Competition, Regulation and Supervision Court

Your Honorable Judge of Law

ASSOCIAÇÃO IUS OMNIBUS, collective entity no. 515807753, headquartered at Second Home Lisboa, Mercado da Ribeira, Av. 24 de Julho, 1200-479 Lisboa (hereinafter, "**Plaintiff**" or "**Ius"**),

comes, under articles 3 and 19 of Law no. 23/2018, of June 5, articles 2, 3, 12 and 14 of Law no. 83/95, of August 31, rectified by Rectification no. 4/95, of October 12, and revised by Decree-Law no. 214-G/2015, of October 2, and articles 31 and 546(2) of the Code of Civil Procedure, to file

DECLARATIVE ACTION OF CONVICTION WITH COMMON PROCESS
(POPULAR ACTION)

against

ALPHABET INC . a corporation incorporated under US law, without a Portuguese company registration number and without a permanent representation in the Portuguese commercial registry, with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, CA 94043, United States of America, registered in the California commercial registry under number C3831672, and whose agent for service of process is Corporation Service Company, with corporate number C1592199 and address for service of process at 2710 Gateway Oaks Drive, Suite 150N, Sacramento CA 95833, United States of America (hereinafter, "**1st Defendant**" or "**Alphabet**"),

GOOGLE LLC , a company incorporated under US law, with Portuguese tax identification number 980363101 and no permanent representation registered in the Portuguese commercial registry, with registered office at 1600 Amphitheatre Parkway, Mountain View, CA 94043, United States of America, registered in the California commercial registry under number 201727810678, and whose agent for service of process is Corporation Service Company, with business number C1592199 and address for service of process at 2710 Gateway Oaks Drive, Suite 150N, Sacramento CA 95833, United States of America (hereinafter, "**2nd Defendant**" or "**Google LLC**"),

GOOGLE IRELAND LIMITED, a company incorporated under Irish law, without a Portuguese legal entity identification number and without a permanent representation registered in the Portuguese commercial register, with its registered office at Gordon House, Barrow Street, Dublin 4, Republic of Ireland, registered in the commercial register of Ireland under number 368047 (hereinafter "**3rd Defendant**" or "**Google Ireland"**),

GOOGLE PAYMENT IRELAND LIMITED, a company incorporated under Irish law, without a Portuguese legal entity identification number and without a permanent representation registered in the Portuguese commercial register, having its registered office at 70 Sir John Rogerson's Quay, Dublin 2, Republic of Ireland, registered in the commercial register of Ireland under number 598776 (hereinafter "**4th Defendant**" or "**Google Payment Ireland"**),

GOOGLE COMMERCE LIMITED, a company incorporated under Irish law, without a Portuguese legal entity identification number and without a permanent representation registered in the Portuguese commercial register, having its registered office at 70 Sir John Rogerson's Quay, Dublin 2, Republic of Ireland, registered in the commercial register of Ireland under number 512080 (hereinafter "**5th Defendant**" or "**Google Commerce"**),

(the 5 Defendants together, hereinafter "**Defendants**" or "**Google**")

which it does in the following terms and on the following grounds:

Summary

1. The present class action for the protection of diffuse and/or collective and homogeneous individual interests, brought by a consumer protection association, is an action for the protection of competition and consumers' rights which seeks the declaration of the unlawfulness, the termination and compensation for damages caused to consumers by a set of behaviours of Google that constitute a single and continuous infringement, simultaneously an **abuse of a dominant**

position prohibited by **Article 102 TFEU and Article 11 of the Competition Act (and its predecessor national rule) and agreements restricting competition prohibited by Article 101 TFEU and Article 9 of the Competition Act.Google's conduct amounts to an abuse of a dominant position, prohibited by Article 102 TFEU** and Article **11 of the Competition Act** (and its predecessor national legislation), and **agreements restricting competition, prohibited by Article 101 TFEU and Article 9 of the Competition Act** (and its predecessor national legislation).

2. This is a **mostly *stand-alone private enforcement* action under competition law**. At issue are anti-competitive behaviors alleged in several lawsuits pending against Google in other jurisdictions (including the United States of America and the United Kingdom) where damages are sought for consumers and businesses. Google's dominant position in two of the relevant markets has already been declared and one of the anti-competitive behaviors at stake has already been partially declared to infringe European competition law in a **European Commission Decision** (Decision of July 18, 2018, in the **Google Android** case (AT.40099)), binding on national courts (***follow-on*** component).

3. Google markets the Android operating system, which is used by virtually all mobile communications equipment (*most* notably *smartphones*) sold in Portugal, excluding Apple equipment (which uses the iOS operating system). Consumers using these mobile communications equipment have no effective alternative to using the Android operating system and applications (*apps*) and *in-app* content for Android.

4. Third parties who install the Android operating system on the mobile communications equipment they produce and sell (manufacturers) must enter into agreements with Google to do so. Under these agreements, they may not develop or assist in the development of alternative (***anti-forking***) operating systems and, if they want to make available on their devices one of Google's core *apps* (such as *Google Maps*, *Gmail* or *YouTube*), **manufacturers are obliged to pre-install and make available the entire** *bundle of* **Google's *apps* including the Google Play Store** (*bundling) and* to **place the Google Play Store icon prominently on the** *homepage of* the mobile device.

5. Third parties who develop Android apps and app content and wish to market them to consumers (app *developers*) must enter into agreements with Google to that effect. Under the terms of these agreements, ***app developers* are obliged to grant**

Google Play Store exclusivity for the distribution of and making payments for Android apps and *in-app* content, , and are **obliged to engage (also) Google's services for Android *in-app* content payments even if they only wish to engage the services for the distribution of the apps**.

6. Google enters into agreements with *app developers* that **oblige** them **to respect a minimum price** for their Android apps distributed through the Google Play Store.

7. Google programs the Android operating system so that consumers seeking to use alternative distribution means (*app stores*) are confronted with **misleading steps and warning messages that dissuade them from** using these alternative mechanisms.

8. Google is **preventing potential competitors and *app developers*** who wish not to distribute their Android *apps* and content through the Google Play Store **from getting critical functionality that is critical to proper operation** and successful market entry.

9. Google has entered into **agreements with potential competitors** to persuade them, in exchange for financial advantages, not to enter the markets in question and not to compete, or to compete to a lesser extent, with the Google Play Store.

10. As a result of these practices, Android applications and Android *in-app* content can practically only be acquired through the Google Play Store, launched in 2008 and available in Portugal as from the commercialization of the first mobile devices with Android operating system, **starting July 6, 2009**. Whenever a consumer residing in Portugal wants to download an application - free or paid - to his Android mobile device, or make any payment for Android *in-app* content, he has no effective alternative but to do so at the Portuguese Google Play Store.

11. Google generally charges *app developers* a **30% commission on** all payments for applications and *in-app* content through the Google Play Store. This **price includes an overcharge resulting from the combination of Google's anticompetitive practices** referred to above . This **price is excessive and inequitable**. It is higher than the price that would have occurred in the absence of Google's abuse of a dominant position and the anti-competitive agreements. It is made possible only by Google's quasi-monopoly in the provision of these services, which has been created and is maintained by its anti-competitive practices.

12. Gradually, starting in 2021, Google partially reduced the above commission until it reached a situation on January 1, 2022 where the commission was reduced to 15% only for *app developers* meeting certain requirements and only for sales up to 1 million USD each year, and 15% for auto-renewing subscription products purchased by subscribers, and 30% in all other cases.

13. The ***app developers*** **passed on at least part of the above overpricing to consumers represented** in the present action who purchased apps and *in-app* content through the Portuguese Google Play Store during the relevant period.

14. In this action, we seek a **declaration that the Defendants have uniquely** and continuously **infringed the** above-mentioned rules since July 6, 2009, causing damages to the diffuse and/or collective interests of protection of the consumption of goods and services and of competition, and that they are **ordered to acknowledge this**, to **refrain from continuing these** unlawful **practices** , to **compensate the represented consumers for the damages caused,** and to **publish a summary of** the final court decision **in national newspapers.**

15. As regards the claim for damages, and without prejudice to other damages resulting from Google's anti-competitive practices at issue (for example, in terms of the variety and quality of the apps and content available to consumers), the present action only seeks compensation for the harm resulting from the **overpricing** (difference between the commission charged and the commission that would have been charged in a competitive environment, in the absence of the Defendants' anti-competitive practices) of the consumers represented. This overcharge was passed on, at least in part, to consumers by *app developers* (*passing on*).

16. The amount of the compensation due, to be determined, under the terms of the LAP and the EPL, in the form of a global compensation, is not yet liquid, since the illicit practice persists and continues to cause damages and, furthermore, due to the need, for its calculation, to obtain non-public information held by the Defendants. It is requested that the exact amount of compensation due, not being able to be determined beforehand, be determined in the liquidation phase of the award, after access to the necessary evidence, for reasons of speed and procedural economy.

Abbreviations

AF**A**	Anti-Fragmentation Agreement
AOSP	Android Open Source Project
CC	Civil Code
CDPGP	Google Play Developer Distribution Agreement
CPC	Code of Civil Procedure
CRP	Constitution of the Portuguese Republic
	USAUnited States of America
LAP	Popular Action Law (Law no. 83/95, of August 31, revised by Decree-Law no. 214-G/2015, of May 2)
LC	Consumer Protection Law (Law no. 24/96, of July 31, last revised by Law no. 63/2019, of August 16)
LdC	Competition Law (Law no. 19/2012, of May 8, revised by Law no. 23/2018, of June 5)
	Private Competition Enforcement Law (Law no. 23/2018, of June 5)
MADA	Mobile Application Distribution Agreement
PPP	Program Policies for Programmers
STJ	Supreme Court of Justice
TFUETreaty	on the Functioning of the European Union
	TJLisbon Judicial Court
CJEU	Court of Justice of the European Union
TRLT	Lisbon Court of Appeal
EU	European Union

1. The facts

1.1. Represented Consumers and Plaintiff

17. In the present action, the Plaintiff acts as the holder of the right to class action, acting on its own initiative, with no need for a mandate or express authorization, in representation and defense of the diffuse and/or collective interests and of the homogeneous individual interests of all non-deceased consumers, residents in Portugal, who have downloaded (for free or for a consideration) Android applications from the Portuguese Google Play Store and/or who have purchased Android application content through Google's *in-app* payments mechanism, from July 6, 2009 to the present, unless they expressly indicate that they do not wish to be represented, i. e.e., unless they exercise their opt-out right (the **"represented consumers"**) .[1]

18. For the purposes of determining the scope of represented consumers, a consumer is deemed to have downloaded Android applications from the Portuguese Google Play Store and/or purchased Android application content through Google's *in-app* payments mechanism if: (i) his account associated with the Google Play Store indicates as country "Portugal"; and (ii) his Google Play account history indicates at least one download of Android applications and/or one purchase of Android application content.

19. Excluded from the scope of the represented consumers are: (i) the officers and employees of the Defendants and their subsidiaries; (ii) the judge(s) deciding the present lawsuit or issues in this lawsuit, in any instance and potential incident; and (iii) the court trustees and economic and technical advisors of Plaintiff and Defendants in connection with this lawsuit.

20. The Plaintiff is a private law association, with legal personality, incorporated in Lisbon on March 6, 2020, by public deed executed from folio one hundred and two

[1] Because of the method used to quantify the overall compensation that the Defendant should be ordered to pay, the determination of the overall compensation owed by the Defendants is not dependent on determining the precise number or identity of the consumers represented.

to folio one hundred and four of the book of notes for diverse deeds, number eighty-two of the Notary's Office of the notary Rita Costa, and respective complementary document, having been registered with the National Registry of Legal Entities on March 10, 2020, with Tax ID number 515807753.

[**Doc. 1**which is attached hereto and is fully reproduced].

21. Pursuant to Article 2(1) of its Articles of Association, the Plaintiff:

> *"is a non-profit organization whose purpose is to defend consumers in the European Union, aiming in particular to increase consumer welfare, and in general to promote the rule of law, the environment and the economy of the European Union."*

22. Under Article 2(2) of the Plaintiff's Articles of Association:

> *"For the purposes of the preceding paragraph, consumer protection means the protection and promotion of the rights and interests of consumers who are citizens of the European Union or who are citizens of third states residing in the European Union and covering those, but not limited to consumers who are members of the Association."*

23. Under Article 2(3) of the Plaintiff's Articles of Association:

> *"The Association protects all consumer rights conferred on them by the legal systems of the European Union and the Member States of the European Union, including those arising from Consumer Law (...), Competition Law (...)".*

24. Under Article 2(4)(h), (i) and (m) of the Plaintiff's Articles of Association:

> *"In pursuance of the purposes referred to in the preceding paragraphs, the Association shall have the power to perform all appropriate legal acts for that purpose, including:*
>
> (...)
>
> *h)To reach out-of-court settlements with persons who have violated consumers' rights, with a view to securing compliance with the law and/or compensation for damages suffered by consumers resulting from a violation of their rights and/or individual and collective interests;*

i)Initiate and pursue legal action, or have recourse to alternative dispute resolution methods, to protect the collective and individual rights and interests of consumers in the European Union, to the extent permitted by applicable law, particularly through representative actions on an opt-in or opt-out basis (including class action) or through any other procedural means for the defence of diffuse rights and interests, collective or homogeneous individual rights and interests, which may have the objective, among others, of obtaining a declaration of the existence of rights and obligations, the imposition of behaviors and/or compensation for damages suffered by consumers resulting from a violation of their rights or interests;

(...)

(m) exercise any other powers conferred on it by rules of the European Union or its Member States."

25. The Plaintiff does not engage in any professional activity competing with companies or professionals, nor does it control or participate in any entity that performs such activity.

26. Pursuant to Article 6(1) of the Author's Statutes, any natural person who is an EU citizen or who is a citizen of a third state residing in the EU, and who agrees with and wishes to promote the purposes of the Association, may become a member of the Author.

27. The Plaintiff is a consumer association recognized by the Directorate General for the Consumer[2] .

28. The Author's Board of Directors is currently composed of[3] :

    a. President: Julia Suderow
    b. Vice President: Maria José Azar-Baud
    c. Vice President: Victoriano Nazareth

[2] See https://www.consumidor.gov.pt/parceiros/sistema-de-defesa-do-consumidor/associacoes-de-consumidores.aspx.

[3] See https://iusomnibus.eu/pt/equipa/.

29. Julia Suderow, President of the Author's Board of Directors, of Spanish nationality, is a professor of Law at the University of Deusto, holds a PhD in Law from the Complutense University of Madrid, and specializes in Competition Law and Private International Law.

30. Maria José Azar-Baud, Vice-President of the Author's Board of Directors, of French nationality, is a professor of law at the University of Paris XI, a PhD in law from the University of Paris 1 (Panthéon-Sorbonne) and from the University of Buenos Aires, specialized in collective defense of consumer rights.

31. Victoriano Nazareth, Vice-President of the Author's Board of Directors, of Portuguese nationality, has a degree in History and a post-graduate degree in Documentary Sciences, as well as President of the Board of Directors of the Consumer Conflict Arbitration Center of the Coimbra Region.

1.2. Rés

32. Alphabet Inc. (1st Defendant), registered in the State of Delaware on August 10, 2015, is, since October 2, 2015 (following a corporate restructuring, the parent company of the Google group (hereinafter referred to as the "Google group", "Google" and "Defendants").

33. Prior to that date, the 2nd Defendant (which changed legal form from Inc. to LLC on September 30, 2017, or alternatively, which is the legal successor to Google Inc. as of the same date), was the parent company of the Google group[4] .

34. The 1st Defendant is a *holding company* that owns, directly and indirectly, the multiple legal entities of the Google group.

35. The direct subsidiaries of the 1st Defendant include: (i) Google LLC (holding 100% of its capital as of October 2, 2015); (ii) Google Ireland Holdings; (iii) XXVI Holdings Inc.; and (iv) Alphabet Capital US LLC.

[**Doc. 2**which is attached hereto and is fully reproduced].

[4] See European Commission Decision of July 18, 2018, Google Android (AT.40099), paras 7-8 and 1387.

36. The Google group is a multinational technology company that specializes in internet-related services and products, which include *online* advertising, search engine, cloud computing, *software* and *hardware,* offering its services worldwide, including throughout the European Union and specifically in Portugal[5] .

37. The business areas of the Google group are divided into *"Google Services"*, *"Google Cloud"*) and *"Other Bets"* - relating to other business areas or potential businesses (specifically, technologies in early stages of development)[6] .

38. The *"Google Services"* business area includes the following main services/products and platforms: advertising (Google Search and others), Android, Chrome, *hardware,* Gmail, Google Drive, Google Maps, Google Photos, Google Play, Search, and YouTube[7] .

39. Google had the following total worldwide revenues: in 2009, USD 23 650 million; in 2010, USD 29 321 million; in 2011, USD 37 905 million; in 2012, USD 50 175 million; in 2013, USD 59 825 million; in 2014, USD 66 001 million; in 2015, USD 74 989 million; in 2016, USD 90 272 million; in 2017, USD 110 855 million; in 2018, USD 136 819

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[5] See European Commission Decision of July 18, 2018, Google Android (AT.40099), para 6.

[6] First Defendant's Report and Accounts, 2021, p. 33, available at https://abc.xyz/investor/static/pdf/20220202_alphabet_10K.pdf?cache=fc81690; 1st Defendant's Report and Accounts, 2020, p. 33, available at https://abc.xyz/investor/static/pdf/20210203_alphabet_10K.pdf?cache=b44182d; Report and Accounts of the 1st Defendant, 2019, pp. 29 and 30, available at https://abc.xyz/investor/static/pdf/20200204_alphabet_10K.pdf?cache=cdd6dbf; Report and Accounts of the 1st Defendant, 2018, pp. 29 and 30, available at https://abc.xyz/investor/static/pdf/20180204_alphabet_10K.pdf?cache=11336e3; Report and Accounts of the 1st Defendant, 2017, pp. 44 and 45, available at https://www.sec.gov/Archives/edgar/data/1652044/000165204418000007/goog10-kq42017.htm; Report and Accounts of the 1st Defendant, 2016, pp. 29 and 30, available at https://www.sec.gov/Archives/edgar/data/1652044/000165204417000008/goog10-kq42016.htm; Report and Accounts of the 1st and 2nd Defendants, 2015, pp. 35-37, available at https://abc.xyz/investor/static/pdf/2015_alphabet_annual_report.pdf?cache=40474a1; 2nd Defendant's Report and Accounts, 2014, pp. 26 and 27, available at https://www.sec.gov/Archives/edgar/data/1288776/000128877615000008/goog2014123110-k.htm; 2nd Defendant's Annual Report and Accounts, 2013, pp. 55 and 56, available at https://www.sec.gov/Archives/edgar/data/0001288776/000128877614000020/goog2013123110-k.htm; 2nd Defendant's Annual Report and Accounts, 2012, p. 36, available at https://www.sec.gov/Archives/edgar/data/0001288776/000119312513028362/d452134d10k.htm; 2nd Defendant's Annual Report and Accounts, 2011, p. 49, available at https://www.sec.gov/Archives/edgar/data/1288776/000119312512025336/d260164d10k.htm; 2nd Defendant's Annual Report and Accounts, 2010, p. 32, available at https://www.sec.gov/Archives/edgar/data/1288776/000119312511032930/d10k.htm; 2nd Defendant's Annual Report and Accounts, 2009, pp. 44 and 73, available at https://www.sec.gov/Archives/edgar/data/1288776/000119312510030774/d10k.htm.

[7] Report and Accounts of the 1st Defendant, 2021, p. 5.

million; in 2019, USD 161 857 million; in 2020, USD 182 527 million; in 2021, USD 257 637 million .[8]

40. Google had the following worldwide operating profits associated with the *"Google Services"* business area: in 2018, USD 43 137 million; in 2019, USD 48 999 million; in 2020, USD 54 606 million; in 2021, USD 91 855 million[9] .

41. The 2nd Defendant was the ultimate parent company of the Google group for part of the relevant period and is currently the operating company at the top of Google's structure (below the 1st Defendant) responsible for defining and implementing the practices at issue in these proceedings.

42. The 2nd Defendant has, even today, as subsidiaries the 3rd, 4th and 5th Defendants[10] .

43. The 2nd Defendant and its subsidiaries provide services, including services provided via the Google Play Store, subject to the terms of the Google Privacy Policies[11] .

44. The 2nd Defendant is the owner of the Google Play Store.

45. The 2nd Defendant is the *app developers*' counterparty to the terms of service regarding the use of Google APIs (for app development)[12] .

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[8] Report and Accounts of the 1st Defendant, 2021, p. 32. See also: Report and Accounts of the 1st Defendant, 2020, available at https://abc.xyz/investor/static/pdf/20210203_alphabet_10K.pdf?cache=b44182d; Report and Accounts of the 1st Defendant, 2019, available at https://abc.xyz/investor/static/pdf/20200204_alphabet_10K.pdf?cache=cdd6dbf; Report and Accounts of the 1st Defendant, 2018, available at https://abc.xyz/investor/static/pdf/20180204_alphabet_10K.pdf?cache=11336e3; Report and Accounts of the 1st Defendant, 2017, available at https://www.sec.gov/Archives/edgar/data/1652044/000165204418000007/goog10-kq42017.htm; Report and Accounts of the 1st Defendant, 2016, available at https://www.sec.gov/Archives/edgar/data/1652044/000165204417000008/goog10-kq42016.htm; Report and Accounts of the 1st and 2nd Defendants, 2015, available at https://abc.xyz/investor/static/pdf/2015_alphabet_annual_report.pdf?cache=40474a1.

[9] Report and Accounts of the 1st Defendant, 2021, p. 39; and Report and Accounts of the 1st Defendant, 2020, p. 41.

[10] See at https://policies.google.com/privacy?hl=pt-PT&gl=pt#footnote-affiliates, which states that "Affiliates are entities within Google's group of companies, including the following companies providing consumer services in the EU: Google Ireland Limited, Google Commerce Ltd, Google Payment Corp and Google Dialer Inc."; cf. the same information at https://policies.google.com/terms/definitions?hl=pt-BR.

[11] View at https://policies.google.com/privacy?hl=pt-PT&gl=pt

[12] View at https://developers.google.com/terms

46. The 2nd Defendant is the counterparty of the mobile equipment manufacturers to the " Mobile Application Distribution Agreement ", relating to distribution on their Android mobile devices of Google's application package (*"Google Mobile Services"*) .

47. The 2nd Defendant, 3rd Defendant and 5th Defendants are the counterparties of the *app developers* in the contracts between Google and the app *developers* for making available and marketing Android applications and *in-app* content through the Google Play Store .

48. The 3rd Defendant is the legal entity of the Google group providing Google services in the European Economic Area (including applications and their content)[13] .

49. 3rd Defendant is the legal entity of the Google group that provides the Google Play Store services in Portugal[14] .

50. The 3rd Defendant is the legal entity of the Google group that acts as data controller of users of Android mobile equipment for the purpose of payments through the Google Play Store[15] .

51. The 4th Defendant is the legal entity of the Google group responsible for processing transactions relating to the purchase of Android applications and *in-app* Android content through the Google Play Store.

52. The 4th Defendant is the legal entity of the Google group that acts as data controller of the sellers (*app developers*) of Android applications and *in-app* Android content, for the purpose of payments through the Google Play Store[16] .

53. The 5th Defendant is the legal entity of the Google group that makes content available on the Google Play Store, including content from third parties, and it is with it that users enter into a sales contract when downloading, viewing, using or purchasing content on the Google Play Store[17] .

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[13] See at https://policies.google.com/terms?hl=pt-PT

[14] See at https://policies.google.com/terms?hl=pt-PT

[15] https://payments.google.com/payments/apis-secure/u/0/get_legal_document?ldo=0&ldt=privacynotice

[16] View at https://payments.google.com/payments/apis-secure/u/0/get_legal_document?ldo=0&ldt=privacynotice

[17] See at https://policies.google.com/terms?hl=pt-PT, in particular sections 2 and 3.

54. The 5th Defendant is the legal entity of the Google group that is appointed, with respect to Portugal, as the agent of the *app developers* for the provision of Android *in-app* applications and content through the Google Play Store.

[**Doc. 3**which is attached hereto and is reproduced in its entirety].

55. Google has a subsidiary in Portugal, GGLE PORTUGAL, LDA, with registered office at Rua Duque de Palmela, No. 37, 4, 1250-097 Lisbon, Portugal, tax identification number, whose activities are focused on the provision of advertising and marketing services (the promotion of online advertising sales/ the marketing of online advertising and the promotion of sales and direct marketing of other products and services/ the development, maintenance and repair of network infrastructure projects, work orders, research and development activities, as well as any activities related to or instrumental to any of the above mentioned activities).

[**Doc. 4**which is attached hereto and is reproduced in its entirety].

56. The 1st Defendant owns and controls, or is able to control, at least directly or indirectly, the 2nd, 3rd, 4th and 5th Defendants, its subsidiaries, all of which comprise the Google group (which also includes other subsidiaries not mentioned here).

57. The 1st Defendant exercised, during the relevant period, decisive influence over the 2nd, 3rd, 4th and 5th Defendants with regard to the development of the economic activities of the latter, in general, including the appointment of the members of the board of directors of these Defendants and the approval of strategic business decisions and business plans.

58. The 2nd Defendant owns and controls, or is able to control, at least directly or indirectly, the 3rd, 4th and 5th Defendants, its subsidiaries, all of which comprise the Google group (which also includes other subsidiaries not mentioned here).

59. The 2nd Defendant exercised, during the relevant period, decisive influence over the 3rd, 4th and 5th Defendants with regard to the development of the economic activities of the latter, in general, including the appointment of the members of the board of directors of these Defendants and the approval of strategic business decisions and business plans.

60. In the event that any of the Defendants was not the Google group legal entity performing the activities or entering into the contracts described above for the entire duration of the relevant period, the respective Defendant listed above is the economic and/or legal successor to the Google group legal entity that performed those functions before they transitioned to the respective Defendant listed above.

61. With respect to the economic activity at issue in these proceedings, all Defendants are active in the same economic activity or, at least, in economic activities connected with the activities at issue in these proceedings.

62. The Defendants act jointly and coordinately in the marketplace, jointly introducing themselves as Google.

63. The Defendants adopted the practices and entered into the agreements that underlie the unlawful practices at issue in this case.

64. Alternatively, some of the practice(s) at issue in this case have been adopted by other legal entities within the Google group, with the knowledge and participation of the Defendants, and/or within the framework of the economic unit formed by the Google group.

65. At the very least, the 1st Defendant knew in advance and determined or approved, expressly or tacitly, the decisions underlying the illicit practices at issue in the present case, for the entire world, including Portugal.

66. At the very least, the 2nd Defendant knew in advance and determined or approved, expressly or tacitly, and/or implemented, in whole or in part, the decisions underlying the illicit practices at issue in the present case, for the entire EU, including Portugal.

67. At the very least, the 3rd Defendant knew in advance and determined or approved, expressly or tacitly, and/or implemented, in whole or in part, the decisions underlying the unlawful practices at issue in the present case, for the entire EU, including for Portugal.

68. At the very least, the 4th Defendant knew in advance and determined or approved, expressly or tacitly, and/or implemented, in whole or in part, the decisions underlying the unlawful practices at issue in the present case, for the entire EU, including for Portugal.

69. At the very least, the 5th Defendant knew in advance and determined or approved, expressly or tacitly, and/or implemented, in whole or in part, the decisions underlying the unlawful practices at issue in the present case, for the entire EU, including for Portugal.

1.3. Defendants' anticompetitive behaviors

1.3.1. Description of the practices concerned

70. The practices in question occur in the Android operating system ecosystem .[18]

71. An operating system is system *software* installed on a device that manages the *hardware* and *software* resources of that device, acting as the platform with which users interact to perform any operation with the device (user *interface*), periodically updated via the Internet connection.

72. For more information on operating systems and their characteristics, reference is made to §§79 to 83 of the European Commission Decision of July 18, 2018, in the Google Android case (AT.40099)[19] , which for reasons of procedural economy are reproduced here.

73. Android is an operating system based on another operating system, Linux, an open source operating system, and built with the Java programming language, albeit with important modifications.

74. Google developed and continues to develop the "*source* code" of the Android operating system, controls the evolution of the system and the release of new versions and changes.

75. For more information on the Android operating system and its relationship with Google, reference is made to §§122 to 130 and 148 to 151 of the European

[18] In the present application, for the sake of simplicity of language, the present tense is used to describe the practices at issue, and the description covers Google's continuous and unchanged practices throughout the relevant period from their inception to the present, unless otherwise expressly stated or the temporal duration of the practice is more precisely delimited.

[19] See at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

Commission Decision of July 18, 2018, in the Google Android case (AT.40099)[20] , which for reasons of procedural economy are reproduced here.

76. The Android operating system is intended for mobile equipment, generically defined as mobile devices that offer the possibility of advanced Internet browsing, *most notably smartphones* and *tablets*.

77. For more information on mobile equipment and its subdivisions, reference is made to §§74 to 78 of the European Commission Decision of July 18, 2018, in the Google Android case (AT.40099)[21] , which for reasons of procedural economy are reproduced here.

78. According to Google, *"Android devices with Google apps include devices sold by Google or one of our partners, as well as cell phones, cameras, vehicles, wearables, and televisions. These devices use Google Play Services and other pre-installed applications that include services such as Gmail, Maps, your phone's camera and dialer program, voice synthesis conversion, keyboard input and security features*."[22] .

79. Excluding Apple's mobile devices, which run on the iOS operating system, the Android operating system is used in virtually all mobile devices (*maxime*, *smartphones*) sold in Portugal and comes pre-installed in all brands of mobile devices in Portugal.

80. Mobile devices use (or run) *software* applications (*apps*).

81. Applications are *software through which* users can access, via their six *smart* devices, content and services available on the *World Wide Web*.

82. Applications can be "stand-alone" and offer *offline* services (such as gaming or photography) or incorporate *online* services (such as geolocation or integration with social networks).

[20] See at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

[21] See at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

[22] See at: https://policies.google.com/privacy?hl=pt-PT&gl=pt#footnote-android-device.

83. To run on a device, *software* applications must be compatible with the device's operating system, requiring specific adaptation to the parameters of the operating system.

84. Applications are offered and obtained through *online* application stores (*app stores*), which are digital platforms for distributing applications.

85. Android devices are used in conjunction with *software* applications developed to run specifically on Android ("Android applications", native to this system), which are downloaded and stored in the devices' memory or memory expansions included with the devices, and appear as icons on the screens of the Android devices (as distinct from Internet applications, which can also be accessed on the mobile device, but are accessed through a web *browser* installed on that device).

86. There are more than 3.4 million Android applications currently available in the Google Play Store.

    [**Doc. 5**which is attached hereto and is fully reproduced].

87. Android applications can be free or paid.

88. Android applications have countless features and purposes, and can be used to work, play, organize personal life, communicate and meet people, interact with businesses and public services, manage shopping, exercise, learn, listen to radio, music or *podcasts*, watch videos, etc.

89. For more information on applications and their characteristics, reference is made to §§84 and 85 of the European Commission Decision of July 18, 2018, in the Google Android case (AT.40099)[23] , which for reasons of procedural economy are reproduced here.

90. Some Android applications offer or are associated with content for Android applications ("*in-app* Android content"), which are services or digital products obtained free of charge or purchased for a fee in the context of Android applications.

[23] Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

91. Android *in-app* content sales include *ad hoc* (individual) and subscription (recurring periodic) sales.

92. The Android *in-app* content referred to in this initial petition includes content described by Google as *"in-app services or features,"* including the following examples: *"in-app purchases of (i) Items (such as virtual coins, extra lives, additional game time, supplemental items, characters, and avatars); (ii) subscription services (such as fitness, gaming, dating, education, music, video, service updates, and other content subscription services); (iii) app features or content (such as an ad-free version of an app or new features not available in the free version); and (iv) software and cloud services (such as data storage services, business productivity software, and financial management software).*"[24] .

93. Typical examples of *in-app* Android content sold include: (i) paid components of free games, in the context of which users download the Android application of the game for free, and then - some - purchase products or pay for certain in-game perks or benefits ("game *add-ons"*), purchase game "currency", or unlock game levels; (ii) subscriptions to certain services provided through Android applications, for example subscriptions to movie or video *streaming services*; (iii) contracting for services managed through Android applications, which are exclusively digital in nature; and (iv) unlocking *premium* features or services in applications with a free basic version (e.g. dating applications).

94. The sales of *in-app* Android content covered in this action exclude:

    a. (physical goods/services) payments intended mainly for: (i) the purchase or rental of physical goods (such as food, clothing, housewares, electronics); (ii) the purchase of physical services (such as transportation services, cleaning services, airline tickets, gym membership fees, food delivery, tickets to live events); and (iii) a remittance related to a credit card bill or a utility bill (such as cable television and telecommunications services);
    b. payments that include peer-to-peer payments, online auctions, and tax-free donations; and
    c. *in-app* content purchased in the context of Google's own applications (and not from *app developers* who are third parties to Google and from whom Google charges a commission).

[24] See https://support.google.com/googleplay/android-developer/answer/9858738, in particular point 2 of the document.

95. Android applications and *in-app* Android content are mostly developed by third parties (not included in the Google group), by *app developers*.

96. Android app *developers* have at their disposal and use varied business models that allow them to earn revenue in different ways, highlighting the following main options:

    a. Free *apps*, without any possibility of direct or indirect revenue;
    b. Free *apps* with advertising (monetization via paid advertising);
    c. Free *apps* through which "physical" goods or services are sold;
    d. *Apps that are* (usually) free, where users subscribe to a service by periodically paying a subscription fee for a certain period, renewable or non-renewable;
    e. Free *apps*, where users can purchase, for a fee, complementary or additional services or content;
    f. Paid *apps*, without the possibility of purchasing, on a paid basis, complementary or additional services or content; and
    g. Paid *apps*, under which users can purchase, for a fee, complementary or additional services or content.

97. Mobile equipment manufacturers can install the Android operating system on their Android devices for free under an *open source* license.

98. No mobile equipment manufacturer sells these devices without an *app store* pre-installed, since the *app store* is an essential tool for accessing applications, which is one of the great benefits and sources of utility of mobile equipment.

99. Mobile equipment manufacturers who want to install the Android operating system on their devices must obtain an "Android Open Source Project" (AOSP) license, which is made available for free by Google .[25]

100. The AOSP license does not grant the right to use the Android logo and other related Android *trademarks* owned by Google[26] . This right is granted by Google only if one

[25] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §124.

[26] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §156.

passes an Android compatibility test, the parameters of which are freely determined and changed by Google .[27]

101. The AOSP license does not grant the right to install Google's applications[28] on mobile devices.

102. Mobile equipment manufacturers who want to pre-install on their devices running Android operating system any application from Google (from the package described as *"Google Mobile Services"*), have to enter into an agreement with Google, specifically with the 2nd Defendant, called "**Mobile Application Distribution Agreement**" (hereinafter "MADA"), and obtain a certification from Google for this purpose.[29]

103. The MADA defines the rights and obligations of mobile equipment manufacturers, and includes the list of applications that Google states are mandatory on devices produced by each manufacturer, and may change this list at any time by unilateral decision and mere communication to the manufacturer.

104. Reference is made to §§172 to 191 of the European Commission Decision of July 18, 2018, in the Google Android case (AT.40099) for further information on the MADA agreements[30] , which for reasons of procedural economy are reproduced here.

105. In order to be able to celebrate MADA, mobile equipment manufacturers have to enter into a " **Anti-Fragmentation Agreement** " (hereinafter "AFA") with Google.

106. All major mobile equipment manufacturers active in the European Economic Area, with the exception of Apple, have had and/or have AFAs with Google[31] , referring for more information to §§157 to 169 of the European Commission Decision of July

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[27] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §§162-163.

[28] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §156.

[29] See partial version of the MADA entered into between the Defendant and Oracle, used in Proc. 3:10-cv-03561-WHA, as Exhibit No. 286, at https://www.benedelman.org/docs/htc-mada.pdf#page=3

[30] See at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

[31] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §166.

18, 2018, in the Google Android case (AT.40099), which for reasons of procedural economy are reproduced here.

107. The AFAs include the following anti-fragmentation obligations[32] :

a. *"The [company] will only distribute products that are: (i) in the case of hardware, Android-compatible equipment; or (ii) in the case of software, distributed only on Android-compatible equipment."* ;[33]

b. *"The [company] will not take any actions that may cause or result in the fragmentation of Android"*[34] ; and

c. *"The [company] will not distribute software development kit (SDK) derived from Android or derived from Android-compatible equipment and will not participate in the creation of, or promotion by any means of, any software development kit (SDK) derived from Android or derived from Android-compatible equipment."*[35] .

108. Under the AFA agreements, mobile equipment manufacturers are prohibited from installing other operating systems (*forks*) or developing and installing their own *forks* on any of their mobile equipment, and the distribution of *software development kits and* the pre-installation of third-party applications for *forks is* prohibited[36] .

109. About 6 months before publishing the latest version of Android *open source*, Google makes the *source codes* available early, but only to Android mobile equipment manufacturers that have signed an ***"Early Access to Android Source Codes Agreement"*** , Google only allows manufacturers to sign this agreement if they have signed an AFA.

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[32] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §157.

[33] Our translation. Original: *"[COMPANY] will only distribute Products that are either: (i) in the case of hardware, Android Compatible Devices; or (ii) in the case of software, distributed solely on Android Compatible Devices*.

[34] Original: "[COMPANY] will not take any actions that may cause or result in the fragmentation of Android. Original: *"[COMPANY] will not take any actions that may cause or result in the fragmentation of Android"*.

[35] Our translation. Original: *"[COMPANY] shall not distribute a software development kit (SDK) derived from Android or derived from Android Compatible Devices and [OEM] shall not participate in the creation of, or promote in any way, any third party software development kit (SDK) derived from Android, or derived from Android Compatible Devices.*

[36] View: https://www.ftc.go.kr/solution/skin/doc.html?fn=f0d92a276eb35238b62e3bdb0ccc17d7a11e538a2d7a6855435ab70ab2b7dc89&rs=/fileupload/data/result/BBSMSTR_000000002402/.

110. Android mobile equipment manufacturers need to have access to this *source code in* advance in order to adapt their devices to the latest future version of Android.

111. Internal Google documents state that the anti-fragmentation obligations are intended to prevent Google's partners and competitors from fragmenting Android and going it alone, by binding mobile device manufacturers that adhere to the Android ecosystem not to sell devices that were not Android[37] .

112. The following are some of the examples of attempts to enter the mobile operating system market that have been thwarted by obligations under the AFAs[38] :

    a. Amazon's Fire operating system: Amazon developed its own "Fire" operating system and intended to market, together with some major mobile equipment manufacturer, the "Kindle Fire" mobile device in 2011 with the "Fire" operating system, but all major manufacturers refused to do so because it would violate their obligations under the AFA with Google;
    b. Alibaba's Aliyun operating system: Alibaba launched a *smartphone* with its Aliyun *fork in* 2011, in conjunction with the manufacturer K-Touch, and Google, in reaction, prevented this manufacturer from accessing the Google Play Store citing a violation of the AFA, and K-Touch abandoned marketing Alibaba's *smartphones* with the Aliyun *fork;*
    c. Samsung's Galaxy Gear 1: In 2013, Samsung released the *smart watch* "Galaxy Gear 1" with a *fork* developed by itself, with Google stating that this was a violation of the AFA and forcing Samsung to switch this device to the Tizen operating system, even though it had no effective app ecosystem. After several years of trying to make this alternative work, Samsung released a new version of the Galaxy Watch in 2021 with a Google operating system.

113. **Mobile equipment manufacturers** who want to pre-install on their **Android-based devices any application from Google** (from the bundle described as *"Google Mobile Services"*), **including applications such as Google *Search*, *Google Maps, Gmail*, *YouTube* or *Google Chrome*, are required to pre-install and make available on**

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[37] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §160.

[38] View: https://www.ftc.go.kr/solution/skin/doc.html?fn=f0d92a276eb35238b62e3bdb0ccc17d7a11e538a2d7a6855435ab70ab2b7dc89&rs=/fileupload/data/result/BBSMSTR_000000002402/.

those devices the entire bundle of Google *apps*, which include the Google Play Store (***bundling*** practice),

114. and are **required to place the Google Play Store icon prominently on or immediately after the** *home* **screen** (*homepage*) of the mobile device.

115. Under section 2.1 of the MADA, *"equipment may only be distributed if all Google applications (excluding any optional Google applications) authorized for distribution in the applicable territory are pre-installed on the equipment, unless otherwise authorized by Google in writing."*[39] .

116. Under section 3.4 of the MADA, *"Unless otherwise authorized by Google in writing: (1) the Company will pre-install on each device all Google applications approved for the applicable Territory or Territories; (2) the Search Google from the top of the phone and the Android Market Client icon must be placed at least in the pane immediately adjacent to the default home screen."*[40] .

117. A subsequent version of the MADA - to be confirmed in this case - now requires that the Google Play Store icon be included on the *homepage of* the mobile device (1st screen).

118. Google's applications will not work on Android mobile devices if their manufacturers have not entered into a MADA and do not have a Google certification for those devices.

119. *Google Search*, Google *Maps, Gmail*, and *YouTube* are essential applications that a mobile device manufacturer cannot afford not to include on Android mobile devices, because of the expectation of users of these devices to find these applications on their mobile devices, working properly from the start, and the added value these applications bring to the sale of their devices.

120. Even if - *ad arguendum* - they were not considered essential, these applications would be useful applications, whose pre-installation brings an added value to

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[39] Our translation. *Devices may only be distributed if all Google Applications (excluding any Optional Google Applications) authorized for distribution in the applicable Territory are pre-installed on the Device, unless otherwise approved by Google in writing.*

[40] Our translation. *Unless otherwise approved by Google in writing: (1) Company will preload all Google Applications approved in the applicable Territory or Territories on each Device; (2) Google Phone-top Search and the Android Market Client icon must be placed at least on the panel immediately adjacent to the Default Home Screen."*

mobile equipment that makes it easier to use for its users, and their pre-installation is an advantage in competition with other mobile equipment that does not include them.

121. In making choices about which applications they pre-install on the devices, Android mobile equipment manufacturers are influenced by the characteristics and preferences of demand around the world, to allow undifferentiation in the production line and greater flexibility to market the devices in any country in the world.

122. The *Google Search* application is an indispensable tool on Android mobile devices, notably as a result of Google's super dominant position in the national *online* search engine market, identified by the European Commission, *inter alia, in the* European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), with the following facts and grounds[41] .

123. As determined in the European Commission's Decision of July 18, 2018, in the Google Android case (AT.40099), based on the facts and grounds alleged above and included in this Decision, which are hereby reproduced[42] , all requirements of the prohibition of *bundling* (or *tying*) are met in the case of the imposition of bundled distribution of the *Google Search* app and Google Play Store, because: the Google Play Store and the Google Search app are distinct products, Google has a dominant position in the market for Android *app stores,* the Google Play Store cannot be obtained without the Google Search app, and the tying between these two products is capable of restricting competition.

124. This same conclusion of the European Commission extends to the ban on sales connected with the other applications mentioned above, and exactly the same reasoning applies, *mutatis mutandis*.

125. Referring to the United States of America, map applications (including navigation) are the most used by *smartphone* owners, along with instant messaging and music applications, being used by 96% of Android users.

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[41] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §§323-366 and 422-425 (see also §§754-1008).

[42] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §§752 e 754-1008.

[**Doc. 6**which is attached hereto and is reproduced in its entirety].

126. This statistic is identical or similar for Portuguese users of Android devices.

127. Google Maps is by far the most used mapping application for mobile devices in Portugal, and specifically, the most used Android mapping application for mobile devices in Portugal.

128. The *Gmail* application is an application that allows you to check, manage, and send email, both from emails specifically associated with a *Gmail* account, and accounts from other email service providers.

129. Using the *Gmail* application, especially when pre-installed on Android mobile devices, is a simple and convenient way for users of these devices to use their email accounts (Gmail and others).

130. By reference to January 2020, there were more than 1.8 billion *Gmail* account users worldwide (out of 4.1 billion total email users in the world), a number that increased from 350 million in 2012, and about 27% of emails viewed worldwide are currently viewed through *Gmail*[43] .

131. *Gmail* is the most used e-mail viewing/management service worldwide, and in Portugal specifically .[44]

132. The relative majority of email viewing in the world, and in Portugal specifically, currently happens via mobile devices (about 43% in 2021, followed by 36% of email viewing via a computer web *browser*).

133. The *Gmail* application, also available in Portuguese, is considered the most important application for the so-called *millennial* generation, after Facebook and Instagram[45] .

134. It is easier and more convenient for Android mobile device users who want to watch *YouTube* videos on their mobile devices to do so through the *YouTube*

[43] View at https://findstack.com/gmail-statistics/

[44] View at https://findstack.com/gmail-statistics/

[45] View at https://findstack.com/gmail-statistics/

application than through alternative means, such as a web *browser* installed on the mobile device.

135. *YouTube* is an *online* video platform with great success and use worldwide, and specifically in Portugal, being that: (i) over 2.3 billion users use *YouTube* at least once a month; (ii) over 1 billion hours of videos are viewed on *YouTube* each day; (iii) an average *YouTube* user views, on average, 9 *YouTube* pages per day; (iv) over 70% of video viewing time on *YouTube* comes from views on mobile devices; (v) *YouTube* is currently responsible, on average, for around 25% of mobile internet traffic; (vi) by the end of 2018, 5 billion Android mobile devices worldwide had the *YouTube* application installed, and this number is higher today; (vii) 95% of the world's population with internet access watches content on *YouTube*; (viii) *YouTube* is the most viewed *website* after Google's *search engine* .[46]

136. In Portugal, by reference to January 2022, about 73.7% of Internet users view content on *YouTube*, and this percentage is similar throughout the relevant period.[47]

137. Through the provisions of the agreements described above between Google and Android mobile device manufacturers, Google ensures that the Google Play Store is pre-installed on all Android mobile devices and appears prominently to users of these devices,

138. deterring pre-installation and highlighting of potential competing application stores on the same equipment.

139. It is not necessary to pre-install the Google Play Store, or to highlight it on the *homepage of* Android mobile devices, in order for them to function properly or for users of these devices to be able to download and use the Google Play Store.

140. Pre-installation on Android mobile devices of the entire *"Google Mobile Services"* package is not required for these devices to function properly or for users of these devices to download and use the applications from the *"Google Mobile Services"* package.

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[46] View at https://www.globalmediainsight.com/blog/youtube-users-statistics/

[47] View at https://www.statista.com/statistics/1219589/youtube-penetration-worldwide-by-country/

141. In the absence of the aforementioned clauses in the agreements, an Android mobile device manufacturer that wants to pre-install some Google applications, such as *Google Maps*, *Gmail* or *YouTube, could pre-install* only those applications and not pre-install (or highlight) the Google Play Store, and could notably choose to pre-install and highlight another *app store*.

142. The nature of the services and applications in question does not require you to pre-install the entire *"Google Mobile Services"* package when you want to install one or some of the Google applications on an Android mobile device.

143. There are no commercial uses that involve the necessary connection between the pre-installation of the Google Play Store and the installation of other *"Google Mobile Services"* applications.

144. **It is not possible for Android mobile device users to uninstall the Google Play Store** (or other applications from the *"Google Mobile Services"* package) pre-installed on their Android mobile device.

145. **It is not possible for Android mobile device users** whose devices do not have the Google Play Store pre-installed to **download the Google Play Store** and install it on their Android mobile device .[48]

146. ***App developers* can only develop and offer *in-app* Android applications and content, for free or for a fee, through the Google Play Store if they enter into a** specific **agreement with Google to do so**.

147. *App developers* can only develop Android apps and *in-app* content through the "Google Play Developer API" if they enter into a specific agreement with Google to do so.

148. An API is a particular set of rules and specifications that a *software* program follows in order to access and make use of the services and resources provided by another *software* or *hardware* program that also implements that API, thus achieving communication between them.

[48] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §134.

149. For more information on APIs and their characteristics, reference is made to §§89 to 93 of the European Commission Decision of July 18, 2018, in the Google Android case (AT.40099)[49] , which for reasons of procedural economy are reproduced here.

150. Under the terms of these agreements with Google, ***app developers*** **are required to grant Google Play Store exclusivity for the distribution of and making payments for *in-app* applications and content for Android**,

151. and/or are subject to a set of obligations that, in conjunction with technical restrictions and other Google practices, lead to the same result,

152. and/or become subject to a set of obligations that, together with technical restrictions and other Google practices, hinder and deter competition in the distribution of Android *in-app* applications and content and Android *in-app* content payment mechanisms and enhance the market power of the Google Play Store.

153. Specifically, **the contracts at issue**, *inter alia*:

a. **prevent *app developers* from using the Google Play Store to provide *app stores*** for **competing** Android apps and *in-app* content, **or any other product that facilitates the use of competing *app stores***;
b. **prevent *app developers* from using user information obtained through the Google Play Store to distribute Android apps or *in-app* content outside of the Google Play Store**;
c. **oblige *app developers* who sell Android apps through the Google Play Store to process these payments through the Google Play Store**;
d. **obligate *app developers* who sell *in-app* Android content for applications distributed through the Google Play Store to process those payments through the Google Play Store**; and
e. **prohibit *app developers* who distribute Android apps through the Google Play Store from directing users to payment methods other than payment through the Google Play Store**.
f. **oblige *app developers* who distribute Android apps through the Google Play Store to** set their prices within price ranges set by Google, including **respecting a minimum price**.

[49] Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

154. Indeed, in order to be able to develop and offer Android applications and *in-app* Android content, *app developers* have to enter into agreements with Google, specifically the " **Google Play Developer Distribution Agreement** "[50] (hereinafter "CDPGP"), which refers to the "**Developer Program Policies**"[51] (hereinafter "PPP"), which *app developers must* also comply with (clause 4.1 of the CDPGP).

155. Use of the "Google Play Developer API" by *app developers* who wish to develop and deliver Android applications is subject to the "Google **Play Developer API Terms of Service"** and the "Google API **Terms of Service**" [5253] .

156. The DCPGP governs the distribution of free or *in-app* Android applications and content through the Google Play Store.

157. PPPs include rules on "monetization and announcements", which break down, *inter alia, into* rules for "Payments" (hereinafter "**Payments Rules**").

158. These agreements function as adhesion contracts, their content not being negotiable with individual *app developers*, or are even rules set unilaterally (and unilaterally changeable at any time) by Google.

159. The CDPGP is entered into by *app developers* with "Google," defined as including, *inter alia,* the 2nd Defendant, the 3rd Defendant and the 5th Defendant.

160. Google is the "merchant of record" for the purposes of the "Distribution Agreement for Developers" and is their agent for sales of Android in-*app* applications or content *in* Portugal.

[**Doc. 7**which is attached hereto and is fully reproduced].

161. Under clause 3.1 of the CDPGP, the *app developer* appoints Google, specifically the 5th Defendant, as its agent for Portugal[54] .

162. Under clause 4.5 of the CDPGP, ***app developers* may not use the Google Play Store *"to distribute or make available any Product that is intended to facilitate the***

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[50] See at https://play.google.com/intl/ALL_pt/about/developer-distribution-agreement.htmlwith the updates described at https://play.google.com/intl/ALL_pt/about/developer-distribution-agreement/summary.html

[51] View at https://play.google.com/intl/pt-PT/about/developer-content-policy/

[52] View at https://developers.google.com/android-publisher/terms

[53] View at https://developers.google.com/terms

[54] View at https://support.google.com/googleplay/android-developer/answer/10532353?hl=pt

distribution of software applications and games for use on Android devices outside of Google Play."

163. The fact that competing *app stores* cannot be included for download in the Google Play Store, in conjunction with other Google practices, makes it difficult for Android mobile users to access and download competing *app stores*.

164. Clause 4.5 of the CDPGP allows Google to identify a breach of this clause if an *app developer* makes available through the Google Play Store an application that: (i) is not itself an *app store*, but facilitates or promotes access to an *app store* other than the Google Play Store; and/or (ii) enables distribution or availability of *in-app* Android content other than through the Google Play Store (e.g. by providing or directing to alternative payment mechanisms for such content).

165. The inclusion in an app made available by the Google Play Store, for example, of *links* or information that informs or directs users to competing *app stores* or to payment mechanisms other than the Google Play Store payment mechanism would be a violation of the CDPGP in conjunction with the Payments Rules.

166. In 2014, Amazon tried to use one of its Android apps to allow these Android device users to download Android apps from Amazon other than through the Google Play Store (Amazon App Store), and Google informed Amazon that this was a violation of the CDPGP and got Amazon to remove that app from the Google Play Store and replace it with a new one (Amazon Shopping App), without that functionality.

167. Under clause 4.9 of the CDPGP, ***app developers* cannot *"use user information obtained from Google Play to sell or distribute Products outside of Google Play***."

168. *App developers* receive information about the users of their apps from Google Play within the meaning of clause 4.9 of the CDPGP, and in the overwhelming majority of cases or as a rule, do not have access to information about the users of their apps in any other way.

169. It is impossible or very difficult for *app developers to* specifically inform users of their apps of the existence of alternative means of paying for *in-app* content of their apps without using the information of those users that they have obtained from Google Play.

170. Pursuant to clause 8.3 of the CDPGP, if *"Google becomes aware and determines, in its sole discretion, that a Product or any part thereof (a) violates any applicable law; (b) violates this Agreement, applicable policies or other Terms of Use, as may be updated by Google from time to time; (c) violates the terms of the distribution agreement with device manufacturers and Authorized Providers," "Google may reject, remove, suspend, limit the visibility of a Product on Google Play or reclassify the Product on Google Play or Devices. Google reserves the right to suspend and/or block any Product and/or Developer from Google Play or the Devices as described in this Section. If the Product contains elements that may cause serious damage to users' devices or data, Google reserves the right to disable the Product or remove it from the devices on which it has been installed. If the Product is rejected, removed or suspended on Google Play or Devices in accordance with Section 8.3, Google may withhold payments due to the Developer."*

171. Clause 8.3 of the CDPGP allows Google to identify a breach of obligations under this agreement *"in its sole discretion," which* allows it a wide margin of discretion in identifying such a breach,

172. allowing Google to interpret the obligations under this agreement broadly,

173. and impose the consequences under clause 8.3 of the CDPGP, which include consequences that completely or almost completely exclude *app developers from* access to users of Android mobile equipment, i.e., exclude them from the market(s) in which they are active downstream.

174. According to the Google Play Developer API Terms of Service, this API may only be used for *"activities related to the distribution of products in accordance with the Google Play Developer Distribution Agreement"*, and may not be used to *"publish apps on behalf of third parties with a developer tool or service"*, and *"a violation of this provision may result in suspension, termination of access to API Publishing, your developer account and/or termination of third party apps created, submitted, published, distributed or updated that violate this provision"*[55] .

[55] https://developers.google.com/android-publisher/terms

175. According to Google's Payment Rules, *app developers* selling Android apps through the Google Play Store *"**must use the Google Play billing system as the payment method for those** transactions"*[56] .

176. According to Google's Payment Rules, apps distributed in the Google Play Store that sell ***in-app* Android content** *"**must use the Google Play billing system for those transactions**, unless Section 3 or Section 8 applies."*[57]

177. Section 3 excludes from the application of these Payment Rules payments for goods and services referred to *above* in Article 93.

178. Under Section 3, the collection of payments *"intended for content or services that facilitate online gambling"* is subject to special rules, but these do not impact the commission charged by Google[58] .

179. Section 8 introduces special rules for selling *in-app* Android content *in* South Korea, allowing *app developers in* that context to offer users an in-app billing system in addition to the Google Play Store billing system for such transactions (see *below* in section 1.6 for more details on what led to these special rules).

180. In accordance with Google's Payment Rules with *app developers*, apps **may not direct users to a payment method other than the Google Play billing system**, namely through: (i) an app's Google Play tab; (ii) in-app promotions related to purchasable content; (iii) WebViews, buttons, links, messages, advertisements, or other calls to action in the app; and (iv) user interface flows in the app, including account creation or sign-up flows, that direct users of an app to a payment method other than the Google Play Store billing system as part of those flows[59] .

181. According to Google's Payment Rules with *app developers*, you can only use in-app virtual coins within the app or game title for which they were purchased[60] .

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[56] See at https://support.google.com/googleplay/android-developer/answer/9858738in particular clause 1 of the content of the identified hyperlink, which for reasons of procedural economy is reproduced here.

[57] See at https://support.google.com/googleplay/android-developer/answer/9858738in particular clause 2 of the content of the identified hyperlink, which for reasons of procedural economy is reproduced here.

[58] View at https://support.google.com/googleplay/android-developer/answer/9877032#gambling-apps

[59] View at https://support.google.com/googleplay/android-developer/answer/9858738

[60] View at https://support.google.com/googleplay/android-developer/answer/9858738

182. The superfluous nature of the exclusivity of the Google Play Store payment mechanism, for *in-app* Android content purchases, is demonstrated by only applying to *in-app* payments for "digital" goods and services, but no longer for "physical" goods and services (e.g., meal delivery by the Uber Eats app).

183. And because that exclusivity does not exist in other operating systems, where you can use multiple payment mechanisms within the applications that run on those systems, such as in the operating systems that run on personal computers.

184. The indication by *app developers of* the **price of their apps and *in-app* content** has to be done **within price ranges set by Google**, which vary by currency and country.

185. Despite stating in clause 3.3 of the CDPGP that the *"products are presented to users at such prices as the Developer establishes in its sole discretion*."

186. **Google obliges *app developers* to charge a minimum price**, which in the case of the Eurozone is **set at 0.50 EUR,** and the only option for *app developers* who want to charge less than this is to offer the application or content for free.

187. Under clause 2.2 of the CDPGP, Google only allows the distribution of Android apps and *in-app* content through Google Play when they belong to a "validated and reputable developer."

188. Under the contractual terms, Google may block access to or delete an *app developer* from the Google Play Store if it considers the *app* "unsuitable" in its sole discretion.

189. Under clause 10.3 of the CDPGP, Google may terminate this agreement with an *app developer*, *"immediately upon written notice or thirty (30) days' written notice if required under applicable law," inter alia*, *"if (a) the Developer has breached any provision of this Agreement, any confidentiality agreement or other agreement relating to Google Play or the Android platform*; (...) *(c) it* is *no longer an authorized developer, a qualified developer or is barred from using Android software."*

190. The contractual obligations identified above are enforced in practice by Google, which takes action when an *app developer* violates them.

191. The contractual terms and conditions described above, taken in context, have a competition-restricting object,

192. and have restrictive effects on competition by effectively preventing or hindering market entry by distributors and payment engines competing with Google,

193. and have a significant impact on the relevant market(s), in particular for the same reason.

194. The contractual obligations described above are to be interpreted and their effects are to be weighed against **other Google practices**, which are described below.

195. Google, through the programming of the Android system, under the pretext of protecting the security of mobile devices and their users, causes **users of Android mobile devices who wish to use alternative *app stores* to the Google Play Store,** or download applications directly from the *websites* of *app developers* or other entities, to be **confronted with steps and warning messages that are misleading and dissuade from** using these alternative mechanisms, **or prevent their use altogether**.

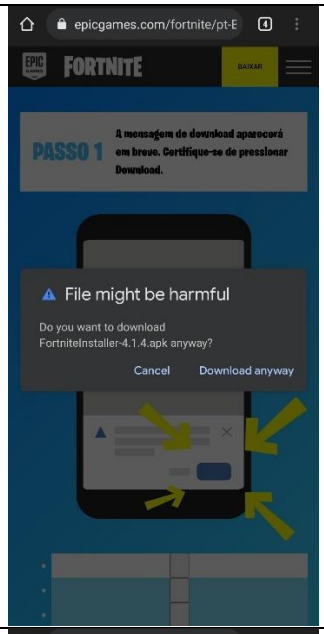
196. Downloading an application to an Android mobile device, other than through the Google Play Store, requires several steps, including changing the device's settings (which it comes pre-programmed with) and reading and overcoming several warnings that such a download may harm or damage the Android mobile device.

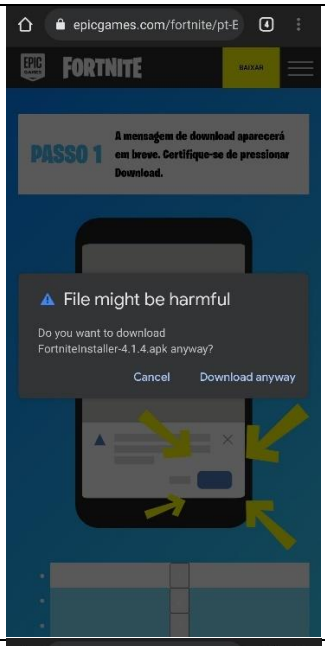
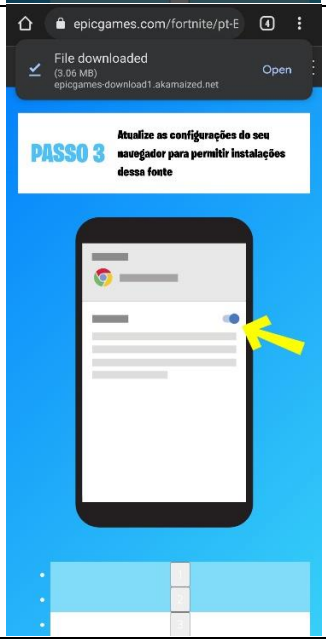
197. These steps and warnings vary between Android devices and depending on the version of the Android operating system.

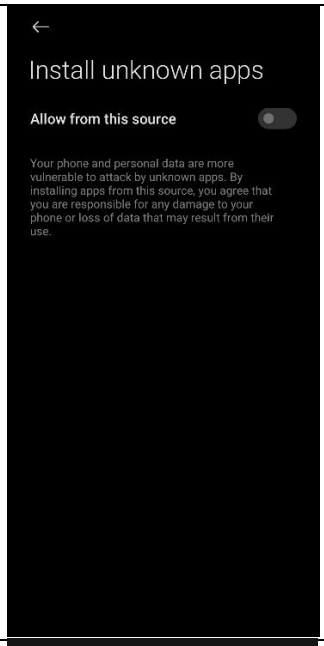
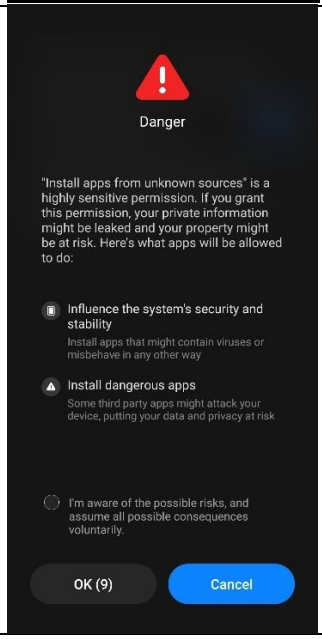
198. Since Android 8.0, permission to install an application other than through the Google Play Store is done for each specific application, rather than a general system-wide permission, which means that the user has to repeat the procedure for each application they want to install, rather than being able to change this system feature once and for all.

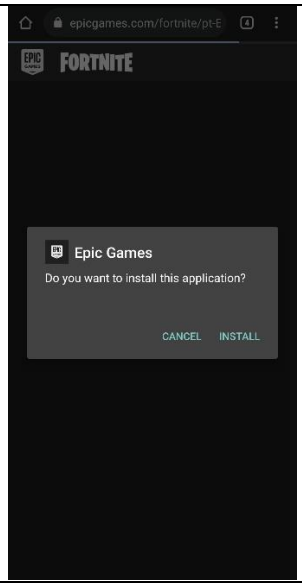
199. So, for example, a user of Xiaomi Android mobile equipment (with MIUI 12.5) trying to install the Fortnite application (game) on his device, from a web *browser,* is confronted with the following succession of messages and steps:

Messages / steps	

#1 Fortnite's Main Web Page			
#2 Page to download the application			

#3 Warning when searching for application download			
#4 Completion warning after selecting "Download anyway			

#5 Screen to authorize application installation from outside the Google Play Store			
#6 Warning when selecting allow installation			

#7 Latest order for installation		

200. The average consumer is deterred from using these alternative distribution methods to the Google Play Store by the type and number of steps that must be performed and the system warnings.

201. According to internal Google documents, at least 68% of Android devices worldwide never change the initial settings that prevent downloading applications other than from the Google Play Store .

202. Google mandates that attempts to download applications other than from the Google Play Store are indicated by the Android operating system as being risky as long as the application in question is not distributed through the Google Play Store or another pre-installed *app store* approved by Google, even if the owner of that application demonstrates to Google that the application is safe for users and Google knows that there are no or only very marginal cases of *malware* associated with the use of such applications (e.g. for the Fortnite game application or Amazon applications).

203. Even if there were legitimate reasons to be concerned about the security of Android apps being installed from sources other than the Google Play Store, less restrictive mechanisms are available from competitors that would achieve the same result.

204. Android users have other mechanisms at their disposal - independent of Google - that can ensure the security of their mobile devices, including antivirus *software*.

205. The unnecessary and/or disproportionate nature of restrictions on installing applications from sources other than the Google Play Store is demonstrated, *inter alia*, by comparing the possibility and steps of installing applications on personal computers, which are exposed to the same or even more risks, without the operating system of personal computers (running in an ecosystem where there is competition in the distribution of applications) imposing these kinds of restrictions.

206. Google offers users an "**Advanced Protection Program**"[61] , which it claims is intended to keep users' private information secure and to prevent unauthorized access to user accounts, and users who join this program are absolutely prevented from downloading applications to their Android devices other than from the Google Play Store or an *app store* pre-installed on the device and approved by Google.

207. Google **prevents modifications to the Android operating system code that make it easier to download applications other than from the Google Play Store**, as part of the restrictions and agreements called Anti Forking Agreements, more recently replaced by "compatibility" agreements (Android Compatibility Agreements), with the same effects.

208. This practice, within the scope of the Anti Forking Agreements, has already been identified as an abuse of dominant position by the European Commission, as described in section 1.6.

209. The Android Compatibily Agreements continue to prohibit Android mobile device manufacturers from marketing devices under their own brand with operating systems altered to facilitate *side loading* or that make it easier for competing *app stores to* use features such as automatic *background updates*.

210. If Android mobile device manufacturers do not accept these conditions, they will not be allowed to use Google's APIs and *Google Play Services*, without which applications cannot have important features such as *push notifications* and device location detection.

211. Google **prevents *app stores other than the Google*** Play Store **from including in their applications basic, useful features expected by** Android mobile device users,

[61] See: https://landing.google.com/advancedprotection/.

such as automatic updates to downloaded applications running **in the *background of*** the Android operating system (and verified for applications distributed by the Google Play Store)[62] .

212. Without these basic features, blocked by Google, *app stores* other than the Google Play Store are at a significant competitive disadvantage in providing Android application distribution services and are less attractive to *app developers* and Android device users,

213. making it difficult for them to enter and succeed in this market.

214. Google consolidates its position in the *online* advertising market through agreements that are under review, for alleged illegality, in several jurisdictions[63] .

215. Google **only allows you to advertise Android mobile apps via ads in the Google universe**, for example on Google *Search* or *YouTube*, **if those apps are distributed via the Google Play Store**.

216. As a result of this practice by Google, all *app developers* who want to advertise their apps *online* through Google universe *websites* are required to make those apps available through the Google Play Store.

217. Google has entered into **agreements with potential competitors** to persuade them, in exchange for financial advantages, not to enter the relevant markets and not to compete, or to compete to a lesser extent, with the Google Play Store.

218. This was at least the case for the agreement between Google and Samsung to prevent or reduce competition from the Galaxy Store in exchange for payments by Google to Samsung, as described in a case brought by the *Attorneys General of* several US states, the details of which are to be determined in this case.

219. According to the description of this agreement contained in the US lawsuit "In re Google Play Consumer Antitrust Litigation" (case no. 3:20-CV-05761-JD) (§§89 to 91 of the pleading, our translation), which contains confidential information to be clarified in the context of the present action:

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[62] View at https://www.techtudo.com.br/noticias/2019/06/por-que-meu-android-nao-atualiza-entenda-a-distribuicao-do-sistema.ghtml [Why won't my Android update? Understanding the system distribution | Operating Systems | TechTudo]

[63] See https://eco.sapo.pt/2022/01/15/eua-acusam-google-e-meta-por-acordo-na-publicidade-online/

"Faced with the possibility of Samsung's Galaxy Store coming to distribute major apps, Google came up with a scheme to effectively pay Samsung to walk away, using part of its monopoly profits to discourage Samsung from becoming a full competitor. To avoid the "worst-case scenario" of a competing "Samsung ecosystem," Google decided to offer Samsung a deal originating from a secret initiative it code-named "Project Banyan." Project Banyan was developed by Google in early 2019 to "mitigate the risks related to Samsung's pursuit of a more profitable app store." The risk was indeed significant. Google estimated that Samsung's Galaxy Store represented a potential revenue risk of USD 3.2 billion by 2022, which would correspond to a "13% / 35% loss of revenue on Samsung devices. Google decided that while it probably couldn't get Samsung to "abandon the Galaxy Store" completely, it could propose that Samsung remove all shared games and apps from its store, leaving the Galaxy Store populated only with "exclusive" titles. In short, Google would remove the Galaxy Store as a potential competitor.

The plan specifically envisioned Google co-opting the Galaxy Store through technology. Google anticipated that for Samsung-exclusive titles, it could implement a "backend" process known internally as "Ally-Oop." This process would allow Samsung-exclusive apps to continue to be hosted in Samsung's Galaxy Store, but "served" by Google Play Billing. In essence, the Galaxy Store would exist only nominally. If implemented, Google's plan to "abandon the Galaxy Store" would then have been largely successful. The "backend" would be Google's, allowing Google to maintain its control over the monopoly rents it continues to earn, year after year. And, critically, Google would continue to control the holy grail: capturing the revenue from in-app purchases.

In exchange for Samsung's agreement to the Banyan Project business plan, Google was willing to offer Samsung, among other things, [CONFIDENTIAL CONTENT] as well as [CONFIDENTIAL CONTENT]."

220. Google also offered financial incentives to some large *app developers* to continue distributing their apps through the Google Play Store, which means that the large app *developers* who accepted such offers do not, in practice, bear the same level of commission as other *app developers*.

221. As a result of the practices described above, Android applications and *in-app* Android content can practically only be purchased and/or are practically only acquired by users residing in Portugal through the Google Play Store,

222. and it is made impossible or very difficult and deterred for users to access Android applications through *app stores* other than the Google Play Store, as well as to access *in-app* Android content paid for by payment mechanisms other than the Google Play Store.

223. Whenever a consumer residing in Portugal wants to pay to download an application to his Android mobile device, or to make any payment for Android *in-app* content, he has no effective alternative but to do so on (or through the payment mechanism of) the Portuguese Google Play Store and/or he almost always does so on (or through the payment mechanism of) the Portuguese Google Play Store.

224. This is the result of a broad strategy of Google, embodied in particular in the various practices described in this application, and which Google set from the outset with the clear aim of reserving the market as much as possible for itself and extracting monopoly rents from it.

225. According to a 2009 internal Google document to be obtained in connection with the present action, cited in the US lawsuit "In re Google Play Consumer Antitrust Litigation" (case no. 3:20-CV-05761-JD) (§109 of the opening brief, our translation), Google told a major mobile device manufacturer that it understood that a single *app store* was an essential piece of the Android ecosystem and that it was working to make the Google Play Store (then Android Market) that single distribution system .

226. After developing their Android application, *app developers* have to upload them to the Google Play Store and indicate a set of parameters, including the price they want to set (within the parameters set by Google) and the countries in which they want the application to be available.

227. The Android Marketplace was launched by Google in 2008, covering, namely, the Portuguese territory and the Android devices of users living in Portugal.

228. By 2011, Google had launched other *online* stores specializing in specific digital content, such as the Google eBookstore and Google Music

229. In 2012, the Android Marketplace was merged with Google's other *online* stores and renamed Google Play Store (or just Google Play) .[64]

230. For the purposes of this action, whenever the term "Google Play Store" is used, it means the Android Marketplace and other *online* stores specializing in specific digital content (such as the Google eBookstore and Google Music) until 2012 and the Google Play Store thereafter.

231. The Google Play Store is a Google platform, accessible via Android devices and pre-installed on Android devices, through which, *inter alia,* Android applications can be searched, viewed, downloaded for free or for a fee, and managed, and through which payments for Android application content are processed.

232. The Google Play Store is a digital distribution service operated and developed by Google, which functions as the official *app store* for certified Android devices, allowing users to search and download Android applications, as well as functioning as a digital *media store* for the distribution of music, books, movies and television shows . [65]

233. The Google Play Store is an Android application distribution (*app store*) and payment platform for Android application content, serving as an intermediary between *app developers* and Android device users .[66]

234. For more information on the Google Play Store, reference is made to §§132 to 137 of the European Commission's Decision of July 18, 2018, in the Google Android case (AT.40099)[67] , which for reasons of procedural economy are reproduced here.

235. *App developers* purchase Google's brokering, distribution, and payment processing services, and Google sells the *apps* to Android users and processes payments for *in-app* content from users.

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[64] See: https://www.androidauthority.com/android-market-google-play-history-754989/; and https://www.androidauthority.com/google-play-android-market-google-play-store-google-play-music-google-play-movies-60425/.

[65] View at https://en.wikipedia.org/wiki/Google_Play

[66] Report and Accounts of the 1st Defendant, 2021, pp. 6 and 30.

[67] Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

236. Android devices started being sold in Portugal at least on July 6, 2009 .[68]

237. Consumers resident in Portugal have had access to Android devices and can now purchase Android applications and *in-app Android* content from the Google Play Store from at least July 6, 2009, which is the start date of the relevant period for the purposes of this action.

238. The Google Play Store is a service provided to users by the 3rd Defendant[69] .

239. The digital content on Google Play, including content from third parties, is provided by the 5th Defendant, and it is with the 5th Defendant that users enter into a sales contract when downloading, viewing, using or purchasing content from the Google Play Store .[70]

240. Your use of the Google Play Store and the applications and digital content made available through it is subject to the Google Play Terms of Use and the Google Terms of Use, the former prevailing in case of conflict[71] .

241. Contracts to purchase content through the Google Play Store are subject to the Google Play Terms of Use[72] .

242. User information collected by the Google Play Store is subject to the Google Privacy Policies[73] .

243. The Google Privacy Policies apply to all services provided by the 2nd Defendant and its affiliates[74] .

244. Google reserves the freedom to unilaterally change the Google Play Terms of Use with at least 30 days notice, and the new version will take effect for the use of all content (including previously purchased content) and for all subsequent installations and purchases. The only alternative for the user, if he does not want

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[68] See: https://www.jn.pt/inovacao/primeiro-smartphone-com-a-plataforma-android-chega-a-portugal-1287612.html; and https://www.comparamais.pt/blog/a-historia-do-telemovel-em-portugal-e-no-mundo.

[69] See Google Play Terms of Use, in particular paragraph 1: https://policies.google.com/terms?hl=pt-PT

[70] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

[71] See Google Play Terms of Use, in particular paragraph 1: https://policies.google.com/terms?hl=pt-PT

[72] See Google Play Terms of Use, in particular section 3: https://policies.google.com/terms?hl=pt-PT

[73] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

[74] See at: https://policies.google.com/privacy?hl=pt-PT&gl=pt

to accept the revised terms, is to *"download previously purchased or installed content"* (if technically possible) and *"stop using Google Play"*[75] .

245. Under the Google Play Terms of Use, Google has the right to terminate a user's access to the Google Play Store, content and their Google account if the user violates *"one or more of the Content restriction provisions of the Terms, materially or repeatedly violates one or more of the other Terms, or is investigated by Google for suspected misconduct"* and does so *"without the user being entitled to any refund"*[76] .

246. According to the Google Play Terms of Use, a **user may not, *inter alia*: *"attempt to, assist, authorize or encourage any third party to circumvent, disable or defeat any of the security components or features that secure, hinder or otherwise restrict access to Content or Google*** *Play"*[77] .

247. The Android operating system **allows Google to collect information about the applications installed on the mobile device through the Google Play Store or from other sources**[78] .

248. Google provides in the Google Play Store Terms of Use that it **can warn users if it considers certain internet addresses or applications to be unsafe** (in Google's view)[79] .

249. Google provides in the Google Play Store Terms of Use that **if Google believes that a particular web address or application is harmful to devices, data or users**, **Google may unilaterally remove or block its installation on mobile equipment**[80] .

250. Also according to the Google Play Store Terms of Use, **users may choose to disable some (not all, it is not specified which) of these "protections" on their mobile device, but even then it cannot prevent Google from continuing to receive information about installed applications, and applications that are installed on**

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[75] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

[76] See Google Play Terms of Use, in particular section 4: https://policies.google.com/terms?hl=pt-PT

[77] See Google Play Terms of Use, in particular section 4: https://policies.google.com/terms?hl=pt-PT

[78] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

[79] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

[80] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

mobile device from sources other than the Google Play Store may still be reviewed by Google for "security issues"[81] .

251. According to the Google Play Store Terms of Use, **when a user selects a *link on* a mobile device, Google has the right to check if there is a matching application available and direct users to download that application from the Google Play Store .**[82]

252. To purchase Android applications or *in-app* Android content through the Google Play Store, users must have a Google Payments account (linked to their Google account) and accept the Google Payments Terms of Use, and the Google Terms of Use (which take precedence over these) and the Google Payments Privacy Notice[83] also apply to transactions via Google Payments.

253. Pursuant to the Google Payments Privacy Notice, the data controller of Android mobile device users for the purpose of payments through the Google Play Store is the 3rd Defendant, and the data controller of sellers (*app developers*) is the 4th Defendant .[84]

254. Google, through the 5th Defendant, states that it is neither committed nor obligated to resolve disputes regarding the purchase of Android applications or *in-app* Android content before alternative dispute resolution entities[85] .

255. Google Payments allows Google Play Store users to store and manage various types of payment methods in their Google account and use them to purchase applications and content on the Google Play Store, including: payment cards (credit, debit and prepaid), account numbers or virtual cards, bank accounts,

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[81] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

[82] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

[83] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT and, also, https://payments.google.com/payments/apis-secure/u/0/get_legal_document?ldo=0&ldt=buyertos&ldr=pt and https://payments.google.com/payments/apis-secure/u/0/get_legal_document?ldo=0&ldt=privacynotice

[84] View at : https://payments.google.com/payments/apis-secure/u/0/get_legal_document?ldo=0&ldt=privacynotice

[85] See Google Play Terms of Use, in particular section 3: https://policies.google.com/terms?hl=pt-PT

operator billing accounts, gift vouchers, public transit passes, and digital wallets or accounts held by the user with third party companies .[86]

256. According to the Google Payments Terms of Use, the *"availability of a particular Payment Method or its compatibility with Google Pay may depend on your country of residence and other factors"*[87] .

257. The exclusivity of the Google Play Store and the Google Play Store *in-app* purchase mechanism is the result of Google's choices, not a technical requirement or legal imposition.

258. Google may choose to allow competition with the Google Play Store from other app delivery platforms and other *in-app* purchase systems, potentially created by *app-developers* themselves or by service providers to *app-developers*.

259. The distribution of applications for other operating systems is done in competitive environments, without exclusivity of the *app store of the* company that owns the respective operating system.

260. Users of the Windows operating system for personal computers have at their disposal a large number of platforms where they can search for and obtain applications.

261. According to Google, it operates as an agent when providing services in the context of Google Play, providing a service to facilitate transactions between *app developers* and end users, and is compensated for this service with a commission[88] .

262. For providing the services to *app developers of* making Android applications available for download (distribution) through the Google Play Store, and for providing payment services for *in-app* Android content, Google generally charges

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86 https://payments.google.com/payments/apis-secure/u/0/get_legal_document?ldo=0&ldt=buyertos&ldr=pt

87 https://payments.google.com/payments/apis-secure/u/0/get_legal_document?ldo=0&ldt=buyertos&ldr=pt

88 Report and Accounts of the 1st Defendant, 2021, p. 55.

a fee (or "service fee"), which Google may unilaterally review from time to time under clause 3.4 of the CDPGP,

263. This is, as a rule, a **30% commission**.

264. And it has charged this same commission since it launched these services.

265. *Regarding in-app* Android content sales in Portugal by auto-renewal subscription, after the first 12 months of subscription, as of January 2018, Google will have started charging a 15% commission.

266. With regard to sales of Android apps and *in-app* Android content in Portugal, as of July 1, 2021, Google will have started charging the following commission levels:

a. 30%, for *app developers* who "are not enrolled in the 15% service fee level";
b. 30% for *app developers* who "are enrolled in the 15% service fee level", for sales beyond 1 million USD each year; and
c. 15% for *app developers* who "are enrolled in the 15% service fee level", for sales up to 1 million USD each year .[89]

267. To "enroll in the 15% service fee tier," an *app developer* must: (i) create a payment profile; (ii) create an account group; (iii) accept the terms of use of the 15% service fee level[90] .

268. Google has established, as of December 18, 2021, a special commission rule, applicable only to transactions with users in South Korea: *app developers* who offer an alternative in-app billing system in addition to the Google Play billing system will be charged a commission for transactions made through that alternative billing system *"equal to the service fee applicable to transactions through the Google Play billing system reduced by 4%"* (see *below*, in section 1.6, for more details on what led to these special rules) .[91]

269. With regard to sales of Android apps and *in-app* Android content in Portugal, as of January 1, 2022, Google will have started charging the following commission levels:

a. 30%, for *app developers* who "are not enrolled in the 15% service fee level";

[89] View at https://support.google.com/googleplay/android-developer/answer/10632485?hl=pt

[90] View at https://support.google.com/googleplay/android-developer/answer/10632485?hl=pt

[91] View at https://support.google.com/googleplay/android-developer/answer/112622?hl=pt

b. 30% for *app developers* who "are enrolled in the 15% service fee level", for sales beyond 1 million USD each year;
c. 15% for *app developers* who "are enrolled in the 15% service fee level", for sales up to 1 million USD each year;
d. 15% for automatic renewal subscription sales (applicable already during the first 12 months of subscription)[92] .

270. As the publicly available data do not clearly identify the difference between the fees charged as of July 1, 2021 and as of January 1, 2022, these changes should be clarified within the scope of this proceeding.

271. After the above rules on reduced commissions go into effect, the vast majority of transactions made on the Portuguese Google Play Store, by value, are still subject to the 30% commission, in an exact percentage to be determined in this action.

272. Google charges a $25 payment to any *app developer* who wishes to register to sell their Android apps through the Google PlayStore .

273. By itself, this imposition of the registration fee generates significant annual revenues for Google, to be determined under this action.

274. These revenues are independent of the sale of any Android application or *in-app* Android content, and offset costs of developing and maintaining the Google Play Store.

275. Google derives very significant annual revenues from ads (paid advertising) placed by *app developers* on *Google Search*, *YouTube* and on other Google universe *websites*, in an exact amount to be determined in the context of this action.

276. These revenues are independent of the sale of any Android application or *in-app* Android content, and offset costs of developing and maintaining the Google Play Store.

277. Google Play revenues are included by Google in the *"Google other" revenue* category, in which Google had the following total worldwide revenues: in 2009, USD 761 million; in 2010, USD 1 075 million; in 2011, USD 1 374 million; in 2012, USD 2 353 million; in 2013, USD 4 972 million; in 2014, USD 6 945 million; in 2015, USD

[92] View at https://support.google.com/googleplay/android-developer/answer/112622?hl=pt

7 151 million; in 2016, USD 10 080 million; in 2017, USD 14 277 million; in 2018, USD 19 906 million; in 2019, USD 17 014 million; in 2020, USD 21 711 million; in 2021, USD 28 032 million[93] .

278. According to another source, the worldwide sales of the Google Play Store in 2020 amount to USD 38.6 billion (potentially, referring to total sales, including amount due to *app developers* and Google commissions).

279. Google's annual costs of providing the services and annual revenues (in commissions) from the Google Play Store to be determined in this action by access to evidence in Defendants' possession.

280. According to internal Google documents cited in the U.S. lawsuit "In re Google Play Consumer Antitrust Litigation" (case no. 3:20-CV-05761-JD) (§§197-198 of the pleading), Google calculated that a 6% commission would suffice to offset the costs of providing Google Play Store services .

281. According to an internal Google document cited in the same lawsuit (§199 of the pleading), Google has already stated that the 30% commission has no rationale other than to set the same commission established in the Apple App Store .

282. According to the above data, Google makes an astronomical profit margin on the Google Play Store that bears no relation to a profit margin that can be expected in a competitive market.

283. An economic study submitted to a UK court in a representative action for damages for UK consumers (Competition Appeal Tribunal, case no. 1408/7/7/21[94]), came to the preliminary conclusion (subject to review after access to evidence held by the Defendants) that Google's profit margin is excessive relative to profit margins expected in competitive markets, and that it has increased over the years rather than decreasing as one would expect in a competitive environment.

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[93] Report and Accounts of the 1st Defendant, 2021, pp. 31, 34 and 61; Report and Accounts of the 1st Defendant, 2020, pp. 34, 36, 61 and 67; Report and Accounts of the 1st Defendant, 2019, pp. 30, 33, 61 and 62; Report and Accounts of the 1st Defendant, 2018, pp. 30, 32 and 59; Report and Accounts of the 1st Defendant, 2017, pp. 45, 49 and 82; Report and Accounts of the 1st Defendant, 2016, pp. 30, 32 and 53; Report and Accounts of the 1st and 2nd Defendants, 2015, pp. 37, 39-40 and 70; Report and Accounts of the 2nd Defendant, 2014, pp. 27, 28 and 53; Report and Accounts of the 2nd Defendant, 2013, pp. 56, 57 and 59; Report and Accounts of the 2nd Defendant, 2012, pp. 36-38 and 71; Report and Accounts of the 2nd Defendant, 2011, p. 49; Report and Accounts of the 2nd Defendant, 2010, p. 32; Report and Accounts of the 2nd Defendant, 2009, pp. 44 and 73.

[94] View at https://www.appstoreclaims.co.uk/Google#about

284. The profit margins on the distribution of analogous digital services are, as a rule, in the absence of monopoly situations, dramatically lower than the profit margins achieved by Google in these markets.

285. Google is only able to charge the aforementioned 30% commission because of the lack of competition and almost complete exclusivity it holds over the distribution of Android apps and *in-app* Android content.

286. This fee is disproportionate to the costs of providing the services in question,

287. is disproportionate to the economic value of the service,

288. is excessive,

289. and is iniquitous.

290. Google itself acknowledges in internal documents that this commission percentage is arbitrary.

291. Within the context of the foregoing facts, the above characteristics of the commission amount are further confirmed by the following facts.

292. First, providers of application distribution services for other operating systems, with much lower distribution volumes and therefore lower economies of scale and scope than Google, are able to charge commissions of 15% or less and still make a profit.

293. Second, the value of the fee has remained unchanged over time, despite the fact that the large increase in the volume of applications and transactions necessarily implies greater economies of scale and scope in the provision of these services, and that the initial costs of developing and launching these services by Google have certainly already been amortized.

294. Third, Google charges the same commission for the Android app distribution and payment service as it does for a service limited to payment for *in-app* Android content, the distribution of which is provided by the app itself, and which therefore require a more limited scope of service by Google than in the case of Android app distribution and payment.

295. Fourth, Google itself believes that a 15% commission for the first million USD of *add developers*' sales volume is justified, and there is no economic justification, from the perspective of the relationship with the costs of provision and the value of the services, for the commission paid by *app developers* up to the first million USD in sales to be lower than the commission paid by *app developers over the* first million USD.

296. Fifth, Google's recent reduction of the commission to 15% (i.e. a halving of the price) for *add developer* sales up to 1 million USD and for subscription services shows that it is possible for Google to charge a 15% commission and still make a profit, since, like any rational economic agent, Google will not provide the service in question without earning at least more revenue than its opportunity cost.

297. Sixth, that commission leads to an annual profit margin that is much higher than the expected profit margin in distribution businesses, and which has increased over the years.

298. Seventh, several damages actions have been brought and are still pending by *app developers* and consumer representatives in the US and the UK alleging excessive pricing, demonstrating that there is now a widespread perception in the market that the commission charged by Google for the services in question is higher than it would be in the absence of the anti-competitive practices in question, and is excessive and inequitable.

299. The Defendants are only able to collect the aforementioned level of commissions by adopting practices that depart from the allowed legal framework.

300. The distribution of applications for other operating systems, where there is competition among the supply agents of the distribution platforms, is done with lower commissions.

301. Microsoft, owner of the Windows operating system for personal computers, also has an *app store* through which it distributes applications for Windows, but it does not prevent the distribution of applications for Windows through other platforms and by its competitors. Third parties can develop their own app *stores*, *app developers* can distribute their apps through any app *store,* and personal computer users can download apps from any app *store*.

302. In the case of applications for the Windows operating system, some distributors charge *app developers* commissions of less than 15%, included:

a. the *Epic Games Store*, which charges a 12% commission ;[95]
b. *HumbleBundle* charges a 5% commission, plus payment processing costs, which it estimates at 5%, for a total commission of 10% ;[96]
c. Microsoft's PC *app* store in 2019 charged a commission, depending on how the user arrived at the page for the download, of 15% or 5% (except for games)[97] , and in April 2021 reduced its commission on games to 12%[98] . As of the end of July 2021, Microsoft stopped charging any commission for using Microsoft's mechanism for paying for *in-app* content .[99]

303. These commissions are the result of, or at least occur in the presence of, competition in the distribution of Windows applications.

304. The platform with a dominant position in the distribution of PC games, Steam, which was fined by the European Commission for anti-competitive *geoblocking* practices[100] , passed in 2018, facing the launch of competition from *Epic Games Store*, reduced the commissions it charged, in a tiered system, with a decreasing percentage as sales volume increases (precisely the opposite logic to that followed by Google in giving a discount on commissions only up to the first million USD), namely: 30% for the first 10 million USD, 25% for sales up to 50 million USD and 20% thereafter[101] .

305. Apple charges a 30% commission on its *Apple App Store*, but this commission is also the result of Apple's abuse of its dominant position in the markets for iOS

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[95] See at: https://www.mcvuk.com/business/new-epic-games-store-takes- on-steam-with-just-12-revenue-share-tim-sweeney-answers-our-questions [MCV/Develop, New Epic Games Store takes on Steam with only 12% revenue share - Tim Sweeney answers our questions (December 4, 2018)].

[96] See at https://www.humblebundle.com/developer/widget and also at https://support.humblebundle.com/hc/en-us/articles/202742190-Widget-Developer-FAQ.

[97] View at https://9to5mac.com/2019/03/06/microsoft-store-revenue-share/

[98] See https://www.theverge.com/2021/4/29/22409285/microsoft-store-cut-windows-pc-games-12-percent

[99] View at https://blogs.windows.com/windowsexperience/2021/06/24/building-a-new-open-microsoft-store-on-windows-11/

[100] See: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_170.

[101] View at https://store.steampowered.com/news/group/4145017/old_view/1697191267930157838

app distribution and iOS *in-app* content, and is the subject of stand-alone litigation.

306. As the CEO of game company Epic, Tim Sweeney, explained:

> *"In running Fortnite we* [Epic] *learned a lot about the cost of running a PC digital store. The math is very simple: we pay between 2.5% and 3.5% for payment processing for major payment methods, less than 1.5% for CDN134 costs (assuming all games are updated as frequently as Fortnite), and between 1% and 2% for variable operational and customer support costs. The fixed costs of developing and maintaining a platform become negligible on a large scale, By our analysis, stores charging 30% are making a profit margin of around 300% to 400%. But with the developers* getting 88% of the revenue and Epic getting 12%, this store will still be a profitable business for *us."*[102] .

307. Sales of *in-app* Android content represent the vast majority of sales through the Portuguese Google Play Store.

308. Subject to confirmation in the present proceeding, via access to evidence in Defendants' possession, it is estimated that at least 70% of the Portuguese Google Play Store's revenues come from sales of *in-app* Android content, particularly in the context of games.

309. The Google Play Store is distinct and separable from Android *in-app* content payment mechanisms, including Google's *in-app* Android content payment mechanism.

310. There is demand for alternative payment mechanisms to Google's *in-app* payment mechanism via the Google Play Store. If it were not for Google's ban on these

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[102] Our translation. Original: *"While running Fortnite we [Epic] learned a lot about the cost of running a digital store on PC. The math is quite simple: we pay around 2.5 per cent to 3.5 per cent for payment processing for major payment methods, less than 1.5 per cent for CDN134 costs (assuming all games are updated as often as Fortnite), and between 1 and 2 per cent for variable operating and customer support costs. Fixed costs of developing and supporting the platform become negligible at a large scale. In our analysis, stores charging 30 per cent are marking up their costs by 300 to 400 per cent. But with developers receiving 88 per cent of revenue and Epic receiving 12 per cent, this store will still be a profitable business for us.* https://www.mcvuk.com/business/new-epic-games-store-takes-on-steam-with-just-12-revenue-share-tim-sweeney-answers-our-questions

alternative payment mechanisms, some *app developers* would hire the services of these alternative mechanisms to make *in-app* Android payments.

311. For the sale of *in-app* Android content there is a wide range of payment mechanisms already available in the market, with very low commissions or processing costs (up to a maximum of 5%), and which could be made available and integrated into Android applications, if it were not for Google's practices that prohibit and prevent it.

312. The services associated with these payment mechanisms are offered independently of other services, namely by companies that specialize in providing such services.

313. This is the case with payment mechanisms such as PayPal, Square or Stripe, which charge commissions of less than 5% .

314. *Online* payment solutions with ATM references or with Visa, Mastercard or American Express credit cards in Portugal also incur commission costs of less than 5%.

315. In addition, some *app developers* could offer payment mechanisms for their *in-app* Android content using free, or negligible, or less than 5% payment methods.

316. Epic Games, for example, currently offers in the Epic Games Store the option to use a proprietary payment method called "Epic Direct Payment".

317. When Epic Games sought payment mechanism service providers for *in-app* content to be marketed in its games, it received in March 2020 a proposal from Coda Payments, to use the Codashop system (widespread especially in Asia), which entailed a commission (for the whole world) between 7% and 10%.

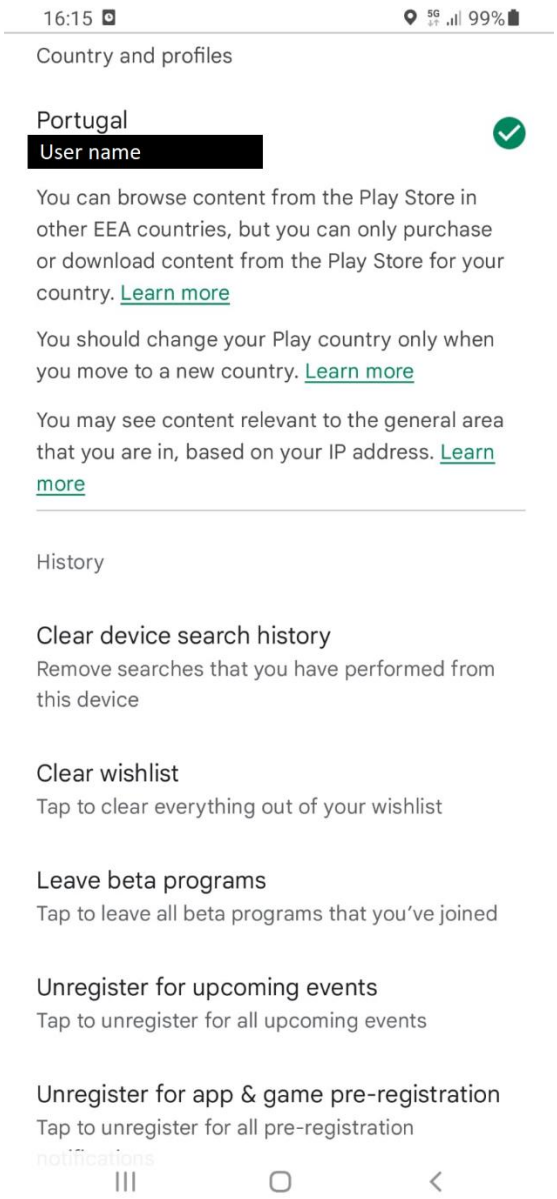
318. The use of the Google Play Store requires that you have an account associated with the Google Play Store ("Google Play account").

319. The same Google Play account can have several devices associated with it (for example, more than one Android mobile device), at the same time or successively.

320. The same user can have more than one Google Play account and use them on multiple Android devices [103]

321. The Google Play Store account is associated with a specific country, the country of residence of the user of the Android device associated with the account, regardless of the language chosen to interact with the Google Play Store, as can be seen in this screenshot of the Google Play account information of an Android device (where the user's name has been obscured):

[103] See Google Play Terms of Use, in particular section 4: https://policies.google.com/terms?hl=pt-PT



322. You can only purchase or download content from the Google Play Store that is available for the respective country of the Google Play account.

323. According to the Google Play Terms of Use, the *"availability of Content and features varies by country and it is possible that not all Content or features may be available in your country"*[104] .

[104] See Google Play Terms of Use, in particular section 2: https://policies.google.com/terms?hl=pt-PT

324. According to the Google Play account instructions, consumers who move to another country must then change the country associated with their Google Play account.

325. As explained in the Google Play "Help" written by Google, purchases of Android *apps* and *in-app* Android content made from the Google Play Store are recorded in the respective Google Play account and their history can later be viewed by the user ("order history").

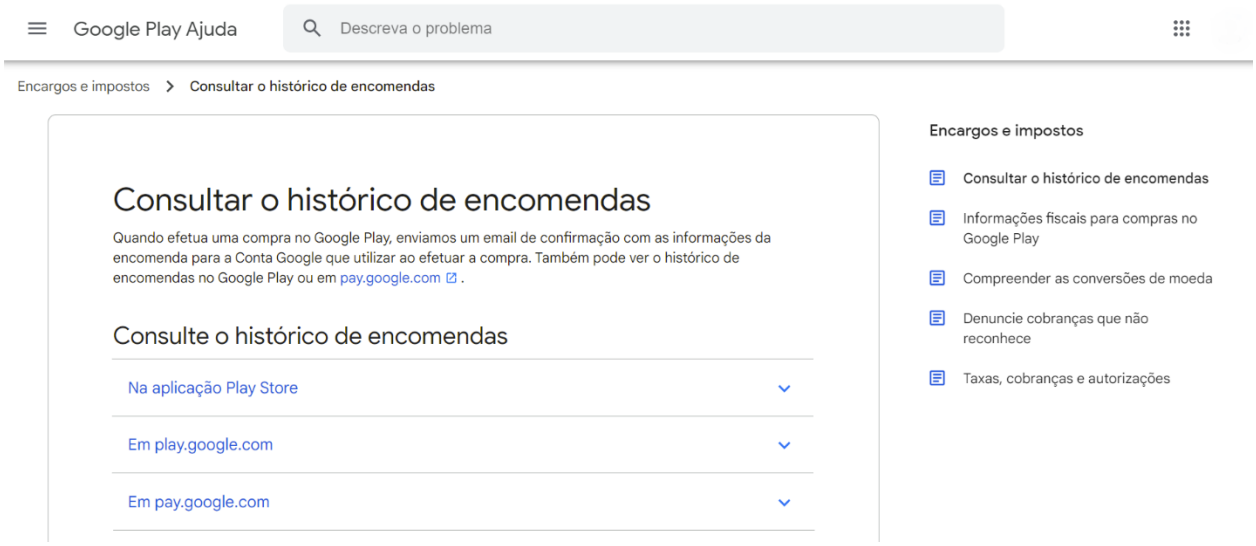
326. Purchases of "physical" goods and services, the use or consumption of which happens outside the digital context (e.g., delivery of meals by the Uber Eats app or hiring cab services) are not recorded in the order history.

327. You can check your order history through the Google Play Store in 3 ways: (i) through the Google Play Store *app* on the Android device; (ii) through the play.google.com *website*; and (iii) through the pay.google.com website.

328. To view your order history through the Playstore *app* on your Android device, you must: (1) open the Google Play Store app; (2) select "Menu" - "Account"; and (3) select "Purchase History".

329. To view your order history through play.google.com, you must: (1) access their Google Play account on this *website*; and (2) scroll down on that page to view purchases.

330. All as described in https://support.google.com/googleplay/answer/2850369?hl=ptreproduced below:



331. The result is that a user of an Android device residing in Portugal, with the Google Play Store pre-installed on that device, has an associated Google Play account indicating as country "Portugal", can only download or purchase Android *apps* and *in-app* content available in Portugal, and can view on the Google Play Store *app* or *online the* record of purchases made throughout their use of the Google Play Store.

332. Google determines and provides individualized information for each country about which Android applications can be distributed for free and for a fee in that country, indicating for Portugal that Android applications can be downloaded for free and for a fee.

333. The order history query allows you to identify purchases of Google's own *apps* and *in-app* content from Google's own apps.

334. A company of Google's size and resources, which has been and continues to be the subject of several investigations by public authorities and several actions for damages for anti-competitive practices in various jurisdictions relating to the practices at issue in this case and other anti-competitive practices, could not have been unaware that the conduct described in this section is prohibited by Articles 101 and 102 of the TFEU and Articles 9 and 11 of the LdC (and its predecessors),

335. and therefore committed the anticompetitive conduct in question intentionally, or at least negligently.

336. According to the rules of common experience and logic, it is not appropriate or reasonable to believe that Google does not know that it has a dominant position on the markets concerned by this case.

337. Especially when such a dominant position has already been identified by the European Commission in decisions in which it has applied Article 102 TFEU to Google's conduct, most notably the Decision in the Google Android case, in which the Commission identified a dominant position of Google in the Android *app stores* market.

338. According to the rules of common experience and logic, it is not appropriate or reasonable to believe that Google is unaware that the practices at issue in this case constitute restrictions of competition by object, with anticompetitive effects, with an appreciable impact on competition and trade between Member States and, specifically, in Portugal, and without benefit of individual or group exemption.

339. According to the rules of common experience and logic, it is not appropriate or reasonable to believe that Google was unaware that the practices at issue in this case constitute abuses of a dominant position, with effects on trade between Member States and, specifically, in Portugal, and without a credible economic justification.

340. Especially when some of the same and similar practices to those at issue in the present action have already been identified as abuses of dominance by the European Commission in decisions in which it has applied Article 102 TFEU to Google's conduct, most notably the Decision in the Google Android case, in which the Commission identified abuses of dominance by Google, *inter alia, in* the Android *app store* market.

341. In addition, Google identifies among the risks with potential impacts on its business, *inter alia*, the following: *"Various legislative, litigation and regulatory activities regarding our Google Play billing policies and business model, which could result in financial penalties, damages and/or a ban"*[105] .

342. It was only through the Defendants' unlawful practice that they were able to profit at the expense of the consumers they represented, causing losses (covered by civil liability, and restitutable enrichment through unjust enrichment).

343. The Defendants' practices caused an unjust enrichment of the Defendants at the expense of the unjustified impoverishment of the represented consumers, albeit indirectly and through the passing on of costs by the *app* developers, the amount in question being charged directly to the represented consumers by Google.

1.3.2. Markets concerned and dominance

344. At issue in the present action is the provision of two types of services: (i) **distribution of Android applications**; and (ii) **processing of payments for Android applications or *in-app* Android content**.

345. As will be seen *below*, each of these services corresponds to a separate product market, determined according to the market definition methodology of competition law.

346. Also at issue in the present action are practices associated with **mobile operating system licensing** services, services whose demand agents are the manufacturers of mobile equipment who wish to install these operating systems on the mobile equipment they intend to market, but it is superfluous, for the purposes of the outcome of the present action, to precisely delimit the market into which these services fall.

347. Operating systems for types of equipment other than mobile equipment (e.g., for personal computers) are not interchangeable with operating systems for mobile

[105] Alphabet's 2021 Annual Report and Accounts, p. 18. Original version: *"Various legislative, litigation, and regulatory activity regarding our Google Play billing policies and business model, which could result in monetary penalties, damages and/or prohibition."*

equipment because they are not able to perform the same functions and meet the same needs as mobile equipment.

348. The players in the supply of operating systems for mobile equipment are: Google, with the Android operating system; the Tizen operating system, developed by the Linux Foundation and Samsung; and the Windows Phone operating system, developed by Microsoft. The iOS operating system is not offered by Apple for installation on non-Apple mobile equipment, and is therefore an internal product of the company that does not enter the supply of this market.

349. The fact that the Android operating system is the operating system installed on almost all mobile equipment in the world (excluding Apple's) is enough to show that Google holds almost the entire market share of this market, and in any case more than 50% of the market share, above the level of jurisprudential presumption of dominance.

350. This market is probably worldwide in geographic scope, but a precise geographic delimitation is not necessary, as a narrower geographic delimitation would not change any parameter impacting the conclusion.

351. Both worldwide and specifically in Portugal, Google holds about 95% or more of the market share of licensable operating systems for mobile equipment.

352. The European Commission has defined the relevant market as the worldwide market (excluding China) for the licensing of operating systems for intelligent mobile equipment, with the following facts and reasons[106] .

353. It follows from the facts exposed in the previous section that, in Portugal and in the world in general, the Google Play Store and Google's *in-app* purchase mechanism are the only effective option for *app developers* who want to offer Android applications and *in-app* Android content, as well as the only effective option for Android device users who want to obtain such applications and content.

[106] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §217-267 e 402-411.

354. In introducing the Google Play Store to *app developers*, Google states, *"By publishing on Google Play, you expose your apps and games to users on billions of active Android devices in more than 190 countries and territories around the world."*

[**Doc. 8**which is attached hereto and is fully reproduced].

355. The remote possibility of Android devices being replaced by Apple mobile devices with the iOS operating system is not significant for the purposes of delimiting these markets.

356. Nor is the remote possibility of replacing iOS devices with Android devices significant for the same purpose.

357. Once an Android device has been purchased at a very significant cost (typically several hundred euros), the small price variation of applications and *in-app* content whose prices are much lower than the price of the Android device is not reasonably likely to make an Android device user purchase another mobile device, with a different operating system (iOS).

358. A user familiar with an Android device would not consider such a device a close substitute for an iOS device (from Apple),

359. namely because the interface of iOS devices is very different from the interface of Android devices, so that the typical user familiar with Android has difficulties using an iOS device, requiring a period of learning and adaptation to properly use the features of iOS devices.

360. This is all the more so because iOS devices are devices belonging to the Apple ecosystem, with multiple features that, objectively and in terms of subjective consumer perceptions, make Apple products not significantly substitutable with products from other manufacturers.

361. Apple's operating systems have certain common characteristics, *most notably* in terms of its *interface* (i.e., the way it communicates with the user, which translates mainly into the way it navigates between menus), which are significantly different from devices running other operating systems, including the Android operating system, making it difficult for users to adapt to devices running non-Apple operating systems.

362. Apple ecosystem devices communicate effectively and permanently with each other from the moment the user connects or networks them with other devices, creating an incentive to purchase multiple Apple ecosystem devices and a disincentive to purchase equipment from other manufacturers that cannot benefit from the same intercommunication and interoperability facilities.

363. For example, through Apple's *Handoff* system, it is easy to stop a task on one Apple device and start it over on another device at exactly the same point - for example, start replying to an email on the iPhone and finish it on the iMac .[107]

364. The *Apple ecosystem* has many other features with utility for its users, including the following examples:

a. Through the *iMessage* service, different Apple devices (and only these) can exchange encrypted messages with each other at no cost[108] .
b. With the *FaceTime* service, they can do the same (again, only between Apple devices) with voice and video calls[109] .
c. The AirDrop service makes it easy, and secure, to share files via Wi-Fi or Bluetooth between Apple devices[110] .
d. Through the *iCloud* cloud storage service, all content (text documents, books, movies, etc.) stored on an *Apple* device, as well as all applications installed by a user of that device, can be shared and/or used from other *Apple* devices that are connected to the first[111] .
e. Sharing all these features is not limited to one user; through the *Family Sharing* service, all content and applications (including, v.g., books, music, games, or movies, as long as they are purchased from Apple stores) can be shared with up to five other Apple device users[112] .
f. Certain applications are only available for Apple mobile devices (through the Apple App Store), such as the Clubhouse application (a social network

[107] As you can see on the support page of this service, at https://support.apple.com/pt-pt/guide/mac-help/mchl732d3c0a/macwhere the example was taken from.

[108] As you can check on the support page of this service, at https://macreports.com/what-is-imessage-how-does-it-work/

[109] As you can check on the support page of this service, at https://support.apple.com/pt-pt/HT204380

[110] As you can check on the support page of this service, at https://support.apple.com/pt-pt/HT204144

[111] As you can check on the support page of this service, at https://www.apple.com/icloud/

[112] As you can check on the support page of this service, at https://www.apple.com/family-sharing/

and sharing of information and opinions, which works exclusively by voice[113]) and the aforementioned *iMessage* and *FaceTime*, nothing prevents offering a version of these applications for Android except Apple's goal of creating incentives to keep users within the Apple ecosystem[114] .

365. An iOS device user is (or can be) naturally and at all times in communication with a whole range of other devices marketed by Apple, namely: iMac computers, iPad tablets, Apple Watch smartwatches, AirPod headphones, iCloud storage cloud, and the entire Apple TV range.

366. Those who "enter" the Apple ecosystem by buying one of these devices (iPhones, iPad, iPod Touch, iMac, Apple Watch, etc.) tend to feel, naturally, not only motivated to buy other Apple devices, but also discouraged to, under penalty of losing access to all these features, exchange their Apple devices (including the iPhone) for a device from another brand (including *smartphones* from other vendors).

367. The decision of an iOS device user to switch to a device from another manufacturer would inherently imply, in addition to the change of operating system and interface, the loss of said device's connectivity with the computer, tablet, headset, *smartwatch*, cloud and/or Apple-branded TV that he or she has also purchased and used in the meantime.

368. And it would also mean the loss of *passwords* associated with apps used on iOS devices, because Apple has introduced an automated *password* system that stores them on the iOS system. By not allowing the use of user memorized *passwords* and by not being compatible with the transition to the Android operating system, this *password* system discourages the transition to an Android mobile device.

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[113] As can be seen in https://apps.apple.com/us/app/clubhouse-drop-in-audio-chat/id1503133294.

[114] Apple's corporate summit acknowledged that Apple could easily create a version "*on Android that worked with iOS*" so that users of both platforms would have the ability *"[to] seamlessly exchange messages with each other*" [see Epic Games v. Apple Inc. Case No. 20-cv-5640 (Northern District of California), vol. No. 777-3, "Findings of Fact Proposed by Epic Games, Inc." p. 20, para. 60 - see at: Epic-Games-20-cv-05640-YGR-Dkt-407-Epic-Games-Proposed-Findings-of-Facts-and-Conclusions-of-Law.pdf (uscourts.gov)].

369. The fact that many accessories and cables associated with Apple mobile equipment are also only compatible - physically and/or technologically - with Apple mobile equipment creates an additional economic disincentive to transition to mobile equipment outside the Apple ecosystem.

370. In contrast, Android devices tend to have an increasingly wide range of accessories compatible with any Android device.

371. All of the above leads to an Apple ecosystem that produces a *lock-in* effect that is not limited to the lifetime of an individual Apple product, and users are, as a rule, captivated within the Apple ecosystem even when replacing that individual product or purchasing other products with distinct but related features.

372. The possibility of substitution of Android equipment for iOS equipment and vice versa does not exert sufficient competitive pressure to be included in the delineation of the market for the services at issue in this case, for distribution and payment of Android applications and *in-app* Android content.

373. Android applications are not sufficiently substitutable with applications for other operating systems, neither from a demand nor a supply perspective.

374. A consumer who wants to use an application on his Android device does not consider iOS applications to be close substitutes, because he cannot install them on his Android device.

375. And you don't consider computer applications to be close substitutes, because they can't be used on your Android device.

376. And you don't consider *web browser* accessible *(*non-"native" Android) apps to be close substitutes, because they don't have the same features, ease and user experience (for example, *web browser apps* cannot be used with *swiping,* a usage method inextricably linked to the success of many apps such as dating apps) and integration with your Android device (including the inability to use the Android device's camera, microphone, and GPS location), and always require internet access in order to use them, unlike Android apps that have many features that can be used *offline* and require less internet data usage (lower costs for users).

377. The lack of sufficiently close competition between Android applications and *web browser* accessible *(*not "native" Android) applications is demonstrated by the fact

that supply-side players invest huge amounts of money and effort to develop and make available Android applications. If they competed closely enough with *web browser applications*, they could simply offer them without incurring the very significant costs of developing and offering an Android application.

378. A supply agent who wants to offer Android applications does not consider iOS applications, desktop applications, or *web browser* accessible applications *(*not "native" Android) to be close substitutes, because Android applications imply specific knowledge, an autonomous development process, subject to specific rules and with their own distribution channel, and their options are impacted by the fact that demand agents do not consider them sufficiently substitutable.

379. Since Android *in-app* content is a secondary product of Android apps, purchasable only within Android apps, the conclusion regarding the lack of sufficient substitutability of Android apps with other apps necessarily extends also to the lack of substitutability between Android *in-app content* and *in-app content* from apps for other operating systems.

380. With regard, specifically, to Android gaming apps, as an example, these are not close enough substitutes for iOS gaming apps or gaming apps for personal computers and game consoles.

381. From the perspective of a demand agent who owns an Android mobile device, an iOS game is not interchangeable with an Android game because you cannot install and use them on your Android device.

382. Games for Android are not exactly the same as games for iOS, personal computers and/or game consoles.

383. Android games can be played anywhere, anytime, and even on the go (in the back seat of the car, on the train on the way to work, in line at the supermarket, at the doctor's office...) via the Android mobile device, whereas PC or console games involve use in a fixed, limited location.

384. Game demand agents often purchase and play games on multiple platforms. If PC and console games were close enough substitutes for Android games, it would be incomprehensible for consumers to buy Android games and PC and console games.

385. Games for computers and consoles tend to be, or at least can be, significantly more complex than Android games, with an immersive and more sophisticated gaming experience, more complex control mechanisms and more detailed graphics, and tend to be played for longer continuous periods of time than Android games that are often played in short intervals of time with frequent interruptions.

386. There is a need and a stand-alone demand for games for Android devices, which is not met closely enough by the supply of games for computers and game consoles.

387. Google is the sole effective agent for the distribution of Android applications and *in-app* Android content, and distribution of such applications and content by other *app stores* or means is residual.

388. Due to the *app developers*' contractual obligations that guarantee the exclusivity of the Google Play Store and Google's practices (including the technical restrictions on Android devices), described in this initial petition, the distribution of Android applications by potential other (third-party) app *stores* and the distribution of Android applications by the *app developers* themselves is not an effective or sufficiently close substitute for the distribution of Android applications by the Google Play Store.

389. The question of whether the distribution of Android applications by third party app *stores* and *app developers*' own distribution, or any other means (even if illicit) of distributing Android applications should be included in the same relevant market as the Google Play Store can be left open in the present case, as it would not change the parameters of analysis and the conclusion on whether the requirements of illegality are met.

390. Distributing iOS apps (or other operating systems) is not an effective or close enough substitute for distributing Android apps.

391. The mobile equipment available in Portugal runs, exclusively or almost exclusively, two operating systems: (i) the remaining mobile equipment runs the Android operating system; and (ii) Apple mobile equipment runs the iOS operating system.

392. It is estimated that today about 70% to 75% of mobile devices use the Android system, and 25% to 30% use the IOS system .[115]

[**Doc. 9**which is attached hereto and is reproduced in its entirety].

393. These figures are followed very closely by data relating specifically to the Portuguese market[116] .

394. Even if it were technically possible, for some Android devices, to install the iOS operating system, this would be an option that would not allow the use of all the features of the Android equipment, including the exclusion of essential features of the equipment, making this option merely theoretical and not effective[117] .

395. Android users have no viable and effective alternative but to use the Android operating system on their devices.

396. The cases of Android users installing other operating systems on their devices are marginal and insignificant.

397. Applications made for other mobile equipment operating systems, *most notably* applications for the iOS system, are not compatible with the Android operating system.

398. The European Commission has defined the relevant market as the worldwide market (excluding China) for Android *app stores*, which is a different way of referring to the market for distribution of Android applications, with the facts and rationale set out below[118] .

399. From the perspective of app demand agents, and from the perspective of subordinate demand for *in-app* content, apps for other operating systems and *in-*

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[115] Indications from the Statcounter website, which for the month of April 2021 indicated that mobile devices using the Android system represent 72.2% of the total, and devices using the IOS system (i.e. Apple devices) represent 26.99%. Cfr. in: https://gs.statcounter.com/os-market-share/mobile/worldwide/2020

[116] Again according to the Statcounter site, in April 2021 73.51% of the mobile devices registered in Portugal use the Android system, and 25.94% the IOS system. Cfr. in https://gs.statcounter.com/os-market-share/mobile/portugal/2020.

[117] See, as an example, at https://stackoverflow.com/questions/68795627/can-i-run-ios-apps-on-android-phone

[118] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §§268-322 e 412-421.

app content from apps from other operating systems are not substitutable with Android apps and in-app Android content .

400. From the perspective of the players in the supply of applications, and from the perspective of the subordinate supply of *in-app* content, the development and supply of applications for other operating systems and *in-app content* from applications of other operating systems are not substitutable with Android applications and *in-app* Android content .

401. From the perspective of demand-side and supply-side players, the Google *in-app* payments mechanism (via the Google Play Store) is not substitutable by other payment mechanisms since, as a result of the contractual obligations of *app developers* and Google's practices, only the Google *in-app* payments mechanism can be used to sell and purchase *in-app* Android (digital) content.

402. Other payment mechanisms, other than the one in the Google Play Store, do not provide the same needs that are met by Google's *in-app* payment mechanism.

403. It follows that users of Android equipment are, by means of contractual obligations included in contracts between Google and *app developers* and between Google and Android mobile equipment manufacturers, Google's business practices and technical features of Android equipment determined by Google, limited to the Android operating system and the provision of Android applications and *in-app* Android content via the Google Play Store (*lock-in* effect).

404. In the present case, it is irrelevant to reach a conclusion on whether the two product markets identified above should be carved out, or whether a single product market should be identified for the distribution and sale of Android applications and *in-app* Android content, as neither of these alternative definitions would alter the parameters of analysis and the conclusion on whether the requirements for unlawfulness are met.

405. In the present case, it is irrelevant to reach a conclusion on whether to distinguish, within the two product markets identified above, autonomous markets relating to the distribution and payment of *in-app* applications and content of a specific nature or content (e.g., market for the distribution of Android game applications, market for the distribution of Android *dating* applications), as none of these alternative definitions would alter the parameters of analysis and the conclusion on whether the requirements for unlawfulness are met.

406. With respect to geographic market delineation, the Plaintiff believes that the market should be defined, in accordance with the competition law market definition methodology, as national in scope, but that the issue is moot, as will be seen.

407. The focal point of the present analysis is the Portuguese territory, since the Plaintiff in the action represents consumers residing in Portugal and only the effects of the anticompetitive practices at issue in the Portuguese territory are discussed.

408. Although developed on a common Platform, the Google Play Store is tailored to each country.

409. There is a Google Play Store specific to Portugal, which works in Portuguese, which offers specific *rankings for Portugal*, where there are applications specific to Portugal (e.g. from Portuguese public authorities), where there are no applications available in other regions (due to the freedom given by Google to *app developers* to not make their Android applications available in all countries through the Google Play Store), and which can only be accessed by users of Android devices registered as being in Portugal.

410. It is technically possible for a user of Android equipment to change the country registered in his/her respective account, but it involves taking a number of steps and measures that make this a very difficult and marginal occurrence, except when the user moves to another country.

411. From a demand perspective, the distribution of Android applications and *in-app* Android content is thus organized on a national level, with consumers living in Portugal downloading and purchasing only from the Portuguese Google Play Store.

412. From the perspective of offering Android applications and *in-app* Android content, there are factors that suggest that the geographic market is broader, including the fact that Android applications are, as a rule, developed to be offered through the Google Play Store all over the world, or at least in many countries around the world.

413. But there are also factors that suggest the need for national segmentation of markets from the supply perspective, especially for certain types of applications, such as the need for translation of content, adaptation of the application to

cultural, political, sociological or other specificities of each country, and even the possibility of price variation (for example, to reflect differentiated purchasing power).

414. Moreover, it could be argued that since the agreements and practices at issue do not vary worldwide and lead to the same monopolistic supply structure all over the world (with the exception of China), the competitive conditions on the markets concerned are sufficiently homogeneous worldwide to identify a market of worldwide scope (with the exception of China).

415. In the present case, it is irrelevant to reach a conclusion as to whether the geographic market is national, European or worldwide (or any other geographic delimitation) in scope, since none of these alternative definitions would alter the parameters of the analysis and the conclusion as to whether the conditions for unlawfulness are met, specifically as regards the identification of an appreciable impact of the practices at issue on competition, a dominant position of Google or a possible economic exemption or justification.

416. As for determining market shares, Android app sales and Android *in-app* purchases, specifically in Portugal, but also in Europe and worldwide, that do not go through Google (and specifically the Google Play App Store) are marginal and negligible in terms of total turnover.

417. The most relevant competitors to the Google Play Store are Aptoide and the Galaxy Store. The Apple App Store is not available for Android devices and does not offer Android applications.

418. Aptoide is an *app store* developed and managed by a Portuguese company, based in Portugal, which started development in 2009 .[119]

419. In 2014, Aptoide filed a complaint with the European Commission alleging that Google was hindering the installation on Android mobile devices of *app stores* competing with the Google Play Store, enforcing the availability of app bundles including the Google Play Store, and blocking access to Aptoide's *websites* through its Chrome *web browser*.

[119] See https://en.aptoide.com/ and https://en.wikipedia.org/wiki/Aptoide.

420. Aptoide achieved annual turnover from sales of Android *in-app* applications and content, to be determined in the scope of this action, but estimated not to have reached EUR 1 million per year until 2015, and not currently reaching EUR 5 million per year.

421. Aptoide is the second largest Android *app store* and has a much smaller number of apps available for download compared to the Google Play Store, which is estimated at around 700,000 apps, a number to be confirmed as part of this action.

422. Aptoide has been identified by Google as being harmful to Android users, thus making it even more difficult and dissuading these users from using this competing *app store*.

423. The Galaxy Store is an *app store* developed and managed by Samsung, launched in 2009 .[120]

424. The Galaxy Store is pre-installed only on some Samsung Android mobile devices, which means that it is not an alternative for *app developers to* distribute their products to Android mobile devices from other manufacturers.

425. The Galaxy Store has a much lower number of apps available for download compared to the Google Play Store, a number to be determined as part of this action.

426. The Galaxy Store has achieved annual turnover from sales of Android apps and *in-app* content, to be determined under the present action, which is estimated to have been about USD 100 million in 2019.

427. Google's "competitors" in the provision of these services that are considered by Google to be illegal and/or unsafe distribution channels, contractually not permitted by Google and technically very difficult to access by Google, should not be considered close enough substitutes to distribution via the Google Play Store.

428. Although theoretically possible, direct downloading by users of applications without using an *app store* (so-called *side loading*) - technically hindered by Google

[120] See https://galaxystore.samsung.com/apps e https://en.wikipedia.org/wiki/Samsung_Galaxy_Store.

- is a reality without significant expression in the distribution of Android applications.

429. Google creates technological obstacles to *side loading*, requiring you to change the settings on your mobile device and bypass various system prompts.

430. Only about 3% of active Android users have ever directly downloaded an Android application without using an *app store* (*side loading*).

431. Google has almost all Android application downloads in Portugal (and in Europe and worldwide), concentrated in the Google Play Store, corresponding to more than 90% of the total number of Android application downloads, a percentage to be determined in the scope of this action.

432. Google has almost the entire share of sales in Portugal (and in Europe and worldwide) of Android applications and *in-app* Android content, concentrated in the Google Play Store, corresponding to a market share of more than 90%, to be determined in the scope of this action.

433. Even if one were to identify - *ad arguendum* - a hypothetical product market encompassing in the same market the distribution of Android and iOS applications, that is, a market for the distribution of applications for mobile devices, Google would still have a market share above the threshold for a presumption of dominance, estimated at 84% in volume (number of *downloads*) and 53% in value, the precise percentages of which must be determined within the scope of this action.

434. When identifying the competition to which it is exposed by providing a long list of business areas in which it is exposed to competitive pressure and its competitors' supply chain players, Google does not mention the Google Play business area or the sale of Android applications or *in-app* Android content at all, proving that, in its view, it is not subject to competitive pressure with respect to this business area and the provision of these services[121] .

[121] Report and Accounts of the 1st Defendant, 2021, p. 7.

435. It follows from the foregoing that Google has more than 50% of the share of the relevant market(s) in this case, and the presumption of dominance established in European case law is met.

436. The burden is therefore on Google to prove in this case that it does not have a dominant position in the relevant market(s) identified above, despite having more than 50% of the market share.

437. Google behaves in the relevant market(s) on terms that prove that it can determine its conduct largely independently of its competitors, suppliers and customers,

438. imposing exclusivity, pricing and other conditions that are only acceptable, particularly for *app developers*, precisely because of Google's market strength - market dominance position,

439. and not subject to significant current or potential competitive pressures.

440. Google has a dominant position in the markets for the distribution of Android applications and the processing of payments for Android applications or Android *in-app* content (or in the market for the distribution and sale of Android applications and Android *in-app* content), whether this market is defined as national, European or worldwide *in* scope.

441. The European Commission adopted a Decision which concluded and declared that Google had, between 2011 and (at least) 2018, a dominant position in the worldwide market (excluding China) for the licensing of operating systems for smart mobile devices, with the following facts and reasons, which are relevant also for the identification of dominance in the two other relevant markets identified in this application[122] .

442. The European Commission has adopted a Decision finding and declaring that Google has, between 2011 and (at least) 2018, had a dominant position in the EEA national markets for *online* search engines (including in Portugal, with a market share of over 95%), with the following facts and grounds[123] .

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[122] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §§440-589.

[123] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §§674-727.

443. The European Commission adopted a Decision finding and declaring that Google had, between 2011 and (at least) 2018, a **dominant position in the worldwide (excluding China) market for Android *app stores*** (another way of referring to the market for distribution of Android apps), with the following facts and reasons[124] .

1.4. Effects on trade between member states

444. The practices in question are decided and implemented, *inter alia,* by Defendants headquartered in another EU Member State, and are therefore by their very nature cross-border and affect trade between Member States.

445. The practices in question are identical throughout the EU (indeed, throughout the world), and are therefore by definition a Europe-wide practice, affecting trade between member states.

446. Many of the Android applications affected by these anti-competitive practices are developed by *app developers* based in other EU Member States, so that the anti-competitive effects of these practices are also felt by these companies in other EU Member States.

447. The characteristics and nature of the anti-competitive practices at issue mean that the negative effects for consumers resident in Portugal continue to be felt when they travel to other EU Member States for leisure or business and download Android applications or *in-app* Android content there for free or at a charge.

448. One of the characteristics of the practices of the Defendants in question is precisely to limit the downloading and purchase of Android applications or *in-app* Android content to the Portuguese Google Play Store, preventing users from accessing *apps* or content available in the Google Play Store of other EU member states.

449. The anti-competitive practices in question currently and directly, or at least potentially and indirectly, have an effect on trade between Member States.

[124] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §§590-673.

450. In the parallel case dealt with in the aforementioned European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), the assessment of the effect on trade between Member States found there to be cross-border economic activity and practices that affect the competitive structure of the internal market by eliminating or threatening to eliminate competition.

451. The same Decision states that "*where a dominant undertaking engages in conduct that is capable of excluding competition in more than one Member State, such conduct is normally by its very nature capable of affecting trade between* Member States"[125] .

452. In the aforementioned EC case, Google has not disputed that:

> *"First, Google's economic activities related to smart mobile operating systems, app stores, general search and browsers are by their very nature cross-border in scope.*
>
> *Secondly, the different forms of conduct described in sections 11 to 13 affect the competitive structure of the internal market by eliminating or threatening to eliminate competitors operating within the European Union.*
>
> *Third, the different forms of conduct described in Sections 11 to 13 have been implemented in all Member States.*
>
> *Fourth, since 2011, Google has held a dominant position in the worldwide market (excluding China) for licensing smart mobile operating systems, in the worldwide market (excluding China) for Android app stores, and in each national market for general search services in the EEA.*
>
> *Google has not contested the Commission's findings as they appear in this section."*[126]

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[125] Original version: "Where a dominant undertaking engages in exclusionary conduct in more than one Member State. Original version: "*Where a dominant undertaking engages in exclusionary conduct in more than one Member State, such conduct is normally, by its very nature, capable of affecting trade between Member States*" - § 1375 of the Decision, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf

[126] Our translation. Original version: "First, Google's economic activities related to smart mobile OSs, app stores, general search and browsers are, by their very nature, cross-border in scope.

Second, the different forms of conduct described in Sections 11 to 13 affect the competitive structure of the internal market by eliminating or threatening to eliminate competitors operating within the territory of the

1.5. Consumer Damage

453. The anticompetitive practices at issue caused harm to the represented consumers throughout the relevant period.

454. In addition to the overpricing effect mentioned *below*, the Defendants' anti-competitive practices in question harm the diffuse and/or collective interests of ensuring healthy competition and consumer protection in the Portuguese market,

455. and cause or create conditions conducive to encouraging a reduction in the amount of Android applications and *in-app* Android content offered to users of Android equipment (supply or *output* reduction),

456. as well as the quality of Android applications and *in-app* Android content offered to users of Android devices (quality reduction),

457. as well as from investment in innovation and development of Android applications and *in-app* Android content offered to users of Android devices (reduction of innovation),

458. as well as the efficiency of Android application distribution, which would benefit from the existence of competition at the distribution level, allowing the emergence of operators with more sophisticated or different ways of allowing applications to be found, or operators specializing in certain types of applications, thus increasing the visibility of Android applications to consumers and the possibility of matching demand and supply of Android applications (reducing efficiency).

459. The foregoing types of damages should be recognized and declared under the present lawsuit, as petitioned.

European Union. Third, the different forms of conduct described in Sections 11 to 13 have been implemented in all Member States. Fourth, since 2011, Google holds a dominant position in the worldwide market (excluding China) for the licensing of smart mobile OSs, the worldwide market (excluding China) for Android app stores and in each national market for general search services in the EEA. Google does not contest the Commission's conclusions as outlined in this Section" - §§ 1378 - 1382 of the Decision, available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

460. However, with regard to the claim for damages, the present action focuses exclusively on the damages corresponding to the **overpricing**.

461. Also with regard to the subsidiary claim for restitution of undue, the present action focuses exclusively on the restitution of the enrichment corresponding to the **overpricing**.

462. In effect, the Defendants' practices have caused the Defendants unjustified enrichment at the expense of the unjustified impoverishment of the represented consumers, albeit indirectly and through the passing on of costs by the *app developers,* the amount in question being charged directly to the consumers represented by Google.

463. In the absence of Google's anti-competitive practices regarding the distribution of Android apps and *in-app* Android content, *app developers*:

a. would have been able to develop - and some would have developed - their own distribution channels, specialized or generalist, just for their Android *apps or* also for Android *apps* from other *app developers* (offering app *stores from the app developers* themselves or direct downloads from *websites*); and
b. would have had access to a larger number of supply-side players who would have developed specialized or generalist Android *app* distribution channels (third-party *app store offerings*).

464. Android device users would have been able to use, and would have used, at least in significant numbers, the alternative Android *app* distribution channels to the Google Play Store.

465. In this counterfactual scenario, the market for Android app distribution and *in-app* Android content, rather than being a monopoly, would have been a market with a significant degree of current and potential competition.

466. In this counterfactual scenario, the existence of competition would have created pressure for greater investment in innovation and quality of Android application distribution services.

467. In this counterfactual scenario, *app developers* would have had access to lower commission amounts than the commission that was charged by Google for

distribution through the Google Play Store offered by platforms competing with the Google Play Store, or to correspondingly lower distribution costs in the case of the *app developer* developing its own distribution mechanisms.

468. And Google would have felt the need, due to competitive pressure, to reduce the commission it charges for distributing Android applications.

469. Absent Google's anti-competitive practices with respect to Android app payment services and *in-app* Android content, *app developers*:

a. would have been able to use - and some would have used - alternative means of distance payments available on the market (use of alternative existing means of payment); and
b. would have had access to a larger number of supply-side players who would have created specific payment services for Android *app* distribution, specialized or generalist (offering new alternative payment methods for Android apps and content).

470. Android device users would have been able to use, and would have used, at least in significant numbers, alternative payment methods to Google's Android app and content payment method.

471. In this counterfactual scenario, the market for Android app payment processing or Android *in-app* content, rather than being a monopoly, would have been a market with a significant degree of current and potential competition.

472. In this counterfactual scenario, the existence of competition would have allowed access to qualitatively better payment mechanisms than Google's payment mechanism and would have created pressure for greater investment in innovation and quality of these services for payment of Android apps and content.

473. In this counterfactual scenario, *app developers* would have had access to commission amounts that were lower than the commission that was charged by Google for payment services for Android apps and *in-app* Android content through Google's payment engine, offered by existing and new alternative payment methods.

474. And Google would have felt the need, due to competitive pressure, to reduce the commission it charges for Android app payment services and Android *in-app* content.

475. It is impossible or exceedingly difficult to construct a counterfactual scenario that identifies, with complete certainty and certainty, the commission(s) that would have been charged in the relevant markets in the absence of Defendants' anticompetitive practices, i.e., that identifies the overpricing(s) resulting from these anticompetitive practices.

476. As mentioned *above*, in the case of Windows applications, where competition in distribution and payment services is allowed (and therefore serves as an example of the impact of competition in this type of market), some distributors charge *app developers* commissions of less than 15%.

477. As noted *above*, there are alternative payment mechanisms that charge commissions of less than 5%, and that only cannot be used to purchase Android apps and *in-app* Android content due to Google's anti-competitive practices.

478. Google itself has reduced its commissions to 15% for certain transactions through the Google Play Store, but with very limited impact on total billing, as described above.

479. An economic study submitted in the *collective claim* filed in the *Competition Appeal Tribunal* against the Defendants in the present action, identified as "**Coll v Google**", Proc. No. 1408/7/21 , came to the preliminary conclusion that in the absence of Google's anti-competitive practices, commissions between 5% and 15% would have been charged.

480. In light of the above, and without prejudice to detailed calculations following access to evidence in the Defendants' possession, it is reasonable to estimate that commissions of up to 15% would have been charged in these markets.

481. Which means that the difference between the 30% commissions charged by Google and the (at most) 15% commissions that would have been charged in the absence of Google's anti-competitive practices, is the amount corresponding to the overcharge (or additional cost) charged by Google as a result of its anti-competitive practices.

482. Thus demonstrating that the Defendants' competitive infringements at issue in this action resulted in an additional cost for Google's direct customers - the *app developers*.

483. Now, as it is clear that the consumers represented - by definition - purchase goods or services affected by those competitive infringements - namely Android applications and *in-app* Android content, the presumption provided for in Article 8(3) of the EPL is met, whether this presumption is applied directly or the same presumption resulting, already previously, from the principle of effectiveness of European competition law is applied.

484. If *app developers* had had access to distribute and pay for Android apps and *in-app* Android content at lower commission rates, they would have been able to offer their apps and content to their customers - including represented consumers - for lower prices while maintaining their profit margins.

485. According to the economic law of demand, a decrease in the price of a good or service increases its demand.

486. The profit-maximizing strategy for *app developers* is to lower prices, thus managing to increase their profits.

487. If *app developers* had had access to lower commissions, they would have passed on all or at least part of the decrease in commissions to their clients in order to profitably increase sales.

488. See, by analogy, the Europe-wide study conducted for the European Commission (IFR Study), in which an economic model was developed to estimate the *pass-on* percentage of savings from merchants to customers, and whose parameters were based on data from a large meta-study of 25 empirical economic studies covering 7 commercial sectors in 21 European countries. The IFR Study identified *pass-on* (or *pass through*) rates of an average of 96%, over the long run, in the European Union .[127]

489. It is impossible or exceedingly difficult to construct a counterfactual scenario that identifies, with complete certainty and certainty, the percentage of *passing-on*

[127] Available at: https://op.europa.eu/en/publication-detail/-/publication/79f1072d-d6c2-11ea-adf7-01aa75ed71a1#:~:text=The%20study%20shows%20that%20the,lead%20to%20lower%20consumer%20prices.

that would have occurred in the absence of Defendants' anti-competitive practices.

490. In a case like this, where there are claims for damages brought by *app developers* in various jurisdictions around the world, it is reasonable to estimate that they did not pass all the overpricing on to their customers, but that they did pass some of the overpricing on to their customers.

491. One of the largest sellers of *in-app* content, gaming company Epic (owner of the game Fortnite), has publicly stated that had it been able to launch its alternative payment mechanism for Android and iOS *in-app* content (which has been stymied by Google and Apple), it would have offered consumers a 20% price reduction, which corresponds to a percentage of overpricing passed on to consumers of about 87%.

492. In *Epic Games*' lawsuit against Apple in the US[128] , comparison was made with commissions applied in the PC market, showing that the *Steam Store*, which had imposed a 30% commission for decades, reduced it to 20% as soon as it became known that *Epic Games* would set its commission at 12%. *Microsoft* did likewise, joined by other platforms that have begun to follow a "*pay-what-you-want*" policy.

493. But also other *app stores* have lower commissions, for example the *Amazon App Store,* whose effective commission does not exceed 18.1%.

494. According to the October 2020 report produced by the *House Judiciary Committee's Subcommittee on Antitrust* ("*US Committee Report*"), in the US, as a result of its investigation into competition in digital markets centered on dominance and dominant *online* business practices, including Google, several *app developpers* claimed to have passed on to consumers a portion of the 30% fee charged by Apple and Google[129] .

[128] Action brought in August 2020 in the United States District Court for the Northern District of California, Epic Games v. Apple Inc. (case no. 20-cv-5640).

[129] Available at: https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519. See, e.g., pp. 220 to 223 and, looking at the parallel Apple App Store case, p. 350.

495. As an example, Airbnb *"explained that Apple's commission, in conjunction with Apple's system of step pricing for in-app purchases would have resulted in a 50% to 60% price increase for consumers."*[130] .

496. And yet, another example: *"A developer offering an app that competes directly with Apple told the subcommittee that it was forced to raise prices to pay Apple's commission. As a result, it became less competitive, and iOS users bought less of its services. The company said that because apps have small margins, they cannot absorb Apple's commissions, so the price consumers pay for its app is more than 25% higher than it would otherwise have been."*[131] .

497. It is reasonable to estimate that *app developers* would have passed on at least 50%, on average, of the difference in commission value to end consumers.

498. The estimate of 50% *passing on* average was identified as a "conservative" estimate in the *above* economic study attached to the *above* mentioned Case No. 1408/7/7/21, which is before the *Competition Appeal Tribunal* (UK), and corresponds to a representative action for compensation of UK consumers.

499. The overwhelming majority of Android applications and *in-app* Android content sold are used for personal, not professional, purposes.

500. Purchases of Android apps and *in-app* Android content are made, almost exclusively, in terms of turnover, by consumers.

501. The average percentage of sales of Android apps and *in-app* content purchased by legal entities or for business purposes, in Portugal, should be determined or estimated within the scope of this proceeding, after access to evidence in Defendants' possession.

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[130] Original: *"explained that Apple's commission, plus compliance with Apple's pricing tiers for in-app purchases would ultimately result in a 50-60% price increase for consumers"*.

[131] Original: *"One developer that offers an app that directly competes with Apple told the Subcommittee it was forced to raise prices to pay Apple's commission. As a result, it was less competitive, and fewer iOS users purchased its service. The company said that because apps often have small margins, they cannot absorb Apple's fees, so the price consumers pay for its app is more than 25% higher than it would otherwise be.*

502. Given the above, and in the absence of data that would allow a more accurate estimate, it is appropriate to estimate that in Portugal 99% (in value) of Android application and *in-app* Android content sales are made by consumers.

503. Whereas deceased consumers and other consumer groups (as identified in Articles 17 a 19), it is necessary to estimate the percentage of sales in Portugal of Android applications and *in-app* Android content purchased by consumers not represented in this action.

504. Whereas:

a. Portugal has an annual death rate of 1%;
b. that Android equipment tends to be purchased by non-elderly people, whose annual death rate, within the age group, is significantly lower;
c. that the sales figures of the Portuguese Google Play Store were initially small and have grown annually; and
d. that the other consumer groups not represented in the present action are extremely small in number;

it is reasonable to estimate that the risk of overestimating the overall compensation is excluded if the value of the relevant sales of the Portuguese Google Play Store is reduced by 5%, i.e. if 95% of the relevant sales of the Portuguese Google Play Store to consumers are estimated to be represented in the present action.

505. Without prejudice to a reassessment of the parameters of the proposed method after access to evidence in the Defendants' possession, Plaintiff believes that the **overall compensation** owed by Defendants in the present case should be **calculated as follows**:

a. Identify or estimate the total amount (in EUR) of sales of Android applications and *in-app* Android content through Google's payment mechanism via the Portuguese Google Play Store (i.e., purchases made by users of Android devices from Portugal), per year ["**Year Y Sales**"];
b. Identify or estimate the average percentage, in Portugal, of Android application purchases and *in-app* Android content purchases by consumers [**"% consumer sales"**];

Which was estimated *above* as 99%.

c. Identify or estimate the percentage of sales in Portugal of Android applications and *in-app* Android content purchased by consumers represented in this action [**"% represented sales"**].

Which was estimated above as 95%.

d. Identify or estimate the commission(s) that would have been charged in the absence of the anti-competitive practices of Google concerned and calculate the overcharge(s), i.e. the difference between the commission(s) charged and the commission(s) that would have been charged in the absence of the anti-competitive practices [**"overcharge"**];

That it is esteemed as:

(i) at least 15% for Android app sales and Android *in-app* content from July 6, 2009 to the present;

(ii) 0% for sales of Android applications and *in-app* Android content from the dates and up to the sales volume where a 15% commission was applied to those applications and *in-app* content (it may be concluded that even after the commission was reduced to 15%, there was still overpricing);

it may be necessary to autonomize the overpricing for sales of Android applications and *in-app* Android content; and

e. Identify or estimate the percentage of the overpricing(s) that was *passed on by* the *app developers* in the prices paid by their customers [**"% *passing on***"].

Which was estimated to be at least 50% on average.

506. Once the values described in the previous article have been determined, the global compensation will correspond to the sum of the result of the following calculations, for each year (with potential subdivisions):

[Sales Year Y] x [% consumer sales] x [% represented sales] x [overpricing x % *passing on*];

507. Monetary restatement and default interest will be added to the above amounts, according to the terms of the request.

508. As for the **method of determining the individual indemnity to which** each represented consumer will be entitled - to be applied both to the consumers who are identified in the present action and to the distribution of the global indemnity to represented consumers who request their share - and without prejudice to a

re-evaluation of the parameters of the proposed method after access to evidence in the Defendants' possession, the Plaintiff believes that it should be as follows, for each represented consumer:

a. Identify the total amount (in EUR) of purchases of Android applications and *in-app* Android content through Google's payment mechanism, via the Portuguese Google Play Store, per year ["**Year Y Purchases**"].
b. Use the overpricing and *passing-on* values determined when applying the global compensation calculation [**"overpricing"** / **"% *passing on"***]

509. Thus, each represented consumer will be entitled to an individual indemnity, or part of the overall indemnity, corresponding to the sum of the result of the following calculations, for each year (with potential subdivisions):

[Acquisitions Year Y] x [overpricing x % *passing on*];

510. Monetary restatement and default interest will be added to the above amounts, according to the terms of the request.

511. The characteristics of the billing for the services at issue in this case and their recording facilitate the accurate identification of the amount spent by each consumer represented in the acquisition of the services affected by the anticompetitive practices at issue and, therefore, the calculation of individual compensation based on actual figures rather than mere estimates or approximations.

512. As noted above, the Google Play Store keeps track of purchases made by each Android device user, associated with their Google Play account.

513. It is therefore possible for a represented consumer to prove that he has a Google Play account on which there are purchases made via the Google Play Store, by providing a statement or proof of his Google Play Store transactions.

514. And it is also possible for a represented consumer to prove that they have downloaded at least one Android application from the Portuguese Google Play Store and that they have purchased some Android applications and *in-app* Android content, as well as the year and amounts paid for such applications and content.

515. With the exception of the practice of tying the Google Play Store and the Google Search app, Google's practices at issue in this case have not yet been declared as infringements of European competition law by any competition authority.

516. Google's practices at issue in this case are a single, continuous infringement from the beginning of the relevant period, which still continues,

517. being a set of practices that are part of an overall plan to distort competition and achieve a certain goal: Google's exclusivity or near-exclusivity in the distribution and payment services for Android applications and *in-app* Android content, allowing the exploitation of the resulting market position to charge supra-competitive prices and obtain monopoly rents.

518. Reference is made in this regard, by analogy, to §§1337-1355 of the European Commission's Decision of July 18, 2018, in the Google Android case (AT.40099)[132] , which for reasons of procedural economy are reproduced here.

519. Google's practices at issue in this case are based on contracts and/or practices whose terms are confidential and/or whose details could not have been known to the consumers represented during the entire relevant period.

520. Even if - *ad arguendum* - knowledge of the existence of damages actions in other jurisdictions alleging Google's anticompetitive practices at issue in the present case were sufficient to lead to knowledge of the existence of a right to damages of some Portuguese consumer, which is not granted, those damages actions filed abroad were not reported in Portugal before 2020.

521. Even if hypothetically aware of the practices of Google at issue, it would be impossible for any represented consumer to identify a claim for damages arising from those practices without first undertaking an extremely complex legal and economic analysis in order to conclude that the practice at issue violates competition law.

522. Such an analysis, given its specificity and complexity, is not reasonably required of any represented consumer.

[132] Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

1.6. Similar actions in other jurisdictions and investigations by public authorities

523. Per **European Commission Decision of July 18, 2018,** in the **Google Android** case **(AT.40099)**[133] , addressed to the 1st and 2nd Defendants, the European Commission identified a single and continuous infringement of Article 102 TFEU consisting of four separate infringements with the indicated durations:

a. linked sales of the Google Search application with the Google Play Store application (as of January 1, 2011, not yet completed);
b. Google Chrome connected sales with the Google Play Store and the Google Search application (as of August 1, 2012, not yet completed);
c. licensing of the Google Play Store and the Google Search application subject to the condition of anti-fragmentation obligations (as of January 1, 2011, not yet terminated);
d. revenue sharing with mobile equipment manufacturers and mobile communications network operators on condition that they do not pre-install on identified mobile equipment any service competing with Google Search (from January 1, 2011 to March 31, 2014).

524. The practice described in paragraph (a) of the preceding article overlaps, in part, with the *bundling* practice described in the present petition (referred to, inter alia, in article 113).

525. This Decision imposed on the 2nd Defendant a fine of EUR 4.3 billion, of which the 1st Defendant was held jointly and severally liable for EUR 1.9 billion (as of October 2, 2015).

526. This Decision required Google to put an end to the anticompetitive practices identified therein.

527. For the purposes of the present action, this Decision defined and identified the following relevant markets:

[133] Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

a. world market (excluding China) for licensing operating systems for mobile equipment;
b. world market (excluding China) of *app stores* for Android; and
c. national markets in the EEA (including the Portuguese market) of the generic *online* search services[134] .

528. Google appealed this Decision to the TGUE on October 9, 2018 (case T-604/18)[135] , and this appeal is still pending, meaning that the European Commission's Decision is not yet final (*res judicata*).

529. *Konkurrensverket*, the Swedish competition authority, published a study of the competitive conditions in the digital platform markets in Sweden in 2021 ("Report 2021:1")[136] , in which it included Google, and stated, through Director General Rikard Jermsten in a press release of February 26, 2021: *"There is a risk that established digital platforms will act in a way that prevents alternative solutions from emerging. This may lead to weaker competition, which in the long run affects* consumers."[137] .

530. The *Competition & Markets Authority* published, in December 2021, a study called "*Mobile ecosystems - Market study interim* report"[138] , containing on page 61, among others, the following conclusion about Google: "*It is likely that (...) are charging app developers a supra-competitive commission percentage, which means that ultimately users will pay higher prices for subscriptions and in-app content purchases, for example within games*"[139] .

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[134] See European Commission Decision of July 18, 2018, in the Google Android case (AT.40099), available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf, §217 et seq.

[135] Report and Accounts of the 1st Defendant for 2021, pp. 76-77.

[136] See at: https://www.konkurrensverket.se/contentassets/47d84f76ac874763b2742557c97d13be/rapport_2021-1-konkurrens-digitala-plattformsmarknader.pdf

[137] See in: https://www.konkurrensverket.se/informationsmaterial/nyhetsarkiv/risk-for-konkurrensproblem-pa-digitala-marknader-i-sverige/ (our translation). Original: *"There is a risk that established digital platform companies will act in such a way that they prevent alternative solutions from emerging. This can lead to weaker competition, which in the long run affects consumers".*

[138] View at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1048746/MobileEcosystems_InterimReport.pdf

[139] Our translation. *Both companies are likely to be charging above a competitive rate of commission to app developers, which will ultimately mean users paying higher prices for subscriptions and in-app purchases such as within games.*

531. In Appendix H of the UK study, the structure of digital purchases from the Google Play Store and the applicable contractual rules are specifically analysed[140] , allowing the Authority to state in the report (p. 364): *"Our expectation is that introducing more competition or choice within the mobile equipment ecosystems could bring a number of benefits to users. These would include (...) lower prices for consumers for equipment, in-app purchases and subscriptions, and goods and services"*[141] .

532. In the US, the *House Judiciary Committee's Subcommittee on Antitrust* conducted an investigation into competition in digital markets focusing on the dominance and business practices dominant *online* platforms, including Google.

533. In October 2020, the Committee issued a report and recommendations (the "*US Committee Report*") finding that Google has strengthened its dominant position over the last decade, considering there to be "*compelling evidence*" *of* consolidation and abuse of its dominant position[142] .

534. The Australian Competition and Consumer Commission ("ACCC") conducted an inquiry into the markets for the provision of digital platform services (including app distribution), and concluded: "*The Interim Report of the ACCC's Second Inquiry into Digital Platform Services concludes that the Apple App Store and Google Play Store have significant market power in the distribution of applications for mobile devices in Australia and action is required to respond to this* situation."[143] .

535. On August 31, 2021, the **South Korean** Parliament **amended the *Telecommunications Business Act***[144] , *inter alia*, by prohibiting *app store* supply chain players from using their dominant market position to force app *developers*

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[140] View at: https://assets.publishing.service.gov.uk/media/61b86a0ce90e070441bcf983/Appendix_H_-_In-app_purchase_rules_in_Apples_and_Googles_app_stores.pdf

[141] Our translation. Original: *"We expect that introducing more competition or choice within mobile ecosystems could bring a number of benefits for users of mobile devices (...). These include: (...) lower prices to consumers with regard to devices, in-app purchases and subscriptions, and goods and services."*

[142] See pp. 174 to 211 of the *US Committee Report*, available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519, which for the sake of brevity are reproduced here.

[143] See at: https://www.accc.gov.au/media-release/dominance-of-apple-and-google%E2%80%99s-app-stores-impacting-competition-and-consumers. Our translation. *The ACCC's second Digital Platform Services Inquiry interim report finds that Apple's App Store and Google's Play Store have significant market power in the distribution of mobile apps in Australia, and measures are needed to address this*.

[144] View: https://keia.org/the-peninsula/the-implications-of-south-koreas-anti-google-law/

to use app store payment systems. Known as the "anti-Google law", this law prohibits several behaviors currently engaged in by Google at issue in this case, including Google's obligation to allow *app developers to* create their own or use existing payment systems to sell *in-app* content.

536. Following this legislative change, Google announced that, with scope limited to South Korea only, whenever a user uses an alternative payment system, the service fee for the *app developer* will be reduced by 4%.

537. That is, even in this situation, Google is still charging a commission (26% in most cases, or 11% in a minority of cases) for selling *in-app* content in apps distributed through the Google Play Store, giving a 4% discount, apparently corresponding to what Google understands to be the cost of the content payment service.

538. The revision of the *Telecommunications Business Act* was implemented by a decree passed on March 8, 2022, effective March 15[145] , which specifies five types of prohibited acts to *app stores*:

a. refuse or delay registration, renewal or upgrade of applications or delete applications
b. deny, limit or suspend the use of the platform;
c. create technical barriers;
d. hindering access to or use of other means of payment; and
e. impose unreasonable or discriminatory conditions or restrictions, including through commissions, visibility, advertising, search results, and user data.

539. On September 14, 2021, a **decision by South Korea's competition authority** (Korea Fair Trade Commission) imposed a fine of USD 177 million on Google for abusing its dominant position in the mobile operating system licensing market by adopting practices that block entry of rival mobile operating systems[146] .

540. Specifically, this South Korea Decision found that since 2011, Google has forced *smartphone* manufacturers to enter into an AFA (to prevent the development of

[145] See: https://www.channelnewsasia.com/asia/south-korea-approves-rules-app-store-law-targeting-apple-google-2548101

[146] Ver: https://www.ftc.go.kr/solution/skin/doc.html?fn=f0d92a276eb35238b62e3bdb0ccc17d7a11e538a2d7a6855435ab70ab2b7dc89&rs=/fileupload/data/result/BBSMSTR_000000002402/; e https://www.reuters.com/technology/skorean-antitrust-agency-fines-google-177-mln-abusing-market-dominance-2021-09-14/.

Android system *forks* that could compete with its operating system) as a condition of being able to enter into the MADA and *"Early Access to Android Source Codes Agreement,"* which are essential for *smartphone* manufacturers.

541. To Plaintiff's knowledge, there are a large number of cases pending in the U.S. and other jurisdictions around the world, brought by businesses or consumers, as individual or representative actions (*class* actions), in which Plaintiffs allege the existence of Google's anti-competitive practices identified in this Complaint, or some such practices, and seek remedies, including damages.

542. The Plaintiff was not able to identify all the lawsuits in question, which should be identified within the scope of the present lawsuit, since the documents produced, testimonies made, and statements made in these actions, namely by the Defendants, are relevant and may even contribute decisively to the discovery of the truth in the present lawsuit.

543. An action named "**In re Google Play Consumer Antitrust Litigation**", case no. 3:20-CV-05761-JD, was filed in 2020 and is pending in the USA before the United States District Court, Northern District of California - San Francisco Division, brought by Mary Carr *et al* against the 2nd, 3rd and 5th Defendants and other legal entities of the Google group[147] .

544. In this action, Plaintiffs allege, essentially, the same anti-competitive practices of Google identified in the present lawsuit and seek a declaration of Google's unlawful practices and compensation for all damages caused to injured consumers.

545. In its response ("*Defendants Answers and Defenses to Consumer Plaintiffs Second Amended Complaint*") filed on January 14, 2022, Google confesses, inter alia, that[148] :

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[147] See at https://www.courtlistener.com/docket/17449268/in-re-google-play-consumer-antitrust-litigation/*The site* and the procedural documents it makes available are finally required to be inspected.

[148] Our translation. Original: "admit that consumers and businesses rely on mobile devices, mobile devices require an operating system, and one or more defendants license Android OS to original equipment manufacturers ("OEMs"). 2. Google admits that apps allow users to add features to their devices designed to serve their needs and interests and that access to a variety of apps is valuable to consumers" (...) "admits that one or more defendants receive a payment for in-app purchases with respect to apps distributed through Google Play, and charge up to 30% as a service fee. Google avers that beginning on January 1, 2018, the service fee on subscriptions with respect to apps distributed through Google Play was reduced from 30% to 15% in the second year, and that as of January 1, 2022, the service fee on such subscriptions is 15% from day one of the subscription. Google further avers that beginning on July 1, 2021, the service fee was reduced to 15% for the first $1 million of developer earnings on digital goods or services every developer earns each

"admits that consumers and businesses rely on mobile devices, mobile devices that require an operating system (...).

(...)

that applications allow users to add features to their devices designed to serve their needs and interests, and that access to a variety of applications is valuable to consumers.

(...)

admits that some Defendants receive a payment for in-app purchases with respect to apps distributed through Google Play, and that it charges 30% as a service fee. Google avers that as of January 1, 2018, the service charge on subscriptions with respect to apps distributed through Google Play was reduced from 30% to 15% in the second year, and that as of January 1, 2022, the service charge on such subscriptions is 15% from the first day of the subscription. Google further states that starting July 1, 2021, the service charge has been reduced to 15% for the first 1 million of revenue in digital goods or services that the app developer earns per year.

(...)

admits that the DDA, Section 4.5 states, "You may not use Google Play to distribute or make available any Product that is intended to provide distribution of software applications and games for use on Android devices outside of Google Play. "

546. An action named "**Bentley et al v Google**", case no. 5:2020-CV-07079, brought by Dianne Bentley *et al* against the 2nd, 3rd and 5th Defendants and other legal entities of the Google group, was filed in October 2020 and is pending in the USA before the United States District Court, Northern District of California - San Francisco Division.

year" (...) "admits that DDA, Section 4.5 states, "You may not use Google Play to distribute or make available any Product that has a purpose that facilitates the distribution of software applications and games for use on Android devices outside of Google Play." (...)

547. In the petition filed[149] the plaintiffs allege, in summary, that Google abuses its monopolistic status in the Android app markets and in the market for processing payments for *in-app* purchases in Android apps, and request that it be ordered to cease the contractual and technical practices it uses for anti-competitive purposes and compensate the represented consumers.

548. An action named "**In re Google Play developer antitrust litigation**", case no. 3:20-CV-05792-JD, was brought in 2020 and is pending in the USA before the United States District Court, Northern District of California - San Francisco Division, brought by the *app developers* Pure Sweat Basketball Inc. Peekya App Services, Inc. and LittleHoots, LLC against the 2nd, 3rd and 5th Defendants and other legal entities of the Google group .[150]

549. In this action, Plaintiffs allege, essentially, the same anti-competitive practices of Google identified in the present lawsuit and seek a declaration of Google's unlawful practices and compensation for all damages caused to the injured *app developers*.

550. In August 2020, an action was filed and is pending in the USA, before the United States District Court, Northern District of California, case no. 3:20-CV-05792-JD, brought by **Epic Games Inc.** again against the 2nd, 3rd, and 5th Defendants and other legal entities of the Google group[151] .

551. Epic Games Inc. alleges that Google, through its contracts and practices, abuses its dominant power in the market for applications distributed for the Android operating system and in the market for payment processing of *in-app* purchases for the Android system, and seeks damages for the harm caused to it by such anti-competitive conduct.

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[149] See at https://www.docketalarm.com/cases/California_Northern_District_Court/5--20-cv-07079/Bentley_et_al_v._Google_LLC_et_al/1/ and at https://www.docketalarm.com/cases/California_Northern_District_Court/5--20-cv-07079/Bentley_et_al_v._Google_LLC_et_al/, finally requesting proof by inspection of the *sites* and the procedural documents and contents they make available.

[150] See at: https://www.courtlistener.com/docket/17452525/in-re-google-play-developer-antitrust-litigation/, ultimately requiring proof by inspection of the *website* and the contents and procedural documents it makes available.

[151] See at https://www.courtlistener.com/docket/17443962/epic-games-inc-v-google-llc/the *site* and the procedural documents and contents it makes available.

552. In its petition,[152] , Epic cites the fees of the most relevant payment processing companies in the U.S. (PayPal, Stripe, Square and Braintree), which are between 2.6% and 3.5%.

553. In another suit filed in July 2021, commonly identified as "**State of Utah, et. al., v. Google LLC, et. al.** ", Case No. 3:21-cv-05227-JD, currently before the United States District Court, Northern District of California - San Francisco Division , thirty-seven U.S. states accuse Google of monopolizing the *smartphone* app market in violation of state and federal *antitrust* laws .[153]

554. According to the petition, Google imposes a network of agreements with phone manufacturers and carriers to exercise control over the distribution of apps on Android phones through the Google Play Store. Thanks to these anti-competitive agreements, Google can demand a 30% service fee (allegedly ten times higher than competing payment system prices) from *app developers*, causing prices to rise for consumers and limiting the options for those using an Android mobile operating system.

555. In the United Kingdom, in July 2021, a *collective claim* was brought before the *Competition Appeal Tribunal* against the Defendants in the present action, identified as "**Coll v Google**", Proc. No. 1408/7/7/21 , on behalf of 19.5 million consumers using the UK Google Play Store .[154]

556. In that case, with a hearing scheduled for July 18, 2022, compensation is sought for the damage caused by the practices identified in the present action in violation of Article 102 TFEU, estimated to amount to up to 920 million pounds.

1.7. Litigation funding agreement

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[152] See in https://www.courtlistener.com/docket/17443962/epic-games-inc-v-google-llc/ - Paper number 1, submitted August 13, 2020.

[153] See at https://www.naag.org/multistate-case/utah-et-al-v-google-llc-no-321-cv-05227-n-d-cal-july-7-2021/ at https://www.docketalarm.com/cases/California_Northern_District_Court/3--21-cv-05227/State_of_Utah_et_al_v._Google_LLC_et_al/ requiring, finally, proof by inspection of the *websites* and procedural documents they make available.

[154] See at https://www.appstoreclaims.co.uk/Google*the site* and the contents and documents it makes available, namely at https://www.appstoreclaims.co.uk/Google/Information and at https://www.appstoreclaims.co.uk/Google/Faq

557. The present action involves a very high degree of complexity, and in order to be properly prepared and to properly and effectively represent the interests of consumers, it requires the hiring of specialized lawyers, economists, and consultants.

558. Given the degree of complexity of this lawsuit, the fees charged by specialized lawyers, economists and consultants, the expected duration of the lawsuit, and the estimated number of hours of work that have been and may be required to litigate this case properly to its conclusion, the costs of successfully prosecuting this lawsuit, including potential appeals and incidents, could total more than one million euros over several years.

559. The Plaintiff has had, since its inception, the recipes identified in Doc. 10.

[**Doc. 10**which is attached hereto and is reproduced in its entirety].

560. Without a litigation funding agreement, the Plaintiff would have no guaranteed financial resources of its own to properly pursue the present action other than those it might collect through membership dues or donations.

561. There are currently no public funds available in Portugal to finance the pursuit of a popular action with the characteristics of the present one.

562. At the time of the preparation and filing of the present lawsuit, the only legally admissible, de facto non-own funds financing option available to the Plaintiff that allows it to effectively cover the estimated and potential costs of promoting the present lawsuit is so-called *"third party litigation funding"* (litigation funding arrangements).

563. On February 23, 2022, Plaintiff entered into a litigation funding agreement (hereinafter, "AFC") with Consumer Justice Legal Fund Trust (hereinafter, "CJLF") relating to the promotion of this class action.

[**Doc. 11**which is attached hereto and is reproduced in its entirety].

564. Under the AFC (clause 2), CJLF has assumed an obligation to Plaintiff to fund the costs of promoting the present action under the terms and categories provided for in the AFC.

565. This funding, which is essential to the continuation of the action, is provided on a non-recourse basis, which means that if the present action is unsuccessful, the Plaintiff will have no financial obligation to the CJLF, and the CJLF will run the risk of losing its entire investment.

566. Under the AFC (clause 2(6)), the CJLF has assumed an obligation to the Plaintiff to provide it with complete information about the origin of the funding provided under the AFC, to ensure compliance with European and Portuguese rules for the prevention of money laundering and terrorist financing, information that can be made available to the Court upon request.

567. Under the terms of the AFC (clause 3), in conjunction with the LAP and Article 19 EPL, the CJLF will only be entitled to remuneration on its investment if so decided and on such terms as may be decided by the Court, and will only be remunerated to the extent that sufficient funds remain from the lump sum indemnity to pay for the expenses incurred by the Plaintiff as a result of the action, after the compensation due to the consumers harmed and represented in the present action claiming them has been paid.

568. Under the AFC (clause 3), the Plaintiff has assumed an obligation to the CJLF that it will, subject always to approval by the Court, namely in accordance with Article 19(7) EPL, pay to the CJLF a "*success fee*" that will be the higher of: (i) a multiple of CJLF's actual disbursement under the AFC; or (ii) a percentage of the global compensation awarded to consumers, plus annual interest at a rate of 4% accruing from one month after the time when payment by the Defendants of the global compensation to consumers becomes definitively due.

569. This remuneration scheme under the AFC is similar to the litigation funder's remuneration scheme in *Merricks v Mastercard*[155] (also an *opt-out* action representing consumers for mass damages caused by an infringement of competition law by Mastercard), pending in the UK, which was approved by the *Competition Appeal Tribunal (*after certain adjustments) under the UK rule identical to Article 19(7) of the EPL (see *infra* section 2.1.1).

570. And it is similar to the litigation funder compensation scheme in the popular actions pending before the TCRS in cases 19/20.5YQSTR and 20/20.9YQSTR and

[155] *Competition Appeal Tribunal* UK, Case 1266/7/7/16 *Merricks v Mastercard*.

before the Judicial Court of the District of Lisbon in cases 6970/21.8T8LSB and 11400/21.2T8LSB.

571. This scheme and level of remuneration provided for in the AFC is in line with the usual practices of the international market for financing litigation, for processes of this nature and with this degree of complexity and risk.

572. Under the AFC (clauses 2(8) and 4(1), (2) and (6)), the Plaintiff, through its attorneys, is fully and exclusively responsible for the preparation and conduct of this lawsuit , in accordance with the interests of the consumers represented, including decisions to propose, manage and settle, and is obligated to act economically and diligently during the lawsuit in furtherance of the interests of the consumers represented.

573. Although the CJLF is entitled to be informed and consulted under the AFC, it has no decision-making power over the choices made in this action, and Plaintiff's full independence and responsibility in this regard is enshrined.

2. From the Law

2.1. Preliminary Issues and Process

2.1.1. On standing and admissibility of the action

574. Under article 52(3)(a) of the CRP:

> *"Everyone, personally or through associations that defend the interests in question, is granted the right to popular action in the cases and under the terms foreseen in the law, including the right to request for the injured party or parties the corresponding compensation, namely to: a) Promote the prevention, cessation or judicial prosecution of infractions against public health, consumer rights, quality of life, preservation of the environment and cultural heritage".*

575. This constitutional right was implemented, in general terms, by the LAP and by article 31 of the CPC and, in special terms, for damages actions for competition law infringements (like the present one), by article 19 of the EPL.

576. As is evident from the use of the adverb *"namely"* in article 52(3)(a) of the CRP, and the adverb *"namely"* in article 1(2) of the LAP and in article 31 of the CPC, the enumeration of interests that can be protected through popular action is merely exemplificative[156] .

577. The present action aims to protect the *"consumer rights"*, as worded in the CRP, and the *"protection of the consumption of goods and services" as worded in the* LAP and the CPC, being also an *"action for damages for breach of competition law" as* worded in the EPL, falling within the provisions of the *above* mentioned rules. That is, the interests that the present action aims to protect fall within the material scope of the right of popular action, regulated in the CRP, LAP, CPC and EPL.

578. The Constitution does not require that popular action be regulated by a single law[157] . It only requires that the fundamental guarantee *sub juditio*, having the nature of rights, liberties and guarantees, be enforceable through a law subject to the scrutiny of constitutional rules for the protection of fundamental rights.

579. The right exercised by the Plaintiff in the present action is not only enshrined in the CRP and ordinary legislation, but also corresponds to the pursuit of two priority duties of the State, provided for in article 81(f) and (i) of the CRP, a factor that decisively frames the role and functions of the Court and the Public Prosecutor's Office in an action such as the present one.

580. The ownership of the procedural guarantee in question is attributed, *inter alia,* to *"associations that defend the interests at stake"* (Article 52(3)(a) of the CRP), materialized in ordinary legislation as *"associations and foundations that defend the interests set forth in the previous article, regardless of whether or not they have a direct interest in the lawsuit" (*Article 2(1) of the LAP).(Article 2(1) of the LAP), *"associations and foundations defending the interests in question"* (Article 31 of the

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[156] In this sense, e.g., the Judgment of the STJ of October 20, 2005, proc. no. 05B2578 (*"The rule has an exemplifying character, as follows from its own textual enunciation (namely)"*); and the Judgment of the TRL of June 20, 2013, proc. no. 720/13.0TVLSB-A.L1-6.

[157] Miranda, Jorge & Medeiros, Rui, *Constituição Portuguesa Anotada, Tomo 1*, 2nd ed, Coimbra Editora: Coimbra, 2010, p. 1039.

CPC), and *"associations and foundations whose purpose is to defend consumers"* (Article 19(2) of the EPL).

581. Article 3 of the LAP establishes as requirements for the active legitimacy of associations:

(i) *"the legal personality"*;
(ii) *"that it expressly includes in its attributions or in its statutory objectives the defense of the interests at stake in the type of action in question"*; and
(iii) *"do not engage in any kind of professional activity in competition with companies or liberal professionals"*.

582. The STJ clarified that *"the "legitimatio ad causam" and "ad processum" of associations is constitutionally conditioned by the requirement that they have as their purpose the defense of interests assigned to them by law, which means that not only the application of the principle of specialty is required, but also the existence of a certain connection between the effects of the acts or situations that are intended to prevent or cause to cease, and the association's statutory purpose"*[158] .

583. The Plaintiff is, precisely, an association (with legal personality) for the defence of the interests and rights of consumers, in particular against violations of these rights and interests by competitive infringements. Its Articles of Association expressly include among the Plaintiff's attributions and purposes the defence of these interests, through actions such as the present one, specifically mentioning the promotion of popular actions in defence of diffuse, collective or homogeneous individual rights and interests and seeking compensation for damages suffered by consumers. The Plaintiff does not exercise any kind of professional activity competing with companies or liberal professionals.

584. As a result, the Plaintiff meets the requirements of ownership of the right of popular action for an action with the scope of the present one, under the terms of the aforementioned rules.

585. As summarized recently by TRL:

[158] Ruling of the STJ of 13/10/1998, proc. nr. 98A910. See also TRL Ruling of 20/06/2013, proc. no. 720/13.0TVLSB-A.L1-6; and TRP Ruling of 19/03/1998, proc. no. 9630986.

"A non-profit association with the statutory purpose of "promoting the defense of competition in Portugal and consumer protection, with a view to increasing the welfare of consumers and the Portuguese economy" - and, "namely", "to initiate and promote legal actions for the defense of competition in Portugal, namely by resorting to popular action or any other procedural means for the defense of diffuse or collective interests, under the terms of the law in force" - has popular legitimacy to file actions aimed at recognizing the right to compensation for infringement of competition law, thus pursuing the defense of consumers"[159] .

586. The popular action regulated by the CRP, LAP, CPC and, as *lex specialis* applicable to the present case, by the EPL, can be used to pursue collective, diffuse[160] and homogeneous individual interests[161] .

587. This is the position already expressed by the STJ:

"Article 1 of Law 83/95 of August 31 covers not only 'diffuse interests' (interests of the whole community) but also 'homogeneous individual interests' (those which are polarized in identified clusters of parallel juxtaposed holders)", and the "right of telephone service subscribers to compensation for damages for breach of contract falls within the category of 'homogeneous individual interests'" .[162]

"in addition to diffuse interests (...) other interests fall within the scope of these rules, namely, homogeneous individual interests that represent all those cases in which the members of the class are holders of different

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[159] TRL Ruling of 04/12/2018, proc. no. 7074/15.8T8LSB. L1-1, available aqui, §2 of the summary.

[160] Judgment of the STJ of 23/09/1998, proc. no. 98A200, available here: *"Diffuse interests correspond to legally recognized and protected interests whose ownership belongs to each and every member of a community or group but is not susceptible of individual appropriation by any of those members - they are simultaneously non-public, non-collective and non-individual interests"*.

[161] In this sense: Teixeira de Sousa, M., *A legitimidade popular na tutela dos interesses difusos*, Lisbon, Lex, 2003, pp. 13-58; Oliveira Ascenção, "A ação popular e proteção do investidor" (2011) 11 *Cadernos do Mercado dos Valores Mobiliários*; Sousa Antunes, H., "Class actions, group litigation and other forms of collective litigation: Portuguese report", paper presented at the *Globalisation of Class Actions* Conference, Oxford, 13-14 December 2007, p. 7; Monteiro, A. P., Júdice, J. M., "Class actions & arbitration in the European Union", *in Studies in Homage to Miguel Galvão Teles,* Almedina, Coimbra, 2012, p. 189, at p. 192; Rossi, L., Sousa Ferro, M., "Private enforcement of competition law in Portugal (II): *actio popularis* - facts, fictions and dreams", 4(1) (2013) *Revista de Concorrência e Regulação* 35, p. 47.

[162] Judgment of the STJ of 23/09/1997, proc. no. 97B503, available here aqui.

rights, but dependent on a single issue of fact or law, requesting for all of them a jurisdictional provision of identical content"[163] .

588.The STJ further emphasized that:

"with regard to those homogeneous individual rights, (...) the rights protected must objectively have a communitarian character, that is, a pluri-subjective value and the interests underlying such actions must assume a meta-individual character, since it is necessary that the common interest be sufficiently diffuse and general not to be identified with the personal and direct interests on which, as a rule, the legitimacy and ownership of the right of judicial action is based"[164] .

589.Prof. Miguel Teixeira de Sousa wrote about this:

"The diffuse interests are characterized by having a double dimension: they are valid both on an individual level (to which corresponds the homogeneous individual interest), and on a supra-individual level (that which concerns the diffuse interest stricto sensu and the collective interest). It follows that its judicial protection may be obtained on each of these levels, because they are not mutually exclusive. This complementarity between the jurisdictional protection of individual interests and that of diffuse interests can be demonstrated in an analysis taking as example the interests related to consumption and the environment"[165] .

590.In the words of Prof. Sérvulo Correia, homogeneous individual interests:

"These are interests that are capable of autonomous individualization, but which arise in mass situations and in terms that are perfectly identical in nature. This is the case, for example, with individualized claims for

[163] Ruling of the STJ of 20/10/2005, proc. no. 05B2578, available here aqui.

[164] Ruling of the STJ of 20/10/2005, proc. no. 05B2578, available here aqui. In the same sense: Judgment of the STJ of 08/09/2016, proc. no. 7617/15.7T8PRT.S1, available here aqui

[165] Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, Lex, 2003, pp. 141-142, quoted in the TRL Judgment of 04/12/2018, proc. no. 7074/15.8T8LSB.L1-1, available here.

compensation by members of a population intoxicated by a gas leak in an industrial plant"[166] .

591. In fact, the constitutionalist doctrine is consensual in extending the scope of protection of the right to popular action *"to all legally consigned forms of common interests, whether diffuse or collective, also covering the defense of individual homogeneous interests, insofar as the respective injury is consequential to the infringement of those common interests"*[167] .

592. The protection of homogeneous individual interests corresponds to the component of the right enshrined in article 52(3) of the CRP under which the popular action includes *"the right to request for the injured party or parties the corresponding compensation"*[168] . The STJ has described the popular civil action regime provided by the LAP as a *"cumulative regime of subjective civil liability, which allows the injured parties to obtain, where appropriate, compensation"*[169] .

593. For example, the STJ reversed a decision of the TRL which had refused the admissibility of a popular action because it (the TRL) considered that the interests of the consumers to be protected (right to the refund of an unduly charged amount) were merely individual. The STJ pointed out that the *opt-out* power provided for in article 15(1) of the LAP implied, on a systematic interpretation, that the popular action covered the protection of homogeneous individual interests and, within this scope, the right to damages[170] .

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[166] Sérvulo Correia, *Direito do Contencioso Administrativo,* Lex, I, 200, p, 653, quoted in the TRL Judgment of 04/12/2018, proc. no. 7074/15.8T8LSB. L1-1, available aqui. It should be noted that this doctrinal definition presupposes that the *quantum of* compensation to which each injured party is entitled may be different, since not all members of a population will have been affected in the same way and with the same degree of intensity by the gas leaking from the industrial establishment.

[167] Miranda, Jorge & Medeiros, Rui, *Constituição Portuguesa Anotada, Tomo 1*, 2nd ed, Coimbra Editora: Coimbra, 2010, p. 1039.

[168] As confirmed, e.g., in the STJ Judgment of 09/23/1997, proc. no. 97B503, available here.

[169] Ruling of the STJ of 07/10/2003, proc. no. 03A1243, available here aqui.

[170] "It is only in the context of divisible goods (and not in the context of indivisible goods, not susceptible of individual appropriation, object of diffuse interests) that the right of self-exclusion allows the dismissal of the res judicata of the decision rendered in the popular action and the consequent opportunity for the self-excluded to propose, in the future, a singular action. Divisible assets are the object of the so-called "homogeneous individual interests", bearing in mind the referenced conceptual scope. Therefore, the scope and meaning of the rule contained in article 15, no. 1 of Law 83/95, implies that the rules of article 1, of the same law, must be interpreted in the sense of encompassing not only "diffuse interests", but also "homogeneous individual interests". Among the "homogeneous individual interests" covered by Article 1 of Law 83/95, one of the consumers' rights stands out: "the case of the right to compensation for damages"" - STJ Judgment of September 23, 1997, proc. n.º 97B503, available at aqui.

594. By including homogeneous individual interests in the scope of popular action, the legislator, both constitutional and ordinary, intended to provide the Portuguese judicial system with a mechanism that would allow the restoration of legality in situations where the interests of a large number of individuals are massively affected by a particular conduct, in which the pursuit of legal actions - individual or collective - by these individuals would face virtually or factually insurmountable obstacles due to the excessive number of parties, the high costs of the action and/or the low value of the patrimonial impact on the sphere of each individual. In this sense, the right to popular action to protect homogeneous individual interests should also be understood as a corollary of the fundamental right of access to the law and to effective judicial protection (article 20(1) of the CRP).

595. The present action aims, firstly, to protect diffuse and/or collective and meta-individual interests, namely the protection of consumer rights and protection of competition, in the pursuit of the priority tasks of the State referred to in article 81(*f*) and *(i) of* the CRP and the Plaintiff's statutory purposes. The norms invoked in the present action aim to protect these diffuse and/or collective interests and their violation affects the entire community. Also at stake is the guarantee of the rule of law and the principle of legality[171] .

596. Secondly, the present action seeks to protect the individual homogeneous interests of consumers harmed in Portugal by the Defendants' practices in question, which are inseparable, and the protection of which goes hand in hand with the protection of the aforementioned diffuse interests. The protection of these homogeneous individual interests, to which the injured consumers' rights to compensation correspond, is dependent on the determination of the same issues of fact and law - the same conduct by the Defendants, unlawful for the same reasons in law, and which affected all consumers in the same way.

597. The only potential variation between the compensation rights of the consumers represented in this action (the actual verification of which will depend on the Court's final determination of the method of individualization of the compensation due to each consumer) is the precise *quantum of* individual compensation for each consumer. Indeed, depending on the Court's determination, it could vary, for example, depending on the amount paid by each consumer represented for Android apps and Android app content as recorded in their Google Play account

[171] In this regard, see TRL Ruling of 06/20/2013, proc. no. 720/13.0TVLSB-A.L1-6, available here.

history. Still, the determination of individual compensation will depend on the discussion of the same questions of fact and law. And the quantification of the individual compensation due will be made according to the same method applied uniformly to all represented consumers, simply by, in the above example, applying the same overpricing and *passing-on* percentage, as determined by the Court, to the purchase amounts of each consumer listed in their Google Play account history.

598. The inclusion of homogeneous individual interests in the scope of popular action does not require perfect identity of the *quantum of* damages to which each injured party is entitled. The identity of nature of the interest is not equivalent to nor does it postulate an identity of *quantum*. First of all, the term "homogeneous" encompasses not only what is absolutely identical, but also what is similar. A different interpretation would reduce the right of popular action for the defense of homogeneous individual interests to extremely rare cases, and such a restrictive and biased interpretation would be contrary to the teleology of the rule. This would be, as will be seen *below, an* interpretation that violates the constitutional right to exercise, which includes the right to *"request for the injured party or parties the corresponding compensation",* without limiting such right to cases in which the compensation due to all injured parties is absolutely identical.

599. Nor would it make sense, in any other way, to provide for the right of popular action to obtain damages within the framework of consumer rights or the EPL, since it would only be theoretically possible to configure a reality in which all consumers affected by an illicit practice would have a precisely identical *quantum of* damages. Just as it would make no sense, for example, to provide for its defense of homogeneous individual interests and obtaining damages in article 31 of the Securities Code, since, by definition, shareholders are injured to different degrees depending on the value and size of their holdings.

600. National jurisprudence points in this direction, which has expressly and repeatedly recognized that the right of popular action includes the right to claim damages for those injured by the same unlawful practice, even if the precise *quantum of* these damages varies from injured party to injured party.

601. So, for example:

a. In the case *ACOP v Portugal Telecom*[172] , the right of ACOP to bring a class action suit to obtain compensation for damages caused to telephone service subscribers by practices of breach of contract whose impact varied according to the specific circumstances of each defendant was recognized;

b. In the case *DECO v. Portugal Telecom (I)*[173] , DECO's right to bring a class action suit was recognized in order to obtain compensation for damages caused to consumers through unilateral alteration of contractual conditions for the provision of telephone communications services, the impact of which necessarily varied among the injured parties;

c. In the case *DECO v. Portugal Telecom (II)*[174] , DECO's right to bring a class action to obtain compensation or refunds for consumers for the unlawful practice of charging a call activation fee was recognized, with the *quantum of* damages for each consumer represented necessarily depending on the number of calls made;

d. In the case *DECO v. English Centers et al*[175] , DECO was recognized as having the right to bring a class action in order to obtain restitution to consumers for amounts unduly charged by a language school and two financial institutions, the amounts varying according to the contracts entered into;

e. In the case of *OdC v. Sport TV*[176] , the right of the Observatório da Concorrência association to take popular action was recognized in order to obtain compensation for a set of alleged practices of abuse of dominant position by the Defendant, with different damages depending on the type of consumer represented and the duration of the contract period of the services in question.

602. In the case *OdC c. Sport TV*, the trial court first denied the Plaintiff's standing, but the TRL reversed that decision and ordered the action to proceed, providing, *inter alia,* the following clarifications:

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[172] Ruling of the STJ on 23/09/1997, proc. no. 97B503, available here aqui.

[173] STJ Judgments of 02/17/1998, proc. no. 97A725, available here aqui.

[174] Case which resulted in the Judgement of the STJ of 07/10/2003, proc. nr. 03A1243, available here aqui*In a popular action filed on the basis of Law no. 83/95 of 31 August, the court held that "the request for refund to customers of amounts charged as activation fees is procedurally admissible and viable from the point of view of substantive law".*

[175] Ruling of the STJ on 07/01/2010, proc. no. 08B3798, available here aqui.

[176] TRL Ruling of 04/12/2018, proc. no. 7074/15.8T8LSB. L1-1, available aqui.

"With its incorporation, the plaintiff acquires legal personality (art. 158, no. 1 of the Civil Code) and its capacity "covers all the rights and obligations necessary or convenient for the pursuit of its purposes" (art. 160 no. 1 of the Civil Code), which means that, by force of the principle of coincidence (art. 11 no. 2 of the CPC), the plaintiff enjoys legal personality, and also has judicial capacity (art. 15 of the CPC)".

"... even if it were concluded that the defense of homogeneous individual interests was at stake - exclusively, the defendant's thesis -, it would always be understood, as the plaintiff claims, that it has legal standing to sue the defendant, under the terms in which it did so. Being established that the plaintiff is an association that "aims to promote the defense of competition in Portugal and consumer protection, with a view to increasing the welfare of consumers and the Portuguese economy", we believe that it is enough, within the legislative framework referred to, to conclude that the plaintiff has popular legitimacy to bring the action".

"The court a quo gave a restrictive reading of the Statute, and it appears to us that there is no reason to do so."

"In the case, by reconducting the 'protection of consumers' through the filing of a class action, exclusively, to the defense of diffuse interests stricto sensu and excluding that such protection may also cover homogeneous individual interests, the court makes a restrictive interpretation of the deal, outside of the cases in which this is justified or the law allows it."

"In short, accepting, as stated by the court of first instance, that the legislator of the LAP, with art. 3, meant that each association "only has standing to act as a plaintiff in the defense of interests, goods or values that fall within its social object, in fulfillment of the purposes and objectives for which it was constituted", then we have that, in this case, having the plaintiff as purpose the "promotion of the defense of competition in Portugal" and the "protection of consumers" - as the plaintiff indicates, the expressions protection/defense have similar content - this means that it can use the popular action for the purposes intended."

"... it would only lack legal standing if the association had no connection with the diffuse interest at stake, which, as seen, is not the case"

[Commenting on Article 19 of the EPL] *"The law came into force much later than the filing of the lawsuit and the provision mentioned does not apply to the present case, but it clearly demonstrates the legislator's position on the scope of action of associations whose purpose is to protect consumers, granting them standing to bring actions for compensation for damages arising from an infringement of competition law"*[177] .

603. In the alternative, even if - *ad arguendum* - national law could be interpreted as not entitling a consumer protection association such as the Plaintiff to bring an action representing all consumers who have not exercised the *opt-out* and, by means of such an action, to obtain an order that the undertaking infringing Article 101 or Article 102 TFEU be compensated.This right would have to be guaranteed by virtue of the **principle of effectiveness**, both as enshrined in Article 23(2) of the SBA and as laid down in the case-law of the CJEU in the context of the exercise of the right to damages for infringements of Articles 101 and 102 TFEU. Indeed, in a case such as the present one, where the damage caused to each consumer is very small, the absence of a right of representation in these terms would have the effect of making it impossible or excessively difficult to compensate consumers. The amount of the damage and the high costs of such litigation would not make it possible to overcome the rational apathy of the injured parties, who would therefore not take the steps necessary to exercise the right to compensation themselves, either individually or collectively.

604. Similarly and on the same grounds, a different interpretation from the one sustained here would undoubtedly lead to a violation of the **fundamental right of access to the law and to effective judicial protection**, as protected by the CRP, by article 47 of the EU Charter of Fundamental Rights and by article 6 of the ECHR.

605. The Advisory Board of the OPG has also highlighted the importance of popular actions in the Portuguese legal system as a mechanism for mass compensation of consumers, framing this mechanism within a broader reflection on the need for mechanisms that protect the rule of law and ensure compensation for injured parties, but which also aim to ensure that the economic gains generated by an illicit activity do not remain with the offender (logic inherent in the popular action

[177] TRL Ruling of 04/12/2018, proc. no. 7074/15.8T8LSB. L1-1, available aqui.

mechanism, when it delivers the remainder of the undistributed global compensation to the Ministry of Justice to promote access to justice):

> *"In recent times, special attention has been paid in the most diverse areas of law (although with special and understandable acuteness in criminal law) to the existence of mechanisms that prevent the economic gains generated by illicit activities from benefiting their beneficiaries, as a way of demonstrating that criminal activity does not pay. It is important to guarantee that those who get rich from an illicit activity, whether they are the agents or not, will always be dispossessed of all the advantages they have derived from it. We have become aware that the perception of the effectiveness of this message is certainly a strong disincentive to commit illicit behavior, since it increases the risks. This is why we try to ensure that there is no economic benefit from illegal activity that encourages its practice, even if sanctioned"*[178] .
>
> *"Although (...) it is important to take into account the amount of economic benefits obtained with the sanctioned illegal activity when calculating the penalty applied* [in the context of *misdemeanors*], *such a consideration does not satisfy the need to restore the patrimonial order of assets corresponding to the law in force. And, as stated by the Constitutional Court in its ruling No. 392/2015 of August 12, 2015, a rule of law cannot fail to be concerned with reconstructing the property situation that existed before someone through unlawful conduct acquired undue property advantages. Even more so, we would add, when these correspond to damage to a specific person. In these situations, the Constitutional Court also states, peremptorily, in Ruling 444/2008 of September 23, 2008, that since the mission of the democratic rule of law is to protect citizens against oppression, arbitrary rule and injustice, the ordinary legislative authorities cannot fail to ensure the right to compensation for unjustified damage suffered by anyone as a result of the conduct of another. The legal protection of citizens' goods and interests that are recognized by the legal system and that have been unjustly injured by the action or omission of others, necessarily guaranteed by a State governed by the rule of law, requires, in such cases, compensation*

[178] Opinion No. 17/2020 of the Advisory Council of the Attorney General's Office, p. 36 (our emphasis).

for the damages suffered, and the institute of civil liability has come to play a primordial role in this task"[179] .

606. Unlike the legislation of other EU member states and Directive (EU) 2020/1828 of the European Parliament and of the Council of November 25, 2020 (whose transposition deadline has not yet passed and will only affect the cross-border exercise of representative rights), the Portuguese Constitution and legislation do not provide any other requirement for the holding and exercise of the right of popular action, under the terms of this case, other than those mentioned and analyzed above.

607. The law provides for various steps and controls by the Court, Public Prosecutor's Office, and other actors, which constitute various safeguards against abusive exercise of the right of action:

a. special regime of dismissal of the initial petition, when it is manifestly unlikely that the request will be granted (article 13 of the LAP);
b. right of *opt-out* and intervention by represented consumers (article 15 of the LAP);
c. The right of the Public Prosecutor's Office to substitute itself for the Plaintiff in the popular action in the event of withdrawal from the litigation, of a settlement or of conduct harmful to the interests at stake (article 16(1) of the LAP);
d. duty-power to gather additional evidence on the Court's own initiative (Article 17 of the LAP);
e. special regime for the purposes of res judicata (Article 19(1) of the LAP);
f. application of the general rules on bad faith litigation (Article 20(4) of the LAP).

608. Under the general regime, the general rules on costs are departed from, namely by allowing the Court to fix the amount of the attorney's fee, according to the complexity and value of the cause (article 21 of the LAP) and to use the amount of the global indemnity that is not claimed by injured parties to pay such attorney's fee (article 22(5) of the LAP). In view of the fact that the ultimate purpose of this mechanism of article 22(5) is to deliver the remaining funds to the Ministry of Justice for *"support in accessing the law and the courts for holders of popular*

[179] Opinion No. 17/2020 of the Advisory Council of the Attorney General's Office, p. 37 (our emphasis).

action rights who justifiably request it", it is understandable that the logic of the system is that the undistributed amounts of the lump-sum settlement be used to pay the expenses of the promoter of the popular action that originated these undistributed amounts, with the remainder being left for support of future popular actions. It would be illogical and aberrant if the financial advantages thus obtained for society in a popular action could be used to finance future popular actions, but not to reimburse the expenses of the promoter of that popular action (subject to control and decision by the court).

609. Confirming this reading of the rule of the general regime, it was established in article 19(7) of the EPL, applicable to the present case, that the *"compensation that is not claimed by the injured party within a reasonable period of time established by the judge of the case, or part of it, shall be allocated to the payment of costs, charges, fees and other expenses incurred by the plaintiff as a result of the action"*.

610. This rule, already included in the preliminary draft of transposition of the Directive prepared by the PCA, was inspired by article 47C(6) of the British *Competition Act*, as revised by the *Consumer Rights Act* 2015. In addition to establishing, in article 47C(5), the equivalent solution to that of article 19(8) of the EPL (remaining unclaimed compensation is delivered to a "charity", after deducting the amounts provided for in article 47C(6)[180]), article 47C(6) establishes:

> *"In a case within subsection (5) the Tribunal may order that all or part of any damages not claimed by the represented persons within a specified period is instead to be paid to the representative in respect of all or part of the costs or expenses incurred by the representative in connection with the proceedings."*[181] .

611. This rule was subsequently implemented in the *Competition Appeal Tribunal*'s Rules of Procedure, Article 93(4) and (5) of which states:

[180] See also Article 93(6) of the CAT rules of procedure.

[181] Translation: "In a case within subsection (5) the Court may order that all or part of the amount of compensation unclaimed by the represented persons in a specified period be instead paid to the representative in respect of all or part of the costs or expenses incurred by the representative in respect of the proceedings."

"(4) Where the Tribunal is notified that there are undistributed damages in accordance with paragraph (3)(b), it may make an order directing that all or part of any undistributed damages is paid to the class representative in respect of all or part of any costs, fees or disbursements incurred by the class representative in connection with the collective proceedings.

(5) In exercising its discretion under paragraph (4), the Court may itself determine the amounts to be paid in respect of costs, fees or disbursements or may direct that any such amounts be determined by a costs judge of the High Court or a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session"[182] .

612. Furthermore, interpretations that render useless or limit the constitutional rights of popular action for the defense of consumer and competition rights and the right to compensation for damages for violations of consumer and competition law to marginal or near-impossible cases are unconstitutional and violate the European principle of effectiveness.

613. Recalling the provisions of article 52(3) of the CRP, implemented, with respect to popular actions for damages caused by infringements of consumer rights and competition infringements, by the LAP and by article 19 of the EPL, it would be unconstitutional the normative interpretation to be eventually extracted from these provisions of the EPL, or from any other rule implementing article 52(3) of the CRP, according to which the popular action would only protect homogeneous individual interests that were equal as to the *quantum of* damages of each injured party .

614. Such an interpretation would suffer from a double material unconstitutionality, for violation of the constitutional right to popular action and the constitutional principle of access to the law and the courts (articles 52(3) and 20(1) and (4) of the CRP). If this interpretation were to hold, the right to popular action would be

[182] Translation: "(4) Where the Court is notified that there are undistributed damages pursuant to paragraph (3(b), it may adopt an order directing that all or part of the amount of undistributed damages be paid to the class representative in respect of all or part of the costs, expenses and other charges incurred by the class representative in connection with the class action.

(5) In exercising its discretion under paragraph (4), the Court may itself determine the amounts to be paid in respect of costs, expenses and other charges, or may direct that those amounts be determined by a High Court costs judge or a fees officer of the Supreme Court of Northern Ireland or by the Hearing Officer of the Court of Session."

limited to practically impossible or marginal cases, rendering the constitutional guarantee incomprehensibly inoperative by introducing inadmissible obstacles to the exercise of the right of popular action in the context of homogeneous individual interests. The right *sub judice* benefits from reinforced constitutional protection. If it is true that it may be subject to restrictions, these should conform to constitutional limits. Any restriction of this right must be justified and pass the proportionality test. *In casu,* however, the fact that no legitimate purpose can be seen to oppose the full legal effectuation of the right in question makes it legally unnecessary and dispensable to subject it to the proportionality tests. In other words, such a judgment of unconstitutionality results from a flagrant and direct violation of the applicable constitutional commands, which prevail and are irremediably binding on the enforcers of the law, under the terms of Article 18(1) of the CRP, a fundamental aspect of the material regime for protecting rights, freedoms and guarantees.

615. The principles referred to, without prejudice to the recognition of the freedom of legislative conformation in procedural matters, prohibit the creation of excessive and materially unjustified difficulties, with the aim of preventing mere formal obstacles from being transformed into pretexts for refusing to answer the claims made.

616. It is easy to conclude that a procedural solution leading to the practical invalidation of the right of popular action to obtain damages for those injured by violations of competition law is clearly disproportionate and does not survive constitutional scrutiny. The basic meaning of the right to a fair trial, as an expression of a subjective legal position with constitutional dignity, such as the right to popular action and the right to compensation for those injured by competition law violations, is, in fact, the requirement to conform the process in a materially appropriate way to an effective judicial protection.

617. Finally, given the inescapable relationship of complementarity between *private enforcement* and *public enforcement*, the implementation, by hermeneutic means, of a rule that reflects such a restrictive view of popular action, by the legislator or the enforcer of the law, would be in clear collision with the constitutional duty, which is primarily incumbent upon the State, to defend the interests and rights of consumers and to defend competition, under the terms of article 81 (f) and (i) of the CRP. In effect, it should be noted that the fact that we are dealing with a

constitutional rule of deferred effectiveness does not preclude the susceptibility of its injury, generating material unconstitutionality by action[183] .

2.1.2. About the process applicable to the present action

618. The present process is governed:

a. by the SBA, as *lex specialis* (as it falls within its scope of application, as defined in Articles 1(1) and (2) and 2(l); regime applicable to lawsuits filed as of its entry into force, as follows from Article 24(2) of the SBA[184]);
b. by LAP; and
c. subsidiarily, by the CPC.

619. As far as is relevant to the organization and prosecution of the present proceeding (without prejudice to the other relevant special rules referred to in other sections), the LAP establishes special rules regarding:

a. form of civil popular action - article 12(2);
b. dismissal of the initial petition - article 13
c. procedural representation, *opt-out* and intervention - articles 14 and 15
d. powers of the Public Prosecutor - article 16;
e. collection of evidence by the judge - article 17;
f. effectiveness of appeals - article 18
g. effects of res judicata - article 19(1);
h. publication of decisions - article 19(2);
i. preparations, costs and proxy - articles 20 and 21;
j. fixing the overall compensation and the right to individual compensation - article 22(2) to (4);
k. destination of undistributed global compensation in popular actions - article 22(5); and

[183] Canotilho, Gomes & Moreira, Vital, *Constituição da República Portuguesa Anotada, Vol. I,* Coimbra Editora: Coimbra, 2007, p. 973.

[184] As already clarified by the Advisory Council of the OPG, *"Article 19 of Law no. 23/2018, of 5 June, (...) being of a procedural nature, is applicable to the present situation"* - Opinion no. 17/2020 of the Advisory Council of the OPG, pp. 46-47.

l. duty of cooperation of public entities and access to information - article 26

620. And the EPL establishes special rules, *inter alia*, regarding:

a. out-of-court settlements and out-of-court dispute resolution - articles 2(a) and (s) and 11
b. global amount of compensation and its distribution in popular actions - article 19(3) to (6);
c. payment of the Plaintiff's costs in popular actions - article 19(7);
d. destination of undistributed global compensation in popular actions - article 19(8); and
e. respect for the principle of effectiveness - article 23(2).

621. As for the form of the lawsuit, without prejudice to the special rules applicable and the existence of a specific category in Citius for this type of action, the popular civil action *"may take any of the forms provided for in the* [CPC]*"* (article 12(2) of the LAP), in which case the form of declaratory judgment action with common procedure applies (article 10(1) to (3) of the CPC).

622. Without prejudice to the application of the general regime of the CPC as to the unfitness of the initial petition (article 186 of the CPC), the court has the power and duty to dismiss the initial petition in a popular action when it considers that *"it is manifestly unlikely that the claim will be granted, after hearing the Public Prosecution Service and after making the preliminary inquiries that the judge deems to be justified or that the plaintiff or the Public Prosecution Service request"* (article 13 of the LAP).

623. If the court concludes that the action must proceed, it must determine (in abstract terms, by definition of category) the *"holders of the rights or interests at stake"* who will be represented in the action by the Plaintiff, *"with waiver of a mandate or express authorization",* if they do not exercise their right to *opt-out* (article 14 of the LAP).(article 14, LAP), and *to* order the summoning of *the "owners of the interests at stake in the suit in question, and who do not intervene in it, so that, within the period set by the judge, they may intervene in the main proceedings, if they so wish, accepting it at the stage it is at, and to state in the case records whether or not they accept to be represented by the plaintiff or if, on the contrary, they exclude themselves from such representation, notably for the purpose of the decisions handed down not being applicable to them, under penalty of their*

passivity being construed as acceptance, without prejudice to the provisions of paragraph 4.No. 4" (article 15(1) LAP).

624. Service of process on represented consumers *"shall be effected by advertisement(s) made public through any means of communication or in print, depending on whether general interests or geographically localized interests are involved, without it being obligatory to personally identify the addressees, who may be referred to as the holders of said interests, and by reference to the action in question, to the identification of at least the first plaintiff, when one of several, and the defendant or defendants, and by sufficient mention of the claim and the cause of action"* (article 15(2) of the LAP).In this case, it must be done *"by reference to the respective universe [of represented parties], determined on the basis of a circumstance or quality that is common to them, of the geographic area in which they reside or of the group or community that they constitute, in any case without being bound by the identification contained in the initial petition"* (Article 15(3) of the LPA).

625. The Plaintiff understands that in a case such as the present one, in which such a wide range of consumers are represented, the summons of the consumers represented must be served by public notice, exclusively or accompanied by the publication of advertisements in one or more newspapers (with costs advanced by IGFEJ). For example, the TCRS ruled in this sense in the case *Ius Omnibus v. Mastercard*[185] and in the case *Ius Omnibus v. Super Bock*[186] , as well as the TJL ruled in the case *OdC v. Sport TV*[187] , in the case *DECO v. VW et al*[188] , *in the case DECO v. Facebook*[189] , and in the case *Ius Omnibus v. Daimler/Mercedes*[190] . Nevertheless, the Plaintiff hereby expresses its intention to promote, at its own initiative, the

[185] TCRS Order of December 17, 2020, in the case of *Ius Omnibus v. Mastercard* (proc. no. 19/20.5YQSTR).

[186] TCRS Order of December 18, 2020, in the case of *Ius Omnibus v. Super Bock* (proc. no. 20/20.9YQQSTR).

[187] Order of September 11, 2019 from the TJL (Juízo Central Cível de Lisboa, Judge 6), in the case *Observatório da Concorrência v Sport TV* (proc. no. 7074/15.8T8LSB).

[188] Order of the TJL (Juízo Central Cível de Lisboa, Juiz 8) of 09/25/2018, *DECO c. Volkswagen AG et al* (proc. no. 26412/16.0T8LSB).

[189] Order of the TJL (Juízo Central Cível de Lisboa, Juiz 14) of 12/12/2018, *DECO c. Facebook* (proc. no. 26304/18.8T8LSB).

[190] Order of the TJL (Juízo Central Cível de Lisboa, Judge 7) of 05/21/2021, *Ius Omnibus c. Daimler/Mercedes* (proc. no. 6970/21.8T8LSB).

widest possible dissemination to consumers, through its *website* and social networks and a press release to the media.

626. If the court confirms the Plaintiff's representation of consumers, the effects of that representation (without prejudice to the rights of intervention and *opt-out*) are retroactive to the date of the filing of the action.

627. The summoning of the Public Prosecutor's Office and the consumers represented (as well as their possible intervention) does not have a suspensive effect, and the process continues with the other steps that should be taken.

628. Even if they do not exercise their *opt-out* right within the deadline set by the court when the represented consumers are summoned under the *above* terms, the represented consumers may still notify the court that they do not wish to be represented by the Plaintiff *"until the end of the production of evidence or equivalent stage"* (Article 15(4) of the LAP).

629. In the present action, the Public Prosecutor's Office has the right to intervene in the proceedings, in accordance with the law, and the right to substitute itself for the Plaintiff *"in the event of withdrawal from the proceedings, as well as in the event of a settlement or conduct prejudicial to the interests in question"* (article 16(1) of the LAP), thus acting, like the court itself, as the guarantor of the due representation and protection of consumer rights.

630. As regards the matter of evidence, *"within the scope of the fundamental questions defined by the parties"*, the court has a duty to take a more proactive stance than under the general rules of the CPC, exercising *"its own initiative in the gathering of evidence, without being bound by the initiative of the parties"* (Article 17 of the LAP).

631. By virtue of the principle of effectiveness, as laid down in European law and in Article 23(2) of the SBA, as well as the fundamental right of access to justice, victims of practices that violate consumer rights and competition protection rules and their representatives have the right to access information and documents that are necessary to ascertain the existence or prove their right to compensation, or without which such ascertainment/proof would become excessively difficult, even if this information or documents are of a confidential nature. In the case of confidential information, a proportionality judgment is applied, finding the solution that maximizes the protection of the conflicting interests, all as further described in section 2.7.

632. Public authorities have a special duty of cooperation with the court and the parties to the present proceedings, including special obligations to provide access to documents and information, under penalty of specified sanctions (Article 26 of the LAP).

633. Without prejudice to the court's power to promote agreement between the parties in accordance with the general rules, if the parties to *these* proceedings decide to participate in an out-of-court dispute resolution procedure relating to the dispute *sub judice*, *"proceedings shall be stayed with respect to such parties for a period not exceeding one year, without prejudice to the termination of the proceedings by arbitral commitment in accordance with Article 277(b) of the Code of Civil Procedure"* (Article 11(1) of the EPL; see also Article 2(a) and (s) of the SPL).

634. If the court finds in favor of the action, it must proceed to quantify the compensation to be paid by the Defendants.

635. This quantification may be done in the execution of a sentence, pursuant to article 609(2) of the CPC, whenever there are no elements to immediately proceed to such quantification. This solution may be particularly appropriate for mass claims such as this one, where the precise quantification of the overall compensation and the individual damages to which consumers are entitled depends on access to a large and complex body of information that may not be collected or obtained in a timely manner. This legal mechanism makes it possible to focus the judicial process on deciding the essential issues and ordering the payment of liquidated damages, encouraging the parties to reach an agreement on the amount of compensation, to be submitted to the Court for approval, in the interest of procedural economy and celerity.

636. In the case of a people's action like the present one, by virtue of Article 22 of the LAP and Article 19(3) to (6) of the EPL, an order for payment of damages requires the court to take the following steps (without prejudice to the possibility of liquidation at the stage of execution of judgment):

a. **quantify** the **damages of** affected **consumers** who have already been **individually identified** in the lawsuit and order the Defendants to pay compensation to those individually identified consumers;
b. determine the **criteria for identifying the injured parties for the** competition infringement at issue **not yet individually identified** in the proceedings, i.e.,

what requirements must be met for a represented consumer to be considered injured by the practices of the Defendants *sub judice* (e.g, being an undeceased consumer, residing in Portugal, who, from July 6, 2009 to the present, has purchased at least one Android application and/or Android application content from the Portuguese Google Play Store, that is, whose Google Play account indicates Portugal as the country, and who has in the history of his account associated to the Google Play Store at least one Android application purchase or one Android application content purchase;

c. determine **what evidence each consumer** not individually identified in the case **must provide to demonstrate that they meet the requirements to** be considered an **injured party** represented in this case (whether direct or indirect evidence, depending on the circumstances of the case) (e.g., providing a printout or copy of their Google Play Store purchase history identifying the amounts spent, during the relevant period, on Android apps or app content);

d. establish an **overall amount of compensation** that covers all **injured parties who have not** already **been individually identified** in the lawsuit, i.e., that determines the overall amount of damages caused by the anti-competitive practice in question to the consumers represented (subtracting the amount of damages already determined for the consumers individually identified in the lawsuit), and orders the Defendants, jointly and severally, to pay the overall amount of the compensation to the entity responsible for its management[191] ;

e. set the **methodology for individualizing the damages** caused to represented consumers, which in the present case may correspond to determining the exact amount paid for Android apps and app content according to the history of the respective consumer's Google Play account;

f. set the **initial deadline** for represented consumers to claim their share of the *quantum of* damages (Article 19(7) EPL), logically and necessarily shorter than the three-year statute of limitations (Article 22(4) EPL);

g. **designates the entity responsible for** receiving the overall amount of compensation and for managing and paying (i.e., distributing according to

[191] There are no precedents for the application of this mechanism in Portugal, and the STJ itself has stated, with regard to article 22 of the LAP, that *"the interpretation of this legal provision raises many doubts"*, highlighting the *"obvious technical imperfections of the Popular Action Law"* - STJ Ruling of 07/10/2003, proc. no. 03A1243. On this controversy, see: Rossi, L., Sousa Ferro, M., "Private enforcement of competition law in Portugal (II): *actio popularis* - facts, fictions and dreams", 4(1) (2013) *Competition and Regulation Journal* 35, pp. 54-64.

the methodology set by the court) the compensation due to injured parties who have not already been individually identified and who apply for their individual compensation, demonstrating that the respective requirements as determined by the court have been met.

h. The court may designate as liable party, *"namely, the plaintiff, one or more injured parties identified in the action"* (Article 19(6) of the EPL, applicable by systematic interpretation also under the general regime of the PLA). The designation of the responsible entity must take into account the high costs and efforts that the performance of these obligations represents, and the court cannot impose that a private entity that was not responsible for the infringement and the damage caused bear the cost of the performance of the obligations imposed by the court. Thus, if a public entity such as the Directorate-General for Consumer Protection is not designated (or even if a public entity is designated), the court must guarantee the payment (in principle, by the Defendants) of the reasonable costs incurred by the entity responsible for managing and distributing the global compensation, either by remuneration of proven costs or by setting a predetermined amount that is sufficient to guarantee the objective.

i. Although omitted from the letter of the law, it is to be expected that the court will require the responsible entity to submit periodic and final reports on the exercise of its responsibilities, in order to allow its control by the court and the Public Prosecutor[192] ;

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[192] By way of analogy, see the remuneration set for the management of the Fund for the Promotion of Consumer Rights in Ordinance 1340/2008 of November 26, as revised by Ordinance 39/2012 of February 10. While the period in which consumers could ask the Fund to return their respective deposit was still running, the Fund manager was remunerated with an annual fee of 1.5% on the total amount of the Fund. From the moment the management of the Fund came to involve only the allocation of support to consumer protection projects, the Fund manager was remunerated at a rate of 4% of the amount distributed to supported projects. The same Ordinances require the submission of periodic reports on the management of the Fund.

See also the UNIDROIT draft rules of civil procedure (ELI-UNIDROIT Model European Rules of Civil Procedure, Consolidated Draft, 2020), specifically rule 228 and its rationale:

"Rule 228. Amount of Compensation

A final judgment that sets the amount of compensation in a collective proceeding shall include

(a) the total amount of compensation payable in respect of the group or any sub-group. If an exact calculation of this amount is impossible or excessively difficult, the court may estimate the amount,

(b) the criteria for distributing the compensation to each group member, and the method of administration of the compensation fund

Comments

In collective proceedings, the exact calculation of individual group member's damages is often difficult or impossible to achieve. Substantive law, in such circumstances, can permit the court to estimate the damages

j. order **publication of the final judgment** (or *"an extract of the essential parts" of it*), *"at the expense of the losing party and under penalty of disobedience, with mention of the final judgment, in two newspapers presumably read by the general* public, as *chosen by the judge of the case"* (Article 19(2) of the LAP), so as to ensure that the decision is properly publicized and that the consumers represented are informed so that they are in a position to exercise their right to claim their share of the total compensation.

637. When fixing the **costs of** the popular action, it will be up to the court to decide whether to reassess the value of the action in light of the net value of the global compensation that has in the meantime been determined by the court, and the court should take into account the **special rules in articles 20 and 21 of the LAP**.

638. Because the Plaintiff in a popular civil action may not be - as is the case in this action - one of the injured parties entitled to damages, and because it defends the diffuse and individual homogeneous interests of a broad community, the special rules of popular action depart from the general rules regarding the **Plaintiff's costs and expenses** which it is entitled to recover if its claim is upheld. In light of the special rules applicable to the present case, and without prejudice to the attorney's fees that are due from the outset by the Defendants in connection with the costs, the court must order *"payment of the costs, charges, fees and other expenses incurred by the Plaintiff by virtue of the action"* using that part of the overall compensation that is not claimed by the injured parties (Article 19(7) of the EPL). The same should be understood as already deriving from the general regime of the EPL, as it would be incomprehensible that the undistributed value of the lump-sum compensation could be used to support (finance) the promotion of future popular actions, but could not be used to support the promotion of the popular action that allowed these funds to be available for this purpose.

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to the group members as a whole, and thereafter distribute those damages according to specified criteria. Consequently, Rule 228 simply requires that a judgment set the total amount of compensation to be paid, the criteria for distributing it to the group members, and the method of its distribution. This latter point may include the appointment of administrators for the compensation fund. It may also result in the court imposing particular conditions on the qualified claimant as the administrator of the fund, e.g., making its administration subject to supervision by the court supervision, a public regulator, or a legal or economic expert.

2. Rule 228(2) thus provides the court with a broad discretion in respect of the administration of the compensation fund. (...)

3. where national legislation permits a court to estimate the amount of damage, that may be applied in collective proceedings."

639. Without these rules allowing the Plaintiffs to recover their costs, the right to consumer protection by individual consumers and consumer protection associations, through popular actions such as this one, would be purely theoretical and not effective. Particularly given the lack (so far) of effectively available mechanisms for public funding of popular actions, none of these right holders would have the financial resources to finance extremely expensive popular actions, without the possibility of recovering these costs in the event that their claim is successful.

640. Once the consumers represented are no longer able to claim their individual compensation (statute of limitations after 3 years), and once the Plaintiff's costs from the lump-sum **compensation have been** paid, the **amount remaining from** the **lump-sum compensation** is **handed over to the Ministry of Justice,** which will keep it in a special account and allocate it to support access to the law and to the courts for holders of the right to class action who justifiably request it (Article 22(5) of the PLA and Article 19(8) of the EPL).

641. It follows from the above that the Portuguese civil popular action follows a logic of calculating the overall compensation, distributing the individual compensation claimed and delivering to the State the unrequested part of the overall compensation that we find in a few EU Member States (see the recent establishment of the same solution in the United Kingdom, the Netherlands and Belgium). The law itself assumes that part of the overall compensation will not be distributed, if only because of the inertia of some of the injured consumers who do not request their share. An exception is therefore made here to the general rule that compensation is only due if all the injured parties are individually identified and only to those injured parties should compensation be paid.

642. The legislator's logic is that in the case of unlawful practices that violate important diffuse interests of society and affect large numbers of consumers with small amounts of damages, the application of the general rule would lead to the unfair result that not only most consumers would never be compensated (because it would be impossible to identify most consumers individually), but that the infringer would always be left with a large part of the profits from its unlawful behavior that it should pay as compensation to consumers. It would be worth breaking the law whenever it caused small harm to large numbers of consumers, because companies would already know that they would never be ordered to compensate most of the harm they caused. The solution of the Portuguese civil

popular action corrects this injustice, by ordering the violator to pay the totality of the damages that he caused to consumers and, as for the part of this global compensation that is not claimed by consumers, this amount reverts to the State, to promote the good of society and, in particular, justice.

643. Although there is not yet a precedent for the operation of the global compensation mechanism and its distribution as provided in the EPL and the LAP, we find a close analogy in the legislature's creation of the "**Fund for the Promotion of Consumer Rights**". The facts and logic that gave rise to the creation of this Fund, and the way in which the legislature regulated this situation, may serve to integrate gaps by analogy, should they be deemed to exist, or, at the very least, to reinforce the interpretative conclusions reached by the Plaintiff in her reading of the EPL and EPL.

644. The Fund for the Promotion of Consumer Rights is, in short, a fund that results from the global payment into an account of all the deposits that the providers of electricity, gas and water services were not entitled to retain and that were too difficult or impossible to return to the respective consumers. The amounts not claimed by consumers were handed over to the state and started being used (still today) to promote consumer protection, as explained below.

645. Decree-Law no. 195/99, of June 8, limited the situations in which bonds could be demanded for the provision of essential public services (e.g. electricity, gas and water). This law required service providers to return bonds provided on dates prior to the entry into force of this law (which became illegal). However, in 2007, the government found that *"a considerable part of the amount provided by consumers is still held today" by service* providers. The companies concerned had not fulfilled their refund obligations, according to the legislator, mainly due to *"the difficulty, and sometimes impossibility, of identifying and locating the holders of the right to a refund or their heirs*. The legislator deemed it necessary to set a time limit for the exercise of the right to claim refund, but also understood that companies should not enrich themselves illegitimately, taking deposits to which they were not entitled, just because not all consumers requested their refund. Thus, it determined *"that the amounts not returned should revert to a fund to be administered by the Instituto do Consumidor, I.P. [today, the Directorate General for Consumers*]. [a *body charged with exercising the policy of safeguarding the rights and interests of consumers, for the purpose of financing out-of-court mechanisms*

for consumer access to justice and national, regional, or local projects for the promotion of consumer rights"[193] .

646. Thus, Decree-Law no. 100/2007, of April 2, which amended Decree-Law no. 195/99, of June 8, was adopted:

a. service providers were required to draw up a list of consumers whose deposits have not yet been returned, and to publish notices (to be posted in the parish councils of consumers' homes and at the service providers' public offices) and advertisements (to be published in the two newspapers with the largest circulation in the country), as well as on the service providers' invoices and websites, inviting such consumers to request the return of the deposit provided and indicating how to do so (including the documents to be submitted for this purpose, to prove ownership of the right);
b. service providers were subject to a *"special duty to cooperate, in particular by allowing access to and consultation of accounting records for the purpose of identifying the consumers" concerned, as* well as a duty to inform the authorities of completed and uncompleted refund proceedings (with justification) and their amounts;
c. consumers had an initial period of 180 days to claim their deposit;
d. After 180 days, the bonds not returned to consumers reverted to a fund managed by the Consumer Institute (IC; today, Directorate-General of the Consumer), *"intended for the financing of extra-judicial mechanisms of access to justice by consumers and projects of national, regional or local scope to promote consumer rights and to be established under terms to be defined by ordinance," with the* service provider having a period of 2 months to deposit the total amount in an account of the IC;
e. consumers had an additional 5 years, after the aforementioned 180 days, to request the IC-managed fund to return their deposit.

647. The Fund was established with a total initial capital of 14,713,255.92 EUR, and has since been used to finance consumer protection projects. The competent ministries have regulated the terms of operation of this Fund in Ordinance 1340/2008 of November 26, which was revised by Ordinance 39/2012 , of February

[193] Decree-Law no. 100/2007, of April 2.

10, as well as in the Regulation of the Fund for the Promotion of Consumer Rights[194]. The limitation of the amount of support granted each year, as well as the investment of that initial amount, caused the Fund's current capital to exceed the initial one, currently reaching about 19 million EUR. The aforementioned Ordinance and Regulation define the objectives of the Fund, the types of projects that may be supported[195], the entities that may benefit from support from the Fund, the Fund's management bodies, the mode of decision on projects to be supported, etc.

648. Finally, in the context of the present case, and in particular the claim regarding the infringement of competition law, no procedural rule may *"render the exercise of the right to compensation impossible in practice or excessively difficult"* (Article 23(2) of the EPL). Thus, there is also an obligation under Portuguese law to **respect the principle of effectiveness** that was already imposed by European law. This means, on the one hand, that the courts must interpret the applicable procedural rules in such a way as to ensure that it is not made practically impossible or excessively difficult to exercise the right to compensation. But it also means that if a procedural rule cannot be interpreted in such a way that the principle of effectiveness is respected, the courts must set it aside and replace it with a solution that allows the principle of effectiveness to be respected.

2.2. Liability

649. Without prejudice to the fact that the solution of this particular case does not vary depending on the application of European or national law, it should be clarified *ab initio that*, by virtue of the primacy of European Union law, as European law has

[194] Approved by Joint Order No. 1994/2012, of January 30, 2012, of the Ministers of State and Finance and of Economy and Employment, and published in the Diário da República II series, No. 31, of February 13, 2012.

[195] The projects must fall under one of four strands: Strand A - Support for out-of-court mechanisms for consumer access to justice; Strand B - Support for local projects to promote consumer rights; Strand C - Consumer information, education and support; Strand D - Studies, opinions and technical and scientific analysis on the general safety of consumer goods and services, advertising and other relevant topics in consumer law and economics. However, each year there is a call for proposals that defines more precisely if projects are open for all axes and what types of projects are admissible in each axis, defined in the Notice of the respective year by the Directorate General for Consumer Affairs.

been interpreted by the CJEU, whenever a **right to compensation for damages arising from a violation of Article 101 and/or 102 TFEU** is invoked:

a. the **existence, requirements and scope of the right to compensation are governed directly by the European legal order** and national rules do not apply (the answer to the questions: "who is entitled/obligated", "to what" and "why/under what conditions");
b. the **procedural rules for protecting that right are governed by the national legal order** concerned, subject to the limits arising from general principles of EU law and, where appropriate, from the harmonization carried out by Directive 2014/104/EU (the answer to the "how" question).

650. It is settled case law that Articles 101 and 102 TFEU directly impose obligations on undertakings and create reflex subjective rights which are directly conferred by the European legal order, i.e. that Articles 101 and 102 TFEU have horizontal direct effect, being capable of being relied upon before national courts (and obliged to apply them) in disputes between individuals, in particular in the context of claims for damages[196] . Even if this did not follow from the very nature of these rules and the general principles of EU law as interpreted by the CJEU, it would still follow from Articles 1 and 6 of Regulation (EC) No 1/2003, which expressly establish this direct effect and the competence of national courts to apply Articles 101 and 102 TFEU.

651. The direct horizontal effect of Article 102 TFEU has already been widely recognized by the Portuguese courts[197] .

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[196] See, e.g.: Case 127/73 BRT v SABAM EU:C:1974:25, para 16; Case C-234/89 Delimitis EU:C:1991:91, para 45; Case C-282/95 P Guérin automobiles EU:C:1997:159, para 39; Case C-344/98 Masterfoods EU:C:2000:689, para 47; Case C-453/99 Courage v Crehan EU:C:2001:465, paras 19-24, 29 and 36; Opinion of AG Mischo in Case C-453/99 Courage v Crehan EU:C:2001:181, paras 16, 20, 21 37-38 and 46; Case C-295/04 Manfredi EU:C:2006:461, paras 56-59, 89, 95, etc; Case C-360/09 Pfleiderer EU:C:2011:389, para 19; Case C-536/11 Donau Chemie EU:C:2013:366, paras 20-22 and 32; Case C-199/11 Otis EU:C:2012:684, para 40; Case C-557/12 Kone EU:C:2014:1317, para 20; Case C-547/16 Gasorba EU:C:2017:891, para 23; Case C-595/17 Apple Sales International EU:C:2018:854, para 35; Case C-724/17 Skanska EU:C:2019:204, para 24; Case C-637/17 Cogeco EU:C:2019:263, para 38; Case C-435/18 Otis EU:C:2019:1069, para 21. See also recital 3 of Directive 2014/104/EU.

[197] All the judgments and rulings that have applied these rules in disputes between private parties are necessarily based on the recognition of their direct horizontal effect. See, in particular, for the clarity of the wording of this point: TRP Judgment of 12/04/2010, *[C] c. [B]* (proc. no. 8615/08.2TBMTS.P1); Ruling of the TRL of 07/06/2011, *Sociedade Central* de *Cervejas v O Difícil da Alameda* (proc. no. 3855/05.9TVLSB.L1-7) (*"Article* [101] as *well as* [102] of *the [TFEU] are considered to be provisions with direct effect, which can be invoked by individuals before the courts of the Member States, regardless of any prior Community decision, in strengthening the direct applicability arising from Regulation 1/2003"*), confirmed in the Judgment of the STJ of 17/05/2012, *Sociedade Central de Cervejas v O Difícil da Alameda (*proc. no. 3855/05.9TVLSB.L1.S1);

652. It has been settled case law, since *Courage v Crehan*, that among the rights thus directly derived from the European legal order is the right to **be compensated** for damage arising from violations of Articles 101 and 102 TFEU.[198] This right was codified in Article 3 (and recitals 3 and 4) of Directive 2014/104/EU.

653. Because the right to rely on an infringement of Article 101(1) TFEU (logic extending to Article 102 TFEU) and to be fully compensated for damages resulting from such an infringement derives directly from the European legal order, whether a person has such rights is a **question governed by European Union law**[199] . Otherwise, there would be no uniform application of European competition law, no *level playing*

Sanctioning Order of the TJL of 20/12/2012, *NOS v PT (II)* (proc. no. 1774/11.9TVLSB) (*"such rules* [Articles 101 and 102 TFEU] *also protect private interests, as recognized by the Court of Justice in Courage v. Crehan, by stating that practices that violate EU competition law and,* mutatis mutandis, *national competition rules, may cause damages to individuals, whether companies or individuals, and that they are therefore entitled to compensation. And this doctrine imposes itself on domestic law, given the primacy of Community law over national law, without prejudice, as has also been mentioned, that each Member State is responsible for defining detailed rules for the introduction of compensation claims"*); Ruling of the TRL of 09/04/2013, *Gas cylinders* (proc. no. 627/09.5TVLSB.L1-7) (*"Under Regulation (EC) No. 1/2003* (...), the right to be compensated for damages caused by the use of *gas cylinders is subject to the law of the country of origin.1/2003 (...), individuals may invoke that regime before the national court, without the need for any prior Community decision - cf. articles 1 and 6 -, and the court must also take into account the provisions of article 3 and proceed to the uniform application of Community competition law"*); TRL Ruling of 04/03/2014, *National Association of Pharmacies and Farminveste v IMS Health (*proc. no. 672/11.0YRLSB). See also, e.g.: TRG Judgment of 20/11/2012, *[T] v [D] and [D]* (proc. no. 1/08.0TBVNC.G1); Case C-39/92 Petrogal EU:C:1993:874, para 15; TRL Judgment of 02/11/2000, *Sport Lisboa Benfica v Olivedesportos - Sociedade Comercial de Organização de Atividades Desportivas e de Publicidade* (proc. no. 60506); and TRL Judgment of 10/11/2009, *VSC and FPF v RTP* (proc. no. 4292/1999.L1).

[198] See, e.g..: Case C-453/99 Courage v Crehan EU:C:2001:181, para 25; Case C-295/04 Manfredi EU:C:2006:461, paras 60-61, 63 and 90; Case T-437/08 CDC Hydrogene Peroxide EU:T:2011:752, para 49; Case T-344/08 EnBW Energie Baden-Württemberg EU:T:2012:242, para 148; Case C-360/09 Pfleiderer EU:C:2011:389, para 28; Case C-536/11 Donau Chemie EU:C:2013:366, para 21; Case C-199/11 Otis EU:C:2012:684, paras 41 and 43; Case C-365/12 P EnBW Energie Baden-Württemberg EU:C:2014:112, para 104; Case C-557/12 Kone EU:C:2014:1317, paras 21 and 32; Case C-724/17 Skanska EU:C:2019:204, paras 25 and 43; Case C-637/17 Cogeco EU:C:2019:263, paras 39-40; Case C-435/18 Otis EU:C:2019:1069, paras 23 and 27. See also recital 3 of Directive 2014/104/EU. See also: Commission Communication on quantification of damages in actions for damages based on infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (OJ C 167/19, 13/06/2013), para 5: *"Among the rights guaranteed by EU law is the right to compensation for damage sustained as a result of an infringement of Articles 101 or 102 TFEU.The full effectiveness of the EU competition rules would be at risk if injured parties could not seek compensation for the harm caused to them by an infringement of those rules. Anyone can claim compensation for harm suffered where there is an appropriate causal link between the harm and an agreement or practice prohibited by the EU competition rules*. See also: European Commission, Practical Guide - Quantification of damages in actions for damages based on infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union, June 2013, available aqui, para 1.

[199] See, e.g.: Case C-453/99 Courage v Crehan EU:C:2001:465, paras 19-36; Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, paras 38-41 and 45-48; Case C-295/04 Manfredi EU:C:2006:461, paras 56-61, 95, 100, etc; Case C-536/11 Donau Chemie EU:C:2013:366, para 32; Case C-557/12 Kone EU:C:2014:1317, paras 13-15 and 27-37; Opinion of AG Jääskinen in Case C-352/13 CDC Hydrogen Peroxide EU:C:2014:2443, paras 30, 65, 67 and 96; Case C-724/17 Skanska EU:C:2019:204, paras 27-28; Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, paras 22-24, 33, 37-41, 52-53, 55-61, 66 and 69; Opinion of AG Kokott in Case C-435/18 Otis EU:C:2019:651, para 30 et ss.; Case C-435/18 Otis EU:C:2019:1069. As an example of case law of the courts of MSs in the context of the truck cartel expressly stating this point, see: Judgment of the Mercantile Court of Bilbao of 3 April 2019 (proc. no. SJM BI 547/2019), ES:JMBI:2019:547.

field in the internal market, and the rights and obligations of companies would vary depending on the Member State where their disputes are litigated .[200]

654. The first concise explanation of this issue appeared in an Opinion by AG Kokott, which referred to the determination of *"the existence of indemnification rights (i.e., the question of whether to award compensation)"*[201] . A development of this explanation followed in an Opinion by AG Wahl, which referred to the ***"constitutive conditions"* of the right**[202] . The CJEU expressly adhered to the latter Opinion, specifying that *"the question of the determination of the entity obliged to make good the damage caused by an infringement of Article 101 TFEU is* ***directly governed by*** *Union* ***law***"[203] . This wording of the Court also underlines that the necessary corollary of the determination of the existence of a right is the determination of the existence of a **corresponding obligation** (who is liable for the infringement), which is also a matter of European law[204] .

655. This does not mean that the applicability of national law as a source of subjective right and obligation to compensate damages for breaches of national rules corresponding to Articles 101 and 102 TFEU (applied in parallel) is excluded. It should also be recalled that, according to Article 6(1) of the Rome II Regulation, to the extent that there is a conflict of applicable legal orders of the Member States, the *"law applicable to a non-contractual obligation arising out of an act of unfair competition is the law of the country where competitive relations or the collective interests of consumers are affected or are likely to be affected*"[205] . However, since the rules of the Portuguese and European legal systems apply, and the exact

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[200] Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, paras 29-30. See also Case C-547/16 Gasorba EU:C:2017:891, paras 24 and 29; and Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, paras 67-68.

[201] AG Kokott Opinion in Case C-557/12 Kone EU:C:2014:1317, paras 20-30. See also AG Kokott's Opinion in Case C-435/18 Otis EU:C:2019:651, para 38 et seq.

[202] Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, paras 41, 43, 66 and 69 ("where the conditions constituting the right to claim damages (such as causation) are at issue, those conditions are governed by Article 101 TFEU") (emphasis added).

[203] Case C-724/17 Skanska EU:C:2019:204, para 28 (emphasis added).

[204] Case C-453/99 Courage v Crehan EU:C:2001:465, para 35; Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, paras 42-50; Case C-557/12 Kone EU:C:2014:1317, paras 13-15 and 27-37; Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, paras 18-19, 25, 28 and 32; Opinion of AG Jääskinen in Case C-352/13 CDC Hydrogen Peroxide EU:C:2014:2443, para 65; Case C-724/17 Skanska EU:C:2019:204, paras 22, 27-28 and 52. Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, paras 52-53, 55-61, 66 and 69.

[205] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II") (OJ L 199/40, 31/07/2007).

configuration and content of the rights arising from each system may be different, the **primacy of European Union law** implies that, in the event of conflict, the European rule should prevail, disapplying the contrary national rule that prohibits the recognition of a right recognized by European law[206] . The national court cannot refuse the existence, by virtue of European law, of a subjective right to compensation or an obligation to compensate on the grounds that this right/obligation is not recognized in national law .[207]

656. *The Skanska* case[208] made this absolutely clear. Although the applicable national law in that case attributed civil liability only to the legal person that had participated in the cartel and not to the economic unit of that legal person (more specifically, the economic successor), the CJEU held the economic successor liable under the European principle of economic unit liability that had been developed by the CJEU in *public enforcement* and had to be applied also in *private enforcement*. Already in *Kone*[209] , the CJEU had determined the offenders' liability for *"umbrella damages"* by applying European law, as opposed to the solution reached by national law. The Court reaffirmed its general position in the *Otis* case[210] , in which it dismissed the relevance of the discussion of the national law requirements of non-contractual liability (e.g., the problem of the protective scope of the rule, characteristic of German influenced law) and stated that the right to compensation claimed by the injured party in the specific case had to be assessed exclusively in light of the requirements arising from European law, which it clarified.

657. More specifically, the CJEU has already clarified that in the case of claims for damages based on the violation of Article 101 or 102 TFEU, these are matters governed directly by EU law:

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[206] Case C-453/99 Courage v Crehan EU:C:2001:465, paras 25, 28 and 36; Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, paras 39 and 46; Opinion of AG Mischo in Case C-453/99 Courage v Crehan EU:C:2001:181, paras 53-55 and 60; Case C-295/04 Manfredi EU:C:2006:461, paras 72, 81 and 98; Case C-536/11 Donau Chemie EU:C:2013:366, para 49; Opinion of AG Jääskinen in Case C-352/13 CDC Hydrogen Peroxide EU:C:2014:2443, para 118; Case C-557/12 Kone EU:C:2014:1317, paras 13-15, 19 and 27-37; Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, para 34; Case C-637/17 Cogeco EU:C:2019:263, para 55.

[207] Cf. e.g.: AG Kokott Opinion in Case C-435/18 Otis EU:C:2019:651, para 40.

[208] Case C-724/17 Skanska EU:C:2019:204.

[209] Case C-557/12 Kone EU:C:2014:1317.

[210] Case C-435/18 Otis EU:C:2019:1069.

a. the **requirements for the existence of a right to compensation**:

Specific case law concerning *private* competition *enforcement* leads to the conclusion that the requirements for the existence of the above-mentioned right to damages governed by European law are divided into:

(i) **unlawful behavior**;

(ii) **damage**; and

(iii) **causal link**.

The precise content of these requirements is being clarified on a case-by-case basis by the CJEU as the referrals it is faced with raise questions about them. In the meantime, some Advocates General have already begun to seek to offer systematized descriptions with which the Court may come to agree.

b. the **existence and scope of** corporate **civil liability** for violations of Articles 101 and 102 TFEU - **who is liable and for what** -[211] , including possible restrictions on corporate civil liability[212] and conditions of joint and several liability among violators[213] .

c. the scope or ***quantum of* compensation** to which the holder of the subjective right under European law is entitled, including: the right to full compensation (including *damnum emergens* and *lucrum cessans*) and no right to overcompensation[214] , the fact that the compensable damage does

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[211] See, as specific examples: Case C-453/99 Courage v Crehan EU:C:2001:465, para 35. Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, paras 39-50; Case C-557/12 Kone EU:C:2014:1317, paras 34-35; Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, paras 18-19, 25, 28 and 32; Case C-724/17 Skanska EU:C:2019:204; Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100; Case C-435/18 Otis EU:C:2019:1069, para 30. Note that the European Commission argued a different position before the CJEU (see Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, para 65).

[212] Case C-557/12 Kone EU:C:2014:1317, para 35.

[213] Case C-557/12 Kone EU:C:2014:1317, paras 27-37; Case C-352/13 CDC Hydrogen Peroxide EU:C:2015:335, para 33.

[214] Case C-453/99 Courage v Crehan EU:C:2001:465, para 30. Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, paras 48 and 54; Opinion of AG Mischo in Case C-453/99 Courage v Crehan EU:C:2001:181, paras 58-59; Case C-295/04 Manfredi EU:C:2006:461, paras 92-97; Opinion of AG Geelhoed in Case C-295/04 Manfredi EU:C:2006:67, paras 62-70; Opinion of AG Jääskinen in Case C-352/13 CDC Hydrogen Peroxide EU:C:2014:2443, para 101; Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, para 28; Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, paras 79-81; Case C-435/18 Otis EU:C:2019:1069, paras 30-31; Opinion of AG Kokott in Case C-435/18 Otis EU:C:2019:651, para 46. Prior to Directive 2014/104/EU, the CJEU held that European law did not confer a right to overcompensation, but that member states could provide for punitive damages (then prohibited by the Directive). Indeed, in Case C-295/04 Manfredi EU:C:2006:461, para 92, the Court stated that in the absence of concrete European rules, it was for each member state to *"fix the criteria for determining the extent of the reparation, provided that the principles of equivalence and effectiveness are respected."* However, *ratio decidendi* has to be distinguished from *obiter dictum*. In that case, the Court was answering the question of whether a member state is obliged by European law to award compensation beyond full compensation. The Court's statement does not mean that the obligation to ensure full compensation did not arise from European law - that question did not arise in *Manfredi*. This interpretation is confirmed by para 94, where the Court stressed that European law does not

not depend on the profit made by the infringer[215] , and the types of damage that can be compensated and interest due .[216]

d. causes of **exclusion or limitation of civil liability** or the right to damages, such as contributory fault[217] and *venire contra factum proprium*.[218]

658. Outside the scope of the questions identified above (when the constitutive conditions of the right/obligation itself are no longer at issue), and insofar as there are no rules in Regulations or Directives applicable by reason of subject matter and time, it is for each Member State to determine the procedural rules applicable to legal actions aimed at protecting those rights arising from the European legal order (**principle of procedural autonomy**)[219] . These rules have been referred to by AG Kokott as the *"details of the application and the modalities of the concrete invocation of such rights (i.e. the question of how compensation is to be awarded), i.e. in particular jurisdiction, procedures, time limits and the production of evidence*"[220] . However, member states are not entirely free to regulate these aspects. As has been codified in Article 4 (and recital 11) of Directive 2014/104/EU, the exercise of the **legislative autonomy of the member states** is **limited** here by:

a. **principle of effectiveness**: the rules applicable to the protection of rights conferred by the European legal order may not render their exercise practically impossible or excessively difficult (see also Article 19(1) TEU);

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prevent national courts from ensuring that the protection of rights conferred by European law does not lead to unjust enrichment, implying that it is only at that level (after full compensation) that the margin of autonomy of national law begins. On this issue, see also the Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, para 51.

[215] Case C-557/12 Kone EU:C:2014:1317, para 35.

[216] Case C-295/04 Manfredi EU:C:2006:461, paras 95-97 and 100; Case C-536/11 Donau Chemie EU:C:2013:366, para 24; Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, para 27; Opinion of AG Jääskinen in Case C-352/13 CDC Hydrogen Peroxide EU:C:2014:2443, para 30; Opinion of AG Kokott in Case C-435/18 Otis EU:C:2019:651, para 46.

[217] Case C-453/99 Courage v Crehan EU:C:2001:465, paras 30-36; Opinion of AG Mischo in Case C-453/99 Courage v Crehan EU:C:2001:181, paras 39-44, 53 and 70-78.

[218] Case C-453/99 Courage v Crehan EU:C:2001:465, paras 28, 31 and 36; Opinion of AG Mischo in Case C-453/99 Courage v Crehan EU:C:2001:181, paras 22-27, 34 and 39-42. The broader language in *Manfredi* (see Case C-295/04 Manfredi EU:C:2006:461, para 63) should be treated as an *obiter dictum in* this regard, as this case did not raise this specific issue.

[219] In addition to the case law that will be cited *below*, see recital 11 of Directive 2014/104/EU.

[220] Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, paras 23 and 28. In the same vein seem to go the words of the Court in Case C-352/13 CDC Hydrogen Peroxide EU:C:2015:335, paras 21-22. See also AG Wahl's Opinion in Case C-724/17 Skanska EU:C:2019:100, para 40 and footnote 21.

b. **principle of equivalence**: the rules applicable to the protection of rights conferred by the European legal order cannot be less favorable than those governing similar domestic situations[221] .

659. If national rules violate these limits imposed by European law, the **primacy of EU law** implies that those rules must be disapplied[222] .

660. It follows from the already available CJEU case law on *private* competition *enforcement* that fall within this sphere of matters to be regulated by national law (in the absence of harmonizing rules, and within the limits imposed by European law), namely:

a. such as avoiding overcompensation (unjust enrichment and reduction of compensation to take into account contributory fault)[223] and, more broadly, as clarified by AG Kokott, the procedural rules on the **methodology for quantifying** damages[224] ;
b. allow or prohibit **punitive damages** (broader protection and deterrence in addition to full compensation)[225] (but this possibility disappeared as of the entry into force of Directive 2014/104/EU - see Article 3(3));
c. how to **assess whether there is a** sufficient **causal link in** a concrete case within the causation requirements defined by European law[226] ;

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[221] See, e.g.: Case C-453/99 Courage v Crehan EU:C:2001:465, para 29; Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, paras 46-48; Opinion of AG Mischo in Case C-453/99 Courage v Crehan EU:C:2001:181, paras 46-47; Case C-295/04 Manfredi EU:C:2006:461, paras 62, 64, 71-72, 77, 81 and 92; Opinion of AG Geelhoed in Case C-295/04 Manfredi EU:C:2006:67, para 49; Case C-360/09 Pfleiderer EU:C:2011:389, para 24; Case C-536/11 Donau Chemie EU:C:2013:366, paras 25-27 and 39; Opinion of AG Jääskinen in Case C-536/11 Donau Chemie EU:C:2013:67, paras 3, 40 and 49; Case C-557/12 Kone EU:C:2014:1317, paras 24-26; Opinion of AG Jääskinen in Case C-352/13 CDC Hydrogen Peroxide EU:C:2014:2443, paras 31 and 118-119; Case C-724/17 Skanska EU:C:2019:204, para 27; Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, paras 32 and 36; Case C-637/17 Cogeco EU:C:2019:263, paras 42-44; Opinion of AG Kokott in Case C-637/17 Cogeco EU:C:2019:32, para 75; Case C-435/18 Otis EU:C:2019:1069, paras 25-26.

[222] See, e.g.: Case C-453/99 Courage v Crehan EU:C:2001:465, paras 25, 28 and 36; Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, paras 39 and 46. Opinion of AG Mischo in Case C-453/99 Courage v Crehan EU:C:2001:181, paras 53-55 and 60; Case C-295/04 Manfredi EU:C:2006:461, paras 72, 81 and 98; Case C-536/11 Donau Chemie EU:C:2013:366, para 49; Opinion of AG Jääskinen in Case C-352/13 CDC Hydrogen Peroxide EU:C:2014:2443, para 118; Case C-557/12 Kone EU:C:2014:1317, paras 13-15, 19 and 27-37; Opinion of AG Wahl in Case C-724/17 Skanska EU:C:2019:100, para 34; Case C-637/17 Cogeco EU:C:2019:263, para 55.

[223] Case C-453/99 Courage v Crehan EU:C:2001:465, paras 30-33. Case C-295/04 Manfredi EU:C:2006:461, para 94.

[224] Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, para 28. See also AG Bobek's Opinion in Case C-27/17 flyLAL EU:C:2018:136, para 30.

[225] Case C-295/04 Manfredi EU:C:2006:461, paras 92-93 and 99.

[226] Case C-295/04 Manfredi EU:C:2006:461, para 64; Case C-557/12 Kone EU:C:2014:1317, paras 13-15 and 27-37; Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, paras 37 and 84; Case C-435/18 Otis

By way of example, it follows from European law that there is a causal link and a right to damages where, as a result of a cartel, a public authority has been forced to award higher subsidies and cannot use that capital for more profitable investments, but it is for the national court *"to determine whether, in the case in question,* [the public authority] *has suffered that loss in practice, by ascertaining in particular whether or not it had the possibility of making more profitable investments and, if so, whether it has adduced the necessary evidence of the existence of a causal link between that loss and the cartel in question"*[227] .

d. which courts of the Member State have **jurisdiction** (within the limits allowed by European private international law)[228] ;
e. rules on the **limitation period for** damages claims arising from infringements of Articles 101 and 102 TFEU (since partially harmonized by Article 10 of Directive 2014/104/EU)[229] ;
f. rules on **access to evidence** (since partially harmonized by Articles 5 to 8 of Directive 2014/104/EU)[230] .
According to Advocate General Van Gerven, all evidentiary rules, including presumptions of proof, would fall into this category[231] .

661. The rules of Directive 2014/104/EU[232] have no direct horizontal effect and therefore cannot be invoked directly in the context of this dispute between private individuals. The rules of Directive 2014/104/EU are relevant in this action only indirectly, to the extent that the Portuguese rules transposing this Directive must

EU:C:2019:1069, para 33. See also AG Bobek's Opinion in Case C-27/17 flyLAL EU:C:2018:136, para 90 and footnote 47 (which seems to overestimate the margin available to member states in this regard).

[227] Case C-435/18 Otis EU:C:2019:1069, para 33.

[228] Case C-295/04 Manfredi EU:C:2006:461, paras 71-72; AG Kokott Opinion in Case C-557/12 Kone EU:C:2014:1317, para 23.

[229] Case C-295/04 Manfredi EU:C:2006:461, paras 73 and 77-82; Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, para 48; Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, para 23; Case C-637/17 Cogeco EU:C:2019:263, paras 42 and 45.

[230] Case C-360/09 Pfleiderer EU:C:2011:389, paras 20-23; Case C-536/11 Donau Chemie EU:C:2013:366, paras 24 and 35; AG Kokott's Opinion in Case C-557/12 Kone EU:C:2014:1317, paras 23 and 28.

[231] Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, para 48.

[232] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 , on certain rules governing actions for damages under national law for infringements of the provisions of the competition laws of the Member States and of the European Union (OJ L 349/1, 05/12/2014), available aqui.

be interpreted, as far as possible, in conformity with the Directive (principle of conform interpretation).

662. Under national law, whether before or after the SBA entered into force[233], and insofar as relevant to the present action and the infringement of national competition law, the right to damages for consumers who have suffered loss is governed by Article 483 of the CC (non-contractual civil liability), according to which:

> *"1. Whoever maliciously or merely culpably violates another's right or any legal provision intended to protect the interests of others shall be obligated to compensate the injured party for the damages resulting from the violation.*
>
> *2. There is only an obligation to indemnify regardless of fault in the cases specified by law."*

663. According to Article 3(1) of the SBA, the *"undertaking or association of undertakings that commits an infringement of competition law shall be obliged to compensate fully the injured parties for the harm resulting from such infringement, in accordance with Article 483 of the Civil Code"*. This rule transposes Article 3(1) of Directive 2014/104/EU (*"Member States shall ensure that natural or legal persons suffering harm caused by infringements of competition law may claim and obtain full compensation for such harm"*). For the purposes of the present case and the conclusion on the Defendant's civil liability, it is not necessary to discuss whether these rules apply *ratione temporis,* since one would always fall - as to the requirements of civil liability for breach of national competition law - back to the solution of applying Article 483 of the CC.

664. Article 22(1) to (3) of the LAP regulates civil liability in popular actions such as the present one, establishing that the agent that violates the interests that can be defended through popular action has the *"duty to indemnify the injured party or parties for the damages caused"*, such indemnification to be *"fixed globally"* as to *"compensation for the violation of interests not individually identified"*, and each

[233] And without prejudice to discussions about the contractual or extra-contractual nature of the liability that are not relevant in the present case, given the lack of a direct contractual relationship between the Defendant and the injured consumers.

holder of the identified (homogeneous individual) interests having *"the right to the corresponding compensation under the general terms of civil liability"*.

665. These rules regarding civil liability in popular actions such as the present one are confirmed in the special rules of Article 19 of the SBA, which confirm that *"actions for damages for infringement of competition law may be brought under the* [PPL]*"* (paragraph 1) and that the court shall fix the compensation for each identified injured party and the overall amount of compensation for injured parties who are not individually identified, as well as the manner of its distribution among the injured parties (paragraphs 3 to 6).

666. Article 23 of the LAP introduces a special rule for civil liability *"where the agent's actions or omissions have resulted in an infringement of rights or interests protected under this law and within the scope of or following an objectively dangerous activity"*. In these cases, **civil liability** becomes **strict liability** (under national law, notwithstanding the fact that fault is not a requirement of civil liability under European law for violations of Article 101 TFEU), i.e. it exists *"regardless of fault"*. As the interests pursued in the present action are protected by the LAP, that standard is applicable to the Defendant's liability in the present case.

667. The civil liability regime applicable to the present case must be interpreted in the light of the principle of effectiveness, as it is a general principle of European law that already applied before Directive 2014/104/EU entered into force, and as this is imposed by Article 4 of Directive 2014/104/EU and Article 23(2) of the EPL. This means that none of its requirements may be interpreted in terms that make it impossible or excessively difficult to obtain the compensation due.

668. It should also be underlined the tendency already seen in the courts of other EU Member States, even when applying their national law to facts that predate the entry into force of Directive 2014/104/EU, to interpret it in terms that lead to the results sought by the Directive, seeing it largely as a codification of the consequences of the principle of effectiveness of European law. In this sense, quote the Dutch Supreme Court: *"Although the Directive is not temporally applicable to the present case and the applicable framework is therefore that of Dutch law - subject to the principles of equivalence and effectiveness (...) - it is*

desirable to interpret that law in such a way as to lead to results consistent with the Directive"[234] .

669. The Advisory Council of the PGR has already addressed the right to compensation of Portuguese consumers arising from competition infringements, having recalled, *inter alia, the* following:

> *"5.* ***The right to consumer compensation***
>
> *(...) In the field of competition law, the idea soon became established that* ***an effective system of reimbursement for damages caused by anti-competitive conduct*** *(private enforcement), together with the application of public sanctions (public enforcement),* ***constituted an important instrument for combating such practices, providing means of protection*** *both to competitors and* ***consumers .***[235]
>
> *This awareness, which was clearly expressed in the famous decision of 20.9.2001 of the Court of Justice of the European Union in the case Courage v. Crehan, in which it was stated that the full effectiveness of Article 85 of the Treaty (EEC) and, in particular, the effectiveness of the prohibition set out in its paragraph 1, would be compromised if it were not possible for any person to claim compensation for damage caused to him by a contract or conduct likely to restrict or distort competition.Article 85(1) would be jeopardized if it were not possible for any person to seek compensation for damage caused to him by a contract or conduct likely to restrict or distort competition, which led to the issuing of Directive 2014/104/EU*[236] . [Quote from Article 1(1) and recitals 3-4, 13, 39, 41 and 44a of the Directive]*".*

670. The same OPG Opinion states that the right to compensation for consumers is governed by Article 483 of the Civil Code[237] . With all due respect, the Author does not agree with the Opinion on this point, since it does not refer to or discuss the European jurisprudence referred to above, from which it follows that the requirements of civil liability for violations arising from Articles 101 and 102 are

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[234] Judgment of the Supreme Court of the Netherlands of July 8, 2016 (NL:HR:2016:1482; our translation).

[235] See in https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/p_2020_017.pdfOPG Opinion - p.40-41 (our emphasis).

[236] See in https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/p_2020_017.pdfOPG Opinion - p. 41 (our emphasis).

[237] See in https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/p_2020_017.pdfOPG Opinion - p. 45 (our emphasis).

governed directly by European law. By applying Portuguese law, the OPG's Opinion suggests that the national courts violate their obligations under European law. In any case, this Opinion shows that the conclusion about the existence of a consumer's right to compensation would not be different if article 483 of the Civil Code were applied.

> *"Article 483 of the Civil Code states that anyone who unlawfully violates, with intent or mere fault ... any legal provision intended to protect the interests of others is obliged to compensate the injured party for damages resulting from the violation.*
> *It is required that this legal provision, by prohibiting or imposing a certain behavior, aims, among its purposes, to protect individual interests against a certain risk of damage.*
> *Most of the rules that prohibit or impose behaviors, aiming to ensure a healthy and fair competition, namely those that seek to prevent the abuse of a dominant position in the market, do not fail to include in their purposes, not only the protection of other competitors, but also the protection of consumers who were financially harmed by the anticompetitive conduct, so that their violation can generate, in the abstract, in the legal sphere of specific affected persons, a right to compensation for the losses suffered by the illicit behavior*[238] .
> (...) *since the damage suffered by consumers falls within the scope of protection of the rule prohibiting abuse of a dominant position, constituting an offense to the legal goods it protects, we are not in this case facing mere reflex protection, even though the damage suffered by consumers, consisting in the payment of higher tariffs and prices, is a consequence of the increase in the market price and the CMEC overcompensations generated by the abusive conduct .*[239]

[238] See at https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/p_2020_017.pdfOpinion of the OPG. Citing in a footnote the following doctrine: *"In this sense, ADELAIDE MENEZES LEITÃO, ob. and loc. cit., MARIA JOÃO PESTANA DE VASCONCELOS, Algumas questões sobre a Ressarciabilidade de Danos Patrimoniais Puros no Ordenamento Jurídico Português, in "Novas Tendências da Responsabilidade Civil", Almedina, Coimbra, 2007, pág. 183 et seq, MAFALDA MIRANDA BARBOSA, ob. cit., p. 290-292, MARIA ELISABETE RAMOS, Situação do Private Enforcement, Revista da Concorrência e da Regulação; Ano VII (2016), n.º 27 e 28, p. 27 and following, GONÇALO ANASTÁCIO e CATARINA ANASTÁCIO, Private Competition Enforcement Review, 11th ed.*

[239] See at https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/p_2020_017.pdfOPG Opinion, p. 46.

As the interests of consumers are the object of targeted protection of the rule whose infraction was detected, we see no obstacle to these damages being subject to an obligation of compensation, and in these situations, the so-called popular actions can assume a special role, whose provision in this area currently appears in Article 19 of Law No. 23/2018 of June 5, which, by having a procedural nature, is applicable to the present situation[240] *".*

671. The Defendants are part of the same economic unit, being **jointly and severally liable** for the damages caused by the competition violations identified in this case.

672. The **1st Defendant** is jointly and severally liable for the damages caused by the competitive infringements identified in this case from the moment it was created (October 2, 2015).

673. This joint and several liability of the Defendants is and was (during the relevant period) determined by European law, which directly governs civil liability for breaches of Articles 101 and 102 TFEU. But it was also determined by national law, even before the transposition of Directive 2014/104/EU.

674. The anticompetitive behaviors at issue were decided, adopted and/or implemented by the Defendants.

675. The anticompetitive agreements in question were entered into and the content of their clauses was determined by the 1st Defendant, 2nd Defendant, 3rd Defendant and 5th Defendant and were implemented by the same Defendants, as well as by the 4th Defendant with respect to the Portuguese territory.

676. Google's practices regarding the definition of the technical parameters of the Android operating system were decided and implemented by the 1st and 2nd Defendants, and are still implemented and supervised by the 3rd, 4th and 5th Defendants with respect to the Portuguese territory.

677. Strictly speaking, the legal discussion of this issue could cease at this point.

678. But, even if *ad arguendum*, any of the Defendants, as a legal entity, had not participated in some or all of the anticompetitive conduct at issue, it would always

[240] See in https://www.ministeriopublico.pt/sites/default/files/documentos/pdf/p_2020_017.pdfOPG Opinion, p. 46-47 (our emphasis).

be liable for the damages caused by those competitive violations by virtue of the special liability rules of competition law.

679. Competition law constitutes a *lex specialis* that derogates from the general rules of civil liability.

680. In competition law, the addressee of the rules is the "undertaking", as this concept has been clarified by the CJEU (see also the definition in Article 3 of the LdC). Crucially, this concept includes the notion of "economic unit". An "undertaking" for competition law purposes is *"any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed"*, and *"*[t]*his concept, placed in that context, must be understood as designating an economic unit, even if from the legal viewpoint that economic unit consists of several natural or legal persons*"[241] .

681. The Defendants are part of the same economic unit. The Defendants are legal entities of the same "company", the company that engaged in the anticompetitive practices at issue in this case.

682. Looking specifically at the application of Article 101 TFEU (logical extension to Article 102 TFEU) to actions for damages, the CJEU stated:

> *"... it is apparent from the wording of Article 101(1) TFEU that the authors of the Treaties chose to use the concept of 'undertaking' to designate the author of a violation of the prohibition set out in that provision* (...)
>
> *Furthermore, it is settled case law that Union competition law targets the activities of companies...*
>
> *Now, since liability for the damage resulting from infringements of the Union's competition rules is personal, it is up to the undertaking which infringes those rules to answer for the damage caused by the infringement*
>
> *It follows from the foregoing that the entities obliged to make good the damage caused by a cartel or a practice prohibited by Article 101 TFEU are*

[241] Case C-724/17 Skanska EU:C:2019:204, paras 36-37.

the undertakings, within the meaning of that provision, which participated in that cartel or practice"[242] .

683. It also follows from the *Skanska* judgment that the clarifications contained in the *public enforcement* case-law on the liability of undertakings (and legal persons within them) for breaches of Articles 101 and 102 TFEU also apply in the context of *private enforcement of* those provisions, since *"the concept of 'undertaking' within the meaning of Article 101 TFEU, which is an autonomous concept in EU law, cannot have a different scope in the context of the imposition of fines by the Commission under Article 23(2) of Regulation (EC) No 1/2003".TFEU, which is an autonomous concept of Union law, cannot have a different scope in the context of the Commission's imposition of fines under Article 23(2) of Regulation 1/2003 and in the context of actions for damages for infringements of the Union's competition rules*"[243] . And it should be noted that the CJEU expressly rejected an attempt to limit in time the consequences of this interpretation[244] , clarifying that this rule of "undertaking" liability, as defined in European competition law, already existed before the adoption of this judgment.

684. In the context of *public enforcement* under European competition law, it has long been settled case law that parent companies which effectively exercised control over a subsidiary are liable to pay fines imposed by the EC for anti-competitive practices of that subsidiary which is part of the same economic unit[245] .

685. The 1st Defendant is the parent company of the others. The fact that it holds, directly and indirectly, 100% of the share capital of all the Defendants means that the jurisprudential presumption of effective exercise of control applies[246] (since codified in Article 3(3) of the SPE), and it is up to the Defendants, if they wish, to

[242] Case C-724/17 Skanska EU:C:2019:204, paras 29-32.

[243] Case C-724/17 Skanska EU:C:2019:204, para 47.

[244] Case C-724/17 Skanska EU:C:2019:204, paras 53-59.

[245] See, e.g. : Case C-516/15 P Akzo Nobel et al v Commission EU:C:2017:314.

[246] See, e.g. : Case C-521/09 P Elf Aquitaine v Commission EU:C:2011:620, paras 53-62 and 80; Case 107/82 AEG EU:C:1983:293, para 50; Case T-65/89 British Gypsum EU:T:1993:31, para 149; Case C-286/98 P Stora Kopparbergs EU:C:2000:630, para 80; Case T-305/94 Limburgse Vinyl EU:T:1999:80, paras 961 and 984; Case T-203/01 Michelin EU:T:2003:250, para 290; Case T-314/01 Coöperative Verkoop EU:T:2006:266, para 136; Case T-112/05 Akzo Nobel EU:T:2007:381, paras 60-62; Case T-12/03 Itochu Corp EU:T:2009:130, paras 49-53; Case C-516/15 P Akzo Nobel et al v Commission EU:C:2017:314, paras 60-64.

prove that the 1st Defendant did not effectively exercise control over any of the other Defendants during the relevant period.

686. Even if the presumption did not apply, it will be proven in this case that the 1st Defendant has indeed exercised decisive influence over the other Defendants.

687. The preceding articles apply, *mutatis mutandis,* to the situation of parent company of the group that was occupied by the 2nd Defendant, prior to the restructuring of the Google group that led to the creation of the 1st Defendant. Moreover, even after that restructuring, the 2nd Defendant remained the parent company (but not the ultimate parent, at the top of the group) of the 3rd, 4th and 5th Defendants.

688. The CJEU has also already had the opportunity to clarify in the *Sumal* judgment that the liability of the "undertaking" or "economic unit" implies not only upward liability (of the parent company for acts of the subsidiary), but also downward liability (of the subsidiary for acts of the parent company), where the subsidiary pursues the same economic activity at issue in the infringement of Article 101 TFEU (reasoning extendable to Article 102 TFEU):

> *"It follows from all of the foregoing that, in the context of an action for damages, which is based on the existence of an infringement of Article 101(1) TFEU declared in a decision by the Commission, a legal entity which is not designated in that decision as having committed the infringement of competition law can nevertheless be held liable on that ground on account of the infringing conduct of the Commission. It follows from all of the foregoing that, in the context of an action for damages based on the existence of an infringement of Article 101(1) TFEU declared in a decision by the Commission, a legal entity which is not identified in that decision as having committed the infringement of competition law may nevertheless be held liable on that ground on account of the infringing conduct of another legal entity where both legal entities form part of the same economic unit and thus form an undertaking which is an offender within the meaning of Article 101 TFEU* (...).[247]
>
> *There is therefore nothing in principle to prevent the victim of an anti-competitive practice from bringing an action for damages against one of*

[247] Case C-882/19 Sumal EU:C:2021:800, para 48.

the legal entities making up the economic unit and thus the undertaking which, by committing an infringement of Article 101(1) TFEU, caused the damage suffered by that victim.[248]

Thus, in circumstances where the existence of an infringement of Article 101(1) TFEU has been established in relation to a parent company, the victim of that infringement may seek to impose liability on a subsidiary rather than on the parent company, in accordance with the case-law referred to in paragraph 42 of this judgment. However, the subsidiary can be held liable only if the victim proves, either by a decision previously adopted by the Commission under Article 101 TFEU or by any other means, in particular where the Commission has remained silent on this point in that decision or where it has not yet had to adopt a decision, that, having regard to, first, the economic, organisational and legal links referred to in paragraphs 43 and 47 of this judgment, the subsidiary is liable for the infringement in question. 43 and 47 of this judgment and, secondly, the existence of a specific link between the economic activity of that subsidiary and the subject-matter of the infringement for which the parent company has been held liable, that subsidiary formed an economic unit with its parent company.[249]

It follows from the foregoing that an action for damages brought against a subsidiary presupposes that the applicant proves, in order for a finding of economic unity between a parent company and the subsidiary within the meaning of paragraphs 41 and 46 of this judgment, the links connecting those companies referred to in the preceding paragraph and the specific link, referred to in the same paragraph, between the economic activity of the subsidiary and the subject-matter of the infringement for which the parent company has been held liable. Thus, in circumstances such as those at issue in the main proceedings, the victim must prove, in principle, that the anti-competitive agreement concluded by the parent company and for which it was found liable concerns the same products as those marketed by the subsidiary. In doing so, the victim shows that it is precisely the economic unit to which the subsidiary belongs, together with its parent company, that

[248] Case C-882/19 Sumal EU:C:2021:800, para 50.

[249] Case C-882/19 Sumal EU:C:2021:800, para 51.

constitutes the undertaking that actually committed the infringement previously found by the Commission under Article 101(1) TFEU, in accordance with the functional understanding of the concept of 'undertaking' adopted in paragraph 46 of this judgment. [250]"

689. All the Defendants, in addition to belonging to the same "undertaking" (economic unit), carry out the economic activity at issue in the infringements of Articles 101 and 102 TFEU at issue in the present case and contribute to the implementation of those infringements, and are therefore liable for the damage caused by those infringements under European competition law.

2.3. Illegality

2.3.1. Anti-competitive agreement

690. The Defendants' practices at issue in the present case constitute practices prohibited by **Article 101(1) of the TFEU** (formerly Article 81 TEC, and prior to that Article 85 TEC), as well as by **Article 9(1) of the LdC,** which is materially identical to and succeeded Article 4(1) of Law No. 18/2003 of June 11, and no question of material succession of rules in time arises in the present case.

691. To fall within these prohibitions, it must be at issue (as far as relevant to the present case):

a. an agreement between companies;
b. that has the object or effect of restricting competition;
c. and this constraint is sensitive; and
d. having an impact on all or part of the national territory (LdC) and on exchanges between member states (TFEU).

692. As general preliminary points, it should be noted that the European rule and the national rule of competition law applicable in the present case are materially identical, that if there were - which there is not - a difference between the solution arising from European law and the solution arising from national law, the solution

[250] Case C-882/19 Sumal EU:C:2021:800, para 52.

arising from European law would always have to prevail (cf. Article 3(1) and (2) of Regulation (EC) No. 1/2003), and that Portuguese jurisprudence has chosen to interpret national competition law (even when applied not in parallel with European law, which is not the case here because there is an effect on trade between MSs) in harmony with the interpretation of European competition law by the CJEU[251] .

693. Google, *app developers* and Android device manufacturers are undertakings within the meaning of competition law, pursuing one or more economic activities in one or more markets.

694. Google, *app developers* and Android device manufacturers have entered into contracts, in which they have included anti-competitive clauses, that lead to or reinforce the Google Play Store's near-monopoly for the distribution of Android applications and *in-app* Android content and for payment for these applications and content - at issue in these proceedings.

695. These contracts are agreements within the meaning of Article 101(1) TFEU and the corresponding national rule.

696. The clauses in the contracts between Google, *app developers* and Android device manufacturers that lead to or reinforce the Google Play Store's near-monopoly for the distribution of Android apps and *in-app Android* content and for payment for these apps and content are clauses that have a competition-restricting object.

697. They are also clauses that have effects that restrict competition, as demonstrated in the present proceedings by identifying the harm to consumers resulting from these practices.

698. The agreements at issue include the following anti-competitive clauses:

a. clauses resulting in an obligation for Android mobile device manufacturers who want to pre-install a Google application to pre-install the entire *Google Mobile Services bundle*, which includes the Google Play Store (*pure bundling* practice);

[251] Cf. e.g.: TRL Judgment of January 29, 2014, Lactogal c. AdC (18/12.0YUSTR.E1.L1), available aquiTCL judgment of 12/01/2006, *Ordem dos Médicos Veterinários* (proc. no. 1302/05.5TYLSB), p. 16.

b. clauses resulting in an obligation for Android mobile device manufacturers to place the Google Play Store prominently on or immediately after the *homepage of* the mobile device;
c. clauses resulting, directly or in conjunction with technical restrictions and other Google practices, in the exclusive distribution of Android applications through the Google Play Store and the exclusive use of the Google Play Store to make *in-app* payments;
d. clauses that prevent *app developers* from creating Android apps that function as or promote an alternative *app store*;
e. clauses that force *app developers to* use the Google Play Store's *in-app* purchase mechanism to sell apps and offer *in-app* Android content;
f. clauses that prohibit *app developers* from directing users to payment methods other than Google Play Store payment;
g. clauses imposing a minimum price for the onerous offering of Android applications by the Google Play Store; and
h. agreements with potential competitors to persuade them, in exchange for financial advantages, not to enter the markets in question and not to compete, or to compete to a lesser extent, with the Google Play Store.

699.The types of practices mentioned are at issue:

a. Article 101(1)(a) TFEU, which consists in *"directly or indirectly fixing the purchase or sale prices or any other trading conditions"*, with regard to the clauses described in point (g) of the previous article, insofar as it sets a minimum price, without giving a chance to charge a value between EUR 0 and 0.50;
b. Article 101(1)(b) TFEU, consisting of *"limiting or controlling production, distribution, technical development or investment", with respect to the* clauses described in subparagraphs (a) to (f) and (h) of the preceding Article, in that it limits and controls the distribution of Android applications and *in-app* Android content payments and discourages investment in and technical development of these means of distribution and payment;
c. Article 101(1)(c) TFEU, which consists in *"sharing markets or sources of supply"*, with respect to the clauses described in (a) to (f) and (h) of the previous article, in that it ensures that these markets remain (fully or nearly) a monopoly of Google and prohibits *app developers from* entering

them or agrees with potential competitors not to enter or to limit their competition in the market;

d. Article 101(e) TFEU.*This is* demonstrated by the fact that suppliers of other operating systems - such as Windows (of Microsoft), for personal computers - do not impose exclusivity and allow the distribution of applications for their operating system and the payment for content within those applications through different channels, do not impose a minimum price for the sale of applications for their operating system, do not compel the distribution of *bundles of their applications* as conditions for the distribution of one of their applications, nor require that one of their applications be prominently placed on the device.

700. To the extent that certain obligations or conditions are provided for in documents adopted and amended unilaterally by Google, but which Google is entitled to adopt and amend pursuant to contracts with *app developers*, these obligations or conditions also qualify as agreements under European competition law as they are a practice adopted within the framework of powers resulting from general agreement clauses which frame and permit them[252] .

701. With Google holding all or almost all of the share of the markets concerned, the practices clearly and necessarily have an appreciable impact on competition.

702. The agreements in question impact - have effects on - the national territory, as they affect the way Android applications and *in-app* Android content are distributed in Portugal and the prices of those applications and content for consumers residing in Portugal.

703. The agreements in question have an effect on trade between EU member states in the sense that this criterion has been clarified by the CJEU, requiring only the identification of an actual or potential effect, direct or indirect, on trade between member states.

[252] Case 107/82 AEG EU:C:1983:293; Case 25 and 26/84 Ford EU:C:1985:340; Case C-74/04 Volkswagen EU:C:2006:460. See: Miguel Sousa Ferro, "Reassessing borders between agreements and unilateral practices after Case C-74/04 Volkswagen II", (2007) 28(3) *European Competition Law Review* 205.

704. If Defendants believe that the anticompetitive agreements at issue meet the requirements for individual or category exemption, they bear the burden of proving the facts leading to that legal conclusion.

2.3.2. Abuse of dominant position

705. The Defendants' practices at issue in the present case constitute an abuse of exclusion and exploitation within the meaning of **Article 102 TFEU**, as well as **Article 11 of the LdC,** which is materially identical and succeeded Article 6 of Law No. 18/2003 of June 11, and no question of material succession of rules in time arises in the present case.

706. To determine the existence of a dominant position, one must first define the relevant market(s).

707. The relevant market consists of the product market and the geographic market (a temporal market delineation does not seem to be warranted in this case) defined in the temporal context of the anticompetitive practices at issue[253] .

708. According to consistent case law of the CJEU, *"the relevant product or service market comprises all those products or services which, by reason of their characteristics, are specifically suitable for satisfying constant needs and are only to a very limited extent interchangeable with other products or services"*[254] . Furthermore, *"the concept of a product market implies that there can be effective competition between the products belonging to it, which presupposes a sufficient degree of interchangeability between all the products belonging to the same market"* .[255]

709. According to settled CJEU case law, the relevant geographic market is *'the territory in which economic operators are in similar conditions of competition in respect of the very products or services concerned. In that perspective, it is not necessary that*

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[253] See Sousa Ferro, Miguel, *The definition of relevant markets in European and Portuguese competition law: theory and practice*, Almedina, 2015, p. 363.

[254] See, e.g.: Case C-7/97 Oscar Bronner EU:C:1998:569, para 33; Case T-65/96 Kish Glass EU:T:2000:93, para 62; Case T-111/08 MasterCard EU:T:2012:260, para 170.

[255] See, e.g.: Case T-111/08 Mastercard EU:T:2012:260, para 170.

the objective conditions of competition of the operators are perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous"[256] .

710. As is apparent from the facts set out in Section 1.3, and without prejudice to practices occurring in the market for the licensing of operating systems for mobile equipment, the practices at issue in this case occurred, essentially, in the markets for the distribution of applications for Android equipment and for the processing of payments for Android applications or in-app Android content (or in a single market for the distribution and sale of Android applications and *in-app* Android content), and the delimitation of this (these) market(s) as national, European or worldwide may be left open, as this does not alter the conclusion as to the fulfilment of the requirements for the unlawfulness of the Defendants' conduct.

711. Given this market definition, there can be no doubt that Google has a dominant position in this market, as it has almost 100% of the market share.

712. For one thing, this means that its market share is above the 50% that triggers the presumption of dominance enshrined in European case law[257] . It is therefore up to the Defendant, should it wish to do so, to prove that it does not have a dominant position, despite its market share.

713. On the other hand, as the TRL stated: *"Ultimately, when there is a 100% quota, there is not even any competition that the company has to worry about, and in the absence of an alternative, it can make the decisions it wants independently of the consumers as well*"[258] .

714. It is also clear that there are no factors that could counter Google's monopolistic market power in the relevant markets.

715. Moreover, the European Commission's Decision of July 18, 2018, in the Google Android case (AT.40099)[259] identified and declared the existence of a dominant position of Google in the market for Android *app stores*, this finding being an indispensable component of the abuses of dominant position declared by this

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[256] See, e.g.: Case C-49/07 MOTOE EU:C:2008:376, para 34; Case T-310/01 Schneider Electric EU:T:2002:254, para 153; Case T-446/05 Amman & Sohne EU:T:2010:165, para 59.

[257] Case C-62/86 Akzo Chemie EU:C:1991:286, para 60.

[258] TRL Ruling of October 8, 2020, proc. no. 49/11.8TVLSB.L1.

[259] Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

Decision and thus being binding on national courts under Article 16(1) of Regulation (EC) No 1/2003.

716. The abuse of dominant position in the markets thus identified, in the present case, is expressed in the two major modes of abuse: (i) exclusionary abuse; and (ii) exploitative abuse.

717. In the *Post Danmark* ruling, the CJEU emphasized that an abuse of a dominant position in the form of exclusionary abuse consists in conduct whereby *"an undertaking holding a dominant position engages in practices which have the effect of eliminating those of its competitors which are considered to be as effective as itself and strengthen its dominant position by means other than those resulting from competition on the merits"* and which *"by means of mechanisms different from those governing normal competition on the basis of the transactions engaged in by economic operators,* prevent *the maintenance of the degree of competition existing in the market or the growth of that competition"*[260] .

718. In other words, a company abuses its dominant position if it takes advantage of this increased market power to exclude competitors, reduce the degree of competition, or prevent the development of competition in the market in which it is active.

719. Within the scope of the **exclusionary abuse**, Google's practices described in the present action have the object and effect of establishing a monopoly (or near-monopoly) of Google in the distribution of Android applications and *in-app* Android content, foreclosing all competition from potential supply-side players in these markets, both as regards the entry of third party service providers and the vertical integration of the distribution activity by the *app developers* themselves.

720. These practices include:

a. Imposing on *app developers* and Android device users the exclusive (or virtually exclusive) distribution of Android applications through the Google Play Store and the exclusive use of the Google Play Store to make payments for Android applications and *in-app* content.

[260] Case C-209/10 Post Danmark EU:C:2012:172, paras 24-25.

b. Imposing on *app developers* who contract to distribute Android apps through the Google Play Store to contract with Google's services for payments for *in-app* Android content in those apps.
c. Imposing an obligation on Android mobile device manufacturers who want to pre-install a Google application to pre-install the entire suite of *Google Mobile Services*, including the Google Play Store (*pure bundling* practice) and to place it prominently on or immediately after the *homepage of* the mobile device.
d. Preventing *app developers* from creating Android apps that function as or promote an alternative *app store*.
e. Configuring the Android operating system in terms that make it impossible or extremely difficult to download and install Android applications from a source other than the Google Play Store.
f. Preventing other *app stores* from including basic features expected by demand agents, reducing their ability to compete with the Google Play Store.
g. Refusal to advertise on Google *websites* Android mobile applications that are not distributed through the Google Play Store.

721. At issue are the types of practices referred to: (i) Article 102(b) TFEU, which consist of *"limiting production, distribution or technical development to the prejudice of consumers"*; and (ii) Article 102(d) TFEU, which consist of *"making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"*.

722. In effect, the aim and effect of the practices at issue is to reduce the distribution channels for Android applications and payment for *in-app* Android content, with significant harm to consumers in the form of increased prices and reduced quantity and quality of the services to which they have access, as well as reduced investment in innovation.

723. The practices at issue also have the object and effect of making the distribution of Android applications and *in-app* Android content by *app developers* subject to conditions that are neither necessary nor customary in analogous markets.

724. This is demonstrated, *inter alia*, by the fact that vendors of other operating systems - such as Windows (from Microsoft) for personal computers - do not

impose exclusivity and allow the distribution of applications for their operating system and the payment for content within those applications through different channels.

725. The practices at issue also have the purpose and effect of *tying* by *forcing* mobile equipment manufacturers to make available applications (for more, in a prominent place) that they could choose not to make available, and forcing *app developers* to contract content payment services from Google that are distinct from Android application distribution services and Android *in-app* content, without the possibility of contracting only distribution services, and preventing them from using alternative means of payment, thus preventing the emergence of competing supply on the market (*foreclosure* effect).

726. Moreover, the behaviour referred to *above* in Article 720 has already been, in part, identified and declared to be an infringement of Article 102 TFEU in the European Commission's Decision of 18 July 2018 in the Google Android case (AT.40099)[261], and this finding of the European Commission is binding on national courts under Article 16(1) of Regulation (EC) No 1/2003.

727. In *United Brands v. Commission*, the CJEU noted that an abuse of a dominant position in the form of **exploitative abuse** consists of conduct whereby an "*undertaking in a dominant position has exploited the possibilities resulting from that position in order to obtain commercial advantages which it would not have obtained under normal and sufficiently* effective *competition*"[262].

728. In other words, the absence of competitive constraints may allow the dominant firm to price at a higher level, depriving customers of benefits that, in a competitive market, the dominant firm would not be able to extract from them.

729. Within the scope of the exploitative abusive conduct, Google's practices described in the present action have the purpose and effect of taking advantage of the monopoly in the distribution of Android apps and *in-app* Android content, created by Google's anticompetitive agreements and exclusionary abusive practices, to:

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[261] Available at: https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.

[262] Case 27/26 United Brands v. Commission EU:C:1978:22, para 249.

a. impose excessive, unjustified fees on *app developers that* Google could not otherwise charge because of its dominant position in these markets; and
b. impose a minimum price for the costly offering of Android apps by the Google Play Store, helping to increase the commissions Google receives.

730. At issue is the type of practices referred to in Article 102(a) TFEU, consisting of *"directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions"*.

731. As clarified by the CJEU, a price is excessive if it does not *"reasonably correspond to the economic value of the service provided"*[263] .

732. This conclusion can be reached by comparing the sales price of the service with the cost of providing it, and assessing the reasonableness of the profit margin. To do so, one must *"assess whether there is an excessive disproportion between the cost actually borne and the price actually charged and, if so, analyze whether an unfair price has been imposed, either in itself or in comparison with competing products"*[264] .

733. The application of this method requires identifying the costs of providing the services in question and the profit margin, which gives rise to known difficulties, *"sometimes enormous", in* determining the production costs and the breakdown of overheads and overheads[265] , and may call into question the veracity of the documents and information submitted by the companies concerned[266] .

734. It does not preclude the application of other methods to identify an excessive price[267] , including price comparison with other geographic markets (provided it is done truthfully and on a strict calculation basis)[268] .

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[263] Case 27/76 United Brands EU:C:1978:22, para 250.

[264] Case 27/76 United Brands EU:C:1978:22, paras 251-252.

[265] Case 27/76 United Brands EU:C:1978:22, para 254.

[266] Case 27/76 United Brands EU:C:1978:22, para 257.

[267] Case 27/76 United Brands EU:C:1978:22, para 253.

[268] Case 27/76 United Brands EU:C:1978:22, paras 258-265.

735. While the CJEU has already held that a price difference of 7% in relation to competing products is not excessive[269], one cannot but conclude that a price difference in relation to similar products (the only possible comparison in the case of monopoly services) in the order of 100% or more (a 30% commission is double - 100% more than - a 15% commission), as in the present case, is manifestly excessive.

736. We find in Portugal at least one precedent of identification of abuse of dominant position translated into excessive prices and condemnation of restitution of the undue or compensation for the amount of the overpricing.

737. In *IMS Health v National Association of Pharmacies*, an arbitral tribunal, in a decision confirmed by the TRL, identified an abuse of a dominant position in the form of excessive pricing and reduced the price paid by the plaintiff by 887,000 EUR. To reach this conclusion, the tribunal considered a drastic price increase over a 5-year period and price comparison with other markets[270].

738. If the Defendants believe that the abusive practices at issue have any objective justification, they have the burden of proving the facts that allow them to reach this legal conclusion.

2.3.3. Parallel application of articles 101 and 102 TFEU

739. The same conduct of an undertaking may constitute at the same time an infringement of Article 101 and 102 of the TFEU (and the same applies to the corresponding national rules).

740. As stated by the TFEU:

> *"According to settled case law, the same practice may give rise to a violation of both Article 101 TFEU and Article 102 TFEU, even if the two provisions pursue different objectives."*[271].

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[269] Case 27/76 United Brands EU:C:1978:22, para 266.

[270] TRL Judgment of April 3, 2014, proc. no. 672/11.0YRLSB.

[271] Case C-307/28 Generics (UK) EU:C:2020:52, para 146.

741. A particularly relevant example of this, because of its analogy to the present case, is the *Van den Bergh Foods* case. The European Commission found this company guilty of an infringement of (the current) Articles 101 and 102 of the TFEU by engaging in exclusivity distribution agreements. The company had a dominant position and concluded exclusivity agreements concerning the placing of freezer cabinets in retail outlets. The undertaking concerned criticised the concurrent application of the prohibitions of (the current) Articles 101 and 102 TFEU. The GCEU confirmed the Commission's position and the conviction in the simultaneous infringement of both rules[272] .

742. In the *Generics* case, where *"pay for delay"* agreements between pharmaceutical companies were at issue, the CJEU, finding that the pharmaceutical company holding the patent held a dominant position on the relevant market, clarified:

> *"a contractual strategy of an original drug manufacturer in a dominant position on a market may be sanctioned not only under Article 101 TFEU, by virtue of each agreement considered in isolation, but also under Article 102 TFEU, for the possible further damage which that strategy causes to the competitive structure of a market on which, because of the dominant position held by that drug manufacturer there, the degree of competition is already weakened"*[273] .

2.3.4. Binding effect of EC decisions

743. It follows from the *Masterfoods* judgment[274] (which has become settled case law[275]) that, by virtue of Articles 101 and 102 TFEU and the rules of EC competence to apply these rules, together with the principles of separation of powers, direct effect, loyal cooperation, effectiveness and legal certainty, final decisions (*res judicata*) of the European Commission identifying an infringement of Article 101

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[272] Case T-65/98 Van den Bergh Foods v. Commission EU:T:2003:281.

[273] Case C-307/28 Generics (UK) EU:C:2020:52, para 147 (see also para 172).

[274] Case C-344/98 Masterfoods EU:C:2000:689, paras 45-52, 56 and 60.

[275] See, e.g.: Case T-271/03 Deutsche Telekom v Commission EU:T:2008:101, para 120; Case C-280/08 P Deutsche Telekom v Commission EU:C:2010:603, para 90; Case C-199/11 Otis EU:C:2012:684, paras 50-54; Case T-402/13 Orange v Commission EU:T:2014:991, para 27; Case C-547/16 Gasorba EU:C:2017:891, paras 23-24 and 29.

and/or 102 TFEU bind national courts in *follow-on* actions discussing the existence of such an infringement[276] .

744. Under this case law:

> *"when national courts rule on agreements or practices that are already the subject of a Commission decision, they* ***may not take decisions that are contrary to the Commission's decision,*** *even if the latter is in contradiction with the decision taken by a national court of first instance"*[277] .

745. The *Masterfoods* case law has come to be codified in Article 16(1) of Regulation (EC) No 1/2003, according to which, in so far as relevant to the present action:

> *"**When ruling on agreements, decisions or practices under Article** **[101 or 102] of the Treaty that have already been decided upon by the Commission, national courts may not take decisions that are contrary to the decision adopted by the Commission**. They must avoid taking decisions that conflict with a decision envisaged by the Commission in cases which the Commission has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty".*

746. More recent case law no longer distinguishes between these two sources of the national court's obligation, obviously giving pride of place to the rule in Regulation 1/2003:

> *"Uniformity of application of Union competition law is notably guaranteed by Article 16(1) of Regulation 1/2003, which obliges national courts not to take decisions that are contrary to the decision adopted by the Commission in proceedings under Regulation 1/2003."*[278] .

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[276] For a broader theoretical framework: Sousa Ferro, Miguel, "Antitrust Private Enforcement and the Binding Effect of Public Enforcement Decisions," (2019) 3(2) *Market and Competition Law Review* 51.

[277] Case C-344/98 Masterfoods EU:C:2000:689, para 52 (restated in the reply provided at para 60). This obligation exists even if an appeal to annul the decision is pending before the GCEU and even if the GCEU has suspended the enforcement of the decision pending the decision on that appeal (see paras 52, 55 and 57).

[278] Case C-547/16 Gasorba EU:C:2017:891, para 24.

747. This matter is also described in the Commission's Communication on cooperation with national courts[279] , which states, *inter alia, as* follows:

> *"If the Commission takes a decision on a given case before the national court, the latter cannot take a decision running counter to that of the Commission. The binding effect of the Commission's decision is of course without prejudice to the ultimate interpretation of Community law by the Court of Justice (...)".*

748. As to the objective scope of the binding effect of the EC decision, the CJEU has not yet had the opportunity to clearly and decisively clarify this issue (only that Court can do so with authority), and Regulation (EC) 1/2003 offers no further explanation. National courts have adopted diverse positions, being confronted with arguments from some Defendants in *follow-on* actions that only the operative part of the decision is binding, and arguments from some Plaintiffs that the entire content of the decision should be binding.

749. First, the CJEU has already provided us with the following clarification in the context of a *private* competition *enforcement* action:

> *"... it is important to note that a civil action for damages (...) implies (...) not only the finding that a harmful event has occurred but also the existence of harm and a direct link between that harm and that harmful event. Whilst it is true that the obligation on the national court not to take decisions which are contrary to the Commission's decision finding an infringement of Article 101 TFEU requires that court to find that there is a cartel or prohibited practice, it must be stated that the finding of harm and of a direct causal link between that harm and the cartel or practice in question remains, on the other hand, subject to the assessment of the national court.*
>
> *Even where the Commission has had to determine the precise effects of the infringement in its decision, it is still for the national court to determine individually the damage caused to each of the persons who have brought*

[279] Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 of the EC Treaty (OJEU C 101/54, 27/04/2004, as revised by OJEU C 256/5, 05/08/2015), paras 11-14.

an action for damages. Such an assessment is not contrary to Article 16 of Regulation No 1/2003" . [280]

750. This case law emphasizes that the national court is bound only as to whether one of the requirements for liability for damages arising from violations of Articles 101 and 102 TFEU is met: the existence of unlawful conduct (existence of the infringement, which in European law includes the determination of fault[281] , and which is therefore not an autonomous requirement of civil liability for violations of European competition law).

751. Second, when commenting on the parallel standard of the binding effect of statements of infringements in NCA decisions in Article 9(1) of Directive 2014/104/EU, the European legislator stated that:

> *"the effect of the declaration should only cover the* ***nature of the infringement and its material, personal, temporal and territorial scope as*** *determined by the competition authority or the review court in the exercise of its jurisdiction"*[282] .

752. The SBA included this clarification when transposing the rule concerning the binding effect of PCA decisions[283] .

753. It follows from case law and Regulation (EC) 1/2003, together with general principles of European law, that the national court may not decide in terms that contradict the EC decision identifying an infringement of Article 101 or 102 TFEU. This implies that it may not disagree, *inter alia*:

a. that the behavior identified in the EC decision existed;
b. that such conduct infringed Article 101 or 102 TFEU, as all the requirements of these prohibitions were met, including qualification as an agreement/concerted practice or abuse, the existence of a dominant position, the existence of fault (wilful or negligent), the existence of an effect on trade between Member States, the existence of an object or

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[280] Case C-199/11 Otis EU:C:2012:684, paras 65-66 (emphasis added).

[281] In *public enforcement*, anti-competitive conduct is only prohibited and sanctionable if the conduct was intentional or negligent.

[282] Recital 34 of Directive 2014/104/EU.

[283] See Article 7(1) of the SBA.

effect restrictive (appreciable) of competition and, to the extent necessary for the finding, the delineation of the relevant market;

c. that such conduct does not qualify for an individual exemption under Article 101(3) TFEU or a categorical exemption or economic justification in the context of Article 102 TFEU. to the extent that the concrete grounds for such exemptions or justifications were relied upon and excluded in the EC decision;
d. that this behavior and the corresponding illegality had a certain material scope, i.e., which behaviors were adopted and their characteristics;
e. that such conduct and the related unlawfulness had a certain personal scope, i.e. which undertakings (in the sense of competition law) engaged in the conduct in question and, where appropriate, that certain legal persons form part of the same economic unit ("undertaking") ;
f. that such conduct and the corresponding illegality had a certain temporal scope, i.e. that they took place throughout the entire period identified in the EC decision for each undertaking concerned;
g. that such conduct and the related illegality had a certain territorial scope, i.e. that they occurred or had effects throughout all territories or geographical areas identified in the EC decision for each undertaking concerned;
h. in cases where a single and continuous infringement is identified, that the undertakings concerned have participated in, and are responsible for, the various geographic and/or material components of the practice included in the single and continuous infringement declaration .

754. For various reasons, it is often the case that competition authority decisions are unclear in describing the details of the infringing conduct. It is virtually impossible for an EC decision to fully describe the material, personal, temporal and territorial scope in the operative part of the decision. Nor would it make sense to include all such details in the operative part. Virtually without exception, to understand exactly what the infringement stated in the (succinct) operative part of the decision is, it has to be read in conjunction with the recitals of the decision.

755. This discussion becomes even more evident when we refer not to the EC decision, but to the judgment of the GCEU or CJEU that confirmed it in full or in part, since the operative part of such judgments will only say, in extremely succinct terms,

that the application was rejected, or that it was accepted as to this or that part and rejected as to the rest.

756. Nor can it be excluded that some of the details of the infringing conduct are not even identifiable from the full text of the decision, in particular in the case of transactions[284] and where only the non-confidential version of the decision is available, which may reproduce or refer at crucial points of the description of the conduct to confidential documents. In these cases, understanding the scope of the infringement found in the EC decision would require having regard not only to the full text of the decision, but also to the confidential content of the documents reproduced or referred to. Access to documents, including confidential documents, may therefore become necessary to understand the scope of the binding effect created by an EC decision, and the mechanisms of cooperation between the national courts and the EC with requests for clarification may also be triggered.

757. In short, it cannot be said that all recitals of an EC decision are binding. National courts are only bound not to disagree with the existence of unlawful conduct as stated in the operative part of the EC decision (or in the operative part of an GC/EU/CJEU judgment). It happens that understanding such a statement in the operative part requires reading the recitals of the decision (or judgment) and sometimes even the reproduced excerpts and confidential documents referred to in the decision. The content of these recitals may thus be binding, indirectly, because it is necessary for the clarification and understanding of the operative part of the decision. Without prejudice to the effectiveness of the *Masterfoods* jurisprudence and Article 16(1) of Regulation (EC) No 1/2003, the **national court cannot**, without violating its European law obligations, **disregard a fact or an interpretation of law which is indispensable to the identification of the infringement described in the operative part, interpreted in the light of the recitals of the decision**.

758. In this sense AG Van Gerven stated:

> *"national courts have a duty, when a decision adopted by the Commission is relied on or challenged by parties before those courts, to limit as far as*

[284] In this sense, see: David Ashton, *Competition Damages Actions in the EU: Law and Practice*, 2nd ed. Edward Elgar, 2018, p. 87; Geradin, Damien & Mattioli, Evi, "The Transactionalization of EU Competition Law: A Positive Development?", (2017) *TILEC Discussion Papers 2017* DP 2017-035.

possible, in the interest of the Community, the risk that a conflict of decisions with the Commission may arise"[285] . The national judge is free to disagree with the *"conclusions of fact and/or law drawn by the Commission"* when *"they are conclusions which are of no significant value for the purposes of the final decision and which do not therefore form the basis of the ratio of the Commission's decision. On the other hand, where such findings have an influence on the final decision reached by the Commission, it is appropriate that the national court, in accordance with the applicable national procedural law, stay its proceedings and request the necessary information from the Commission, or make a direct reference to the Court of Justice for a preliminary ruling on the validity of the decision in question or on the interpretation of the Community competition rules in question"*[286] .

759. In support of the above interpretation, it should also be noted that, according to European case law, an action for annulment of an EC decision does not have to deal exclusively with the operative part of the decision, but factual or legal findings in the recitals of the decision may be relied upon (provided that the general requirements for an action for annulment are met). This is important not only to show that these recitals can produce binding legal effects, on their own or in conjunction with the operative part, but also to show that the fundamental rights of the undertakings concerned are adequately protected, as they can challenge these findings in the recitals.

760. The interpretation advocated above is in line with the position expressed by the Competition Appeal Tribunal in one of the so-called "truck cartel" actions:

"The obligation which follows from Article 16 [of Regulation (EC) 1/2003] *is that a national court may not take a decision which is inconsistent with (which is contrary to) a decision of the Commission. If a judgment of this Court were inconsistent with the recitals of the Decision which were the 'essential basis' or the 'necessary support' for the operative part, as these*

[285] Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, para 59.

[286] Opinion of AG Van Gerven in Case C-128/92 Banks EU:C:1993:860, para 61.

terms have been explained above, in our view this would, on any reasonable interpretation of Article 16, be inconsistent with the Decision."[287] .

"Second, if a conclusion of a decision cannot be appealed to the European courts, then it would normally be a denial of justice if that conclusion were binding in domestic court actions. In contrast, to the extent that it can be appealed in Luxembourg, it falls within the scope of European jurisdiction and thus outside the domain of the national court."[288] .

"Consequently, we consider that the principles that determine whether a conclusion included in a recital is appealable to the European courts are properly applied to determine whether a conclusion is binding for the purposes of Article 16: the criterion is that the conclusion in the recital is an essential basis or necessary support for a determination in the operative part, or necessary to understand the scope of the operative part. (...) We therefore reject FAD's main argument that only the operative part of the Decision is binding. Additionally, based on the above authorities, and the Otis judgment, we consider that the criteria of "essential basis" or "necessary support" are not necessarily confined, as the other Defendants have argued, to "legal benchmarks" or a very narrow category of findings of fact. However, we accept Ms Bacon's argument that it is a fact-specific exercise in each case to identify what was actually decided either in the operative part (which has to be interpreted with the aid of the recitals) or in a recital which is an essential basis or provides the necessary support for the operative part, such that the national court would be acting in contradiction with the decision if it came to a different conclusion."[289] .

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[287] CAT judgment of March 4, 2020, Royal Mail et al v. DAF et al (proc. no. 1284/5/7/18 and 1290-1295/5/7/18 (T)), available aquiSee Case C3/2020/0625, C3/2020/0648, C3/2020/0643, C3/2020/0627, C3/2020/0619 Royal Mail Group v DAF et al. Original: *"the obligation resulting from Article 16 [of Regulation (EC) 1/2003] is that a national court must not make a decision that would be inconsistent with ("run counter to") a decision of the Commission. If a judgment of the Tribunal were to be inconsistent with recitals in the Decision that were the "essential basis" or "necessary support" for the operative part, as those terms are explained above, in our view that would, on any sensible interpretation of Article 16, be inconsistent with the Decision"*.

[288] Idem, para 67 (our translation). Original: *"Secondly, if a finding in a decision cannot be challenged in proceedings before the EU Courts, then it would ordinarily be a denial of justice for that finding to be binding in national proceedings. By contrast, to the extent that it can be challenged on an application in Luxembourg, it falls within the jurisdiction of the EU regime and thus outside the realm of the national court"*.

[289] Idem, para 68 (our translation). Original: "*Accordingly, we consider that the principles which determine whether a finding in a recital to a decision is susceptible to challenge before the EU courts are appropriately applicable to determine whether a finding is binding for the purpose of Article 16: the criterion is that the finding in the recital is an essential basis or the necessary support for a determination in the operative part,*

761. It should also be made clear that, if it follows from the *Masterfoods* case-law and Article 16(1) of Regulation (EC) No 1/2003, as well as from the general principles of law cited in that case-law, that the national court may not disagree with the European Commission's findings as to the existence of an infringement of Articles 101 and 102 TFEU, this necessarily implies that **the national court may not disagree with the European Commission's findings made in the context of identifying the infringement when deciding another requirement of civil liability**. Indeed, if this were the case, the national court's decision would be internally contradictory. **One cannot consider a fact as proven for the purposes of fulfilling the unlawfulness requirement, and then disagree with it for the purposes of fulfilling the damages or causation requirement**. It is true that there will normally be no overlap between the facts whose proof is required for these requirements and the first, but if there is an overlap, there cannot be divergent conclusions.

762. There are only two avenues available to national courts that wish to take issue with a finding of infringement of Article 101 or 102 TFEU included in an EC decision, or with any intermediate finding of that decision indispensable to its finding of infringement:

a. invoke, with good reason, the limits of the European primacy; or
b. make a referral to the CJEU, asking that the EC decision be declared invalid because it violates European law.

763. Furthermore, insofar as the interpretation and application of European law to specific facts has already been **clarified by the CJEU,** national courts cannot, by virtue of the **principle of loyal cooperation,** contradict the CJEU's conclusion. For the purpose of the present case, this means, by way of example, that, to the extent that the CJEU (in a broad sense, encompassing the CJEU and the CJEU *stricto sensu*) has already confirmed a European Commission Decision identifying an abuse of Google's dominant position that corresponds to or overlaps with practices at issue in the present case, the national court may not, without violating the

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or necessary to understand the scope of the operative part. (...) We therefore reject DAF's primary case that only the operative part of the Decision is binding. Further, from the authorities discussed above, and from Otis, we consider that the criteria of "essential basis" or "necessary support" are not necessarily confined, as the other defendants contended, to "legal assessments" or a very narrow category of findings of fact. However, we accept Ms Bacon's submission that it is a fact specific exercise in each case to identify what has actually been decided either in the operative part (which is to be interpreted with the aid of the recitals) or in a recital which is an essential basis or provides the necessary support for the operative part, such that the national court would be acting inconsistently with the decision if it made a different finding".

Portuguese State's obligations under the TFEU, contradict that finding (and the requirements underlying it).

764. It follows from all of the foregoing that, in the case *sub judice,* the **national court is bound under the** principle of loyal cooperation, Article 16(1) of the (EC) Regulation and European case law, as discussed above, *inter alia*, by the **following findings of fact and law,** which establish irrebuttable **presumptions**:

a. Google is an enterprise within the meaning of competition law and constitutes an economic unit that includes the 1st and 2nd Defendants);
b. The following relevant markets exist:
   (i) world market (excluding China) for licensing operating systems for mobile equipment;
   (ii) world market (excluding China) for Android *app stores;*
   (iii) Portuguese market for *online* generic search services;
c. Google's practices in these markets affect trade between member states, and European competition law applies to them;
d. Google had, between 2011 and (at least) 2018, a dominant position in the three relevant markets identified above;
e. Google abused its dominant position and infringed Article 102 TFEU by entering into agreements with Android mobile equipment manufacturers that mandated tied sales of the Google Search application with the Google Play Store application (conduct beginning on January 1, 2011 and not terminated at the time of the adoption of this Decision).

2.4. Causality

765. Regarding the law applicable to the Defendants' civil liability, causality, as well as all other requirements of the Defendants' liability, is governed by European law, as clarified by CJEU case law, and not by Portuguese law. However, in the present case, the application of national rules on causation would not lead to a different outcome from that resulting from the application of European law.

766. But it should be noted that, if the causality test itself is defined by European law (i.e. how much causality is enough to trigger civil liability for breach of Articles 101 and 102 TFEU, both applicable to the present case), it is already within the exercise of the legislative autonomy of the Member States, limited by the principles of

equivalence and effectiveness (without prejudice to the harmonization operated in the meantime by Directive 2014/104/90).The exercise of the legislative autonomy of the Member States, limited by the principles of equivalence and effectiveness (without prejudice to the harmonization effected in the meantime by Directive 2014/104/EU), already includes the rules on the methodology for assessing the existence of a sufficient causal link, in a specific case, within the requirements of causality defined by European law[290] .

767. That is, the legal question of which causation test is applicable is determined by European law, but the methodology of its application to the actual case is determined by national law[291] (and applied by the national court)[292] .

768. Now, as was the case at the beginning of the CJEU case law that stated that the requirements for Member State liability for infringements of EU law are governed

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[290] Case C-295/04 Manfredi EU:C:2006:461, para 64; Case C-557/12 Kone EU:C:2014:1317, paras 13-15 and 27-37; Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:45, paras 37 and 84; Case C-435/18 Otis EU:C:2019:1069, para 33. See also AG Bobek's Opinion in Case C-27/17 flyLAL EU:C:2018:136, para 90 and footnote 47 (which seems to overestimate the margin available to member states in this regard).

[291] It is to these kinds of national methodological rules that the Directive refers, for example, when it states that *"Member States shall establish appropriate procedural rules that ensure that compensation for actual damage at any level of the supply chain does not exceed the additional cost damage suffered at that level"* - cf. Article 12(2) of Directive 2014/104/EU.

[292] This difference is analysed in detail in AG Kokott's Opinion in Case C-435/18 Otis EU:C:2019:651, paras 47-62 and 67. From this analysis, the following is *noteworthy*: *"in compensation law, the concept of "causal link" between the harmful act and the damage is a multifaceted legal institute: Thus, in the examination of causation, it is not only a question of determining whether a particular damage is to be attributed to a particular event. Rather, the examination of causation may include other normative elements that relate to the question whether the alleged harm has a sufficient connection with the purpose of the infringed legal norm"* (para 50). *"*[T]he *question at issue here is an aspect of the examination of causation which does not concern the modalities of application but rather the substantive prerequisites of the right to compensation for harm caused by infringements of competition law. It concerns the question whether Article 101 TFEU also entitles a person who was not operating as a supplier or purchaser on the market affected by the cartel to compensation for the harm he suffered as a result of the cartel. This thus concerns the question of the scope of protection of Article 101 TFEU and thus a question of interpretation of a provision of Union law which can only be answered on the basis of Union law"* (para 52). *"According to the settled case-law of the Court of Justice, it follows both from the requirements of the uniform application of European Union law and from the principle of equality that the terms of a provision of European Union law which does not contain an express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be subject to an autonomous and uniform interpretation throughout the European Union, which must be sought having regard to the context of the provision and the objective pursued by the legislation in question. This means in the present context that theoretical concepts of national law for restricting unlimited liability, such as the doctrine of the protective purpose of the rule or the adequacy of the causal relationship between the infringement and the damage, cannot be decisive for defining the scope of Article 101 TFEU"* (para 54). *"In accordance with the separation between substantive law and procedural enforcement, the "modalities for the application of the "causal link"", the definition of which, according to the declaration of the Court of Justice in the Manfredi judgment and the eleventh recital in the preamble to Directive 2014/104, remains reserved to the domestic legal order of the Member States, can only be the modalities for the actual declaration of a causal link between the act giving rise to the damage and the damage itself in the specific case. This is in line with the fact that the Court of Justice, in the Manfredi judgment, included "the modalities of the application of the concept of 'causal link'" in the "modalities of the exercise of that right [to compensation for damage]": "It is the application of rights to compensation for damage and not the existence of such rights"* (para 56).

by European law and not by national law[293] , we still have little European case law clarifying the requirements for corporate liability for infringements of European competition law. These requirements will gradually have to be clarified by the CJEU. In any case, we already have two precedents that allow us to infer that the causality test defined by the Court is broad, and even significantly broader than the one that would be applied under the law of some member states.

769. Indeed, European case law has already clarified that under European law there is, in theory, sufficient causation between a cartel and:

(i) so-called "*umbrella damages*", that is, damages caused to customers of companies not participating in the cartel because of a generalized price increase in the markets[294] .

(ii) damage caused to persons who are not active in the market concerned, or even in upstream or downstream markets, as in the case of a public authority obliged by law to provide subsidies, which were higher because of the cartel, preventing the application of that additional capital to more profitable investments[295] .

770. A fortiori, this means that there is also sufficient causation under European law if consumers, owners of Android devices, have to bear higher costs (an overcharge) when purchasing Android applications and *in-app* Android content developed by *app developers* through the Google Play Store, because the prices of these applications and content include the overcharge of commissions charged by Google within the Google Play Store, caused by the anti-competitive practices at issue in the present action.

771. Consumers have the right to be compensated by the infringer for the harm corresponding to the overpricing caused by its anti-competitive practice, when this overpricing has been passed on to them along the vertical chain (*pass through*)[296]

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[293] Cases C-6/90 and 9/90 Francovich EU:C:1991:428; Cases C-46/93 and C-48/93 Brasserie du pêcheur and Factortame EU:C:1996:79.

[294] Case C-557/12 Kone EU:C:2014:1317.

[295] Case C-435/18 Otis EU:C:2019:1069, para 32. See also AG Kokott's Opinion in Case C-435/18 Otis EU:C:2019:651, e.g. para 151.

[296] See, e.g., AG Kokott Opinion in Case C-435/18 Otis EU:C:2019:651, para 71: "*also direct and indirect suppliers and buyers in the markets upstream and downstream of this market - for example, persons who have supplied*

. This is so by virtue of Articles 101 and 102 TFEU, interpreted in conjunction with the general principles of European law. This solution has also been included in Directive 2014/104/EU and the EPL (there is no succession of material rules in time as regards causation for the purposes of the present action).

772. It is clear from Articles 8 to 10 of the SBA, and Articles 12 to 15 of Directive 2014/104/EU, that consumers have the right to be compensated for harm caused to them due to the effects of anti-competitive practices passed on/repercussed to them through a vertical chain.

773. In any event, charging *app developers* a higher price than would have been charged, in the absence of anticompetitive practices, for selling their Android apps and *in-app* Android content through the Google Play Store is a proper cause of the increase in the prices of the products/services sold by those *app developers* through the Google Play Store (charged directly by Google) and, therefore, the price paid for those products/services by the represented consumers.

774. To hold otherwise would violate the principle of effectiveness of European competition law, reducing the useful effect of Articles 101 and 102 TFEU and destroying the right to compensation for consumers arising from that article and the general principles of European law. Indeed, companies would be free to violate competition law, without fear of civil liability consequences, when the damage caused is passed on/repercussed by their customers to end consumers, diluted in a large number of products.

775. The causal intensity is, moreover, reinforced by the fact that consumers' devices run exclusively on the Android operating system, with consumers having no choice but to use Android and *in-app Android* applications and content, and that consumers have no alternative to downloading Android applications and *in-app* Android content through the Google Play Store.

776. Even if the national law were understood to apply, a position rejected by the Plaintiff and which is discussed merely as a precautionary measure of sponsorship, the outcome of this analysis would be identical.

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components for the cartelized product or have purchased this product as part of another product - fall within the protective purpose of Article 101 TFEU."

777. For the causation judgment established by national law (cf. Articles 562 and 563 of the Civil Code), it is necessary to establish, in accordance with an adequate causal link, that the damage would probably not have occurred in the absence of the harmful event, in this case, in the absence of the anti-competitive conduct.

778. Adequate causation requires that the anticompetitive conduct be capable - in the expression of the law, probable - of causing the overpricing suffered by the *app developers* and of causing this overpricing to be reflected in the final price to consumers.

779. The causality formula required in article 563 of the CC does not presuppose the indispensability of the condition, but its adequacy to the production of the damage, through a judgment of probability[297] .

780. The causality judgment required by national law corresponds to a normative-valorative decision[298] . That is, causality is normative, decided by the legal system in accordance with its values, considering the underlying social and economic context, as well as its evolution, not taking refuge in traditional or purely natural conceptions of causality.

781. In the case *sub judice*, the Defendants' practices described in section 1.3, as already argued, are adequate cause to cause overpricing to *app developers*, which is also adequate cause for *passing on the* same overpricing to the represented consumers.

782. In the case of violation of protection rules, competition law establishes prohibitions to restrictive practices, seeking to prevent their effect, precisely because it considers them capable of creating damages, namely the overprice paid by customers in a vertical chain. Thus, once the competition rule is violated, it is the legislator itself that establishes the connection between the anticompetitive conduct and the damage (the overprice) verified and past/repercurred along a vertical chain.

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[297] Judgment of the STJ 18/12/2013, case no. 1749/06.0TBSTS.P1.S1, available here; MENEZES LEITÃO, Luís, *Direito das Obrigações,* vol. I, 12th edition, Coimbra, Almedina, 2015, p. 313; MENEZES CORDEIRO, António, *Tratado de Direito Civil VIII: Direito das Obrigações,* reprint of the 1st edition, Coimbra, Almedina, 2014, p. 542 "*as a rule, the need for absolute confirmation of the causal course is removed: it is not necessary to prove such course, but simply the reasonable probability of its existence*".

[298] MOTA PINTO, Paulo, *Interesse Contratual Negativo e Interesse Contratual Positivo, volume I,* Coimbra, Coimbra Editora, 2008, p. 728; CARNEIRO DA FRADA, Manuel, *Direito Civil, Responsabilidade Civil, O Método do Caso,* Coimbra, Almedina, 2006, p. 100.

783. It should be recalled that in the modality of unlawfulness concerning norms of protection, the causal relationship is determined according to the norm that has been violated[299] .

784. In this sense, the aforementioned standards of protection already establish a functional link between their violation and the causing of an injury.

785. European case law in case T-65/98, *Van den Bergh Foods v. Commission has* made this clear:

> *"It follows that Article 86 of the Treaty* [now Article 102 TFEU] *prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by means other than those embodied in competition on the merits. The prohibition imposed by this provision is further justified by the intention not to harm consumers (...)"*[300] .

786. This justifies the triggering of at least a *prima facie* presumption of causality as a result of the violation of the protection standard[301] . Within this scope, it should be recalled that the use of judicial presumptions is allowed when establishing the causal link based on the rules of experience and on the probable consequences of the fact[302] .

787. Even so, the judgment of adequacy and probability, according to the rules of experience, also denotes that a vertical agreement between the Defendants and the *app developers*, and an abuse of the Defendant's dominant position involving the charging of a surcharge on its sales to consumers, increases the costs of all *app developers* and causes them to raise the prices of the products and services they offer, in order to avoid losses or reductions in profits, causing consumers of those products and services to pay more for them than they would have paid in

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[299] SINDE MONTEIRO, Jorge, *Liability for Advice, Recommendations or Information*, Coimbra, Almedina, 1989, pp. 276-282, 286-291.

[300] Case T-65/98 Van den Bergh Foods v Commission EU:T:2003:281, para 157, reinforced in Case T-155/06 Tomra Systems and Others v Commission EU:T:2010:370, para 206

[301] SINDE MONTEIRO, Jorge, *Liability for Advices, Recommendations or Information*, Coimbra, Almedina, 1989, pp. 267 and following and 283; MENEZES LEITÃO, Adelaide, Normas de Protecção e Danos Puramente Patrimoniais, Coimbra, Almedina, pp. 738-740.

[302] TRL Judgment of 30/09/2014, case no. 1415/07.9TCLRS.L1-1, available here ; STJ Judgment of 14/03/2019, case no. 2411/10.4TBVIS.C1.S1, available here. *"If a protection norm seeks to react against a typical endangering possibility and if, in violation of that norm, a damage of the kind that the norm seeks to prevent occurs, a causal relationship between the violation of the protection norm and the damage must be considered, in first appearance"* - MENEZES LEITÃO, Adelaide, Normas de Protecção e Danos Puramente Patrimoniais, Coimbra, Almedina, p. 738.

the absence of the anticompetitive practice, and it is manifestly likely and foreseeable, at the time of the adoption of the vertical agreements and the abuse of a dominant position, that this result will occur.

788. There is no causal limit as to the knock-on effect of chain losses. It is enough, of course, that the respective adequacy is demonstrated. One could not fall into the trap of considering that, because the merchants (in this case, the *app developers*) pass on their losses to consumers, that these losses are not recoverable.

789. To consider that these damages are not compensable would undermine the principle of full compensation, because, the obligation to compensate covers all damages caused (articles 562, 563 and 566(2) of the Civil Code).

790. Finally, the difficulty in calculating and determining the damages is also not a reason to prevent its compensation since it follows from article 566(3) of the CC that "*if the exact amount of the damages cannot be ascertained, the court shall judge equitably within the limits it deems proved*" and from article 9(2) of the EPL that "if it is practically impossible or excessively difficult to calculate exactly the total *damages suffered by the injured party or the amount of the repercussion referred to in the preceding article, taking into account the means of proof".If it is practically impossible or excessively difficult to calculate precisely the total damage suffered by the injured party or the value of the passing-on referred to in the previous article, having regard to the available evidence, the court shall make such calculation by means of an approximate estimate, and in so doing may take into account the Commission Communication (2013/C 167/07) of 13 June 2013 on the quantification of damages in actions for damages for infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).It may take into account the Commission Communication (2013/C 167/07)* of 13 June 2013 on the quantification of damages in actions for damages for infringements of Articles 101 *and 102 of the Treaty on the Functioning of the European Union.*

791. In the present case, the *pass-on* presumption provided for in Article 8(3) of the EPL, in transposition of Directive 2014/104/EU, applies.

792. This is a procedural rule, which applies immediately to lawsuits filed when the EPL is already in force.

793. Regardless of whether Article 8(3) of the EPL is classified as a substantive or adjective rule, the moment in respect of which such retroactivity is to be assessed is not that of the commission of the unlawful act, but that of the commencement of the action, from which it follows that its application in the present case does not entail any retroactive effect.

794. There is no retroactivity in this application which Article 24(1)(*in fine) of* the EPL is intended to prevent. There is no right or interest, in particular no question of legal certainty, to be safeguarded by prohibiting the application of a new rule of evidence to facts preceding the entry into force of that rule, provided that the action was brought after the entry into force of the new rule. This would not be the case if it were understood that the offender deserves protection in the sense that he knows, at the moment he decides to commit the offence, which rules of evidence will apply in a hypothetical future case. Besides being unjustified, such protection would have the effect of freezing the rules of burden of proof for decades, preventing legislative revisions even when it is understood that the rules of burden of proof do not guarantee the effectiveness of the rights of injured parties.

795. In order to exclude the existence of a retroactive effect, it should also be taken into account that the conduct in question constitutes continuous infringements that have not yet ended, i.e. that will necessarily end after the SBA comes into force.

796. As this is a rule with several possible interpretations, the interpretation advocated here is also required by the obligation of interpretation in accordance with Article 22(2) of the Directive, interpreted in the light of the general principles of European law, which require new procedural rules to take effect immediately.

797. Moreover, there is no real succession of rules in time, because the same presumption of *pass-on* was already required, before the adoption of the Directive, by Articles 101 and 102 TFEU in conjunction with the principle of effectiveness of European Union law, as well as by the fundamental right of access to justice (and continues to be so). Indeed, the European legislator enshrined this presumption in Directive 2014/104/EU precisely because it became clear that, in its absence, it would be impossible or excessively difficult for injured parties in downstream markets to prove the *passing-on of* damages.

798. Under the aforementioned Article 8(3) of the EPL, and the presumption that was already required, previously, by the principle of effectiveness (and without prejudice to the possibility of proof to the contrary by the Defendant), it is sufficient for the Plaintiff to prove, as it will prove in the present action: (i) that the Defendants violated competition law; (ii) that this infringement led to an additional cost (overpricing) for direct customers of the Defendants (in this case, the *app developers*); and (iii) that the represented consumers purchased the services affected by the competitive infringement (in this case, the Android apps and *in-app* Android content). The 3rd requirement is met in the present case by definition (without the need for additional proof) as a result of the way represented consumers have been defined.

2.5. Damage quantification

799. We begin by recalling that, in the present action, as clarified *above* in section 2.2the determination of the ***quantum of damages,*** as well as all other requirements of the Defendants' civil liability, **is governed by European law,** as clarified by CJEU case-law, and not by Portuguese law. In any event, in the present context, the application of **national rules on quantification of damages would not lead to a different outcome from** that resulting from the application of European law, with the debatable exception of the question of the interest that is due.

800. That said, if the *quantum* owed is itself defined by European law (that is, knowing the amount of damage that the injured party is entitled to be compensated for, in violation of Article 102 TFEU), the rules regarding the **methodology for quantifying the damage and its application to a specific case,** within the criteria of compensable damage defined by European law, fall within the exercise of the legislative autonomy of the Member States, limited by the principles of equivalence **and** effectiveness (without prejudice to the harmonization effected in the meantime by Directive 2014/104/EU).[303] . This is why

[303] AG Kokott Opinion in Case C-557/12 Kone EU:C:2014:1317, para 28; Case C-453/99 Courage v Crehan EU:C:2001:465, paras 30-33; Case C-295/04 Manfredi EU:C:2006:461, para 94. Cf. Commission Communication on the quantification of damages in actions for damages for infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (OJ C 167/19, 13/06/2013), para 8 (*"On the issue of the quantification of damages, to the extent that this type of exercise is not governed by EU law, the legal rules of the Member States determine the appropriate type of evidence and the necessary degree of precision to indicate the amount of damages suffered. It is also the national rules that govern the distribution*

the European Commission adopts Guidelines recommending to Member States different methods that may be considered to arrive at this quantification, and the Directive itself is limited to imposing limits on how damages are quantified, providing for the adoption of such recommendations[304] .

801. It follows from the TFEU and general principles of European law, as interpreted by the CJEU (see *above*) that those injured by a violation of Article 102 TFEU are entitled to full compensation, which includes: (a) *damnum emergens*; (b) *lucrum cessans*; and (c) interest.

802. As in national civil law, the European principle of full compensation implies putting the injured party, as far as possible, in the position in which he would have been if the infringement had not been committed[305] . As summarized by the European Commission, based on CJEU case law:

> *"Reparation consists in placing the injured party in the situation in which he would have found himself if the violation had not been committed. Therefore, reparation includes compensation not only for the actual damage suffered (damnum emergens), but also for the loss of profit (lucrum cessans), as well as the payment of interest. Actual damage is to be understood as a reduction in the injured party's assets; loss of profit is, in turn, to be understood as the exclusion of an increase in those assets which would have occurred in the absence of the infringement*"[306] .

803. It follows from the European institutions' case law on non-contractual liability (which has served as inspiration for European *private* competition *enforcement jurisprudence*) that:

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of the burden of proof and the responsibilities between the parties concerned for the facts to be presented to the court").

[304] See Articles 16 and 17 of Directive 2014/104/EU.

[305] See, e.g., Commission Communication on the quantification of damages in actions for damages based on infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (OJ C 167/19, 13/06/2013), para 3 (*"The quantification is based on a comparison of the claimants' actual position with the position they would have been in if the infringement had not been committed"*).

[306] European Commission, Practical Guide - Quantification of damages in actions for damages based on infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union, June 2013, para 1.

"the purpose of damages in the context of non-contractual liability is to reconstitute as far as possible the assets of the party seeking redress"[307] .

804. We find the same principles today in the rules of Directive 2014/104/EU and in Law No. 23/2018. In addition to the reference to the right to full compensation in Article 1(1) of the Directive, it is established in Article 3(1) and (2) of the Directive (emphasis added), with transposition in Articles 3(1) and 4(1) and (2) of the EPL:

"1. Member States shall ensure that natural or legal persons suffering harm caused by infringements of competition law may claim and obtain full compensation for that harm.

2. Full compensation puts the person who has suffered harm in the position he would have been in if the infringement of competition law had not been committed. It therefore covers the right to compensation for actual loss and loss of profit plus the payment of interest.

805. Law No. 23/2018 states in Article 9(2) (transposing Article 17(1) of Directive 2014/104/EU):

"Where it is practically impossible or excessively difficult to calculate precisely the total damage suffered by the injured party or the value of the passing-on referred to in the preceding article, having regard to the available evidence, the court shall make such calculation by means of an approximate estimate, and in so doing may take into account the Commission Communication (2013/C 167/07) of 13 June 2013 on the quantification of damages in actions for damages for infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union."

806. The imposition of this estimation approach (when the requirements are met) has to apply also to the determination of the *quantum of* the *pass through*, i.e. *of the "share of additional costs that has been passed on"*. Not only because logic requires it, but also because Article 12(5) of the Directive, with which this rule has to be interpreted accordingly, requires it.

807. In the Plaintiff's opinion, we do not have, in this matter, a true succession of rules with different contents. On the one hand, the approach of estimation when it is excessively difficult to reach a precise quantification of damages already existed

[307] Case T-292/15 Vakakis kai Synergates EU:T:2018:103 , para 200.

in our legal system, by means of article 566(3) of the Civil Code. On the other hand, the above-mentioned normative solutions were already required by the principle of effectiveness of European law before the entry into force of the Directive, whenever a right to compensation arising from an infringement of Article 101 or 102 TFEU is at stake.

808. That said, it should be noted that the PCA, accepting the position expressed by the EC during the Portuguese legislative process, defended the differentiation of the obligation to estimate the damages in relation to the general rule of the CC in the following terms:

> *"The expression "calculate" used in the Portuguese version of these provisions has the sense of estimate/calculate approximately (in the English version: "estimate"; in the French: "estimer"; in the Italian: "stimare"), as follows from the wording itself, which expressly refers to situations in which "it is practically impossible or excessively difficult to accurately quantify the damage suffered, based on the available evidence".*"[308]
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> *"The reason for establishing this jurisdiction of the courts is that the quantification of harm caused by competition law infringements 'involves an assessment of how the market in question would have developed in the absence of the infringement' and that this assessment involves 'a comparison with a situation which is by definition hypothetical and can therefore never be made with complete accuracy' (recital 46 of the Directive)".*[309]
>
> *"Since the courts' power to calculate damages by means of a "rough estimate" is not customary in the national legal system, nor does it correspond, strictly speaking,* to *a decision based exclusively on criteria of equity, it was decided to make an express reference in the present proposal (Article 9(2)) to the aforementioned Commission Communication in order to facilitate the interpretation and exercise of that judicial power."*[310]

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[308] Competition Authority, Explanatory Memorandum to the Preliminary Draft Transposition of Directive 2014/104/EU, para 49 - see at:

http://concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Private%20Enforcement%20-%20Exposi%C3%A7%C3%A3o%20motivos.pdf

[309] *Ditto* for 50.

[310] *Ditto*, para 52.

"Some suggestions were received that the possibility of the judge resorting, for the purpose of calculating the damage, to an approximate estimate should be replaced by the possibility of recourse to equity, contemplated in article 566, paragraph 3, of the Civil Code. Such suggestions were not accepted, however, since these are different types of judgments, which appeal to different decision criteria, and only the reference to the former adequately transposes the Directive. What is intended is that the judge may, using traditional means of calculating damages, conclude by a value that is not entirely precise, but approximate"[311] .

809. Also apparently in the sense of some differentiation from the general rule were the then magistrates of the TCRS[312] .

810. The principle of effectiveness and the fundamental right of access to justice imply that the details of the methodology used for quantifying damages, including the requirements on the burden of pleading and the burden of proof, should not be such as to make it impossible or excessively difficult to exercise the right to damages. It is unanimously accepted among legislators and judicial authorities in Europe that the precise quantification of damages in damages actions of the nature of the case *at hand* is excessively difficult. Even if complete and perfect data were available, as well as endless amounts of money to finance the collection and processing of data and the subsequent econometric studies and models aimed at quantifying the damages resulting from the anti-competitive practice, the conclusions of these studies, which would necessarily aim to predict a hypothetical counterfactual scenario, would always be debatable. And of course, neither complete data nor infinite funds are available for this purpose. A disproportionate and unreasonable burden, incompatible with the resources available to them, cannot be imposed on the Plaintiffs, at the risk of effectively denying them access to justice.

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[311] Competition Authority, Public Consultation Report on the Draft Transposition of Directive 2014/104/EU, para 40 - see: http://concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Relat%C3%B3rio%20sobre%20a%20Consulta%20P%C3%BAblica%20da%20Proposta%20de%20Anteprojeto%20de%20Transposi%C3%A7%C3%A3o%20da.pdf

[312] Opinion of the TCRS judicial magistrates to PPL 101/XIII, December 4, 2017, p. 2: *"The rule implies an express departure from the recourse to equity provided for in Article 566(3) of the Civil Code, at the same time as it links the calculation of compensation in the event of difficulty or impossibility of exact calculation to the European Union law figure of a rough estimate."*

811. As part of this discussion, the European Commission recalled:

> *"One of the consequences of the principle of effectiveness* [effectiveness] *is that national legal rules and their interpretation must reflect the difficulties and limits inherent in the quantification of damages in competition cases. For the quantification of such damages, it is necessary to compare the actual situation of the injured party with the situation it would be in in the absence of the infringement. This cannot be observed in reality; it is impossible to determine exactly how market conditions and the interactions between market participants would have evolved in the absence of the infringement. Only an estimate of the scenario that might have existed in the absence of the infringement is possible. The quantification of harm in competition cases, by its very nature, has always been characterized by considerable limits to the degree of certainty and accuracy that can be expected. Sometimes only rough estimates are possible."*[313] .

812. National law on the distribution of the burden of proof must be interpreted in accordance with Article 17(1) of Directive 2014/104/EU, which requires Member States (including their courts) to ensure:

> *"that neither the burden of proof nor the standard of proof required for the quantification of damages renders the exercise of the right to compensation practically impossible or excessively difficult. Member States shall ensure that national courts have jurisdiction, in accordance with national procedures, to calculate the amount of damages if it is established that the claimant has suffered harm but it is practically impossible or excessively difficult to quantify with precision the harm suffered, on the basis of the available evidence."*

813. Based on the reasonably required elements that have been and will be provided by the Parties to enable the court to quantify damages, the court may refer to the **Commission Guide on quantification of damages** as a non-binding tool to support

[313] Commission Communication on the quantification of damages in actions for damages based on violations of Articles 101 and 102 of the Treaty on the Functioning of the European Union (OJ C 167/19, 13/06/2013), para 9.

its analysis, annexed to the Commission Communication to which reference is made in Article 9(2) of Law No. 23/2018[314] .

814. The overpricing caused by the Defendants' conduct indirectly affected the consumers represented in the present action. This means that the overpricing (or additional costs) resulting from the competitive infringement was passed down the vertical chain.

815. In this initial petition and throughout the present proceeding, through the production of the required evidence, the Plaintiff will demonstrate, to the extent possible and reasonably required, the existence of the overpricing for *app developers, as* well as its repercussion on the represented consumers, meeting the burden of proof established in Article 8(2) of the EPL and which is identical to that which would result from the general rules of the CPC.

816. However, the **presumption set out in Article 8(3) of the SBA, in transposition of Article 14(2) of the Directive**, as referred to in the previous section, applies to the present case.

817. **Article 9(3) of the EPL** (transposing Article 17(3) of the Directive) provides the possibility for the court to **ask the PCA for assistance in quantifying the damages** resulting from the competition infringement. Without prejudice to the Court's wise decision, the **Plaintiff considers that the use of this option is not justified in the present case,** considering that, to the best of the Plaintiff's knowledge, the PCA has never specifically addressed the anti-competitive practices at stake here and is not in a better position to comment on these matters than independent experts.

818. As this is a popular action under Article 19(7) of the EPL and the SPL, the **special rules for popular actions** are still applicable to the quantification of damages in the present case. This includes the rules concerning the determination of the overall compensation and the manner of its distribution, already described in section 2.1.2. In the context of quantifying damages, since this is one of the *"fundamental questions defined by the parties"*, the judge's duty to exercise *"**his***

[314] European Commission, Practical Guide - Quantification of damages in actions for damages based on infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union, June 2013, available aqui.

own initiative in matters of gathering evidence, without being bound by the initiative of the parties" (Article 17 of the PLA) is worthy of note.

819. As for the **interest due**, it is one of the components of the *quantum of* compensation to which consumers are entitled (a substantive element of the right to compensation and its extent), which means that, as noted *above, it is* also directly governed by European law, as recently emphasized by Advocate General Kokott[315] . In *Manfredi*, the CJEU stated that *"their* [interest] *award, under the applicable national rules, must be regarded as an indispensable component of compensation"*[316] . This statement seemed to suggest that the applicable interest rate should be calculated according to national rules. However, this statement was an *obiter dictum* (not decisive for the outcome of the case at hand), and was made at a time before the consolidation in case law of the clear message that the determination of the requirements of civil liability, including of the *quantum of* compensation, lies directly with European law. And subsequent case law that reaffirmed *Manfredi* as to the obligation to award interest no longer included the words *"under the applicable national rules"*. The CJEU now refers only to the *"interest payment*" requirement[317] . Indeed, the compensation to which an injured party is entitled for an infringement of Article 102 TFEU should not vary depending on the Member State where the legal action is brought, where the anti-competitive act was carried out or where the damage in question occurred.

820. Even if some leeway for the application of national interest rules were to result from European jurisprudence, it is indisputable that the guarantee of the principles of full compensation and effectiveness of the right to compensation would always be imposed as a limit to this margin of freedom[318] . This is why it was concluded in the most extensive European study on this topic that *"the distinction between*

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[315] See AG Kokott Opinion in Case C-435/18 Otis EU:C:2019:651, para 46, clarifying that *"the payment of interest"* is among the elements *"determined by Union law."*

[316] Case C-295/04 Manfredi EU:C:2006:461, para 97.

[317] See, e.g.: Case C-536/11 Donau Chemie EU:C:2013:366, para 24; Opinion of AG Kokott in Case C-557/12 Kone EU:C:2014:1317, para 27; Opinion of AG Jääskinen in Case C-352/13 CDC Hydrogen Peroxide EU:C:2014:2443, para 30; Opinion of AG Kokott in Case C-435/18 Otis EU:C:2019:651, para 46.

[318] Cf. MONTI, Giorgio & VAN LEEUWEN, Barend, "EU law and interest on damages for infringements of competition law", in MONTI, Giorgio, *EU law and interest on damages for infringements of competition law : a comparative report*, Working Paper, EUI LAW 2016/11, available at: https://cadmus.eui.eu/handle/1814/40464, para 6.

matters of EU Law and matters for national procedural autonomy is so blurred as to lose much significance"[319] .

821. The right to receive interest from the time of the damage until the actual and complete payment of the compensation is a fundamental corollary of the principle of full compensation, without which the true restoration of the situation that would exist today, had the infringement not occurred, is not guaranteed. We still have no concrete clarification, in the European case law on *private enforcement of* competition, as to what interest is due. In this regard, the European legislator has understood:

> *"The payment of interest is an essential component of compensation for the damage suffered, taking into account the passage of time, and should be due from the time when the damage occurred until the time of payment of the compensation, without prejudice to its qualification as compensatory interest or interest on arrears under national law and to the question whether the passage of time is taken into account as a separate category (interest) or as a constitutive part of the actual loss or loss of profit*."[320] .

822. In Directive 2014/104/EU the European legislator did not regulate precisely the interest owed. As this obligation to pay interest already arose and continues to arise from Article 102 TFEU in conjunction with general principles of European law, in terms to be clarified by the CJEU, there is no need to discuss the application *ratione temporis of* this Directive and its transposition in this case. In any case, it should be noted that the Portuguese legislator has no right, by virtue of the primacy of European law, to derogate from the right to compensation (including interest) arising from European law. This means that the provision in Article 4(2) of the EPL that *"the amount of compensation provided for in the previous paragraph shall be increased by the amount due by way of default interest, counted from the time of the decision until full and effective payment"* cannot apply to situations, such as the present one, in which Article 101 TFEU is applicable, insofar as it would lead to a different result from that required by European law.

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[319] Idem, para 2 (our translation: *"the distinction between questions of European law and questions under national procedural autonomy is so blurred that it loses much of its importance"*).

[320] Recital 12 of Directive 2014/104/EU.

823. In the absence of specific case law, for the time being, we can only resort to CJEU case law on the civil liability of European institutions and member states for violations of European law, which has been applied by analogy and served as a basis for the development of *private enforcement* jurisprudence. It should be recalled that the position of the CJEU in *Manfredi* was stated by analogical reference to the *Marshall ruling*[321] . And this judgment referred to the need to ensure *"adequate compensation for the damage suffered"*, stressing with regard to the *"interest payment order"* that *"a full compensation of the damage suffered* (?) *cannot ignore elements, such as the passage of time, which are liable in fact to reduce its amount"*, interest being an *"indispensable component of a pecuniary remedy enabling the restoration" of* legality, *"intended to compensate for the loss suffered by the recipient of the remedy as a result of the time that has elapsed until the actual payment of the compensation awarded"* .[322]

824. The main lessons from European case law on the calculation of interest due for violations of European law are as follows:

a) **Interest** must be awarded **covering the entire period of time elapsed between the date of the damage and the date of the actual and full payment of the respective compensation**[323] .
b) European jurisprudence normally distinguishes between **compensatory interest and default interest**, but in a different sense from that used in the Portuguese legal system. The former are the types of interest that are due to ensure full compensation and will be discussed in the following paragraphs. The latter are the types of interest that are due to guarantee compliance with a court decision that declares the violation of European law[324] . This moratory interest, in the sense of the European order, is in addition to the compensatory interest and would only be due from the moment the court orders the payment of the compensation. It is not evident that this jurisprudential logic concerning the moratory interests is applicable by analogy in the scope of *private enforcement of* competition.

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[321] Case C271/91 -Marshall EU:C:1993:335, para 31.

[322] Case C271/91 -Marshall EU:C:1993:335, paras 30-32.

[323] Cf. e.g.: Case C-104/89 Mulder et al v Council EU:C:2000:38.

[324] Cfr, e.g., Case T-673/15 Guardian Europe c. Commission and CJEU EU:T:2017:377, para 166 et seq.

c) **Rigid rules for fixing rates of compensatory interest due are not admissible**. There must be room for a **case-by-case assessment to** ensure respect for the principle of effectiveness and full compensation for damages[325] .

d) **European law does not impose a choice between simple or compound interest**, but neither does it allow an absolute prohibition of compound interest. This **must be assessed in light of the characteristics of the individual case** and what is proven to be necessary to ensure full compensation[326] . In principle, compound interest must be expressly requested by the injured party, under penalty of being condemned only to simple interest[327] . By analogy with European State aid regulation and jurisprudence, it may be understood that compound interest is necessary to guarantee full compensation when the capital was invested in business activities or financial investments, but it is not clear whether the same applies in the case of consumer damages.

e) At the very least, "monetary erosion" should be compensated for (unless it is proven that this would lead to overcompensation). It follows from case law that *"monetary erosion due to the passage of time* [is] *in principle reflected by the annual rate of inflation determined over the period concerned by Eurostat (the Statistical Office of the European Union) in the Member State -in which the claimant is established*"[328] . The **inflation rate in Portugal is**, therefore, **the level of the minimum interest due (unless proven otherwise)**. And this level of interest is due, in particular, when, as in *Mulder,* the injured parties would not have invested the capital of the damages in business activities, but would have spent them for their subsistence .[329]

f) It is up to the injured parties - and it should always be possible - to prove (as far as possible, guaranteeing respect for the principle of effectiveness) that, if the capital corresponding to the damages had been available to them, it would have been invested in business activities or financial applications (e.g. term

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[325] In this sense, see: MONTI, Giorgio & VAN LEEUWEN, Barend, "EU law and interest on damages for infringements of competition law", in MONTI, Giorgio, *EU law and interest on damages for infringements of competition law : a comparative report*, Working Paper, EUI LAW 2016/11, available at: https://cadmus.eui.eu/handle/1814/40464, para 11.

[326] Idem, paras 26-27. See, by way of example, the analysis carried out by the CJEU and confirmed by the CJEU in: Case T-369/00 *Département de Loiret v Commission* EU:T:2007:100; Case C-295/07 P Commission v Département du Loiret et al EU:C:2008:707.

[327] See Case T-160/03 AFCon Management Consultants et al v Commission EU:T:2005:107, para 131.

[328] Case T-292/15 Vakakis kai Synergates EU:T:2018:103, para 217; Case T-40/15 Plásticos Españoles v TJUE EU:T:2017:105, paras 145-146.

[329] MONTI, Giorgio & VAN LEEUWEN, cited *above*, para 48.

account or other investments) that would have guaranteed them a level of remuneration higher than the "monetary erosion"[330] . In other words, it **is up to the injured parties to prove that their full compensation requires a compensatory interest rate higher than the "monetary erosion"** from the date of the damage.

g) **European law does not prohibit the provision of a statutory rate of interest for late payment** (as compensatory interest) as a default solution, **provided the parties can prove that this would lead to insufficient or excessive compensation**.

825. In light of the above, the Plaintiff believes that, in the present case, the solution imposed by European law is identical to the solution resulting from the general rules of Portuguese law, i.e. that: (i) adjustment for inflation from the time of the damage up to the date of constitution in default, which in a case such as this (due to the lack of liquidity of the debt) is only constituted at the time of the summons to file the action for damages; and (ii) civil default interest from the time the action is filed up to the effective and complete payment.

2.6. Unjust enrichment

826. If the assumptions for the application of civil liability are not deemed to be met, a position that the Plaintiff does not subscribe to, it is the Plaintiff's opinion, in the alternative and *ad arguendum,* that, with regard to the damage corresponding to the overpricing, there should be a refund of the overpricing charged through the Google Play Store to the consumers represented, as a result of the Defendants' unlawful conduct, based on the institute of unjust enrichment (articles 473 and following of the CC).

827. The Defendants were only able to collect the overpriced commissions from the *app developers,* who in turn passed this overpricing on to consumers (indeed, it was Google itself that passed this overpricing on to consumers, via the Google Play Store), by virtue of their unlawful behavior, resulting from the violation of protective standards.

[330] MONTI, Giorgio & VAN LEEUWEN, cited *above*, paras 48-49.

828. Thus, Defendants' unlawful conduct enabled Defendants to charge represented consumers, via *passing on* performed by *app developers* and through the Google Play Store, an unjustified overpricing on Android applications and *in-app* Android content.

829. Thus depriving the overcharged price of legal cause.

830. It amounts to an unfair and unjustified gain for the Defendants.

831. The Plaintiff's claim is not prejudiced by the subsidiary nature of the institute of unjust enrichment (postulated in article 474 of the CC).

832. First, because, in the hypothetical scenario discussed in this section, restitution of unjustified locupletamento was made impossible by the mechanism of civil liability.

833. Being that the impossibility of invoking the institute of unjust enrichment would result in the impossibility of fair and due restitution to the injured consumers represented.

834. A consequence that would be unacceptable because it would result in the lack of effectiveness of the rights and interests of consumers harmed by the Defendants' unlawful practices, and in the deprivation of the useful effect of the prohibitive rules in question.

835. This would allow the Defendants to engage in unlawful conduct, profit from it, and still be able to maintain their unjustified locupletamento.

836. Second, the subsidiarity prescribed in article 474 of the CC, has been and must be interpreted in a restrictive way, operating only when there is an economic overlap of the claim that is made possible by civil liability and the claim that is made possible by unjust enrichment[331] .

[331] MENEZES LEITÃO, Luís, *O enriquecimento sem causa no direito civil,* Cadernos de Ciência e Técnica Fiscal, no. 176, 1996, pp. 746-751; CARNEIRO DA FRADA, Manuel, *Direito Civil, Responsabilidade Civil, O Método do Caso,* Coimbra, Almedina, 2006, p. 96; PAIS DE VASCONCELOS, Pedro, Direito de *Personalidade,* Coimbra, Almedina, 2006 pp. 150-151.

837. Thus, subsidiarity is only justified to the extent of the cumulation of a claim for damages and a (non-alternative or subsidiary) claim for restitution for enrichment, with the same object.

838. What does not happen when the plaintiff's claim is made unviable by way of civil liability[332] , but made possible by unjust enrichment.

839. The subsidiary character means that the exercise of the institute of unjust enrichment must be consented to in the absence of another remedy[333] .

840. It is based on the same understanding that the jurisprudence has found that *"even if the law originally did not allow the exercise of the action for enrichment because the interested party had another right/action at a later date and, in particular, in cases of expiry or prescription, recourse to this action is optional"*[334] .

2.7. Access to evidence

841. Access to evidence in the present case is governed by **national law within the limits of European law**, both the general principles of European law, in particular the **principle of effectiveness,** and the harmonization imposed by **Directive 2014/104/EU**.

842. As regards the limits already deriving from the principle of effectiveness of European law, it is settled CJEU case law that national courts *"are obliged to apply Articles 101 and 102 TFEU where the facts fall within the scope of EU law and to ensure their application in the general interest" , and that national rules on access to evidence in this context must respect EU law.*[335]In this context, national rules on access to evidence must respect *EU law and, "*[i]n particular, they *may not render the application of EU law impossible or excessively difficult* (...) and, *specifically, in the field of competition law, they must ensure that the rules they lay down or apply*

[332] Judgment of the STJ of 18/12/2012, case no. 978/10.6TVLSB-A.L1.S1, available aqui.

[333] Júlio Vieira Gomes, *O conceito de enriquecimento, o enriquecimento forçado e os vários paradigmas do enriquecimento sem causa,* Oporto, Catholic University of Portugal, 1998, pp. 466-467.

[334] TRG ruling of 26/06/2014, case no. 919/13.9TBVVD.G1), available aqui.

[335] Case C-360/09 Pfleiderer EU:C:2011:389, para 19.

do not prejudice the effective application of Articles 101 TFEU and 102 TFEU"[336] . When considering a request for access to evidence in an action for damages, *"care must be taken that the applicable national rules are not less favourable than those governing similar domestic claims and are not systematised in such a way as to make it practically impossible or excessively difficult to obtain such redress*"[337] . In particular, it violates the principle of effectiveness not to grant access to evidence when such access is *"the only possibility offered to those* [injured *parties*] to *obtain the evidence necessary to substantiate their claims for compensation*"[338] .

843. Among the **general rules** relevant to Plaintiff's access to evidence are the general access regime of the CPC and articles 573 to 576 of the CC. Under the terms of article 573 of the CC, there is an *"obligation to provide information" "whenever the holder of a right has reasonable doubt about its existence or content and another is in a position to provide the necessary information"*. Under Articles 575 and 574 of the CC, a person who invokes a right and has a compelling legal interest in the examination of certain documents may demand that those documents be produced to the possessor or holder of the right, provided that this is necessary to ascertain the existence or content of the right and the defendant has no reason to oppose the request. Under the terms of article 576 of the Civil Code, once the documents have been presented, the plaintiff is entitled to make copies or by other means obtain a reproduction of the document, as long as this is necessary and the defendant has no serious reason to oppose it.

844. Without prejudice to the subsidiary application of the general rules, always within the limits imposed by the need to respect the principle of effectiveness and the fundamental right of access to justice, the **special rules on access to evidence of** popular actions (LAP) and the EPL apply to the present proceeding.

845. As highlighted *above*, public authorities have a special duty of cooperation with the court and the parties intervening in these proceedings, including the obligation to provide them, upon request, with certificates and information that the court or the parties deem necessary for the success or dismissal of the claim, to be provided in a timely manner (Article 26(1) and (2) of the LAP). *"Refusal, delay or*

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[336] Case C-360/09 Pfleiderer EU:C:2011:389, para 24.

[337] Case C-360/09 Pfleiderer EU:C:2011:389, para 30.

[338] Case C-536/11 Donau Chemie EU:C:2013:366, para 39. See also AG Jääskinen's Opinion in Case C-536/11 Donau Chemie EU:C:2013:67, para 49 et seq.

omission of indispensable data and information, except when justified on grounds of state or judicial secrecy, shall render the agent responsible liable to civil and disciplinary liability" (Article 26(3) of the LAP).

846. The particular difficulty of access to evidence for injured parties and the profound information asymmetry that exists in the context of *private* competition *enforcement* actions led the European legislator to oblige member states to introduce special rules on access to evidence. These rules of Directive 2014/104/EU have the merit of making clearer and better known the obligations that already resulted from the principle of effectiveness of European law. As highlighted in recital 14 of the Directive, these special rules result in a reduction of the burden of proof (in particular, at the commencement of proceedings) resulting from the general rules:

> *"Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to support a claim for damages is often in the sole possession of the opposing party or third parties and the claimant does not have sufficient knowledge of, or access to, such evidence. In such circumstances, strict legal requirements requiring claimants to specify in detail all the factual elements relating to their allegations at the beginning of an action and to produce specific items of evidence may unduly impede the effective exercise of the right to compensation guaranteed by the TFEU".*

847. Because relevant evidence in competition cases is likely to be found in electronic formats and communication records, Article 2(o) of the SPE (transposing Article 2(13) of the Directive) makes a point of including in the definition of "evidence" *"documents and other objects containing information, irrespective of the medium on which this information is stored"*.

848. As it already follows from the general rules of the CPC, the EPL emphasizes that "the *court may, at the request of any party to the action for damages, order the other party or a third party, including public entities, to produce evidence in its possession*"[339] . The novelty of the EPL regime is, on the one hand, the introduction

[339] Article 12(1) of the EPL, transposing Article 5(1) of Directive 2014/104/EU.

of certain exceptions to the possibility of access to evidence and, on the other hand, the specification of special requirements and rights of access to evidence.

849. In asking the court to grant her access to evidence held by the Defendant or third parties, the Plaintiff must:

a. refrain from making *"requests that imply indiscriminate searches for information"* (so-called "fishing expeditions")[340] ;
b. substantiate the claim *"with facts and evidence reasonably available and sufficient to support the plausibility of the claim"* ;[341]
c. *"state*[r] *the facts that are to be proved"* ;[342]
d. *"identify*[r] *as precisely and as strictly as possible the means of proof or categories of means of proof the presentation of which is required, based on the facts on which it is based."* ;[343]

850. The Plaintiff has the right to request and have access to *"**categories of evidence**"*, i.e. sets or types of documents identified as precisely as possible given the information asymmetry, but necessarily in a general and abstract way to some extent[344] . As highlighted in Directive 2014/2104/EU, *"since litigation in the field of Union competition law is characterised by information asymmetry, it is appropriate to ensure that claimants have the right to obtain disclosure of the evidence relevant to their claim, without the need to specify individual pieces of evidence"*[345] . By way of example, if an injured party needs to prove that a person sends anti-competitive instructions to other persons, and the identity and exact date of those communications are confidential and unknown to the injured party, the only remedy left to him is to request access to the communications between those

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[340] Article 12(4) of the EPL.

[341] Article 12(2) of the SBA (see also Article 12(5)(a)), transposing Article 5(1) of Directive 2014/104/EU (see also Article 5(3)(a)).

[342] Article 12(2) of the SBA.

[343] Article 12(3) of the EPL, transposing Article 5(2) of Directive 2014/104/EU (which states: *"evidence or relevant categories of evidence, characterized as precisely and strictly as possible on the basis of reasonably available facts stated in the reasoned justification"*).

[344] Article 12(3) of the SBA. See recital 16 of Directive 2014/104/EU: *'Where the purpose of a disclosure request is to obtain a category of evidence, that category should be identified by the common features of the constituent elements, such as the nature, object or content of the documents whose disclosure is sought, the time at which they were drawn up, or other criteria, provided that the evidence included in that category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts*.

[345] Recital 15 of Directive 2014/104/EU

persons, in the period and area and about the relevant products. In the words of the European Commission:

> *"Categories of evidence may be identified by the common characteristics of the constituent elements, such as the nature, object or content of the documents whose disclosure is sought, the time at which they were prepared, or other criteria. For example, a request for categories of evidence might relate to data on sales of product Y by Company A to Company B between years N and N + 5."*[346] .

851. As is reinforced and follows expressly from Articles 12 and 13 of the EPL (see also Articles 33(4) and 81(3) of the CoL), the Plaintiff is entitled to access documents and information necessary to determine and/or prove the existence of a claim for damages arising from a practice restricting competition, including documents containing **confidential information**.

852. As the European Commission reminds us:

> *"EU courts qualify as confidential that information that meets the following cumulative conditions:*
> *i) are known only to a restricted number of people; and*
> *(ii) their disclosure is likely to cause serious harm to the person who provided them or to a third party; and*
> *(iii) the interests that might be harmed by the disclosure of the confidential information are objectively worthy of protection"*[347] .

853. It is necessary to carry out a **case-by-case assessment of the conflicting interests** and to make a **proportionality judgment**. European case law has been particularly clear in emphasizing the need for a duly motivated case-by-case assessment of access requests, and absolute prohibitions on access to documents are contrary to European law[348] . As it follows from the EPL and is imposed by the Directive, *"the interest in avoiding actions for damages following an infringement of*

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[346] European Commission, Notice on the protection of confidential information by national courts in proceedings concerning the private enforcement of EU competition law, July 20, 2020, available aqui, para 13.

[347] European Commission, Notice on the protection of confidential information by national courts in proceedings concerning the private enforcement of EU competition law, July 20, 2020, available aqui, para 20 and case law cited therein.

[348] Case C-536/11 Donau Chemie EU:C:2013:366, para 32 et seq.

competition law does not constitute an interest that justifies protection"[349] . Under the principle of effectiveness (general principle of European law and Article 23(2) SBA), the law cannot be interpreted in terms that make it practically impossible or excessively difficult to exercise the right to damages.

854. The classification of certain information as deserving protection as confidential, for reasons of trade secrets, is only justified if access to that information by the person requesting it, under the terms in which it is requested, is likely to harm the legitimate interests of the person holding the documents or a third party. The person claiming that a particular document includes confidential information (e.g., the Defendant) bears the burden of **proving this confidentiality**, but also the burden of **proving that** granting access to the Plaintiff, under the terms in which she requested it, would have **a negative impact on her or a third party**.

855. The court cannot assume that there is confidential information worthy of protection just because a party claims it. Either the court verifies, on a reasoned case-by-case basis, the confidential nature of the information in the requested documents, or it finds an access solution that allows safeguarding the (possible) conflicting interests without having to perform that case-by-case verification (e.g., access in a physical or electronic *data room*, with confidentiality obligations).

856. It should be recalled that, at the European level, there is a tendency to use as a guiding criterion the idea that **information on markets older than 5 years, as** a rule, is not likely to affect legitimate interests. In fact, it is settled jurisprudence of the CJEU that

> *"information which was secret or confidential but which dates back five years or more, by the passage of time, is in principle historic and has thereby lost its secret or confidential character, unless, exceptionally, the party invoking that character shows that, despite its antiquity, such information still constitutes essential elements of its or a third party's commercial position. Such considerations (...) lead to a rebuttable presumption...*" .[350]

[349] Article 12(6) of the EPL, transposing Article 5(5) of Directive 2014/104/EU.

[350] Case C-162/15 Evonik Degussa EU:C:2017:205, para 64 (emphasis added). See also, e.g.: Case T-462/12 Pilkington EU:T:2015:508, para 58. In the same vein: European Commission, Communication on the protection of confidential information by national courts in proceedings concerning the private enforcement of EU competition law, July 20, 2020, available here, footnote 24.

857. In a case such as this one, in which some very old facts and evidence are at stake, the age of the information is a particularly important factor for the court's consideration of whether some degree of protection of that information is still justified, or whether a reduced degree of protection of that information is justified. It is up to the Defendants to rebut the rebuttable presumption established in European case law by demonstrating, for example, that the Plaintiff's access to information about its market behavior more than 5 years ago still affects, today, some interest of its own deserving of legal protection. Note that this is more than proving confidentiality, it is necessary to demonstrate that disclosure as at issue in this case would have a significant negative impact on interests worthy of protection (recall that the objective of avoiding or hindering damages claims is not an interest worthy of protection).

858. The court should not order the disclosure of information protected by lawyer's professional secrecy and should not rule on the request for access before giving the possessor of the evidence an opportunity to comment[351] .

859. The special regime for access to evidence in *private* competition *enforcement* actions is complemented by a **special sanctioning framework**, provided by Article 18 of the SBA. In addition to the application of the general rules, including the reversal of the burden of proof provided for in Article 344(2) of the CC (see Article 18(4) of the SBA), these special sanctions aim to ensure, on the one hand, that persons to whom orders to gather evidence are addressed comply with such orders effectively and in full. On the other hand, they also aim to ensure that those requesting access respect the limits and conditions imposed by the court. Hence, the EC stresses that the *"choice of the most effective measure(s) to protect confidential information may depend on the existence of sanctions and the ability to impose and enforce them in the event of non-compliance or refusal to comply with such measures*"[352] . Importance must be given, in weighing proportionality, to the existence of these sanctions.

860. The court has the power and duty to grant access to the means of proof requested by the Plaintiff whenever such request was sufficiently reasoned, within the

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[351] Article 12(8) and (9) of the EPL, transposing Article 5(6) and (7) of Directive 2014/104/EU.

[352] European Commission, Communication on the protection of confidential information by national courts in proceedings concerning the private enforcement of EU competition law, July 20, 2020, available here, para 33.

reasonably possible (principle of effectiveness and the fundamental right of access to justice), and such means of proof are necessary to prove the facts alleged and to defend the rights in question. Naturally, this judgment of necessity is only a judgment of probability, since the court (usually) does not know the content of the documents. In essence, the court must ask itself:

a. whether it is possible that the evidence requested includes content that could serve to prove the respective fact alleged by the Plaintiff;
b. whether it is reasonably possible for the Plaintiff to prove that fact or part of that fact (necessary for the granting of her claim) without having access to the evidence in question[353] ;
c. whether the Plaintiff has identified and circumscribed the scope of the requested evidence as narrowly as possible, within what is reasonably required and necessary to make the proof of her right to damages an effective possibility;
d. whether the possessor of the document has proved that the document(s) in question include(s) confidential information, which (still) deserve protection, and that access to such information, in the context and terms decided in this case, would have actually harmful consequences, and a risk of a concrete injury has to be identified[354] ;
e. if the previous question is answered in the affirmative, which means of granting access guarantees the most proportional solution, including the one that imposes the least costs on the procedural subjects (that is, the one that least harms the interests of all the subjects, including the Parties and the court itself).

861. With respect to (e) *above*, the EPL provides that in finding the proportionate remedy for access to confidential information, the court shall choose the *"most effective measures"* to safeguard the conflicting interests, including:

> *"a) Hide sensitive excerpts of documents;*

[353] With regard to these two subparagraphs, it should be recalled that the CJEU has emphasized the need for national courts in this context to *"assess*[s], on the one hand, the *applicant's interest in obtaining access to those documents in order to prepare his claim for damages, taking into account, in particular, any other possibilities open to him"* (Case C-536/11 Donau Chemie EU:C:2013:366, para 44).

[354] See, e.g., Case C-536/11 Donau Chemie EU:C:2013:366, para 45: *"those courts must take into account the genuinely prejudicial consequences to which such access may give rise, having regard to public interests or the legitimate interests of other persons"*; and para 48: *"only the existence of a risk that a given document will concretely damage an interest* (...) *may justify that document not being disclosed"*.

b) Conduct hearings behind closed doors;

(c) Restricting the number of persons authorized to have access to evidence, in particular by limiting access to the legal representatives and counsel for the parties or to experts subject to a confidentiality obligation;

(d) request the preparation by experts of summaries of information in aggregated or otherwise non-confidential form."

862. In considering on a case-by-case basis the most appropriate way to grant access, the court may take into account, inter alia, the factors listed by the EC in the Communication on the protection of confidential information[355] .

863. In the present case, and without prejudice to the possibility of ad hoc solutions decided by the court for specific documents, based on a case-by-case assessment of their content, the Plaintiff considers that the solution that allows the interests in conflict to be properly protected and is less costly for all involved, including the court, is that the *"organisation of a **confidentiality ring**"* be ordered, provided for in an EC Communication, which includes non-binding guidance for the court on how it can implement this option in practice[356] . The Plaintiff believes that this option should involve providing the set of documents on one or more electronic media (e.g., CD, DVD or USB key), or *uploading* them to a virtual *data room*, subject to the following **conditions**:

a. access provided only to Plaintiff's attorneys and outside economists, as well as to the court's own magistrates and staff, and to Defendants' attorneys (to permit the citation of documents included in the package so made available);
b. prohibiting the downloading of documents included in this package, as well as their copying or reproduction, except for what is strictly necessary for the purposes of alleging and proving facts within the scope of this proceeding;
c. an obligation of confidentiality and a prohibition on the use or disclosure of any and all information included in this package that is not public, except in the context of these proceedings (with the possibility for the court to

[355] European Commission, Communication on the protection of confidential information by national courts in proceedings concerning the private enforcement of EU competition law, July 20, 2020, available here, para 32.

[356] European Commission, Communication on the protection of confidential information by national courts in proceedings concerning the private enforcement of EU competition law, July 20, 2020, available here, paras 57-85.

require, if it deems it appropriate, the submission of written undertakings to the court by each person to whom access is granted).

864. The court has a special power to ensure the discovery of the truth in *private* competition *enforcement* actions, further reinforced by its special duty of proactivity in popular actions. A court may not, for example, refuse access to evidence on the grounds that such access is not necessary to prove a particular fact, and then hold that fact not proved, unless it has previously established that it was possible to prove the fact on the basis of publicly available evidence, or that it was impossible that the content of the evidence in question could prove the corresponding fact. So that the Plaintiff's right of access is not deprived of useful effect, the court's decision must be reasoned, document by document (or category by category), in terms that permit effective judicial review.

865. The purpose of these special rules of access is to protect the effectiveness of the right to compensation, which would almost always be destroyed in *private* competition *enforcement* actions by the application of the general procedural rules and legal culture of continental Europe, which are extremely demanding as to the granting of access to evidence. The intention is, in essence, to allow solutions identical or close to those found in the Anglo-Saxon regimes of the so-called *"discovery process"*, finding a balance that duly protects the interests of all parties to the proceedings - not only the Parties, but also the Court itself, which should not be burdened with work because of the need for access to evidence. It is only a cultural issue and lack of practical experience that leads some jurists in continental Europe to think that there is some injury (much less a disproportionate injury) to the rights and interests of the possessors of confidential documents when such documents are ordered to be made available in a circle of confidentiality and given access only to Plaintiffs' lawyers and outside counsel in a civil action, subject to non-disclosure obligations (including not sharing with clients), on pain of criminal and misdemeanor sanctions. In other jurisdictions, equally or more protective of corporate rights, the *"discovery process" in the* terms requested in the present action is lived with peacefully, as it has long been demonstrated that this process, with its proper safeguards, does not harm the interests of the holders of confidential information.

Request

866. In these terms, and in the more legal terms that Your Honor shall wisely supply, the present action must be considered well-founded, as proven, and, consequently:

a. Declare that, since July 6, 2009, the Defendants have violated, by a single and continuous practice or, alternatively, by multiple and continuing practices, Articles 101 and 102 of the TFEU and, successively, Articles 9 and 11 of the LdC and Articles 4(1) and 6 of Law No. 18/2003, of June 11, by adopting contractual practices and terms that

(i) impose on *app developers* and users of Android devices the exclusive (or virtually exclusive) distribution of Android applications through the Google Play Store and the exclusive use of the Google Play Store to make payments for *in-app* Android applications and content, and preclude competition *in* the provision of these services by *app developers* and third parties;

(ii) forces *app developers* who contract to distribute Android apps through the Google Play Store to contract a package including Google's services for payments for *in-app* Android content in those apps;

(iii) prevent *app developers* from creating Android apps that function as or promote an alternative *app store*;

(iv) make it impossible or very difficult to download and install Android applications from sources other than the Google Play Store on Android devices;

(v) They prevent other *app stores* from including basic features expected by demand agents, reducing their ability to compete with the Google Play Store;

(vi) refuse to advertise on Google *websites* Android mobile applications that are not distributed through the Google Play Store;

(vii) impose on Android mobile equipment manufacturers to pre-install the entire *"Google Mobile Services"* package, including the Google Play Store, and require that it be prominently placed, not allowing the installation of just one or a few Google applications;

(viii) agree with potential competitors, in exchange for financial advantages, not to enter the markets in question and not to compete, or to compete less, with the Google Play Store;

(ix) impose unreasonable, excessive commissions on *app developers*; and

(x) impose a minimum price for the costly offering of Android applications by the Google Play Store, contributing to an increase in the commissions Google receives

b. The Defendants be ordered to cease the anticompetitive practices in question;

c. A declaration be made that these practices of the Defendants have caused harm to the diffuse or collective interests of protecting the consumption of goods and services and competition, and to the individual homogeneous interests of the consumers represented, and the Defendants be ordered to acknowledge this;

d. Subsidiary to paragraph c), a declaration that the Defendants' practices caused their enrichment at the expense of the impoverishment of all consumers represented, and that the Defendants be ordered to acknowledge this;

e. Either on the basis of civil liability, or, in the alternative, for the restitution of undue payments, the Defendants be ordered, jointly and severally (with the 1st Defendant being held jointly and severally liable only for the harm caused as from 2 October 2015), to fully compensate all the consumers represented in the present action for the harm caused to them by the anti-competitive practices in question, in respect of the overpricing caused by the unlawful practices that was passed on by the *app developers* to the represented consumers and charged directly by Google, in an aggregate amount which at the present date the Plaintiff is unable to settle, because, under the provisions of Article 556(1)(b) and (c) of the Civil Procedure Code, the Plaintiff is unable to pay the amount of the overpricing caused by the unlawful practices.(1)(b) and (c) of the CPC, it is not possible to definitively determine the consequences of the Defendants' unlawful practice, which still persists, and because such determination partially depends on an act to be performed by the Defendants. Since it is not possible to fully or partially settle the claim until the beginning of the discussion of the case, for the aforementioned reasons, the Court should order the Defendants to pay whatever may be settled, pursuant to article 609(2) of the CPC:

(i) updated to the inflation rate from the moment of the damage until the Defendants are notified of this action (monetary correction),

(ii) and accrued civil late payment interest thereafter,

(iii) and with method for determining and distributing individual compensations determined by the court;

f. In the alternative to subparagraph (e), either on the basis of civil liability, or, in the alternative, by restitution of undue payments, if data allowing the immediate quantification of the total amount of damages is obtained in the course of the present proceedings, order the Defendants, jointly and severally (with the 1st Defendant to be held jointly and severally liable only for the damages caused as from 2 October 2015) Fully compensate all consumers represented in the present action for the damages caused to them by these unlawful practices, as regards the overpricing caused by the unlawful practices which was passed on by the *app developers* to the consumers represented and directly charged by Google, in a global amount to be fixed:

(i) by arithmetic calculation;

or, failing that,

(ii) in equity, pursuant to Article 566(3) of the CC, as follows: 7.5% (half of 15%) of the value of sales by *app developers* to represented consumers of Android applications and *in-app* Android content through the Portuguese Google Play Store from July 6, 2009 to the present, excluding sales of Android applications and *in-app Android content* through the Google Play Store as of the dates and up to the sales volume at which a 15% commission was applied to such applications and *in-app content;*

(iii) This amount, calculated annually, will be updated to the inflation rate from the moment of the damage until the Defendants are notified of this action (monetary correction),

(iv) and accrued civil late payment interest thereafter,

(v) and with method for determining and distributing individual compensations determined by the court;

g. In the case of (e) or (f), be an order for the Defendants to pay liquidated damages materialized in the bond:

(i) of the payment of the individual compensation due to the injured consumers who intervene and are thus individually identified in the scope of this action, for the amounts that are determined in the scope of this action, updated at the inflation rate from the moment of the damage until the notification of this action to the

Defendant (monetary correction), plus civil default interest thereafter;

(ii) of the payment to the entity designated by the court of the global amount of compensation, minus the amounts referred to in (i), to be determined by the court, updated at the rate of inflation from the time of the damage until the notification of this action to the Defendants (monetary correction), plus civil default interest as of then, the global amount to be distributed among the injured consumers represented under the terms defined by the Court;

h. A declaration that the Plaintiff has standing to collect the amounts that the Defendants were ordered to pay on behalf of the represented consumers, including standing to apply for judicial liquidation of the amounts and judicial execution of sentence and other acts necessary for the effective collection of said amounts, with the Defendants having to pay the overall compensation to the represented consumers directly to the entity designated by the Court to administer the same, without prejudice to the Plaintiff's standing to demand and enforce collection, even if judicially;

i. Be appointed as the entity charged with the administration of the lump-sum settlement (without prejudice to the need for acceptance of the charge):

(i) the General Directorate of the Consumer;

(ii) Alternatively, if the Directorate-General for Consumer Affairs is not appointed, a company specialized in the distribution of compensation in representative actions should be appointed;

(iii) In the alternative, if DGC or a company specialized in the distribution of compensation in class actions is not appointed, the Plaintiff should be appointed;

j. To declare that the entity designated by the Court to administer the amounts that the Defendants were ordered to pay shall be remunerated for performing this activity, at an annual rate of 1.5% on the total amount of the global compensation administered, or such other remuneration as may be determined by the Court;

k. To declare that the entity designated by the Court for that purpose shall administer the amounts that the Defendants were ordered to pay, as a trustee, being responsible for it:

(i) create, manage, and publicize a platform on which each represented consumer can claim the compensation to which he or she is entitled;

(ii) verify the right of each represented consumer to claim their compensation through proof of purchases made by them in the Portuguese Google Play Store during the relevant period, to be delivered by the represented consumer within three years after the sentence has become final;

(iii) to deliver the respective amount within three months after requesting payment;

(iv) at the end of the period determined by the Court after publication of the announcement of the final judgment, and in compliance with the provisions of paragraph (m) of the petition, deliver the remaining amount to the Ministry of Justice in the terms and for the purposes provided for in Article 19(8) of the EPL and Article 22(5) of the PVL;

l. In the alternative to the requests in paragraphs (e) and (f), only declare that the Defendants have a joint and several obligation (with the 1st Defendant to be held jointly and severally liable only for the damage caused as from 2 October 2015) to compensate the consumers represented for the damage caused by the anti-competitive conduct in question, for such amounts as may be determined in court proceedings or by alternative means of dispute resolution subsequently promoted by the consumers represented;

m. The Defendants be ordered to pay costs;

n. That the Plaintiff be reimbursed for the costs, charges, fees and other expenses it has incurred in connection with this action, including the cost of funding this litigation (to be settled under the AFC), from the amount of the lump-sum settlement, without exceeding the amount of the remaining lump-sum settlement, pursuant to Article 19(7) of the EPL and Article 22(5) of the LAP.

o. The Defendants be ordered to publish in two (2) generalist newspapers nationwide a summary of the final court decision in the present case, written by the Court, at the Defendants' expense and under penalty of disobedience.

867. This requires that it be:

a. The Defendants were summoned to answer, if they wish;
b. The summons of the Dignified Magistrate of the Public Prosecution Service attached to this Court is ordered, for the purposes of article 13 of the LAP;
c. The summons has been served on the holders of the interests at issue in the action - namely all non-deceased consumers, resident in Portugal, who, from 6 July 2009 to the present day, have downloaded (free of charge or for a consideration) Android applications from the Portuguese Google Play Store and/or have purchased Android application content via Google's *in-app* payments mechanism (that is, whose account associated with the Google Play Store indicates as country 'Portugal'; and who have indicated in their Google Play account history at least one Android application download and/or one Android application content purchase)They may also declare in the records whether or not they accept to be represented by the plaintiff or if, on the contrary, they exclude themselves from that representation, namely to the effect that the decisions handed down will not be applicable to them, under penalty of their passivity being construed as acceptance; The summons is served by notice or announcements made public through any means of social communication or in print, depending on whether general interests or geographically localized interests are at stake, identifying the universe of consumers holding homogeneous individual interests, the lawsuit, the Plaintiff, the Defendants, and by sufficiently mentioning the request and the cause of action.

Quote from the Defendants

Under the provisions of article 225(2)(b), applicable *ex vi vii of* article 246(1), both of the CPC, the service of legal entities can be made by delivering a registered letter with return receipt to the defendant. However, given that the Defendants' head offices are located abroad, it is necessary to articulate the CPC rules with the provisions of the applicable international documents, binding on the Portuguese State, as determined by article 239 of the CPC.

A) Quote from the 1st and 2nd Defendants (USA)

The 1st and 2nd Defendants are based in the USA, therefore service of the summons should be governed by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (hereinafter, the "Convention"), concluded in The Hague on November 15, 1965.

The Convention provides for several ways of transmitting documents, the main one being the transmission of the service document to the Central Authority of the requested State, i.e. the State in which service is to be effected.

In this way, the Central Authority of the requested State will execute the request for service or will have it executed by an entity it designates, delivering the document to the addressee informally, if the addressee accepts it voluntarily, or by the legal means provided for in the requested State, without prejudice to a third possibility, which consists of delivery in accordance with the method proposed by the Requesting State for service, provided that such method is not incompatible with the law of the Requested State.

In the USA, the designated Central Authority is ABC Legal, based at 633 Yesler Way in Seattle, WA 98104, United States of America, providing a service at a cost of USD 95.00 that takes on average two months to execute.

Given the previous practice of the TCRS in case no. 19/20.5YQSTR, and in order to collaborate with the Court and to speed up the process, the **Plaintiff requests that the Court determines that the summons of the 1st and 2nd Defendants be served through ABC Legal, with the Plaintiff being responsible for promoting the respective summons,** after the Court makes available the respective letter of summons, and the Plaintiff bearing the respective costs, including the translation of the documents (without prejudice to the recovery of these costs at the end of this process, under the terms of the applicable rules).

The summons, translated into English, must be sent to the 1st and 2nd Defendants (articles 227 and 239 of the CPC and articles 3 and 7 of the Convention): duplicate of the writ of summons, respective translation (the translation into English of the writ of summons is attached as Annex) and a copy of the documents accompanying it, informing them that they have been served with the summons for the action to which the duplicate refers, and indicating the court, trial court, and section where the proceedings take place.

The summons must indicate to the Defendants the timeframe within which they may file a defense, the need for legal counsel, and the penalties they will incur in the event of default.

B) Summons 3rd, 4th and 5th Defendants (Ireland)

According to Article 15 of Regulation (EC) No 1393/2007, *"interested parties in a judicial proceeding may effect service of judicial documents directly through the competent persons of* (...) the *Member State addressed, where such direct service is permitted under the law of that Member State"*.

As can be seen at https://e-justice.europa.eu/content_serving_documents-373-ie-pt.do?member=1, Ireland allows service under the aforementioned Article 15 to be made through an Irish lawyer (*solicitor*).

The Plaintiff **requests the Court to order the direct summons of the 3rd, 4th and 5th Defendants, pursuant to article 15 of Regulation (EC) No. 1393/2007**.

Evidential requirement

A) Testimony of Party

- It is requested, under the provisions of Article 452 of the CPC, the deposition of part of the Defendants, as to the facts alleged in articles 32 a 69, 74, 78, 86, 92, 95, 97 a 103, 105 a 118, 122, 137 a 147, 150 a 167, 170 a 190, 194 a 198, 201 a 203, 206, 207, 209 a 229, 235, 237 a 258, 261 a 281, 286, 287, 290, 293 a 297, 307 a 309, 318 a 327, 331 a 341, 347, 348, 351, 358, 372, 373, 387, 388, 394, 395, 408 a 413, 427 a 429, 431 a 433, 435, 444, 445, 463 a 474 e 519 of this initial petition, as they are of their personal and direct knowledge, for which purpose the respective legal representatives should be notified (it is further requested that the Defendants be notified to grant them the necessary powers), for which reason the current CEOs/Directors of each of the Defendants are indicated, without prejudice to later alteration in the event of a change in the holder of said position or legal representative):

a) for the 1st and 2nd Defendants, Sundar Pichai, CEO, with business address at Amphitheatre Parkway, Mountain View, CA 94043, United States of America and, for procedural purposes, at 2710 Gateway Oaks Drive, Suite 150N, Sacramento CA 95833, United States of America;

b) for the 3rd Defendant, Nick Leeder, CEO, business address at Gordon House, Barrow Street, Dublin 4, Republic of Ireland;

c) for the 4th Defendant, Elizabeth Cunningham, CEO, with a business address at 70 Sir John Rogerson's Quay, Dublin 2, Republic of Ireland;

d) for the 5th Defendant, Zeina Hatem, CEO, with business address at 70 Sir John Rogerson's Quay, Dublin 2, Republic of Ireland.

B) List of witnesses, whose summons to appear is requested by the Court, pursuant to the provisions of article 507(2) of the CPC

- Luís Eduardo Teixeira Rodrigues, full professor at Instituto Superior Técnico, with professional address at Av. Rovisco Pais 1, 1049-001 Lisbon;

- João Coelho Garcia, Assistant Professor at the Instituto Superior Técnico, with professional address at Av. Rovisco Pais 1, 1049-001 Lisbon;

- Timothy Dean Sweeney, Epic Games Inc. CEO, with business address at Epic Games Headquarters, 620 Crossroads Blvd, Cary, NC 27518, United States of America; and

- Paulo Trezentos, Aptoide's CEO, with professional address at Rua Soeiro Pereira Gomes, Lt 1, 3rd D, 1600-196 Lisbon.

C) Evidence by judicial inspection

The Plaintiff requests, pursuant to the provisions of Article 490 of the CPC, judicial inspection of the content of the *websites* and *online* electronic documents indicated throughout this Initial Petition in body text or in footnote. The Plaintiff assumes that the Court has the necessary means for the requested cyber navigation, without prejudice to, under the provisions of Article 428 of the CPC, applied by analogy, it is now available to, if not, provide a paper reproduction of the contents in question or other technical means of display.

D) Request for documents held by the Defendants

Under articles 417 and 429 of the CPC, articles 573 to 576 of the CC, and articles 12 to 18 of the EPL, as discussed in section 2.7 of this Initial Petition, the Plaintiff requests the Court to order the Defendants to attach to the present records (or to make

available to the Plaintiff and the Court by any other means that the Court may determine) the documents necessary to prove the alleged facts, which are indispensable to the merits of this action, and to which the Plaintiff does not have access. The said documents are in the possession of the Defendants, having been prepared or received by them.

As regards the documents with content deemed worthy of protection for reasons of business secrecy or data protection, the Plaintiff requests that they be included in the proceedings in such a way as to ensure their confidentiality, and that they only be accessible to the Court and the parties to the present proceedings, namely by being included in a confidential annex, or any other solution the Court deems appropriate, pursuant to article 12(7) of the EPL.

The documents are as identified in the list that follows[357] :

R1. Minutes of the board of directors of the 2nd Defendant and emails internal to the Google group addressed, exclusively or *inter alia,* from or to any or some members of the board of directors of the 2nd Defendant, during the relevant period, which refer to the Google Play Store and/or Google's *in-app* payments engine.

PI Articles	41
Justification of relevance	Documents to demonstrate the 2nd Defendant's authorship and/or participation in the determination and adoption of the illicit conduct at issue in this action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and, potentially, third parties unknown to the Plaintiff

R2. Agreements entered into (signed) - or example of each agreement with any separate content - with *app developers* relating to the creation and offering of Android applications and *in-app* Android content on the Google Play Store, including the (or separate versions of the) Google Play Developer Distribution

[357] Given the information asymmetry, it is not possible for the Plaintiff to indicate all the facts that the documents listed here may serve to demonstrate. Therefore, without any pretension of exhaustiveness, we indicate only the facts that the Plaintiff knows or suspects concern the documents in question, given their nature or publicly available information, for the purpose of justifying the need to obtain them (demonstration that the documents in question are relevant to prove at least one fact of interest to the decision of the case). As a result, it cannot be presumed that the only potentially relevant information in these documents is that corresponding to the articles of the Statement of Claim indicated herein.

Agreement, the "Developer Program Policies", the Google Payment Rules, the "Google Play Developer API Terms of Service" and the "Google API Terms of Service" (or equivalent), and appendices and attachments thereto, during the relevant period.

PI Articles	45, 47 a 52, 54, 60, 64 a 69, 146, 147, 150 a 162, 164, 165, 167, 170 a 189, 191 a 193, 211, 261 a 272, 387, 388, 403, 444, 445 e 463
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties, or which may include non-public versions only in the possession of the Defendants and third parties

R3. Agreements entered into (signed) - or example of each agreement with any separate content - with Android device manufacturers relating to the distribution on their mobile devices of the *"Google Mobile Services"* application package, including the (or separate versions of) the *"Mobile Application Distribution Agreements"*, the "Anti-Fragmentation Agreement" (or "Anti-Forking Agreement" or "Android Compatibility Agreements"), and the *"Early Access to Android Source Codes Agreement"* (or equivalent), and the appendices and attachments thereto, during the relevant period.

PI Articles	46, 60, 64 to 69, 102 to 103, 105 to 111, 113 to 118, 137, 138, 191 to 193, 207, 209 to 211, 403, 444, 445 and 469
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties, or which may include non-public versions only in the possession of the Defendants and third parties

R4. Versions of the Google Play Terms of Use, Google Terms of Use, Google Play Account instructions, Google Privacy Policies, and Google Payments Privacy Notice (or equivalent documents) in effect throughout the relevant period, applicable to users residing in the United Kingdom, prior to the versions currently in effect.

PI Articles	53, 60, 64 to 69, 238 to 256 and 318 to 326

Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties, or which may include non-public versions only in the possession of the Defendants and third parties

R5. Minutes of the board of directors of the 1st Defendant and emails internal to the Google group addressed, exclusively or *inter alia*, from or to any member or members of the board of directors of the 1st Defendant, during the relevant period, which refer to the appointment of board members and the approval of business plans of subsidiaries of the 1st Defendant, specifically the 2nd, 3rd, 4th and 5th Defendants.

PI Articles	56 e 57
Justification of relevance	Documents to demonstrate that the 1st Defendant is part of the same economic unit as the other Defendants and is responsible for their conduct
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R6. Minutes of the 2nd Defendant's board of directors and emails internal to the Google group addressed, exclusively or *inter alia*, from or to any member or members of the 2nd Defendant's board of directors, during the relevant period, which refer to the appointment of board members and the approval of business plans of subsidiaries of the 2nd Defendant, specifically the 3rd, 4th and 5th Defendants.

PI Articles	58 e 59
Justification of relevance	Documents to show that the 2nd Defendant is part of the same economic unit as the 3rd, 4th, and 5th Defendants and is responsible for their conduct
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R7. Minutes of the boards of directors of the 1st, 2nd, 3rd, 4th 3rd/or 5th Defendants and emails internal to the Google group addressed, exclusively or *inter alia*, from or to any or some members of the boards of directors of the 1st, 2nd, 3rd, 4th 3rd/or 5th Defendants, during the relevant period, which refer to or discuss Google's practices at issue in these proceedings or, in the alternative: (i) the packaging of the *"Google Mobile Services"* into the *"Mobile Application Distribution Agreement"*; (ii) the Google Play Store; (iii) Google's *in-app* payments mechanism; (iv) the 30% and 15% commissions for sales of Android applications and Android *in-app* content; (v) lawsuits and public investigations, in any country of the world, concerning Google's practices in connection with services of the distribution of Android applications and the processing of payments for Android applications or Android *in-app* content.

PI Articles	65 a 69
Justification of relevance	Documents to demonstrate the Defendants' participation in the adoption and/or implementation and knowledge of the illicit practices at issue in these proceedings
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R8. Internal Google documents, including internal group emails, produced or sent during the relevant period, which refer to the objectives or results of the Anti-Fragmentation obligations under the Anti-Fragmentation Agreements (or equivalent), including references to the attempted market entry of the Fire (Amazon), Aliyun (Alibaba) and Galaxy Gear 1 (Samsung) operating systems; or alternatively, which include at least one reference to the Anti-Fragmentation Agreements.

PI Articles	111 a 114
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R9. Internal documents or market research prepared by or for Google, or acquired by Google, during the relevant period, relating to or including analysis of the frequency and intensity of use of map applications, and of the Google Maps application in particular (including its use in comparison with competing applications), by holders of Android devices in Portugal and in the United States.

PI Articles	125 a 127
Justification of relevance	Documents to demonstrate compliance with the requirements of one of the anticompetitive behaviors at issue in this action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R10. Internal documents or market research prepared by or for Google, or acquired by Google, during the relevant period, relating to or including analysis of the frequency and intensity of use of email applications, and the Gmail application in particular (including its use compared to competing applications), by Android device owners in Portugal and worldwide.

PI Articles	130 a 133
Justification of relevance	Documents to demonstrate compliance with the requirements of one of the anticompetitive behaviors at issue in this action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R11. Internal documents or market research prepared by or for Google, or acquired by Google, during the relevant period, relating to or including analysis of the features of the Android YouTube application and the advantages or disadvantages of its use by Android device owners versus viewing YouTube content in the mobile device's *web browser*.

PI Articles	134
Justification of relevance	Documents to demonstrate compliance with the requirements of one of the anticompetitive behaviors at issue in this action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R12. Documents (including emails) internal to Google and/or emails between Google and Amazon, in 2014 or on facts occurring in 2014, regarding Amazon's attempt to launch the Amazon App Store and Google's informing Google that this would constitute a violation of the CDPGP.

PI Articles	166
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R13. Documents (including emails) internal to Google and/or emails between Google and *app developers*, during the relevant period, which identify or refer to violations (or alleged violations) by *app developers* of contractual obligations set out in the Google Play Developer Distribution Agreement, Google Play Developer Program Policies, Google Payment Rules, Google Play Developer API Terms of Service and/or Google API Terms of Service (or equivalent).

PI Articles	190
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R14. Internal documents or market research prepared by or for Google, or acquired by Google, during the relevant period, regarding or estimating the percentage of Android devices worldwide (or just in Portugal) that never change the initial settings that prevent downloading applications other than from the Google Play Store.

PI Articles	201
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action

Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R15. Agreements entered into between Google and potential competitors in the distribution of Android *in-app* applications and content during the relevant period, which include direct or indirect obligations not to engage in this activity or to limit the scope of this activity, and documents internal to Google that describe or refer to such agreements, including the agreement between Google and Samsung referred to in the US lawsuit "In re Google Play Consumer Antitrust Litigation" (case no. 3:20-CV-05761-JD).

PI Articles	217 a 219
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R16. Agreements between Google and large *app developers* during the relevant period that offer lower-than-normal Google Play Store commission levels or other financial advantages associated with the distribution of applications and *in-app* content through the Google Play Store, and documents internal to Google that describe or refer to such agreements.

PI Articles	220
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R17. Internal Google document from 2009, cited in the US lawsuit "In re Google Play Consumer Antitrust Litigation" (case no. 3:20-CV-05761-JD; §109 of the pleading), which states that a single *app store* was an essential piece of the Android ecosystem and that work was underway to make the Google Play Store (then Android Market) that single distribution system.

PI Articles	225
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R18. Internal Google documents identifying the total amount, per year, of revenue Google earned through the fee it charges *app developers* for registering to sell their Android applications through the Google PlayStore, during the relevant period.

PI Articles	272 a 274
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the Defendants' possession

R19. Internal Google documents identifying the total amount of revenue, by year, earned by Google from ads (paid advertising) placed by *app developers* on Google Search, YouTube and other Google-owned *websites* during the relevant period.

PI Articles	275 e 276
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the Defendants' possession

R20. Google's internal document(s) identifying, from 2009 to the present, by year, the total value of the costs of providing the services and the annual revenues (in commissions) of the Google Play Store, with a breakdown of the type of costs and financial supports that allow their veracity to be verified and the options for sharing costs in common or shared with other Google activities.

PI Articles	279, 286 to 289 and 297

Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive behaviors at issue in the present action, and to allow the quantification of the overpricing caused by those behaviors
Reason of unavailability to the Plaintiff	Non-public documents only in the Defendants' possession

R21. Internal Google documents cited in the U.S. lawsuit "In re Google Play Consumer Antitrust Litigation" (case no. 3:20-CV-05761-JD; §§197-198 of the pleading), from which it follows that Google calculated that a 6% commission would suffice to offset the costs of providing Google Play Store services.

PI Articles	280
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive behaviors at issue in the present action, and to allow the quantification of the overpricing caused by those behaviors
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R22. Internal documents (including emails) from Google, during the relevant period, that refer to the reasons for setting the amount of commission for distribution of applications and *in-app* content by the Google Play Store and/or the relationship of the resulting revenues to the costs of providing these services.

PI Articles	280, 282, 284, 285 a 290
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive behaviors at issue in the present action, and to allow the quantification of the overpricing caused by those behaviors
Reason of unavailability to the Plaintiff	Non-public documents only in the Defendants' possession

R23. Internal Google document cited in the US lawsuit "In re Google Play Consumer Antitrust Litigation" (case no. 3:20-CV-05761-JD; §199 of the pleading), from which it follows that Google has stated that the 30% commission has no rationale other than to set the same commission established in the Apple App Store.

PI Articles	281 e 290
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R24. Economic study submitted by the Plaintiff in the representative consumer action pending against Google in the Competition Appeal Tribunal, case number 1408/7/7/21 (*Coll v Google*).

PI Articles	283, 479 e 498
Justification of relevance	Documents to demonstrate the illicit nature of the anti-competitive conduct at issue in the present action, and to allow the quantification of the damage caused by that conduct
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and third parties

R25. Internal Google document(s) identifying, during the relevant period, by year, the total value of annual sales revenues of the Portuguese Google Play Store, broken down into app sales and *in-app* content sales; in the absence of data specifically about Portugal, the same data for the European Union or the world.

PI Articles	307 e 308
Justification of relevance	Documents to demonstrate the illicit nature of the anti-competitive conduct at issue in the present action, and to allow the quantification of the damage caused by that conduct
Reason of unavailability to the Plaintiff	Non-public documents only in the Defendants' possession

R26. Market research prepared by or for Google, or acquired by Google, covering all or part of the relevant period, relating to or including analysis of the characteristics of the markets for mobile application distribution services and sales of *in-app* content for mobile applications, and the demand and supply characteristics of these services.

PI Articles	344 a 440
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anti-competitive conduct at issue in the present action, and to allow the quantification of the damage caused by that conduct
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and, potentially, third parties

R27. Market research prepared by or for Google, or purchased by Google, or internal Google documents, from 2009 to the present, that identifies or references, however estimated, the number of available applications, the total number of application downloads per year, the annual revenues and/or the market shares of the Google Play Store, Aptoide, the Galaxy Store and other App Stores, associated with the distribution of Android *in-app* applications and content, in Portugal, Europe and/or worldwide.

PI Articles	420, 421, 425, 426, 431 to 433 and 435
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anti-competitive conduct at issue in the present action, and to allow the quantification of the damage caused by that conduct
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and, potentially, third parties

R28. Internal documents (including emails) from Google, and emails between Google and Aptoide, during the relevant period, regarding the identification of the Aptoide App Store as being harmful to users of Android equipment, actions taken in this regard, and Aptoide's response/reaction.

PI Articles	422
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and, potentially, third parties

R29. Internal documents (including emails) from Google during the relevant period regarding the total numbers and/or percentages of direct downloads of applications without using an *app store* (*side loading*) by Android device users by year, and the number or percentage of Android device users who ever downloaded an application on Android device by *side loading*.

PI Articles	428 e 430
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and, potentially, third parties

R30. Google internal document(s), or market research prepared for or acquired by Google, that identifies or estimates, by reference to the relevant period or portion thereof, the percentages (by turnover) of purchases of Android applications and *in-app* Android content made for personal and business purposes.

PI Articles	499 a 502
Justification of relevance	Documents to enable quantification of the harm caused to consumers represented by the anticompetitive conduct at issue in the present action
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and, potentially, third parties

R31. Full version of case AT.40099 (Google Android), which culminated in the European Commission Decision of July 18, 2018; or, in the alternative, non-confidential version of the same case and descriptive index of its confidential elements.

PI Articles	32 to 458, 463 to 502, 511 to 514, 516 to 517 and 519
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anti-competitive conduct at issue in the present action and to allow the quantification of the harm caused to consumers represented by that conduct

Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and, potentially, third parties

R32. Documents with factual allegations, documentary and testimonial evidence produced and attached to the proceedings, and court decisions with findings of fact in the following court proceedings concerning, in whole or in part, Apple's anticompetitive practices at issue in this action:

(i) United States District Court, Northern District of California - San Francisco Division, Mary Carr *et al c. Google* ("In re Google Play Consumer Antitrust Litigation"), case no. 3:20-CV-05761-JD;
(ii) United States District Court, Northern District of California - San Francisco Division, *Bentley et al c. Google*, case no. 5:2020-CV-07079;
(iii) United States District Court, Northern District of California - San Francisco Division, *Pure Sweat Basketball Inc. et al c. Google* ("In re Google Play developer antitrust litigation"), case no. 3:20-CV-05792-JD;
(iv) United States District Court, Northern District of California, *Epic Games Inc. v. Google*, case no. 3:20-CV-05792-JD;
(v) United States District Court, Northern District of California - San Francisco Division, *State of Utah, et. al., c. Google*, case no. 3:21-cv-05227-JD;
(vi) Competition Appeal Tribunal UK, *Coll v Google*, case no. 1408/7/7/21;
(vii) and any other action not identified above, brought in any jurisdiction throughout the world, concerning Google's anticompetitive practices at issue in this action.

PI Articles	32 to 458, 463 to 502, 511 to 514, 516, 517, 519 and 542 to 556
Justification of relevance	Documents to demonstrate the existence and illegal nature of the anti-competitive conduct at issue in the present action and to allow the quantification of the harm caused to consumers represented by that conduct
Reason of unavailability to the Plaintiff	Non-public documents only in the possession of the Defendants and, potentially, third parties

Joint

Forensic Power of Attorney, eleven (11) documents and Appendix (English language version of the initial petition).

The Plaintiff is available to attach as documents the printscreens of the *links* and *sites* indicated for consultation and confirmation of the facts alleged in this initial petition, should the Court or the Defendants report any difficulty in accessing the respective contents.

Share value

EUR 60,000.00 (sixty thousand euros)[358]

Exempt from preparation and costs, pursuant to Article 20 of the LAP and Article 4(1)(b) of the Procedural Costs Regulation.

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[358] In accordance with the provisions of Article 303(3) of the CPC and Article 44(1) of the Judicial System Organization Act.

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List of documents together

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1	Author's Statutes and their publication *online*	15
2	List of direct subsidiaries of the 1st Defendant	1
3	Google, "Supported locations for distribution to Google Play users"	8
4	GGLE Portugal, Lda. SABI Report	13
5	Avinash Sharma, "Top Google Play Store Statistics 2021 You Must Know," August 6, 2021	16
6	David Curry, "App Data Report - App Store Stats, Downloads, Revenues and App Rankings", 2022	70
7	Google, "Registry Merchant	2
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9	StatCounter Global Stats, Mobile Operating System Market Share Worldwide	1
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