

Kluwer Competition Law Blog

Dutch ACM Upholds its Penalty Order against Apple: Apple's App Store Terms Are in Breach of Competition Law

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On 2 October 2023, the Dutch competition authority ACM published its [decision on the objections](#) filed by Apple on 13 July 2023 (**decision on objection**) against the ACM's [decision of 24 August 2021](#) imposing an order subject to periodic penalty payments on Apple for infringing the abuse of dominance provision laid down in Article 24 of the Dutch Competition Act (**DCA**) and Article 102 TFEU (**the penalty order**), and against the decision of 13 June 2022 on the collection of penalty payments for non-compliance with the penalty order (**the collection decision**, which is not publicly available).

Apple case: What do we know

So far, the ACM has only published summaries of its decisions in relation to the Apple case. It seems that Apple is vehemently opposing the publication of the full decisions and may have obtained a partial interim order. This means that the information publicly available on the case is rather slim, but on the basis of the information that the ACM has disclosed so far (in short):

- On 24 August 2021, ACM imposed the penalty order (of which [a summary](#) was published on [24 December 2021](#)) as it had found that Apple was abusing its dominant position by imposing unreasonable conditions for in-app payment services to dating app providers;
- On 24 December 2021, the District Court of Rotterdam issued [its ruling](#) following a preliminary relief request filed by Apple against the penalty order and publication thereof. This interim ruling led to the partial suspension of the ACM penalty order (likely relating to the commission fee of Apple, yet no information was published on that issue due to this ruling), but the court followed ACM in its conclusion that the in-app payment conditions of the Apple Store for dating apps breached Articles 24 DCA and 102 TFEU. The penalty payment was limited by the Court to €5 million per week up to a maximum of €50 million.
- On 24 January 2022, the ACM [concluded](#) that Apple failed to satisfy the requirements set by the ACM because dating app providers were still unable to use other payment systems. With Apple's adjusted policy, dating app providers could merely express their 'interest', but were still forced to make a choice: either refer to payment systems outside of the app or to an alternative payment system. According to the ACM, providers must be able to choose both options. Therefore, the ACM held that Apple had forfeited the first penalty payment of €5 million;

- On 27 March 2022, having incurred the maximum penalty of €50 million, Apple **submitted** its amended terms & conditions;
- On 11 June 2022, ACM **confirmed** that Apple had sufficiently changed its unfair conditions and that it complied with the requirements set by the ACM in its penalty order. Now, dating app providers are free to choose a method of payment in their apps and to refer their customers to their own websites for payments.
- On 13 June 2022, the ACM decided on the collection of the forfeited penalty payment over the first period of non-compliance (not published, see below).
- On 13 July 2023, ACM **decided** on the objections raised by Apple (see below). On 2 October 2023, a brief press release and summary of the decision on objection were published by the ACM.

For more details on the case, please see our blog [here](#) and a Kluwer Competition Law Blog post [here](#).

Most recent development: decision on objection by ACM

Apple, as had been reported, filed objections against the penalty order and the collection decision. In the decision on the objection of 13 July 2023, the ACM re-established that Apple abused its dominant position by imposing unreasonable conditions on dating app providers. This abuse consisted of three conditions, of which only two have been made public; the third is still confidential due to the preliminary relief ruling:

1. The obligation to have the payment process for selling digital content within an app be mandatorily handled through Apple's In-App Purchases system (**the IAP condition**);
2. The prohibition to refer within an app to payment methods outside of the app in any way (**the anti-steering condition**).

The collection decision of 13 June 2022 holds that Apple did not comply with the penalty order within the applicable compliance period. Thus, the ACM decided to proceed with the collection of €50,234,246.58 (€50 million in penalty payments and €234,246.58 in statutory interest).

According to the summary, Apple brought forward the following objections:

- The ACM defined the relevant market incorrectly as the market for app store services on the mobile operating system iOS for dating app providers. – The ACM disagrees and states that there is no reason to expand the relevant market for app store services on the mobile operating system iOS for dating app providers to other methods of offering digital services, to other mobile operating systems or to providers of other types of apps. ACM has supported its market definition with two market studies performed among consumers;
- The ACM incorrectly ruled that Apple enjoys a dominant position in the relevant market. – Again, the ACM disagrees and states that dating app providers have not real alternative to Apple as there is no other app store provider within the iOS environment. App providers are, thus, dependent on the App Store to cater for their services to users of Apple devices. The high market shares of Apple are not, according to ACM, nuanced by the threat of potential competition, expansion of existing supply or countervailing buyer power;
- Apple's conditions do not constitute an abuse of dominance. – The ACM counters that the IAP and the anti-steering conditions result in harm to dating-app providers and their customers

because they restrict the choice of dating app-providers users in their preferred methods of payment, which negatively impacts the services of dating-app providers by hindering them from the capacity of engaging in direct relationships with their customers and in accessing key customer data. Furthermore, Apple does not have a legitimate objective that would make these conditions necessary, according to the ACM;

- An order subject to penalty payments is an inappropriate measure. – According to the ACM, the penalty order is an appropriate measure and it already made sufficiently clear and concrete how Apple could comply with the order during the proceedings;
- Apple submitted conditions that complied with the order in due time. – The ACM states that the adjusted conditions continued to unnecessarily restrict the ability of dating app providers to freely choose payment services.

Not surprisingly, the ACM concludes that Apple's objections do not hold and they are declared unfounded. As only a very brief summary of the decision on Apple's objection has been published, we can only guess the substantiation of the objections by Apple and the further reasoning of ACM.

Next steps

The decision on objection is open for appeal to the District Court of Rotterdam. We consider it likely that Apple will appeal and that we have not seen the end of this case.

It will be interesting to find out what the court will rule in a judgement on the merits, especially on the aspects of the case that the public is still in the dark on, and whether ACM can hold on to this (partial) win at the injunction stage. The same Court's preliminary judgement was mostly favourable towards the ACM's reasoning, which must be somewhat comforting to the national competition authority. But regarding the case on its own merits, the District Court is not bound by its preliminary injunction decision.

The publicly available information unfortunately is quite scarce meaning that much is still unclear. For the competition community (and for potential damage claims), a fully published ruling on the merits would be very welcome.

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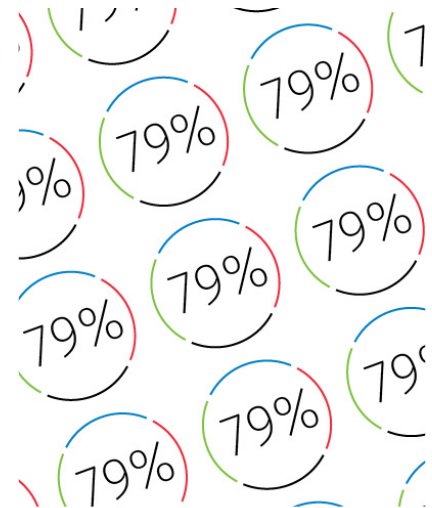
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