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Summary of decision on objection in connection with the Apple App Store

Chapter 1 of the decision of the Netherlands Authority for Consumers and Markets of 13 July 2023 on the objections filed by Apple Inc. and Apple Distribution International Ltd against the decision of 24 August 2021 on the imposition of an order subject to periodic penalty payments for infringing Section 24 of the Dutch Competition Act (Mw) and Article 102 of the Treaty on the Functioning of the European Union (TFEU), and against the decision of 13 June 2022 on the collection of penalty payments (ACM/UIT/603465).

Case number ACM/21/053587
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On August 24, 2021, the Netherlands Authority for Consumers and Markets (hereafter: 'ACM') imposed an order subject to periodic penalty payments on Apple Inc and Apple Distribution International Ltd (hereafter: 'Apple') for abusing its dominant position by imposing unreasonable conditions on dating-app providers (hereafter: 'the decision on penalty payments' or 'the order'). This abuse consists of three conditions that Apple applies when granting access to the Dutch Store Front of its App Store. More specifically, these concern:

- The obligation to have the payment process for selling digital content within an app be handled through Apple's In-App Purchases system (hereafter: the IAP condition); and
- The prohibition to refer within an app to payment methods outside of the app in any way (hereafter: the anti-steering condition); and
- [confidential]

In the decision on penalty payments, ACM ruled that the IAP condition, the anti-steering condition and [confidential] (collectively hereafter: 'the Conditions') qualify as unfair conditions within the meaning of Section 24 of the Dutch Competition Act (hereafter: 'Mw') and Article 102 of the Treaty on the Functioning of the European Union (hereafter: 'TFEU'). The decision on penalty payments obliges Apple to adjust its conditions for access to the Dutch Store Front of its App Store in such a way that dating-app providers are also able to use an alternative to Apple's IAP-system. In addition, dating-app providers must be enabled to refer in their apps to payment methods outside of the app. [confidential] If Apple failed to comply with the order, it would have to pay a penalty payment of [confidential] euros per week, up to a maximum of [confidential] euros.

In its ruling of 24 December 2021, the provisional-relief judge stayed the part of the order relating to [confidential], and limited the amount of the penalty payment to 5 million euros per week with a maximum of 50 million euros. The judge upheld the other parts of the order. In its decision of 13 June 2022 (hereafter: 'the collection decision'), ACM subsequently established that, after the grace period had ended, Apple did not comply with the order because it did not adjust the conditions it imposed on dating-app providers in accordance with the decision on penalty payments. That is why ACM decided to proceed with the collection of a total amount of 50,234,246.58 euros, which is composed of 50 million euros in penalty payments and 234,246.58 euros in statutory interest.

In the decision at hand, ACM decides on the objections that Apple had filed against the decision on penalty payments and against the collection decision.

First of all, Apple claims that ACM defined the relevant markets incorrectly. However, also on objection ACM concludes that the most important market for this decision is the market for appstore services on the mobile operating system iOS for dating-app providers. There is no reason to expand this market with

other methods for offering digital services (such as progressive web apps), with other mobile operating systems (such as Android), or with providers of other types of apps (other than dating apps). In ACM's opinion, the criticism leveled by Apple against two consumer studies that ACM had commissioned does not affect the conclusions that ACM had drawn from said studies.

Second, Apple contends that ACM incorrectly ruled that Apple enjoyed a dominant position on the abovementioned market. With regard to this point, too, Apple's objections do not hold. On the relevant market, dating-app providers have no real alternatives to Apple, and are dependent on the App Store for access to consumers that use Apple smart devices. The resulting high market share that Apple has on the relevant market is not nuanced by the threat of potential competition, expansion of existing supply, or countervailing buyer power. Also, smart mobile devices and appstore services do not constitute a so-called systems market, since consumers barely take into account specific apps (or the prices thereof) when choosing a smart mobile device.

Third, Apple believes that its conditions do not result in an abuse of dominance. With regard to this point its objections do not hold either. The IAP condition in combination with the anti-steering clause results in harm to dating-app providers and their customers. These conditions restrict the ability of app providers to choose payments methods that correspond with the wishes of their users, which can have a negative effect on their services to the consumer. Furthermore app providers are prevented from forging a direct customer relationship with their users, and key customer data is kept from them, which restricts their ability to offer customer service and to combat fraud. That is unfair, since Apple does not have a legitimate objective for which the use of these conditions is necessary. The [confidential] is unfair, too. [confidential].

Fourth, ACM does not follow Apple's objections against the imposed order subject to periodic penalty payments. The order is an appropriate measure for ending Apple's abuse, and it makes sufficiently clear and concrete what Apple needs to comply with in order to avoid penalty payments.

Finally, also after reconsideration in the objection proceedings, ACM concludes that Apple did not comply on time with the non-stayed part of the order, as a result of which it had to pay penalty payments. The adjusted conditions that Apple had set continued to restrict unnecessarily the ability of dating-app providers to freely choose payment services, and thus undermined the order's effectiveness.

That is why, having supplemented its reasoning, ACM concludes that Apple's objections do not give reason to repeal either the decision on penalty payments or the collection decision. This means that Apple's objections have been declared unfounded. However, ACM does see reason to suspend the grace period of the part of the order relating to [confidential] until six weeks after a ruling by the District Court of Rotterdam in proceedings on the merits, should Apple file an appeal.