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Dutch ACM orders Apple to amend its terms for dating apps – interim relief judge largely agrees

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On 24 December 2021, the Dutch Authority for Consumers & Markets (ACM) published a summary decision finding an abuse of a dominant position by Apple. The decision dates back to 24 August 2021 but was published only last month following an injunction proceeding aimed at suspending the effects of the ACM's decision as well as its publication. In the decision, the ACM requires Apple to amend the service terms in the App Store that apply to dating app providers since the ACM considers some of these terms to be unreasonable. In short, the ACM demands Apple to make it possible for dating apps to allow users to use an alternative payment system for in-app purchases. In addition, dating app providers must be given the possibility to refer to payment options outside the dating app. If Apple would not comply, it risks periodic penalty payments.

Summary of the decision

In its summary decision, the ACM states that if app providers offer content or services for payment in their apps installed through the App Store, they must use Apple's in-app-purchase service (IAP service). In addition, app providers may not refer in any way to payment options outside the app (for example, on their own website).

In order to assess whether Apple has a dominant position, the ACM first investigated whether substitution possibilities for Apple's App Store exist for dating app providers. According to the ACM these are insufficient, as (dating) app providers need to have access to all app stores (in any case, the Apple App Store and Google Play Store) since access to a particular app store is dependent on a mobile phone's operating system (on iPhones Apple's iOS and on most other devices Google Android). In addition, Apple users cannot use download Google's Play Stores or alternative app stores on their iPhones. Furthermore, the ACM does not consider regular websites for display on mobile devices to constitute suitable alternatives for dating app providers because those channels cannot offer the same functionalities as apps. Therefore, the ACM concluded that insufficient substitution possibilities for the App Store exist and that hence Apple is able to behave to a high degree independently from the dating app providers. Consequently, the App Store provides Apple with a dominant position.

According to the ACM, Apple also abused this dominant position by (i) restricting the freedom of

choice of dating app providers with respect to the settlement of payment for the digital content and services they sell, and (ii) not giving the operators of dating apps access to customer data. The ACM considers the latter behaviour to be, *inter alia*, detrimental to the customer service of dating app providers.

Through the decision, the ACM orders Apple to amend its terms and conditions in such a way that dating app providers offering their apps through the App Store can freely choose the party that settles payments for digital content and services sold within the app. Apple is to create a possibility for the dating app providers to refer within their app to payment systems outside the App Store. If Apple does not comply or does not comply in time, it will forfeit a periodic penalty payment of EUR 5 million per week, with a maximum of EUR 50 million.

On 17 January 2022, the ACM announced that it is in the process of assessing a submission by Apple reporting to the ACM on how Apple had complied with the ACM's decision and whether its compliance should be deemed sufficient.

Judgment in the interim relief proceedings

Apple requested an injunction to temporarily suspend the decision imposing conditional periodic penalty payments and also in an attempt to prevent the ACM from publishing its decision. Apple argued, *inter alia*, that compliance with the decision (i) would involve major changes to the App Store, (ii) would create significant security and fraud risks for users, (iii) users would lose other functionalities associated with the IAP system, and (iv) would damage Apple's reputation as a safe and reliable platform.

However, the preliminary relief judge largely rejected these requests, which means that Apple must comply with the order for periodic penalty payments on the most important points. According to the preliminary relief judge, no major technical adjustments to the App Store would be needed to ensure compliance with the ACM's decision since the vast majority of in-app payments are made outside the IAP system (by *inter alia* Amazon, Uber and Airbnb). In addition, the interim relief judge established that the ordered changes to the App Store are not irreversible. Should Apple prevail in proceedings on the merits, the consequences for Apple of complying with the ACM's order would be merely financial. In addition, the interim relief judge did not foresee any risks with regard to safety for users or Apple's reputation. In addition, the interim relief judge concluded that dating apps only constitute a small minority of all apps that are available through the app store. In this regard, the interim relief judge observed that Apple already allows certain categories of apps to process payments outside the app store. As for the alleged loss of functionality, the interim relief judge pointed out that Apple mainly referred to functionalities that are irrelevant for dating apps (such as parental control and family sharing).

An apparently limited success for Apple is that part of the order subject to periodic penalty payments, which would relate to certain adjustments to (the conditions of) the App Store, will be suspended and remain confidential until six weeks after the ACM has decided on Apple's administrative review request. The Court also partly suspended the amount of the periodic penalty payment (to the extent that it exceeds an amount of EUR 5 million per week and an amount of EUR 50 million at most).

What may lie ahead?

It is highly likely that the judgment in the interim relief proceedings will not be the last chapter in this saga. In a press release dated 14 January 2022, Apple announced that it had lodged an appeal against the ACM's decision "[b]ecause we do not believe these orders are in our users' best interests". In the same press release, Apple equally announced that it should introduce two optional new entitlements exclusively applicable to dating apps on the Netherlands App Store that provide additional payment processing options for users.

It also remains to be seen whether the consequences of Apple's defeat in the interim relief proceedings shall remain limited to merely dating apps. In any event, other app providers may very well be in similar positions and may find support in the decision and the judgment to lodge proceedings of their own against Apple, either with the ACM or before a civil court.

We shall continue to monitor further developments in this case and intend to revert with a follow-up post should further relevant developments become public.

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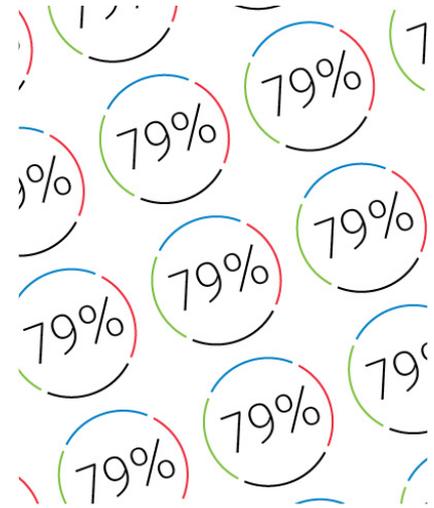
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