The concept of ‘fairness’ in the EU and Japanese Regulation on Digital Platforms: through the lens of the *Apple Music* streaming decision (Case AT.40437) and Japan’s 2025 Smartphone Act

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Introduction

On 4 March 2024, the European Commission adopted a decision finding that Apple Inc had abused its dominant position in the market for the distribution of music streaming apps to iOS users through its App Store (‘the *Apple* decision’).[1] The Commission imposed a fine of over €1.8bn, one of the largest fines ever

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1 European Commission, CASE AT.40437 – *Apple* – App Store Practices (music streaming), Commission Decision of 4 March 2024 (‘*Apple* Decision’).

imposed in an antitrust case.[2] The infringement consisted of Apple's imposition of 'anti-steering provisions' that prevented music streaming service providers from informing iOS users about alternative, and often cheaper, subscription options available outside the Apple ecosystem.[3]

This case is significant for several reasons. First, it represents a rare application of Article 102(a) of the Treaty on the Functioning of the European Union (TFEU) as a standalone exploitative abuse, focusing on unfair trading conditions rather than exclusionary conduct. Second, the Commission developed a novel analytical framework for assessing market power in digital ecosystems, applying aftermarket analysis principles to the relationship between smart mobile devices and app distribution platforms. Third, the decision articulates a consumer-focused theory of harm in a platform-to-business (P2B) relationship, finding that conditions imposed on developers were detrimental to the interests of end-users.

This paper proceeds as follows. The second section provides a detailed analysis of the *Apple* decision, examining the factual background, market definition, dominance assessment and the Commission's legal reasoning on abuse. The third section explores the concept of 'fairness' as applied in EU competition law, contrasting the approaches under Article 102 TFEU and the Digital Markets Act (DMA). The fourth section examines Japan's regulatory response to similar concerns through the Smartphone Software Competition Promotion Act and compares the Japanese and European approaches. The fifth section concludes with observations on the mutual learning opportunities between the two jurisdictions.

The *Apple* decision: Case AT.40437

Factual background

Apple operates a vertically integrated ecosystem comprising hardware devices, software services and digital content. The company is well-known for its 'walled garden' approach, maintaining tight control over the user experience within its ecosystem.[4] As one commentator observed, the App Store represents a classic example of asymmetrical relationships in digital platform markets, where Apple exercises superior power over developers who must accept its terms and conditions to reach iOS users.[5]

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2 See European Commission, Press Release IP/24/1161, 'Commission fines *Apple* over €1.8 billion over abusive App store rules for music streaming providers' (4 March 2024).

3 *Apple* Decision paras 2, 555.

4 *Apple* Decision para 100.

5 See Beata Mäihäniemi, '(The Big) *Apple*'s "Walled Garden": CASE AT.40437 – *Apple* – App Store Practices (music streaming)' (*Kluwer Competition Law Blog*, 23 July 2024).

The App Store is the sole channel for the distribution of native apps to iPhone and iPad users. Developers wishing to offer apps to iOS users must enter into a Developer Programme Licence Agreement with Apple, accepting the terms and conditions set unilaterally by Apple with no opportunity for negotiation.[6] For apps that sell digital content or services, Apple requires developers to use its in-app purchase mechanism (IAP) and pay a commission fee of 30 per cent during the first year of a subscription, reduced to 15 per cent thereafter.[7]

The case was initiated following a complaint by Spotify in March 2019. Spotify, operating under a freemium model offering both free (ad-supported) and premium (paid subscription) tiers, had previously offered in-app subscriptions through IAP but discontinued this in May 2016.[8] Spotify's complaint focused on two practices: the obligation to use IAP and pay Apple's commission, and the anti-steering provisions that prevented developers from informing users about alternative purchase options.[9]

The anti-steering provisions

The anti-steering provisions, as contained in Apple's App Store Review Guidelines, prohibited developers from including within their apps any buttons, external links, or other calls to action that would direct users to purchasing mechanisms outside of the app.[10] According to the Commission's findings, these provisions effectively prevented developers from (1) including links or buttons directing users to external subscription options; (2) informing users about subscription prices available outside the app; (3) communicating price differences between in-app and external subscriptions; (4) providing instructions on how to subscribe outside the app; and (5) contacting users via email about alternative pricing options.

The practical effect of these provisions was significant. After Spotify disabled IAP in 2016 to avoid the commission fee, it could no longer inform existing iOS users – who were still paying the higher subscription price – that cheaper alternatives were available on Spotify's website.[11] Meanwhile, Apple launched its own competing service, Apple Music, in June 2015 at a price of €9.99 per month – the same price as Spotify's web-based subscription, but lower than Spotify's in-app subscription price of €12.99.[12]

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6 *Apple* Decision paras 97, 112.
7 *Apple* Decision paras 118, 124.
8 *Apple* Decision para 113.
9 *Apple* Decision paras 151, 154.
10 *Apple* Decision paras 163, 228.
11 *Apple* Decision paras 213–218.
12 *Apple* Decision para 215.

Market definition and dominance

The Commission identified three relevant markets: (1) the market for smart mobile devices; (2) the market for the provision to developers of platforms for the distribution of music streaming apps to iOS users; and (3) the market for music streaming services.[13] The second market – the developer-facing side of the App Store – was the primary focus for the dominance assessment.

A significant analytical challenge in this case was addressing the relationship between these interconnected markets within Apple's ecosystem. The Commission approached this by adapting the aftermarket framework traditionally applied to primary product and secondary service markets.[14] As Professor Monti has observed, the Commission did not obsess over labels such as 'ecosystem' or 'aftermarket' but used these concepts functionally to capture how the market actually operates.

Regarding market definition, the Commission found that the App Store constituted a two-sided market with distinct but interlinked sides facing developers and consumers.[15] Importantly, the Commission rejected Apple's argument that Android should be considered a substitute, finding that music streaming service providers cannot credibly threaten to delist from iOS given the significant revenue they derive from Apple's user base.[16] This approach can be understood to align with the fundamental concept of the definition of the market concerning ecosystems, as referred to in the Revised Market Definition Notice.[17]

The Commission also examined whether competition at the device level could constrain Apple's market power in app distribution. Applying modified aftermarket analysis, the Commission found that the smart mobile device market and the app distribution market were not sufficiently closely connected to enable effective consumer discipline.[18] Consumers do not engage in lifecycle costing when purchasing devices, app-related prices lack transparency and switching costs between iOS and Android are substantial.

Based on this analysis, the Commission found that Apple held a dominant position in the market for the provision to developers of platforms for the distribution of music streaming apps to iOS users since at least 2015, with a 100 per cent market share that has remained stable, extremely high barriers to entry, significant network effects, and an absence of countervailing buyer power from developers.[19]

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13 *Apple* Decision paras 241, 276.

14 Giorgio Monti, 'Exploitative Abuse – Takeaways from the *Apple* App Store Practices Decision' (TILEC Discussion Paper No 2024-006, June 2024) p 3.

15 *Apple* Decision para 264.

16 *Apple* Decision paras 295, 301–305.

17 See Commission Notice on the definition of the relevant market for the purposes of Union competition law [2024] C/2024/1645 para 104.

18 *Apple* Decision paras 336, 414–465.

19 *Apple* Decision paras 338, 340–357.

The abuse: unfair trading conditions

Article 102 TFEU imposes upon dominant undertakings a 'special responsibility' not to abuse their position.[20] The Commission found that Apple's anti-steering provisions constituted an exploitative abuse under Article 102(a) TFEU, which prohibits the imposition of unfair trading conditions. The legal test articulated by the Commission required proof that (i) the conditions were unilaterally imposed by the dominant undertaking on its trading partners; (ii) the conditions were detrimental to the interests of trading partners or third parties, including consumers; and (iii) the conditions were not necessary for the achievement of a legitimate objective or, in any event, were disproportionate.[21]

Applying this test, the Commission concluded that the anti-steering provisions: '(i) [were] unilaterally imposed by Apple on music streaming service providers; (ii) [were] detrimental to the interests of iOS users of music streaming services; and (iii) [were] not necessary for the achievement of a legitimate objective or in any event not proportionate for that purpose.'[22]

A notable feature of the Commission's approach was its focus on consumer harm rather than harm to developers. While the abuse occurred in the P2B relationship between Apple and music streaming providers, the detrimental effects were assessed from the perspective of end-users. This represents an extension of traditional exploitative abuse analysis, which typically examines unfairness in the bilateral relationship between the dominant firm and its counterparty. As the academic literature has noted, there is often an explanatory link between exclusionary and exploitative elements in abuse cases, and the classification is not always clear-cut.[23]

The Commission identified both monetary and non-monetary harm to consumers. Monetary harm arose because the commission fees were passed on to consumers through higher subscription prices, with iOS users paying more than they would have absent the anti-steering provisions.[24] Non-monetary harm included degraded user experience and reduced choice, as users were prevented from making informed decisions about where and how to purchase music streaming subscriptions.[25]

Importantly, the Commission clarified that once unfair trading conditions are established, there is no additional requirement to demonstrate anti-competitive

20 *Apple* Decision para 522.

21 *Apple* Decision para 529.

22 *Apple* Decision para 555.

23 David Bailey and Laura Elizabeth John (eds), *Bellamy & Child: European Union Law of Competition*, 8th edn (Oxford: OUP, 2018) p 903 (para 10.072).

24 *Apple* Decision paras 594–599.

25 *Apple* Decision paras 681, 693–694.

effects on inter-firm competition.[26] The harm to competitive variables affecting trading partners or consumers is, in itself, sufficient to establish the abuse.

Regarding justification, the Commission rejected Apple's arguments that the anti-steering provisions were necessary to prevent free-riding or to finance the App Store.[27] The Commission noted that if Apple's concern was truly about legitimate monetisation, it could inform users about the convenience and security of in-app purchases while still allowing them to choose from a range of options. The provisions were found to be neither necessary nor proportionate to achieve any legitimate objective.

The concept of 'fairness' in EU competition law

Exploitative abuse under Article 102(a) TFEU

The *Apple* decision represents a significant development in the enforcement of Article 102(a) TFEU against exploitative abuses. Historically, European competition authorities have been more active in pursuing exclusionary conduct than exploitative practices, in part due to concerns about regulatory overreach and the difficulty of establishing appropriate benchmarks for 'unfair' conditions.[28]

The Commission's approach in *Apple* advances the analytical framework for exploitative abuse in several ways. First, it demonstrates that unfair trading conditions can be found not only in the direct bilateral relationship between the dominant firm and its counterparty but also where those conditions cause harm to third parties such as consumers. Second, it establishes a three-part test (unilateral imposition, detriment, lack of proportionality) that may provide legal certainty than previous case law. Third, it recognises both monetary and non-monetary harm as relevant indicators of consumer detriment.

At the same time, the decision reveals tensions in the application of fairness concepts. The Commission focused solely on consumer harm and did not pursue the claim that the anti-steering provisions were unfair to developers – a narrowing of the case that was not fully explained but may have been influenced by the fact that developers passed commission costs on to consumers rather than absorbing them directly.

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26 *Apple* Decision para 530.
27 *Apple* Decision paras 776–811.
28 See Thibault Schrepel, 'The *Apple* Music Streaming Case: The Good, The Bad, and The Ugly' (Network Law Review, 27 March 2024).

Fairness under the Digital Markets Act

The *Apple* decision also illuminates the relationship between Article 102 TFEU and the DMA. The DMA, which entered into full application in March 2024, contains explicit prohibitions against anti-steering provisions similar to those at issue in the *Apple* case.[29] Article 5(4) of the DMA requires gatekeepers to allow business users to communicate and promote offers to end users, including the ability to conclude contracts outside the gatekeeper's core platform services.[30]

However, the Commission was careful to maintain the distinct legal bases of Article 102 TFEU and the DMA. As noted in the decision, the DMA pursues complementary objectives and operates as ex ante regulation, whereas the *Apple* decision was based on ex post enforcement under competition law.[31] The fact that conduct is prohibited under the DMA does not automatically make it an abuse of dominance; the ordinary tests under Article 102 TFEU must still be satisfied.

A key distinction concerns the scope of 'fairness' under each regime. Professor Monti has observed that the DMA's concept of fairness is primarily directed at P2B relations, focusing on the imbalance between gatekeeper and business user.[32] Recital 33 of the DMA explicitly ties unfairness to situations where 'the gatekeeper obtains a disproportionate advantage' vis-à-vis business users.[33] By contrast, the *Apple* decision focused on unfairness to consumers – third parties who were not direct trading partners of the dominant firm.

This distinction suggests a potential distinction between the two regimes: where conduct harms business users directly, the DMA may be the more appropriate tool; where conduct harms consumers through effects that flow from P2B relationships, Article 102 TFEU may continue to play an important role. The ongoing DMA enforcement proceedings against Apple will provide further clarity on how these complementary frameworks operate in practice.

29 *Apple* Decision paras 551–552.

30 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) [2022] OJ L265/1 Art 5(4), 5(5).

31 Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) [2022] OJ L265/1 Art 5(4), 5(5).

32 Monti, 'Exploitative Abuse – Takeaways from the *Apple* App Store Practices Decision' (TILEC Discussion Paper No 2024-006, June 2024) pp 12–13.

33 DMA Recital 33.

Japan's approach: the Smartphone Software Competition Promotion Act and Regulation on Abuse of Superior Bargaining Position under the Antimonopoly Act

Legislative background

Japan enacted the Smartphone Software Competition Promotion Act (the 'Smartphone Act') in June 2024, with full implementation on 18 December 2025.[34] The legislation represents Japan's response to concerns about the dominant market positions held by Apple and Google in the smartphone ecosystem, following an extensive study by the Cabinet Secretariat's Digital Market Competition Council.[35]

The relevant ordinance of the Act designates Apple and Google as 'Specified Software Operators' and imposes approximately 14 categories of prohibited conduct and compliance obligations designed to promote competition with third-party service providers. The Japan Fair Trade Commission (JFTC) has been designated as the primary enforcement authority, with powers to investigate non-compliance and impose administrative surcharges.

In addition to this ex-ante regulatory framework, Japan maintains a robust ex-post enforcement mechanism through the regulation of abuse of superior bargaining position under Article 2(9)(v) of the Antimonopoly Act.[36] This provision, which has no direct equivalent in EU competition law, prohibits undertakings from using their superior bargaining position to unjustly engage in conduct detrimental to their trading counterparties. Significantly, unlike Article 102 TFEU, the abuse of superior bargaining position doctrine does not require proof of dominance in a relevant market or even the definition of such a market.[37]

The JFTC has explicitly recognised that digital platform operators may hold superior bargaining positions vis-à-vis both business users and consumers, as articulated in its 2019 Guidelines on digital platform-consumer transactions.[38] The legal test focuses on three elements: (i) the existence of a superior bargaining position; (ii) conduct that is unjust; and (iii) conduct that falls within specified

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34 Act on Promotion of Competition for Specified Smartphone Software (Act No 46 of 2024).

35 See Cabinet Secretariat, Headquarters for Digital Market Competition, 'Final Report on Competition Assessment of Mobile Ecosystems' (June 2023).

36 Antimonopoly Act Art 2(9)(v)(c); General Designation No 14 (Designation of Unfair Trade Practices by the Japan Fair Trade Commission).

37 See Tadashi Shiraishi, 'Abuse of Superior Bargaining Position in Japanese Competition Law' in Ioannis Kokkoris and Rostam J Neuwirth (eds), *Competition Law and Development* (Cheltenham: Edward Elgar, 2013) pp 247–248.

38 Japan Fair Trade Commission, 'Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc' (February 2019).

categories of abuse including imposing disadvantageous terms, demanding unreasonable economic benefits, or discriminatory treatment.[39]

This ex-post mechanism provides the JFTC with flexible enforcement tools that complement the sector-specific Smartphone Act, enabling intervention against exploitative platform conduct without the evidentiary burden of demonstrating market dominance.[40]

Anti-steering provisions under the Smartphone Act

Article 8(2)(ii) of the Smartphone Act contains provisions analogous to the EU's prohibition of anti-steering conduct. The law prohibits designated app store operators from requiring individual app developers, as a condition of distributing apps through the app store, to (a) refrain from displaying external pricing information; or (b) exclude links directing users to external web pages.[41] Additionally, the Act prohibits designated operators from 'preventing' app developers from providing goods or services to smartphone users through related web pages or other channels outside the app store.

The JFTC's guidelines clarify that the determination of whether conduct constitutes 'prevention' will be assessed comprehensively, taking into account the nature of the designated operator's conduct; the degree of impact on individual app developers; and the degree of impact on smartphone users.[42] This formulation is notable for explicitly incorporating both developer interests and user interests into the violation analysis – an approach that differs somewhat from the EU's potentially bifurcated treatment under Article 102 TFEU and the DMA (arguably business-user focused).

Comparative analysis: EU and Japanese approaches to fairness

The EU and Japanese approaches to regulating platform 'fairness' share common objectives but differ in their legal architecture and enforcement mechanisms. Several points of comparison merit attention.

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39 See JFTC, 'Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act' (November 2010) Pt 2.

40 JFTC notes in its explanatory materials that, although dual administrative fines under both the Smartphone Act and the Antimonopoly Act are theoretically possible, this is not expected in practice. It further explains that, since the Smartphone Act is designed to enable swifter enforcement by removing the need to prove an effects requirement, it will ordinarily take priority over the Antimonopoly Act in overlapping cases, rendering duplicative application unnecessary.

41 See Smartphone Act Art 8(2)(ii)(a) and (b).

42 See JFTC, 'Guidelines on the Act on Promotion of Competition for Specified Smartphone Software' (2025) p 19 line 23 onwards.

BENEFICIARIES OF PROTECTION

The *Apple* decision under Article 102 TFEU focused on consumer harm as the basis for finding unfair trading conditions, while the DMA primarily addresses fairness in P2B relationships. Japan's Smartphone Act appears to integrate both perspectives more directly, with the JFTC's guidelines explicitly requiring consideration of impacts on both developers and users in assessing violations.[43] This integrated approach may offer advantages in cases where harm flows simultaneously to multiple stakeholder categories.

LEGAL BASIS FOR INTERVENTION

The EU approach involves a complex interplay between ex-post enforcement under competition law (Article 102 TFEU) and ex-ante regulation under the DMA. Japan maintains a parallel but structurally distinct dual framework. The Smartphone Act creates an ex-ante regulatory framework specifically designed for smartphone platforms, analogous to the DMA. However, Japan's ex-post enforcement toolkit differs fundamentally from the EU's dominance-based Article 102 TFEU approach. The regulation of abuse of superior bargaining position under the Antimonopoly Act provides a mechanism for addressing exploitative conduct without requiring demonstration of dominance or market definition – a significant departure from EU competition law orthodoxy.[44] This approach recognises that platforms may exercise significant power over their trading partners even in the absence of traditional market dominance, and that the relative bargaining strength between parties, rather than market share, may be the critical factor in digital platform relationships. The JFTC has already demonstrated willingness to apply this framework to digital platforms, finding in several enforcement actions that platforms held superior bargaining positions vis-à-vis both business users and individual consumers.[45] This ex-post mechanism operates alongside the Smartphone Act, providing enforcement authorities with greater flexibility to address novel forms of exploitative conduct that may not be explicitly covered by the sector-specific legislation. The availability of both frameworks – ex-ante regulation for designated platforms and ex-post enforcement through the superior bargaining position doctrine – gives Japanese authorities

43 See JFTC, 'Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act' (November 2010).

44 See Mel Marquis, 'Abuse of Superior Bargaining Position in Japan: Uniquely Japanese or Precedent for Other Competition Law Regimes?' (2022) 10(2) Journal of Antitrust Enforcement 398–425.

45 See, eg JFTC, 'Warning to Rakuten, Inc. concerning its Provision of E-commerce Platform Services' (April 2019); JFTC, 'Amazon Japan GK: Cease and Desist Order and Surcharge Payment Order' (June 2021).

potentially broader enforcement tools than their EU counterparts, who must either demonstrate dominance under Article 102 TFEU or wait for gatekeeper designation under the DMA.

Remedial measures

Both jurisdictions require the removal of anti-steering provisions and introduction of alternative payment systems. However, the specificity of permitted fee structures under the Japanese regime – and their similarity to outcomes in other jurisdictions such as Brazil[46] – suggests that platform responses to regulatory pressure may be converging globally. This convergence could facilitate enforcement by providing benchmarks for assessing compliance, although it also raises questions about whether prescribed fee levels adequately address the underlying competition concerns.

Conclusion

The European Commission's *Apple* decision represents a watershed moment in the application of competition law to digital platform markets. The decision advances competition enforcement in three critical respects. First, it demonstrates the viability of Article 102(a) TFEU as a standalone basis for addressing exploitative abuse, reviving a provision that has historically been underutilised compared to prohibitions on exclusionary conduct. Second, it establishes a structured three-part test – unilateral imposition, detriment to interests and lack of proportionality – that provides greater analytical clarity for future exploitative abuse cases. Third, and perhaps most significantly, the decision articulates a theory of harm focused on consumer welfare even where the abusive conduct occurs in platform-to-business relationships, extending the reach of exploitative abuse analysis beyond the immediate bilateral relationship between dominant firm and trading partner.[47]

While the EU has expanded the application of Article 102 TFEU to address these platform issues – as evidenced by the *Apple* decision – Japan's regulatory framework offers a fundamentally different approach that warrants close attention from other jurisdictions. The regulation of abuse of a superior bargaining position under the Antimonopoly Act focuses on the relative bargaining strength between

46 *Apple* has implemented in December 2025 in Japan a tiered commission structure: 26 per cent for purchases using *Apple*'s payment system (down from 30 per cent); 21 per cent for purchases using third-party payment providers; 15 per cent for external payment link steering (directing users to external websites); and five per cent for apps distributed through third-party stores. Notably, these fee structures bear striking similarity to those established through CADE's (Brazil's competition authority) settlement with *Apple* in December 2025.

47 Monti, 'Exploitative Abuse – Takeaways from the *Apple* App Store Practices Decision' (TILEC Discussion Paper No 2024-006, June 2024) pp 13–14.

parties rather than market definition and dominance. This enables intervention against exploitative conduct that might otherwise escape Article 102 TFEU's analytical framework.[48] The JFTC's application of this doctrine to digital platforms demonstrates its practical utility in addressing novel forms of platform power. Moreover, Japan's dual framework – combining ex-ante regulation through the Smartphone Software Competition Promotion Act with ex-post enforcement through the superior bargaining position doctrine – provides enforcement authorities with a highly adaptable toolkit.

As competition authorities worldwide develop regulatory responses to digital platform power, cross-jurisdictional dialogue and mutual learning will be essential to the development of effective and proportionate platform regulation, recognising that different legal traditions and market circumstances may generate distinct but equally valid regulatory approaches.

48 Baskaran Balasingham and Alessia S D'Amico, 'Beyond exclusion: revisiting exploitative abuses in digital platform markets' (2025) 13(2) Journal of Antitrust Enforcement 265–283.