

5.3.1.2. Apple's arguments

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Apple contests the Commission's interpretation of the scope of Article 5(4) of Regulation (EU) 2022/1925. According to Apple, it is only

"required to allow developers an effective possibility to communicate with end users and promote offers outside the App Store. Apple is also required to allow developers to contract with end users outside of the app."

Apple argues that the Commission wrongly seeks to "enlarge the scope of a straight forward provision into a much more complex means of control over the App Store - preventing Apple from exercising any control over the means or content of communications / promotions, and going beyond that, to require technical facilitation to enable contracting and a 'seamless' user experience."

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First, regarding the meaning of "allow", Apple argues that it is "required to 'allow' developers to contract with end users within or outside of the app, as it has always done" and not to "technically enable or actively facilitate the transfer of end users from an app to an environment outside the app". In other words, Apple simply has "to give permission for someone to do something".

Apple further claims that what it is "required to do is to give developers the possibility to convey information (including about offers) and (by reference to the 'conclusion of contracts') to reach agreements:",

Similarly, according to Apple, Article 5(4) of Regulation (EU) 2022/1925 only has the purpose to "ensure that gatekeepers allow (i.e., give the possibility for) business users to conclude agreements with end users" but does not "require Apple to permit every means for reaching an agreement and does not seek to add any other requirement"

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Apple contends that its view that it is not required to technically enable any additional methods of communication and promotion under Article 5(4) of Regulation (EU) 2022/1925 is supported by the language used in Article 6(3) and (4) of that Regulation, which, according to Apple, contains an obligation to facilitate, contrary to Article 5(4).

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Second, regarding the meaning of "communicate" and "promote", Apple argues that "communicate" means "allowing developers to convey information to end users." and "promote" would be "a more specific form of 'communicate', i.e. a 'commercial communication' as defined under the Digital Services Act.

For Apple, "Article 5(4) is therefore concerned with allowing [...] developers to convey information to end users, including information that encourages end users to take up offers. It does not require Apple to permit every communication or promotion. It does not require the provision of particular technology to transmit or convey that information."

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According to Apple, the above would demonstrate that "Article 5 obligations are intended to be self-executing and straightforward. [...] It is consistent with the self-executing nature of Article 5(4) that this provision should be interpreted in a straightforward manner. The Commission's interpretation adds "technical complexity" and would be inconsistent with the scope of Article 5(4) of Regulation (EU) 2022/1925.

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Third, Apple argues that the lack of any security exception in Article 5(4) of Regulation (EU) 2022/1925, contrary to Article 6(3) and (4) of that Regulation, means that Apple should be allowed to impose restrictions on app developers' ability to steer and conclude steered transactions. Those restrictions would be required to safeguard end users' security

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In view of the above, Apple concludes that the Commission's "sweeping interpretation of the communication / promotion and contracting obligation in Article 5(4) goes significantly further than the text of the provision, and is not supported by the context or the legislative history."

5.3.4.1.2. Apple's arguments

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Apple argues that the "free of charge" requirement only applies to the obligation to allow the communication and promotion of offers, but not to the conclusion of contracts

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First, Apple bases that interpretation of Article 5(4) of Regulation (EU) 2022/1925 on the syntax of the text.

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In the first place, Apple argues that the wording used in the English language version of Article 5(4) of Regulation (EU) 2022/1925 clearly does not qualify the conclusion of contracts as "free of charge", and that, if differences between language versions of that provision exist, that provision should be interpreted in the light of the general scheme and purpose of the legislation of which it forms part.

According to Apple, its interpretation is allegedly supported by the French and German versions of Article 5(4) of Regulation (EU) 2022/1925.

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In the second place, Apple argues that "business users should be 'free' to communicate and promote offers and enter into contracts"¹¹⁰ and that Article 5(4) of Regulation (EU) 2022/1925 "says nothing, however, about the imposition of control over gatekeepers levying charges or commission for joint value creation through the valuable benefits that the gatekeeper provides".

In other words, Apple should be free to charge a fee for transactions concluded following steering and this would be confirmed by the fact that recital 40 of Regulation (EU) 2022/1925 does "not use the 'free of charge' language at all."

Apple also argues that the reference to "free" in the wording of recital 40, according to which "business users should be 'free' to communicate and promote offers and enter into contracts", does not mean that users should not have to pay charges¹¹¹.

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Second, Apple claims that its interpretation of Article 5(4) of Regulation (EU) 2022/1925 is also supported by the objective and legislative history of Article 5(4) of Regulation (EU) 2022/1925.

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In the first place, Apple argues that the words "free of charge" in Article 5(4) of Regulation (EU) 2022/1925 apply to a specific restriction aimed at preventing circumvention. Allegedly, that is, those words prevent gatekeepers from imposing a charge on app developers for including communications and promotions.

Apple argues that the inclusion of those words was a limited last minute textual addition which "was never considered in the Impact Assessment or discussed in any of the public legislative materials", and does not aim to radically alter the nature of the business models permitted under of Regulation (EU) 2022/1925, nor is there any indication that those words seek to apply to the conclusion of contracts¹¹².

In this regard, Apple also argues that the Commission relied, in its preliminary findings, on a non-public version of a negotiating document to sustain its interpretation of Article 5(4) of Regulation (EU) 2022/1925.

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In the second place, Apple argues that "Article 5 obligations - unlike the obligations in, for example, Article 6 - are meant to be self-executing in nature and not "susceptible of being further specified"¹¹³.

According to Apple, to the extent regulating prices charged by gatekeepers is "an inherently complex exercise fraught with uncertainties", it cannot be that Article 5(4) of Regulation (EU) 2022/1925 aims at regulating pricing. This would be confirmed by the Annexes to the Impact Assessment, which do not include price control in the "blacklist" of gatekeeper behaviour.

In the same vein, Apple also criticises the Commission for imposing a "series of complex rules and requirements that apply to the nature and level of Apple's remuneration in relation to the 'matchmaking' element."

Apple argues that its position is confirmed by Article 8(2) of Regulation (EU) 2022/1925 and the process for requests for specification. According to Apple, "the legislature clearly intended compliance with Article 5 obligations to be simple and clear and not to give rise to complex delineations." The Commission cannot therefore turn Article 5(4) of Regulation (EU) 2022/1925 into a "complex price regulation scheme".

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In the third place, Apple argues that the Commission's interpretation leads "Article 5(4) to interfere with those other provisions [Articles 5(7), 6(4) and 6(12)] and to undermine the fulfilment of their objectives"¹²⁵

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Third, Apple refers to the situation in other jurisdictions which allegedly supports its argument that "obligations in relation to anti-steering rules should not be conflated with price regulation."

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Fourth, Apple claims that the economic context of Article 5(4) of Regulation (EU) 2022/1925 supports its position that a gatekeeper can charge a fee for transactions concluded after steering.

According to Apple, a "reading of Article 5(4) that the "free of charge" language applies to conclusion of contracts [...] takes an unsustainably broad view of a fee 'for contracting' such that gatekeepers are

significantly constrained in their ability to impose transaction-based fees notwithstanding the value they provide (beyond an initial acquisition fee) is imputing to the legislature intentions it did not have.

5.3.4.2.2. Apple's arguments

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Apple argues that the Commission has not proven "that commission-based charging undermines the objectives of Article 5(4) by reducing incentives for developers to steer their users to alternative distribution channels".

5.3.4.3.2. Apple's arguments

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First, Apple argues that the Commission misinterprets the notion of "initial acquisition" and what Apple can charge for. In particular, Apple criticises the Commission's position that the initial acquisition fee must be commensurate to the value of the matchmaking function and that any possible fee must not go "further than what could be considered as the possible remuneration for facilitating the initial acquisition of end users by the app developers".

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According to Apple, the Commission's "interpretation of Article 5(4) is not supported by, or consistent with the language of Article 5(4) and is contrary to what the Article was intended to achieve within the framework of the DMA"¹⁵⁴, since such an interpretation would prohibit Apple from being remunerated for the "very significant value and services Apple provides to developers".

Furthermore, Apple argues that its decision to apply its commission-based charging structure to transactions made after link-outs is simply an application of its existing business model. According to Apple, imposing "a prohibition on certain forms of monetisation" under Article 5(4) of Regulation (EU) 2022/1925 is contrary to that Regulation's objective of enabling "different business and charging models" in digital markets¹.

Apple also considers that it is unclear how the Commission's interpretation of Article 5(4) of Regulation (EU) 2022/1925 would apply to other CPSs. Apple further claims that the "language of 'initial acquisition' simply provides some limitation on the obligations of gatekeepers to allow the communication / promotion of offers (and the conclusion of contracts). It explains the trigger for Article 5(4) obligations to apply. It doesn't have anything to do with charging. "

Apple also argues that it is for the Commission to provide an indication of what might be an appropriate fee for the acquisition of users through the download of a free app. According to Apple, the Commission has not clarified what constitutes an appropriate benchmark for determining a possible remuneration for the initial acquisition.

Apple argues that it was entitled to receive guidance on relevant benchmarks before the compliance deadline of 7 March 2024 and, in any event, before the opening of the non-compliance investigation in relation to Article 5(4) of Regulation (EU) 2022/1925, and, failing that, in the Preliminary Findings.

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Second, Apple claims that the Commission's interpretation of Article 5(4) of Regulation (EU) 2022/1925 would require Apple to provide IAP free of charge.

According to Apple, since that provision refers to app developers concluding contracts with end users "regardless of whether, for that purpose, they use the core platform services of the gatekeeper" and if contracting must be free of charge, then Apple's IAP must also be free of charge.

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Third, Apple argues that the notion of "steered transactions" does not appear in Article 5(4) of Regulation (EU) 2022/1925 and recital 40 of that Regulation¹⁶². According to Apple, the Commission introduced the unclear concept of "steered transactions" to distinguish in-app transactions carried out through IAP from offers alternative to the in-app transactions carried out by alternatives to IAP.

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Apple further argues that it does not charge a fee "for the conclusion of contracts", "for steering", "for steered transactions" or "for the conclusion of contracts for steered transactions", but rather charges fees for the "significant value and services

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Fourth, Apple argues that the Commission's interpretation of Article 5(4) of Regulation (EU) 2022/1925 is incompatible with other provisions of that Regulation applicable to app stores, such as Article 5(5) and (7) and Article 6(4) and (12).

More specifically, Apple argues that the legislator intended Article 6(12) of Regulation (EU) 2022/1925 to deal with pricing and commission fees and that this provision does not rule out commission-based charging 166. In relation to Article 5(5) of Regulation (EU) 2022/1925, Apple argues that since that provision lacks any reference to a "free of charge" requirement, the gatekeeper is free to charge a fee in relation to purchases of content made entirely outside of the app. In relation to Article 5(7) of Regulation (EU) 2022/1925, Apple claims that the objective of that provision would be undermined because there would be no incentive for app developers to use alternative payment services.

Finally, according to Apple, the objective of Article 6(4) of Regulation (EU) 2022/1925 would be undermined because the Commission would effectively impose a zero-monetisation requirement in relation to facilitating transactions, and potential entrants will therefore have less incentive to enter the market and compete with Apple.

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Fifth, Apple argues that the Commission's "interpretation of Article 5(4) and Recital 40 is inconsistent with Article 16 of the Charter and the principle of proportionality."

According to Apple, it is "ostensibly required to undertake complex organisational changes by fundamentally changing its business model to a uniform, non-differentiable model despite its Article 16 Charter right to determine its own business model.". This would be in breach of Article 16 of the Charter of Fundamental, as ruled by the Court of Justice Apple further argues that the Commission "is required to investigate these matters properly because it is required to interpret Article 5(4) in light of general principles of EU law, such as the principle of proportionality and fundamental rights" and that "Apple competes on the basis of providing particularly high security and user privacy. Restrictions on its ability to compete on this basis clearly engages Apple's freedom to conduct its business under Article 16 of the Charter."

Finally, Apple argues that the Commission's "interpretation is also disproportionate to the stated objective of the DMA / Article 5(4) and is as such inconsistent with Article 16 and Article 52(1) of the Charter.