

THURSDAY, MARCH 28, 2024

## GUEST COLUMN

## Epic Games has returned to the Apple Store. Will Apple throw a Hail Mary?

By Luis Blanquez

Apple was a significant beneficiary of the DOJ's suit against Microsoft more than 20 years ago in the US. The remedy paved the way for Apple to launch iTunes, iPod, and eventually the iPhone. These are not my words, but the words from Jonathan Kanter—Assistant Attorney General for the Antitrust Division of the DOJ—following the DOJ's recent antitrust suit against Apple in the US. He presented the DOJ complaint as a way to protect competition and innovation for the next generation of technology. Kanter's words well define what Epic Games—together with other developers trying to list their apps in the Apple Store—are going through. That's why the European Commission has forced Apple, for the very first time, to allow iPhone users to directly download apps from the web and to install other app stores on their devices.

After initially blocking Epic Games in the EU, Apple recently had no choice but to reverse course and allowed Epic Games' competing game store in the Apple Store. That wasn't a free concession from Apple, but rather a requirement under the new Digital Markets Act (DMA). The DMA is a new "ex ante" regulation in the EU that entered into full force on March 7, 2024. It imposes rules on platforms acting as "gatekeepers" that provide "core platform services" (CPSs) to ensure



This art was created with the assistance of Shutterstock AI tools

fairness and contestability in digital markets.

The European Commission has designated Apple as a gatekeeper of the AppStore, iOS and Safari

CPSs. In the case of the App Store CPS, this mainly means three things. First, the DMA requires Apple to permit third-party app stores to distribute apps on its iOS devices,

eliminating Apple App Store's position as the sole distributor of iPhone apps in the EU. So "alternative app marketplaces" are now a reality under the last iOS 17.4 up-



date. This is the main reason why the Epic Games Store was recently allowed into the Apple Store. Apple has finally been forced to open its operating system. Second, “Web Distribution”—iPhone users downloading their apps directly via a website, as we currently do with desktop operating systems—will also be available in a few months in the EU, most likely with the iOS 17.5 update. So, iPhone users will soon be able to go to a developer’s website and download an app without using the App Store or any alternative app marketplace. Third, developers can either use Apple’s payment services and in-app purchases (with an additional 3% processing fee) or integrate a third-party system for payments without paying an additional fee to Apple.

But make no mistake: Apple is coming out with a fight in the EU. What seems like a straightforward sideloading process is nothing but an endless maze that might scare away iPhone users from considering the alternative-app downloads from third parties, while creating unnecessary friction and constraints for developers. Indeed, Apple still controls the entire distribution process in the App Store. If you don’t have a developer account in the EU, forget about end users directly down-

loading apps from the web or installing rival app stores on the iPhone.

Under the updated guidelines, developers must opt into the new App Store business terms. And that’s a very big deal. Developers need special authorization from Apple and must be registered as a company in the EU. They must have been part of Apple’s Developer Program in good standing for at least two years and sell an app that achieved over one million initial installations in the EU in the previous calendar year. Only then, authorized developers get access to APIs that facilitate the distribution of developer’s apps from the web and integration with system functionality. Apps offered through Web Distribution must meet Notarization requirements and can only be installed from a website domain that the developer has registered in App Store Connect. And Apps willing to use an alternative app store must also pay a new minimum “Core Technology Fee” of €0.50 per user per year, in addition to a 20% commission (as opposed to the existing 30% one in the Apple Store) for all sales of digital goods.

This means right away that small developers are automatically excluded from sideloading. Moreover,

today free apps—including those supported by advertising such as Facebook or Instagram, and those selling non-physical goods such as Amazon or Uber among many others—do not pay any distribution fees on the Apple Store. Under the new guidelines, if a free app tries to work with a rival app store, they must switch to the new terms. In other words, they must pay €0.50 for each user they reached for free in the past. This is effectively a new tax imposed by Apple that will likely limit the move of popular free apps to alternative app stores. This, of course, could substantially limit potential competition. These are just a few examples of the impact of the new guidelines. We are barely scratching the surface here.

That’s why the European Commission has just opened a non-compliance investigation under the DMA regarding Apple’s rules on (i) steering in the App Store; (ii) its new fee structure for alternative app stores; and (iii) Apple’s compliance with user choice obligations—to easily uninstall any software applications on iOS, change default settings on iOS and prompt users with choice screens that must effectively and easily allow them to select an alternative default service. Meanwhile, in the US, Epic Games

just filed a motion accusing Apple of violating an order issued last year under California law barring anti-steering rules in the App Store, extracting excessive commissions from developers, including a new set of rules and a 27% fee on any purchases made outside an app.

Will existing antitrust rules and regulations on both sides of the Atlantic be enough to tackle Apple’s last try for a touchdown? We are about to find out very soon.

---

**Luis Blaquez** is a partner at *BonaLaw PC*.

