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Additional Data Protection Rules for Thee But Not for Me – Bundeskartellamt Sends S/O to Apple in App Tracking Case

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Introduction

On February 13, 2025, the Bundeskartellamt (Federal Cartel Office, "FCO") sent its statement of objections to Apple regarding the App Tracking Transparency Framework ("ATTF"), setting out competition concerns based on a preliminary legal assessment (see press release here). The FCO initiated proceedings under Section 19a ARC and Art. 102 TFEU on June 14, 2022 (see press release here), while the proceedings to designate Apple as digital gatekeeper under Section 19a ARC were still ongoing. In fact, the FCO only issued the designation decision on April 3, 2023 (see blog on German developments 2023 here), and the Federal Court of Justice is expected to deliver it ruling in Apple's appeal against the designation on March 18, 2025.

Apple's third-party user tracking rules

The case concerns the ATTF that Apple introduced for third-party apps in 2021 (in its various operating systems as of version 14.5), so Apple's regulatory power for third parties' activities in its operating systems. User tracking is employed by advertisers or app publishers to deliver personalized ads or to track and use user data for other purposes. The FCO points out that tracking is particularly important for providers of apps that are free of charge but financed through advertising. The case was triggered by complaints from media and advertising associations (see press release here). They alleged that Apple abused its position to the detriment of third-party apps and advertisers under the cover of data protection purposes.

The FCO clarifies that while it is key that users can make an informed and free decision regarding allowing access to their data for personalized ads, under applicable data protection laws, app providers must already obtain user consent prior to accessing any user data. The current case thus only concerns the additional conditions Apple imposes on third-party apps for user data tracking: They need to obtain the consent of users to use and combine their data across companies, via a pop-up-window when a third-party app is started for the first time – in addition to the existing consent requirement dialogue window. Apple also makes access to the Identifier for Advertisers (IDFA), which is important for advertisers to identify devices, conditional upon this additional consent. Importantly, these rules do not apply to Apple's own apps and its own user data tracking, so-called first-party tracking.

The FCO's objections

The S/O raises competitive concerns in terms of possible self-preferencing and impeding other market participants, relying on three points:

- The definition of app tracking is limited and only covers data processing for advertising purposes across different companies (within the antitrust meaning of undertaking) – it does apparently not apply to Apple's similar processing across its own integrated ecosystem.
- In practice, third party apps need to display up to a maximum of four consecutive consent dialogues, whereas Apple's own apps only need to show a maximum of two. Moreover, the consent dialogues do not explicitly refer to Apple's first-party tracking.
- The FCO sees a dark pattern in the different designs of the consent dialogues required for third party apps and for Apple's own apps, respectively. In the FCO's view, users are steered to refuse consent for third-party apps to process their data, while they are encouraged to agree to Apple's user data processing.

Possibly relevant abusive practices under Section 19a(2)(1)ARC

Self-preferencing

The press release does not identify in more detail which of the practices under Section 19a(2)(1)ARC the FCO examined. But it seems to rely on the general clause under which the FCO can prohibit a gatekeeper to self-preference its own offers over those of competitors when intermediating access to sales and supply markets (Section 19a(2)(1) no. 1 ARC. It remains to be seen whether the FCO also relies on one related regulatory example, i.e., that the gatekeeper presents its own offers more favourably (Section19a(2)(1) no. 1 lit. a ARC). The design of the consent dialogue may qualify as "presentation" within that meaning, even though the legislative materials (in German) primarily refer to presentation in terms of rankings (in general search engine results but also in app store searches) or the promotion of apps (p. 114).

The possibility to prohibit self-preferencing under Section 19a ARC covers a broader scope than the per se prohibition under the DMA. Art. 6(5) DMA is limited to Core Platform Services, and to the specific conduct of ranking, indexing and crawling. In contrast, the FCO can in principle prohibit any type of self-preferencing in any area of the gatekeeper's activities.

Impeding third parties

The concern of impeding third parties seems to be based on the general clause under which the FCO can prohibit the gatekeeper from taking measures that impede other undertakings in their business activities on supply or sales markets where the gatekeeper's activities are relevant for access to these markets (Section 19a(2)(1), no. 2 ARC).

Burden of proof

The legislative materials provide that if the gatekeeper's conduct meets the elements of a specific regulatory example, e.g. presenting its own offers more favourably, this indicates that the elements of the corresponding general clause, here self-preferencing, are also met (p. 113). Moreover, the general clauses under Section 19a(2)(1) ARC are said to be designed like a rebuttable presumption: i.e., the FCO (only) needs to prove that the conduct it wants to prohibit meets the provision's elements – whereas the gatekeeper needs to prove that its conduct is justified. There is a debate in Germany, whether in light of the FCO's broad powers and due to the principle of proportionality and legal clarity, the FCO must additionally demonstrate (to some extent) that the gatekeeper's relevant conduct needs to have at least the potential for harming competition – even though this is not explicitly mentioned in the provision's wording.

Outlook

Apple can now defend itself against the FCO's preliminary assessment, notably providing input for an objective justification of its conduct, for which it bears the burden of proof (Section 19a(2)(2) ARC). If the FCO subsequently issues a decision, it will be interesting to see to what extent and depth the FCO will engage in any additional reasoning as to the potential for competitive harm.

Indeed in the first decision under Section 19a(2) ARC, the Google user consent case (see decision in German here), the FCO showed that Google met the elements of a specific regulatory example (Section 19a(2)(1), no. 4 lit. a ARC) and then referred to the legislative materials describing the typical risks or impact associated with the practice in question. The FCO moreover set out its preliminary assessment that Google's conduct was capable of objectively harming competition, albeit this part was rather short. (Google disputed this aspect of the assessment.) The FCO did not need to carry out a final assessment because it issued a commitment decision (Section 32 b ARC.)

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