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Apple Mobile Payments: Evaluating the Proposed Commitments to the European Commission

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On 9 January 2024, Apple offered several commitments under Article 9 Regulation 1/2003 to address the competition concerns of the European Commission in the markets for mobile wallets on iOS, inter alia to ensure effective interoperability with the Near Field Communication (NFC) functionality on iOS. This post will give an initial overview of Apple's proposed commitments and discuss briefly whether they are sufficient to meet these concerns and, moreover, even result in a level playing field as required by the Digital Markets Act.

Statement of Objections and underlying theory of harm

On 2 May 2022, the European Commission informed Apple of its preliminary view, asserting that it may have abused its dominant position in the markets for mobile wallets on iOS mobile devices (see the Statement of Objections [here](#)).

According to the Commission's preliminary assessment, Apple abused its dominant position in the markets for mobile wallets by restricting access to the NFC technology, a standard wireless communication technology used inter alia for contactless payments with smartphones in stores.

Apple offers multiple software development kits (SDKs) and developer services for third-party app developers that feature over 250,000 so-called Application Programming Interfaces (APIs) for 'virtually any hardware or software task imaginable' on its software platform iOS – except for the very APIs that are strategically important for Apple to keep a tight grip on its closed ecosystem, such as the ones necessary for the mobile payment functionality in concern. APIs are sets of specifications and protocols enabling developers to integrate applications with a digital platform's features, data, or services. They facilitate communication between software applications, allowing them to perform tasks or share information. Thus, access to the interface information is crucial for the functionality of apps. Apple refused to disclose necessary interface information of its 'NFC Interface', a set of iOS APIs that enables interoperability with a so-called 'NFC-Controller' – a chip integrated into mobile devices that assures communication with payment terminals – to favour its own solution, Apple Pay.

In the Commission's view, the absence of interoperability with the NFC functions therefore has the effect of reinforcing Apple's competitive position and eliminating effective competition in the

markets for mobile wallets on iOS, because Apple Pay is the only mobile wallet solution that currently may access the necessary NFC input on iOS.

Central to the Commission's perspective is the preceding consideration of Apple's position in the market for smart mobile devices. In the Commission's view, Apple's mobile devices (iPhones, iPads and software) form a closed ecosystem. To understand the strength of these closed ecosystems, interfaces are a key factor. This is because the degree of openness of a platform mainly depends on the ability of the platform to interoperate with other products (see [here](#)). When an ecosystem is closed, network effects are proprietary, leading to significant lock-in effects and high switching costs (see in general [here](#) and see a very thorough recent decision of the German Federal Cartell Office under Section 19a of the German Competition Act regarding Apple's paramount significance for competition across markets [here](#)).

Hence, the competitive position of products in adjacent markets may not be the result of competition on the merits but results only from the refusal to make complementary products of third parties interoperable to a platform, in this case to the proprietary software platform iOS. Therefore, one could argue, that vertically integrated platforms have strong incentives to deny or, at least, degrade the degree of interoperability to foreclose adjacent markets, especially if there is a clear intent to capture rents in those markets. Recently *Motta* has outlined possible theories of harm for such restrictions on interoperability and shown which economic models provide a rationale for anticompetitive foreclosures in digital markets (see [here](#)).

In the case of Apple, two points seem particularly interesting. First, the possibility that Apple vertically forecloses the market to extract transaction fees from in-store NFC payments. Second, how Apple may dynamically foreclose the market and prevent follow-on innovation. Every time customers make purchases via Apple Pay, Apple earns a transaction fee. For Wallet users, Apple Pay is free of charge, whereas participating banks pay a transaction-based fee. Even though Apple's commission may not be very high which is mainly due to the fact that interchange fees in the EEA are limited to 0.3 % for credit cards and 0.2 % for debit cards under [Regulation \(EU\) 2015/751](#), Apple's profits add up due to its exclusive position in mobile wallets on iOS. Moreover, according to the Commission's preliminary view, the denial of interoperability also undermines innovation by complementors and thereof dynamic competition. In this context, the high barriers to entry also mean barriers to innovation. Furthermore, by impeding the growth of products in a complementary market, Apple might be able to protect its ecosystem overall.

Refusal to supply interoperability information

To determine an abusive interoperability obstruction under Article 102 TFEU, [Microsoft](#) seems to be the leading case even after 20 years. Herein the Commission concluded that in order to keep multi-sided platforms open for competition *in* the market, competitors must be able to interoperate with the platform on an equal footing with products offered by the dominant undertaking, i.e. have a degree of interoperability that enables effective competition. Although the Microsoft case is still referred to as the applicable legal standard, it is, at least, questionable if it is still appropriate.

First, it is based on the (false) premise, that the refusal of interoperability information requires a stricter standard due to presumed intellectual property rights of interface information. As a result, the refusal is qualified as a refusal to license (see [here](#)). Instead, both intellectual property law and

competition law aim to promote competitive interoperability in a complementary way and thereof require a different interpretation of Article 102 TFEU (for an alternative approach see [here](#) and [here](#)). Second, it may be necessary to adapt the legal standard to the platform economy where self-preferencing by a vertically integrated dominant digital platform may be abusive not only under the preconditions set out by the ‘essential facility’ doctrine, which is directly related to the discussion of whether self-preferencing and refusal to deal are two sides of the same coin (for the discussion see [here](#) and for an alternative concept see [here](#)). However, since the Commission does not have to prove an infringement of competition law under Article 9 Regulation 1/2003, this question will remain unanswered.

Interoperability obligation under Article 6(7) DMA

Apple’s decision to disclose the interface information in question could kill two birds with one stone, as the company faces another potential interoperability obligation with Article 6(7) DMA. Apple has already been designated as a gatekeeper and its operating system iOS as a core platform service (CPS) pursuant to Article 3 DMA (see [here](#) and [here](#)), a decision Apple seeks to challenge before the General Court (see [here](#)).

In accordance with Recital 56, the vertical interoperability obligation set out in Article 6(7) DMA addresses the dual role of gatekeepers as developers of operating systems or device manufacturers when they offer products or services that rely on certain functionalities of these particular systems. As outlined in Recital 57, the vertical interoperability obligation is intended to enable innovation by alternative providers and end-user choice.

Under Article 6(7) DMA, Apple will be required to ensure, free of charge, effective interoperability with, and access for the purposes of interoperability to, the same operating system, hardware or software features that are available or used in the provision of its own complementary and supporting services and hardware. It is without a question that the NFC functionality would fall under the scope of the provision, as the Apple Mobile Payments case served as the central reference for the design of Article 6(7) DMA and thereof is explicitly mentioned in Recital 56.

To comply with the DMA, Apple [announced](#) on 25 January 2024 to adapt iOS, Safari, and the App Store in the European Union and inter alia provide various APIs and an interoperability request form where developers can submit additional requests for interoperability with iPhone and iOS hardware and software features. In the narrative of Apple, the changes seek to reduce the privacy and security risks that the DMA creates (see the press release [here](#), analysis of the announcement see [here](#)).

For the sake of completeness, I would also like to mention the right to access technical infrastructure in the German Section 58a PSSA (better known as ‘Lex Apple Pay’ – see in detail [here](#)), which also served as a reference for the design of Article 6(7) DMA (see [here](#)). In contrast to Article 6(7) DMA, access to the NFC functions under Section 58a PSSA is only granted in return for a fee that does not exceed the actual costs of the respective access, which is why no one has used this provision so far. Furthermore, this means that the provision may now be redundant and could even be inapplicable due to the harmonisation effects and the prohibition of further obligations for the purpose of ensuring contestable and fair markets under Article 1(5) DMA. However, this depends on the exact interpretation of Article 1 (5) DMA, which is still unclear (for

the various interpretations of Article 1 (5) and Recital 9 see [here](#) and for the objective of Section 58a PSSA see [here](#)).

Proposed Commitments under Article 9 Regulation 1/2003

If the European Commission becomes aware of a breach of Article 102 TFEU, it has the choice between two different approaches. The Commission can either determine the existence of an infringement under Article 7 of Regulation 1/2003 and impose the necessary remedies, or, if the undertaking concerned offers commitments that sufficiently address the preliminary concerns, declare these binding under Article 9 of Regulation 1/2003.

Thus, the commitments correspond with the main issue that the Commission would also ultimately face: designing effective but proportionate remedies. To address the Commission's concerns Apple offered several commitments (see [here](#)), limited to all third-party mobile wallet app developers established in the EEA and all iOS users with an Apple ID registered in the EEA. In the following, I will only discuss the most important aspects.

Interoperability obligation

First and foremost, Apple will allow vertical interoperability between third-party mobile wallets and its NFC function. Interoperability remedies are quasi-structural remedies for digital platforms (see in detail [here](#)). Even though they come with a lighter touch than a structural break-up of a firm, in multi-sided digital markets they can be way more effective (see [here](#)). Interoperability remedies allow interconnection while preserving the differences between the complementary products and, therefore, enhance dynamic competition. Hence, Apple's proposal to allow interoperability has the potential to be sufficient to address the competitive concerns and even lead to a level playing field as required by the DMA, if designed properly.

In particular, Apple will allow third-party mobile wallet and payment service providers to access and interoperate through a set of APIs with the NFC functionality on iOS devices free of charge, without the involvement of Apple Pay or the Apple Wallet App (para. 3.1.). Therefore, Apple would create the necessary APIs to allow equivalent access to the NFC components in question. Third-party developers will be able to develop and distribute an eligible payment app through Apple's App Store (para. 3.2.).

In addition, Apple is also seeking to clarify the relationship with the use of the NFC interfaces on the Apple Watch (para 3.22.). First, Apple will not prevent iOS users from setting up Apple Pay on Apple Watch to make in-store NFC payments by using Apple Watch, irrespective of the mobile payment app used on iPhone. Second, Apple will enable iOS users to select an eligible third-party app as default for NFC in-store payments on iPhone and select a payment card credential from the same bank as their host card emulation payment app as default on Apple Watch if the credential is eligible for use with Apple Pay. Third, configuring Apple Pay on Apple Watch should also not interfere with the default settings set up by iOS users on their iPhones.

Measures against self-preferencing

Granting the interconnection itself is not enough. While the fundamental objective of vertical interoperability obligations is to lower entry barriers and create opportunities for complementors, it is well understood that interoperability must be combined with prohibitions against discrimination, especially between third-party apps and the platforms vertically integrated app (see [here](#)). Therefore, it is crucial that access to interface information is not only granted but conferred on a non-discriminatory basis.

To ensure this, Apple offers also to provide additional features and functionalities. Apple will allow defaulting of third-party payment apps that will be easy to locate within settings, provide access to the local authentication framework (e.g. Face ID), enable the utilisation of Field Detect and Double-click ('tap and go') and establish a suppression mechanism that supports the co-existence of payment apps (paras 3.4. – 3.9.). Also, Apple commits to grant access to the NFC functions on FRANDT terms (fair, reasonable, non-discriminatory and transparent) to third-party mobile wallet app developers, who will have to conclude an Apple Developer Program license agreement to have access (para 3.19.) defining the access conditions in detail in order to prevent misuse.

The interplay between the Commitments and the DMA

Apple's proposed obligations would apply for ten years. Afterwards, Apple itself stated that it would be obliged to fulfil the requirements of the DMA concerning payments using NFC technology – but only on the iPhone and iOS (para 4.2.). This seems to be consistent with Apple's argument laid out in the Commission's designation decision that it operates five different CPSs, not just one. Thus, the interplay between the proposed commitments and the regulatory standard in the DMA reflects Apple's designation decision, where the Commission qualified each of the operating systems, namely iOS, iPadOS, macOS, watchOS, and tvOS, as distinct CPSs in the meaning of Article 2(2)(f) DMA due to the differing characteristics and purposes for which each service is used by end- and/or business-users. Yet, only iOS met the thresholds laid down in Article 3(2) DMA and was therefore designated as CPS (see in detail [here](#) and [here](#)).

Outlook

Of course, the Commission has the final say on this matter. At the moment of writing, the Commission seeks feedback on the commitments offered by Apple (see [here](#)). However, only if a market test indicates that the commitments address the competition concerns, the Commission may adopt a decision making them legally binding under Article 9 Regulation 1/2003.

Such a decision would mean that the NFC functionality would have to be made available by March 7, 2024 (see para 4.1.), while on the other hand, the European Commission would not clarify whether there is an infringement of Article 102 TFEU. While a decision to declare Apple's proposed commitments binding under Article 9 Regulation 1/2003 would be perfectly understandable for reasons of procedural economy, this would also mean that another fundamental question of competition law in the digital economy will not be clarified (in court) – a point of criticism that repeatedly has been put forward against such commitment decisions and the

Commission's willingness to accept them.

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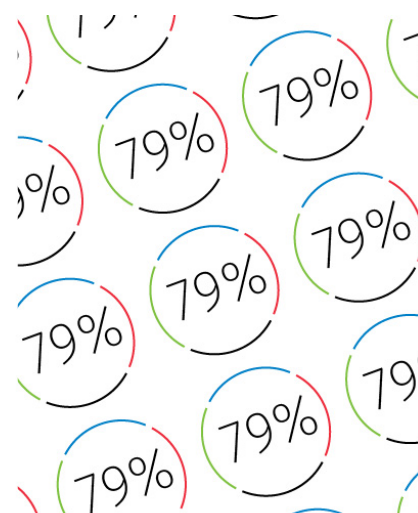
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