Zentralverband der deutschen Werbewirtschaft ZAW e.V.

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Contact
ZAW
Presse & Kommunikation
Am Weidendamm 1A
10117 Berlin
+49 30 59 00 99 – 717
presse@zaw.de

Apple must amend ATTF rules found to be in breach of antitrust law

Major success for the media and advertising industries — but commitments fall short of the clear antitrust finding

Apple must amend its unilaterally imposed rules governing the use by app providers of user data on iPhones and iPads for personalised advertising, and must also revise its own practices regarding personalised advertising. The complaint filed in 2021 with the German Federal Cartel Office (Bundeskartellamt, BKartA) by the advertising and media industry associations BDZV, Die Mediaagenturen, Markenverband, MVFP, VAUNET and ZAW has therefore achieved an important success.

The BKartA found that the previous specific design of the so-called App Tracking Transparency Framework (ATTF) infringed German and European competition law: the rules impede publishers, advertisers, advertising intermediaries and service providers in the conduct of their business and favour Apple over its competitors. The associations had made this clear from the out-set and substantiated it with specific evidence. The BKartA followed this assessment and clear-ly rejected Apple's assertion that the design of ATTF serves users' privacy and is therefore compatible with competition law.

This decision is the first binding measure adopted by the German Federal Cartel Office against Apple pursuant to Section 19a GWB. It is also based on European competition law, namely Article 102 TFEU. Apple is now required to make a number of changes to the design and operation of ATT for seven years. The German Federal Cartel Office will monitor this. The competition-law finding is of considerable importance beyond the future design of ATT. For companies affected by ATTF, there is now a substantial basis for antitrust damages claims in

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respect of the significant economic disadvantages they have suffered as a result of ATT.

Preliminary assessment of the BKartA's findings and Apple's commitments

The BKartA's decision has strengths and weaknesses. It is particularly positive that the authority confirms the core of the complaint: as the operator of iOS, iPadOS and the App Store, Apple unilaterally established and enforced rules governing third parties' use of data which impede third parties and favour Apple's own advertising offerings. The company's requirements regarding the design of user prompts and the additional prompt architecture for third parties as such have been very clearly classified by the BKartA for what they have been from the outset: mani-fest infringements of national and European law.

"The clear finding of an infringement of German and European competition law is an important success for the media and advertising industries," explains a spokesperson for the associations, Dr. Bernd Nauen, Director General. "The German Federal Cartel Office confirms: Apple may not simultaneously impose impeditive rules, enforce compliance with them, and, in its own advertising business, profit from the resulting disadvantages for other companies. In this respect, this decision sets an important precedent for the regulation of the rule-making power of large digital corporations and, at the same time, provides a key basis for the assessment of civil claims brought by affected companies."

In the associations' view, the weakness of the decision is that the BKartA does not respond to this with the necessary — and legally available — degree of consistency. Two aspects are decisive in this regard:

First, the complainants continue to take the view that a powerful gatekeeper may not narrow the legislatively calibrated framework for data processing through its own extra-statutory requirements, to the detriment of dependent undertakings. The BKartA considers this to be permissible in principle where the requirements are necessary to achieve an objective pursued by the gatekeeper. Whether such private rule-making at the expense of third parties is compatible with Section 19a GWB remains of central importance for the future application and development of the provision. In the complainant associations' view, unilateral rule-making should be effectively constrained, rather than effectively legitimized. Even the data protection supervisory authorities consulted had not considered ATTF necessary from a data protection perspective.

The second weakness of the decision is that the commitments accepted do not sufficiently reflect the stringent standard set by the BKartA itself for the specific assessment of ATTF. Contrary to the BKartA's statement in its press release, the associations had demonstrated in detail that equally suitable, but less restrictive, means than the commitments now accepted were available for safeguarding Apple's recognised economic interests. In particular, the fact that third parties will, in many cases, still have to implement two user prompts in the future is, in the associations' view, avoidable. Moreover, the BKartA has made no provisions to prevent Apple from continuing to carry out certain uses of data entirely without users' consent. There is therefore a risk that the identified disadvantages will not be fully remedied through the implementation of the commitments.

"The German Federal Cartel Office's finding of an abuse of market power is clear and compelling. However, the authority remains too lenient and inconsistent in its remedies," says the associations' spokesperson." Section 19a GWB was created to place effective limits on gatekeeper rule-making. The commitments must therefore be assessed by reference to whether they actually bring the identified foreclosure and self-preferencing to an end — not merely by reference to whether individual design features of the prompts have been improved."

The complainants will closely monitor the technical testing, implementation and seven-year monitoring process. The relevant test will be whether third parties can in the future actually use fair, workable and effective consent processes, and whether the competition disadvantages suffered to date are eliminated on a lasting basis.

Background

Apple introduced ATT in 2021. The framework governs, among other things, app publishers' access to the IDFA, a device identifier that is important for personalised advertising and the measurement of advertising performance. For certain data-processing operations, third par-ties were required, in addition to the consent required under data protection law through a Consent Management Platform (CMP), to obtain further consent via an ATT prompt prescribed by Apple. By contrast, Apple uses data from its own ecosystem for its own personalised advertising and is not subject to the same ATT-prompt requirement.

The associations representing the media, publishing, brand and advertising industries challenged this design in a joint complaint to the German Federal Cartel Office. The authority objected to the specific design of ATT pursuant to

Section 19a GWB and Article 102 TFEU, referring in particular to Apple's dual role as the operator of iOS, iPadOS and the App Store, and as a provider of its own apps, services and advertising inventory. Apple has offered commitments, which the authority has now made binding.

Apple has four months to implement the changes and will test them technically in advance with the involvement of app publishers. The commitments apply for seven years and will be monitored by an independent monitoring trustee. The solution applies to users whose App Store billing address and device location are in Germany and, according to the German Federal Cartel Office, may also influence the future design of ATT in other EU Member States.
