective and obsolete in the mid-term. It is our view that the request-based process does not eliminate the strong network effect and the self-preferencing of the gatekeeper's own products. While it may be an achievement over the previous scenario, it still does not impede the weakening of contestability of markets.

The Commission, in this case's summary admits that *"a request-based process can lead to important limitations for third parties, in particular it delays the availability of interoperability opportunities, and it presents the risks of making developers dependent on the gatekeeper's discretion"*. Nonetheless, the Commission seems to have abandoned alternative measures outside the request procedure. If the requirements were sufficiently clear and the accountability of the gatekeeper *via* DMA sufficiently ensured, there should be no need to undergo a request procedure in the terms proposed by Apple. Under the **proposed system, the acceptance of the request by Apple is set as a procedural requirement for interoperability and does not avoid the result that the DMA seeks to prevent: perpetuating the gatekeepers' monopoly and limiting supply.**

The measures proposed by the Commission focusses on very specific aspects of the request-based process that are too technical and addressed solely for developers and companies attempting to interoperate their apps or app stores in Apple's operating system.



The ultimate effect interoperability has on consumers and other end users are left out of this assessment.

In DMA terms, this is a result of giving the spotlight to art. 6(7), without sufficient consideration for its interplay and effect on art. 6(4), which should always be assessed with due regard to one another. This is: art. 6(7) guarantees free of charge and effective interoperability from the gatekeeper's ecosystems to the services offered to be controlled via iOS. On the other hand, art. 6(4) comes at a later stage, where once third-party software applications are interoperable, end users shall not face technical installation issues.

Analysing this altogether, it becomes clear that end users are only regarded at a phase where interoperability has already occurred and can have been conducted to the detriment of consumers. If both articles foresee the eventual taking of measures to protect the integrity of the operating system, we do not share the opinion that these should be part of separate analysis. Such measures, in both cases, can be of a technical or contractual nature.

In case DMA.100206, the Commission currently has an open proceeding regarding Apple's new business terms. One of the three sets of business terms relate to Apple's multi-step user journey to download and install alternative app stores or apps on iPhones. All the actions needed to undertake the download of a third-party software from outside Apple's ecosystem are also obstacles to the interoperability, that fall outside the scope of developers and are addressed from the lenses of the end user.

In other words, these unnecessary steps, precisely, can be understood as contractual measures that can be framed both in art. 6(4) and 6(7), in so far as these, *de facto*, delay and limit to interoperability from the standpoint of the consumer and end user. This is an opportunity for the Commission to take advantage of the synergies created from the joint application of these provisions and address the contractual issue of consumer interoperability from a broader view.

The Commission, in the field of distribution, must be able to ensure a smooth user journey while the developers are requesting and entering the ecosystem. If this does not happen, the consumer is unprotected, as Apple will only allow users to handle apps and app stores whose requisites have been carefully planned to protect the gatekeeper's own interest and limit user experience –in comparison to what could be had the market been truly contestable as the DMA intends–. The prerogative given by the DMA to take measures to preserve the integrity of the operating system, or software features should not come at the expense of end user experience.

Following this line, Apple positions itself as an intermediary between the developer (or any software or hardware manufacturer) and Apple's device user, who does not have freedom to decide which apps and functionalities can operate in his or her iPhone or iPad and is restrained to the catalogue supervised by the gatekeeper.

At the end, these are all problems affecting the interoperability that harm the distribution of apps for consumers, and consequently, should also be included in the final measures proposed by the Commission. The monopolistic control exerted by Apple over the distribution of apps and app stores results in an indirect control on the

content offered, and ultimately in a loss of the end user's freedom, including consumers.

The request-based process will continue to be unavailing if the gatekeeper is then left for another examination on the effective installation of such app of app store. It is all part of the same picture. This discussion on implementation should already be tackled when the gatekeeper grants access to its operating system.

Consumers have no real choice for apps or app stores coming from outside the ecosystem if the entry requirement is lengthy and rigorous. Before the DMA, Apple had the ability to create a bottleneck (in terms of interoperability) with its app store. Now, Apple exerts its control through the request-based process, controlling the terms under which the developer can introduce its product.

These sorts of issues also became apparent with FairPlay's digital rights management (DRM) protection, the requirements to be part of the Apple Developer Program, or the ones to submit for Notarization. Moreover, even in cases of steering and link outs, as it happened with Spotify, the consumer is always affected and sees its options limited.

The gatekeeper still holds enough maneuvering room to determine the services and products targeted to its users, where the ecosystem serves as a monopoly. The consumer has no real choice over the services it wants to have available, and that is because the developer has no freedom to interoperate and enter Apple's iOS freely and effectively.

Thus, interoperability is taking steps forward regarding developers and companies but faces the same difficulties as it used to when it comes to distribution to consumers and other end users.

The ultimate goal pursued by Ius Omnibus is to ensure that the general procedural rules governing interoperability do not collide with consumer freedom. Likewise, and despite having another public consultation open in this regard, this procedure should be extrapolated to all types of developers and connected device manufacturers.

We respectfully request the Commission to take these comments into consideration and envisage an interoperability regime aimed at protecting both developers and consumers.



for Ius Omnibus

Lena Hornkohl, Member of the Board of Directors of Ius Omnibus