RÉPUBLIQUE FRANÇAISE
Autorité de la concurrence

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Decision 21-D-07 of 17 March 2021 regarding a request for interim measures submitted by the associations *Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil et Achat Media*, and *Syndicat des Régies Internet* in the sector of advertising on mobile apps on iOS

The *Autorité de la concurrence* (Section III),

Having regard to the letters registered on 23 October 2020 under numbers 20/0098 F and 20/0099 M in which the associations 'Interactive Advertising Bureau France' (IAB), 'Mobile Marketing Association France' (MMA), 'Union Des Entreprises de Conseil et Achat Media' (UDECAM), and 'Syndicat des Régies Internet' (SRI) referred to the *Autorité de la concurrence* practices implemented by the company Apple Inc., and requested that interim measures be ordered;

Having regard to Article 102 of the Treaty on the Functioning of the European Union ("TFEU");

Having regard to Book IV of the French Commercial Code (*code de commerce*);

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC;

Having regard to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, amended by Directive 2009/136/EC of 25 November 2009;

Having regard to Law No. 78-17 of 6 January 1978, as amended, relating to information technology, files and freedoms;

Having regard to deliberation n° 2020-137 of 17 December 2020 of the *Commission nationale de l'informatique et des libertés* (CNIL) giving its opinion in the context of the complaint filed

by certain online advertising professional associations against the company Apple Inc. before the *Autorité de la concurrence*;

Having regard to the Decisions on Business Secrecy No. 20-DSA-657 of 14 December 2020, No. 20-DSA-663 of 21 December 2020, No. 20-DSA-664 of 21 December 2020, No. 20-DSA-673 of 28 December 2020, n° 21-DSA-059 of 25 January 2021, n° 21-DSA-060 of 25 January 2021, n° 21-DSA-065 of 29 January 2021, n° 21-DSA-066 of 29 January 2021, n° 21-DSA-073 of 3 February 2021 and No. 21-DECR-079 of 5 February 2021;

Having regard to the observations submitted by the associations *Interactive Advertising Bureau France* (IAB), *Mobile Marketing Association France* (MMA), *Union Des Entreprises de Conseil et Achat Media* (UDECAM), and *Syndicat des Régies Internet* (SRI) and the company Apple Inc.;

Having regard to the other evidence in the case file;

The Rapporteurs, the Deputy General Rapporteur, the representatives of the associations *Interactive Advertising Bureau France* (IAB), *Mobile Marketing Association France* (MMA), *Union Des Entreprises de Conseil et Achat Media* (UDECAM), and *Syndicat des Régies Internet* (SRI), and of Apple Inc. and the representative of the Minister of the Economy heard at the hearing of the *Autorité de la concurrence* on 10 February 2021;

Adopts the following decision:

Summary[1]

The associations 'Interactive Advertising Bureau' (hereinafter, "IAB"), 'Mobile Marketing Association' (hereinafter, "MMA") France, 'Union des entreprises de conseil et achat media' (hereinafter, "UDECAM"), 'Syndicat des Régies Internet' (hereinafter, "SRI") referred the Autorité de la concurrence (hereinafter, "the Autorité") on 23 October 2020, practices implemented by the company Apple Inc. (hereinafter, "Apple") in connection with forthcoming changes to its iOS 14 operating system. The mobile operating system developed by Apple, iOS, powers the iPhone smartphones.

At the conference of 22 June 2020 intended for app developers[2], Apple announced that as part of its policy to enhance the protection of its customers' privacy, it would implement a mechanism called ATT (App Tracking Transparency), by September 2020. This mechanism displays a pop-up window which requires the explicit consent of the iPhone user before any use of their Identifier for Advertisers (hereinafter, "IDFA"). The IDFA is a unique identifier, proprietary to Apple, which allows different companies in the online advertising ecosystem to track user activity on different websites or mobile apps, for the purposes of targeted advertising.

In support of their complaint on the merits of the case, the complainants submit that the implementation of the ATT prompt and the requirement for app developers to use it to access the IDFA constitute an abuse of a dominant position, in that they impose unfair trading conditions within the meaning of Article 102(a) TFEU. These provisions provide that "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" may be considered an abuse by one or more undertakings in a dominant position. The abuse would stem from the fact that the ATT prompt is neither necessary nor proportionate to achieve Apple's objective of protecting users' privacy.

Furthermore, they argue that this practice can also be interpreted as imposing a supplementary obligation, in breach of Article 102(d) TFEU. These provisions provide that such an abuse of a dominant position may consist in "(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts".

In addition to their referral, the complainants have also filed a request for urgent interim measures with the objective that the Autorité orders the immediate cessation of the alleged practices. To this end, they request that Apple be ordered to:

- *desist from requiring the use of its pop-up window to obtain user permission for tracking, until a decision on the merits of the case is reached, or until an acceptable solution is found, following negotiations between Apple and industry stakeholders, in accordance with the second requested interim measure;*
- *engage in a constructive dialogue with industry stakeholders to find an acceptable solution for obtaining permission/consent for user tracking that complies with the requirements of European privacy legislation (in particular the GDPR and the ePrivacy Directive), and that is less intrusive to users and harmful to competition in the relevant markets.*

[1] This summary is for information purposes only. Only the following numbered paragraphs of the decision are authentic.

[2] https://www.vox.com/recode/2020/6/22/21299398/apple-ios14-big-sur-privacy-wwdc-2020

After analysing the evidence submitted by the complainants in support of their request for interim measures, the Autorité considered, in the context of a preliminary examination under interim measures, that it could not be considered at this stage that the introduction of the ATT prompt would result in Apple imposing unfair trading conditions or a supplementary obligation, in breach of Article 102 TFEU and, in particular, (a) and (d) of that Article.

In particular, the Autorité noted that, based on the evidence, the implementation of the ATT prompt might not be considered to impose excessive or disproportionate restrictions on the activities of app developers, thereby constituting unfair trading conditions within the meaning of Article 102(a) TFEU, and was in line with Apple's long-standing strategy of protecting the privacy of users of iOS products. As the investigation stands, this strategy does not appear to be anticompetitive in itself, and is a legitimate exercise of Apple's commercial policy. Moreover, it appears to be unlikely to constitute an abuse under Article 102(d) of the TFEU.

As such, it does not follow from the preliminary investigation conducted at the stage of the examination of the interim measures that Apple, by the contested decision to introduce the ATT prompt, pursued an anticompetitive purpose, took a decision that lacked objective justification or was disproportionate, or implemented a practice that could potentially have an anticompetitive effect.

With regard more specifically to the differentiated treatment between the collection of user consent for Apple's advertising services and that of third-party advertising services raised by the complainants, the Autorité considered, at the preliminary stage of the examination of the interim measures, that it did not follow from the elements in the case that Apple might be applying, by imposing the ATT prompt on the market participants intending to use the tracking of user activity on third-party sites, a more rigorous treatment than that which it would apply to itself for similar processing. However, the investigation of the complaint on the merits of the case will make it possible to ensure that this treatment does not constitute an anticompetitive practice, in particular in that it might result in a form of discrimination or "self-preferencing" on the part of Apple.

Considering that none of the practices reported by the complainants were likely, on the basis of the evidence presented during the proceedings, to constitute an anticompetitive practice, the Autorité dismissed the request for interim measures presented by the complainants, without it being necessary to verify whether the other conditions required by Article L. 464-1, paragraphs 1 and 2, of the French Commercial Code (code de commerce) were met in this case.

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I. Findings

1. In this section will be presented in succession: the complaint **(A)**, the sector of mobile app advertising on iOS **(B)**, the applicable legal framework **(C)**, the companies concerned **(D)**, the reported practices **(E)** and the request for interim measures **(F).**

A. THE COMPLAINT

2. By letter registered on 23 October 2020 under number 20/0098 F, the associations 'Interactive Advertising Bureau' (IAB), 'Mobile Marketing Association France' (MMA), 'Union des entreprises de conseil et achat media' (UDECAM), 'Syndicat des Régies Internet' (SRI) referred to the *Autorité* practices implemented by the company Apple Inc. (Apple) regarding the forthcoming changes to its iOS 14 operating system.

3. According to the complainants, Apple has a monopoly on the market for the distribution of apps on iOS and abuses its market power by imposing, on app developers active on its operating system, firstly, unfair trading conditions, infringing the provisions of Article 102(a) of the TFEU, and secondly, a supplementary obligation which has no connection with the subject matter of the contract, in breach of Article 102(d).

4. In addition to their complaint on the merits of the case, the complainants requested, by letter registered on 23 October 2020 under number 20/0099 M, that interim measures be ordered pursuant to Article L. 464-1 of the French Commercial Code (*code de commerce*).

B. THE SECTOR OF MOBILE APP ADVERTISING ON IOS

1. THE IDENTIFIER FOR ADVERTISERS

5. In the digital world, there are different types of identifiers, which are used for various purposes. An identifier may be used by a smartphone operating system, and may be used to identify the user of that smartphone and then recognise the user as they go about their business. It may also be used to identify an Internet user, either through the device they use, or through their Internet access (IP (Internet Protocol) address), or through the browser they use to browse the Internet. In order to recognise and track Internet users, websites place various categories of identifiers: these include in particular cookies and other trackers, which may be placed either directly by the site in question (referred to as first-party cookies), or on third-party sites that the Internet user subsequently visits (referred to as third-party cookies).

6. Trackers[3], and in particular cookies, have been in widespread use for many years by the online publishing industry to produce and collect data, in particular for advertising purposes[4].

7. In the mobile app environment, publishers of mobile apps rely on the "device ID", which is an encrypted identification number specific to the device and assigned by the mobile operating system (OS) of that device (smartphone, tablet, etc.)[5]. Unlike cookies used to track the user's web browsing, which are set independently for each third-party advertiser, this identifier remains the same for all third parties.

8. As regards Apple's mobile operating system, iOS (which powers the iPhone, among other things), an advertising identifier called the *Identifier for Advertisers* (IDFA)[6] was launched in 2012, when iOS version 6 was released. The IDFA is assigned randomly and anonymously when the device is first started up (this is referred to as a pseudonymous identifier). It allows actors in mobile advertising networks, including advertisers, mobile app developers, but also advertising intermediation services, to "track" the user's device through their use of apps.

9. The IDFA replaces the *Unique Device Identifier* (UDID) and the *Media Access Control* (MAC) address, two identifiers that developers previously used to identify and track users' smartphones. The UDID and MAC address made it possible to track users without the need to obtain their consent, a highly permissive process with regard to privacy. This tracking was, moreover, relatively intrusive, insofar as these identifiers were "fixed", with no possibility for the user to reset them. As for the IDFA, this was designed so that it can be manually reset by the user at any time. Furthermore, since the iOS10 update on 13 September 2016, Apple has offered the user the ability to opt out of using the IDFA, by going to the iOS device settings (and selecting the "Limit ad tracking" option).

10. In practice, although the IDFA is attributed to a specific device, it can nevertheless identify an individual and their device, as a smartphone does not have as much shared use as a computer. The IDFA therefore facilitates linking collected data regarding an individual between third-party advertising services. This can allow advertisers to benefit from the data collected about a user in the context of an app, by offering them targeted ads in other apps.

11. There are various uses of the IDFA by mobile advertising networks. For example, the IDFA makes it possible to enforce *frequency capping*, which is used to limit the number of times a given ad is shown to the same user over a determined period of time[7].

12. It is also used for attribution purposes. In such cases, it allows advertising intermediation services to determine the exact origin of downloads of an app. The attribution function consists in determining a causal link explaining a given event, which meets various objectives, in particular, that of measuring the efficiency of advertising (measuring the

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[3] CNIL's guidelines of 17 September 2020 "*cookies and other trackers*" - https://www.cnil.fr/sites/default/files/atoms/files/draft_recommendation_cookies_and_other_trackers_en.pdf

[4] See in particular paragraph 40 et seq. of Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector.

[5] IDFA on iOS and Android Advertising Identifier on Android.

[6] As defined by Apple in its "*Apple Developer Program License Agreement*" (classification mark 167), the IDFA is a unique, non-personal, non-permanent identifier provided via advertising APIs that are associated with a given Apple-branded device and are to be used solely for advertising purposes unless expressly authorised in writing by Apple.

[7] Hearing of the company E-Novate on 8 January 2021. *"The IDFA also makes it possible to enforce frequency capping and to combat certain forms of advertising fraud*" (classification mark 2031).

efficiency of targeted advertising impressions for example). Attribution is all the more important in the current modus operandi of online advertising, as it now determines the terms and levels of remuneration of the various actors in the ecosystem. For example, some ads are only charged if a certain event occurs (e.g., a visit to a site or purchase of a product, based on the "cost per click"[8] principle) or the "cost per install" for a downloaded app. In addition, the fee paid by the advertiser can also vary significantly depending on the effciency of the advertising.

13. With regard more specifically to Apple's ecosystem, the IDFA makes it possible to determine whether an app was downloaded by a user purely autonomously (this is referred to as an "organic" download) or whether it was downloaded after the user had seen an ad encouraging him or her to install the app. This attribution is based in particular on a question of fact: has the Internet user "seen" the ad in question (and if so, for how long before downloading, etc.), did he or she click on a link in that ad, etc.? If the download is "attributable" to an ad, i.e., if there is evidence that the download was substantially motivated by that viewing, then this will have consequences for the ad in question: the latter may be considered as efficient advertising that has reached its target, and receive remuneration determined accordingly.

14. The IDFA is also used to combine, in a single advertising profile, the data collected on the uses and interests of a user across all the apps they use, or even to link them with data obtained during their use of a logged-in platform (for example, a social network, an e-commerce site, etc.)[9].

15. Finally, mobile advertising networks rely on the IDFA to encourage consumer "*re-engagement*".[10] To encourage this re-engagement, various actions can be implemented, in particular displaying an ad in an app, which is linked to a purchase which did not go ahead in the context of another app, in order to encourage the user to go ahead and complete their purchase. This type of advertising (originally developed by the company Criteo) is known as "*retargeting*", which consists of displaying an ad to a user after they have viewed a product on an e-commerce site, whereby the ad is directly linked to the product initially viewed, in order to convince the user to make a purchase, or to buy other products.

16. Unlike physical identifiers, the IDFA is revocable. When the user of the IDFA has refused ad tracking (by activating the option "*Limit ad tracking*" in their device settings), the IDFA is replaced by a string of zeros. This makes it unusable by mobile advertising networks, which can no longer "recognise" the user or track them in their browsing or their activities. According to the complainants, 14.5% of iOS users in France have activated this feature[11].

17. App developers can also use the "*Identifier For Vendor*" (hereinafter, "IDFV"), supplied by iOS, which has similar functions to the IDFA, and makes it possible to identify users who use different apps from the same publisher. However, unlike the IFDA, the IDFV does not allow publishers to track users through third-party apps or websites. Apple's web page for

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[8] Paragraphs 25 and 30 of *Autorité de la concurrence* Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector.

[9] Hearing of the company Mobsuccess on 6 January 2021. "*The IDFA allows us to verify in the first instance that the user is actually in our socio-demographic target. In the second instance, it allows us to know if the person has already registered the app or already seen an ad*. ", (classification mark 1987).

[10] The engagement of the customer is assessed in terms of their investment in a brand or product. For a user who has consulted a page linked to a product, a hotel reservation or a plane ticket, re-engagement means that they finally go on to make the purchase.

[11] Complaint - classification mark 26: "*In the UK, nearly 28% of iPhone users disabled tracking in 2020, in Germany this was 22.5% of iOS users, and in France 14.5%.*"

developers states that: "*The ID for Vendors (IDFV), may be used for analytics across apps from the same content provider."*

2. APPLE'S PLAN TO LAUNCH A PROMPT FOR CONSENT, CALLED ATT *APP TRACKING TRANSPARENCY*

18. On 22 June 2020, Apple announced an update to its iOS operating system at its Worldwide Developer Conference. This update includes, among other things, several new features for which the stated objective is to protect the confidentiality of users' personal data. As such, every app page in the App Store now includes a new section outlining the data that the app collects and uses. Among other new features, consumers would be able to share their approximate geographical location[12].

19. As such, as of 14 December 2020, app developers, including Apple, now disclose on their App Store product pages the personal data that each app uses, in a way that is intelligible to users.

20. Version 14 of iOS was also supposed to introduce the obligation for app publishers wishing to access the IDFA of iOS devices to obtain prior authorisation from users, through a pop-up window, known as "the ATT prompt." Apple postponed the rollout, originally scheduled for September 2020 alongside the launch of iOS 14, to March or April 2021[13]. The postponement of this ATT prompt comes in the wake of a major debate among mobile app developers and online advertising companies, who are concerned about the consequences of this feature. At the request of companies from the world of apps and online advertising, there have been a few exchanges with Apple to discuss this development and its practicalities (videoconference of 11 September 2020 and meeting of 13 October 2020[14]).

21. The rules and conditions for implementing the ATT prompt are mainly provided on Apple's website, in its privacy section for developers, "*App-store, user privacy and data use*". Technical information, frequently asked questions and the possibilities of customising the ATT prompt are also available.

22. Apple has designed the ATT prompt to have certain "fixed" elements, which they themselves have imposed, and which cannot be changed by the actors developing and operating the apps, while other elements will be flexible and "up to" the actors, who will be able to adapt the scope and partly determine the content. The figure below shows how the pop-up window looks, as intended by Apple, and specifies the fixed elements and those which, according to Apple's statements, can be adapted according to the preferences of app developers.

23. The ATT prompt will result in a pop-up window appearing on a user's iPhone when using a given app (previously downloaded via the App Store) whenever the app wants to track the user on third-party applications or sites.

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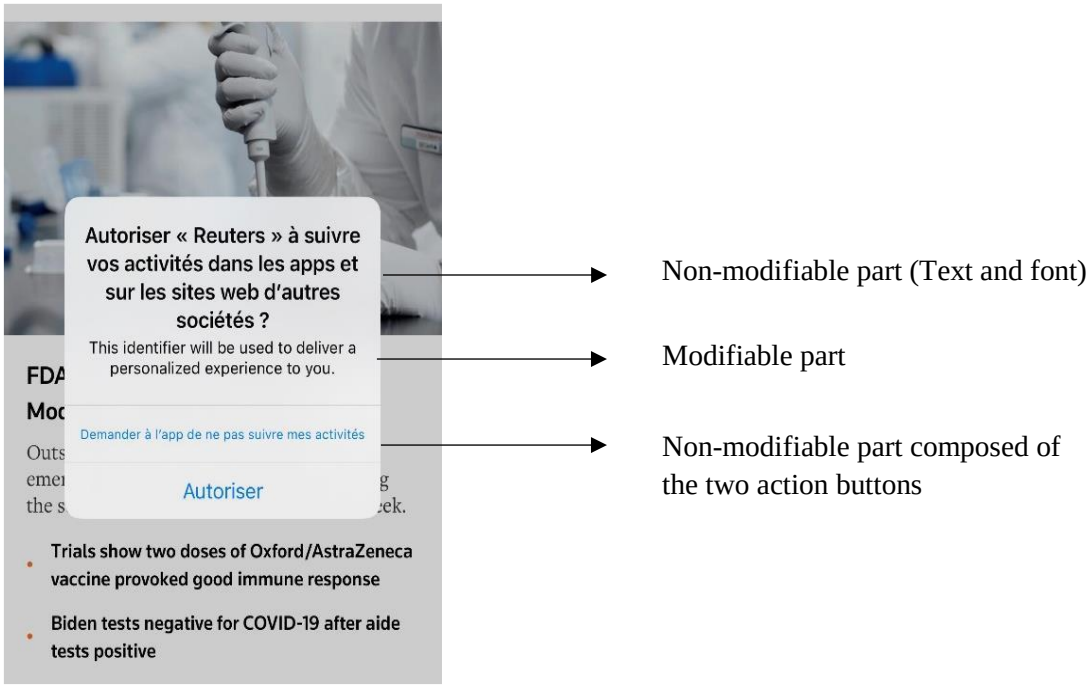
[12] This new feature (https://www.apple.com/ios/ios-14/features/) will be available in the iPhone's privacy settings or when an app asks the user to share their location. In the latter case, in the authorisation request window, an "exact location" button, set to yes, can be deactivated in order to authorise only the sharing of the user's "approximate" location (a circle with a diameter of around 10 km). This setting will provide an additional alternative to the current precise location (or the "no location" option, which prohibits access to certain apps such as location-based navigation).

[13] Apple's summary reply of 26 January 2021, footnote 8 - classification mark 2287.

[14] Paragraph 45 of the observations of Apple of 17 December (classification mark 494).



24. The graphic framework and the interface of the ATT prompt are thus designed and imposed by Apple. Apple's developer website specifies the extent to which developers can modify the prompt: "*The system automatically generates the prompt's title, which includes the name of your app. You supply a message called a purpose string or a usage description […] to indicate the reason that your app needs the access. Accurately and concisely explaining to the user why your app needs access to sensitive data, typically in one complete sentence, lets the user make an informed decision and improves the chances that they'll grant access […]* "[15].

25. The three parts of the prompt, the title, the description of the use and the action buttons can be seen in the figure above[16]. The title, not modifiable and in bold type, states "*[The app] would like permission to track you across apps and websites owned by other companies".* The usage description, composed of a text in non-bold characters, can be customised by developers. Finally, the third part of the ATT prompt, consisting of the two action buttons, allows the user to choose between: "Ask app not to track" or "Allow Tracking".

26. In addition to customising the ATT prompt itself, Apple indicated on 22 January 2021 to the investigation services of the *Autorité* which options were available to developers to adapt the ATT[17].

27. In the first instance, developers are only required to display the ATT prompt when they wish to share their users' data with third parties. Developers therefore have the option of letting consumers familiarise themselves with the app and only asking for consent to be tracked later. It is therefore possible either to program the prompt from the first launch of the app, if

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15 https://developer.apple.com/documentation/uikit/protecting_the_user_s_privacy/requesting_access_to_protected_resources

16 Classification mark 2118, page 4 of Apple's response to questions 1-10 of the questionnaire of the *Autorité de la concurrence* of 29 December 2020.

17 Classification mark 2116 to 2121.

the developer wants to make data sharing possible from the outset, or to allow a period of time to elapse, as decided by the developer, during which the prompt does not appear, on condition, in this case, that the activation of data sharing is also postponed.

28. In the second instance, developers may display an additional pop-up window before, but also after, displaying the ATT prompt, for example to explain to consumers why the data tracking is necessary for the correct functioning of the app or to finance it (classification mark 2316)[18]. These pop-up windows are not generated by Apple's operating system. Their format, as well as their content, are freely designed by developers.

29. On 1 February 2021, Apple made additions to the privacy page on its developer website (developper.apple.com)[19] to clarify that the window that pops up after the ATT prompt can be used by developers not only to give information to the user, but also to convince him or her to reconsider his or her choice, if he or she has refused tracking for example. In the context of the investigation, Apple stated, inter alia, that "*the user can change his or her choice by clicking directly on a link (and not by reading complex or detailed explanations of how to change the original choice). All the developer has to do is insert a link in the information window that takes the user directly to the relevant settings on their device*"[20].

30. If the user makes the choice in the ATT prompt not to allow the app to track them in other app or third-party sites by clicking on the button at the bottom, developers and their suppliers will not be allowed to track the user, either through the IDFA of their device or through any other alternative tracking method based on the user's identification[21]. The methods concerned include, for example, the hash of the e-mail address or telephone number[22], or the technique of digital fingerprinting.[23] Failure to comply with this obligation may result in a decision by Apple to remove the app in question from the App Store.

3. THE DEPLOYMENT OF THE TRANSPARENCY AND CONSENT FRAMEWORK (TCF) BY THE IAB

31. The Transparency and Consent Framework (hereinafter, "*TCF*") is a set of rules developed by IAB Europe in April 2018, supplemented by a second version in August 2019. Its objective is to facilitate compliance, by actors of the online advertising ecosystem, with the

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[18] Paragraph 61 of Apple's summary observations of 26 January 2021 (translated) (classification mark 2316): "*If developers wish, they can:* (...)
- have a window pop up before the ATT prompt, to explain in more detail how the user data such as the IDFA will be used and for what type of tracking;
- make another window pop up after the ATT prompt, if the user refuses the tracking. (...) ".

[19] https://developer.apple.com/app-store/user-privacy-and-data-use/

[20] Classification mark 2936 to 2937.

[21] Information available in the frequently asked questions on the "*User Privacy and Data Use*" webpage at *https://developer.apple.com/app-store/user-privacy-and-data-use/*.

[22] A technique that consists of anonymising certain elements of the e-mail address or telephone number by replacing them with crosses, as on credit card receipts for example.

[23] *Fingerprinting* consists in creating a "*digital fingerprint*" of the user thanks to an algorithm that collects a range of information, the combination of which forms a unique signature which makes it possible in particular to "recognise" a user and to track their activity on an app. Each time a user visits a website or mobile app, they send up to 80 pieces of technical information, such as their time zone, browser version, screen resolution and installed plug-ins, which are analysed to identify and track them across apps.

obligations set by the regulations on advertising processing. This facilitation is based on standardising interactions required to comply with the regulatory framework.

32. In particular, the TCF is intended to help online advertising companies comply with the requirements of the GDPR and to provide them with a harmonised framework in this area[24].

33. In practical terms, the TCF offers a standardised cooperation tool which allows publishers, and in particular application developers and their technology partners, to inform consumers about the data they are collecting, the different actors involved in its processing, and the way it will be used. The user's consent is collected through a Consent Management Platform (CMP), which transmits the consumer's choices to the other players in the online advertising value chain.

34. In its current version, the TCF allows publishers to create different rules and limits regarding the processing of their users' data by third parties. To do this, they can select the purposes for which third parties may or may not process user data, and share this information with the actors in the chain of consent implemented within their CMP.

35. The TCF therefore provides for ten data processing purposes, for each of which the consumer may or may not give consent: "*store and/or access information on a device*", "*select basic ads", "create a profile-based personalised ad* ", "*select personalised ads*", "*create a profile-based personalised content* ", "*select personalised content*", "*measure ad performance*", "*measure content performance*", "*undertake market research to generate traffic*", and "*develop and improve products*".

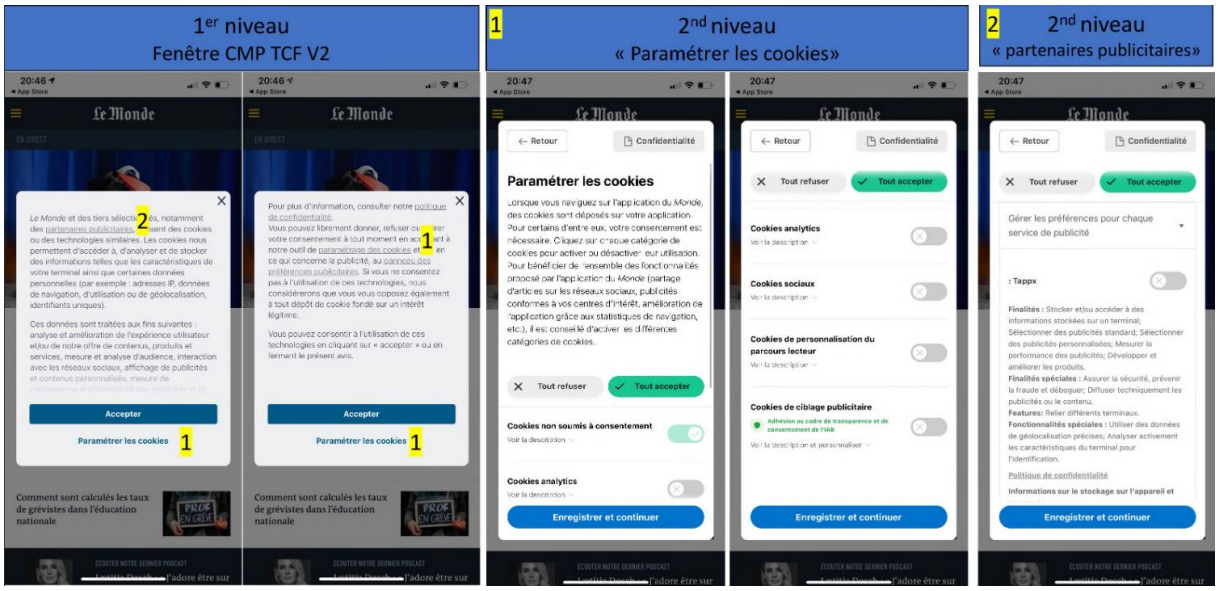
36. The TCF is not mandatory. Nevertheless, online advertising companies registered with the IAB, the entity in charge of monitoring the TCF, are required to comply with it. In France, of the top 100 Internet publishers, 97 applied the most recent version of the TCF as of September 2020[25]. This standard was conceived as a response to the debate on whether certain techniques for collecting and using personal data were compliant with privacy rules. In the context of the investigation, the complainants provided pictures of how consent is collected by a CMP, compatible with the second version of the TCF[26]. This collection may take the following form, for example[27]:

[24] As matters currently stand, however, complying with the TCF does not constitute a certain guarantee of compliance with the regulatory framework, as the CNIL has not yet given its opinion on this point.

[25] https://www.iabfrance.com/actualite/liab-france-presente-le-taux-dadoption-de-la-nouvelle-version-du-tcf-en-france

[26] Classification mark 2758 to 2765

[27] Classification mark 2765.



1st stage: *CMP TCF V2 Window*	*2nd stage:* *"Set cookies"*	*2nd stage:* *"commercial partners"*

4. APPLE'S INTRODUCTION OF A PROGRAMMING INTERFACE, THE SKADNETWORK

37. In 2018, Apple implemented a programming interface, the SKAdNetwork, which aims to make it possible to attribute a mobile app installation to an ad campaign. To this end, the advertising network behind the ad must register with Apple to use the SKAdNetwork. If the end user clicks on the ad, he or she is redirected to the App Store and can download the advertised app; Apple then records the attribution and sends a message to that effect to the advertising network that initiated installing the ad.

38. This solution is made available free of charge by Apple to developers. In particular, developers will be able to use it in cases where the user refuses tracking following an ATT prompt.

39. In their complaint, the complainants highlight the limitations of this technical solution proposed by Apple, which is allegedly ineffective and leads to very poor performance in terms of attribution, compared to what is currently possible with the use of IDFA for market players specialising in attribution. According to the complainants, the attribution under SKAdNetwork therefore differs significantly from the attribution possible using the IDFA, both in terms of its way of functioning and its effectiveness. Firstly, the attribution appears to be at the level of an ad campaign, not at the user level, as is the case with IDFA. As such, for the complainants: "*the advertiser will know that campaign X in app Y resulted in the installation of app Z*" but will not be able to link this information to the user's profile[28].

40. Moreover, it can be seen that the feedback provided by Apple to the advertising network is not made in real time, but according to a specific timing:

- if Apple observes an installation attribution, a 24-hour countdown is started;

[31] Classification mark 47.

- if the user performs a conversion event, i.e. when he or she has performed the action desired by the advertiser (e.g. an in-app purchase after viewing an ad in another app), when he or she uses the app before the 24-hour time limit expires, the countdown is reset if the app requests it;
- the same process can be repeated 64 times or until the 24-hour countdown expires.

41. The investigation showed that the SKAdNetwork was still under development. In its response of 2 February 2021[29], Apple therefore indicates that it continually develops and improves its attribution service. In particular, the SKAdNetwork should, according to Apple, make it possible to attribute app installs on a "*view-by-view*" basis for a large number of different advertising formats (video, audio and interactive ads).

C. THE APPLICABLE LEGAL FRAMEWORK

1. THE REGULATIONS REGARDING ADVERTISING PROCESSING

42. Data processing for advertising purposes is subject to two European regulations, the General Data Protection Regulation (GDPR) (a) and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (b).

a) The General Data Protection Regulation

43. The GDPR is a European regulation of 27 April 2016 that provides a framework for, and harmonises, the rules for processing personal data within the European Union.

44. It is in line with the amended French law no. 78-17 of 6 January 1978 on information technology, files and freedoms, known as the “Informatique et Libertés” law, and strengthens citizens' control over the use that can be made of data concerning them.

45. Having come into force on 25 May 2018, the GDPR applies to all processing of personal data. Article 4 defines personal data as any information relating to an identified or identifiable natural person. According to this article, an “identifiable natural person” is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity.

46. One of the cornerstones of the GDPR is the principle of obtaining consent. This regulation requires controllers to obtain the user's explicit consent before any processing of personal data. This consent must be freely given, specific, informed and unambiguous. Moreover, the GDPR provides that the user must be able to withdraw this consent, at any time, with the same simplicity with which it was granted.

47. The processing of personal data covers all operations relating to personal data, regardless of the process used (such as collection, recording, structuring, storage, adaptation, alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, combination).

[29] Classification mark 2937 and 2938.

48. The GDPR is applicable to all controllers, whether private or public (companies, administrations, associations or other bodies), and to their processors (hosting companies, software integrators, communication agencies, etc.) established in the EU, regardless of where the data are processed. It also extends to controllers and their processors established outside the EU, when they perform processing operations aimed at providing goods or services to EU residents or targeting them.

b) The e-Privacy Directive

49. The e-Privacy Directive, as amended in 2009, provides a framework and harmonisation of the provisions of Member States on the processing of personal data in the electronic communications sector, as well as the free movement of such data and of electronic communications equipment and services within the European Union.

50. Article 82 of the Law on "Informatique et Libertés" of 1978, which transposes Directive 2002/58/EC, applies in addition to the general rules of the GDPR, when an operator accesses information which is already stored in the user's terminal equipment by means of electronic transmission (e.g. an advertising identifier) or records information on it.

51. Article 5(3) of the e-Privacy Directive therefore establishes the principle of prior consent of the user before storing information on their terminal or accessing information already stored on it, unless these actions are strictly necessary for the provision of an online communication service expressly requested by the user or are exclusively for the purpose of enabling or facilitating a communication by electronic means.

52. The CNIL, in its opinion of 17 December 2020 (see below paragraphs 54 to 64), recalls that, for the assessment of consent[30] provided for by these provisions of the Directive, the definition and conditions set out in Articles 4(11) and 7 of the GDPR are applicable.

53. Failure to comply with the GDPR and e-Privacy Directive renders offending companies liable to significant penalties (up to €20 million or, in the case of a company, up to 4% of annual worldwide turnover[31]).

2. THE OPINION OF THE CNIL OF 17 DECEMBER 2020 ON THE DATA PROTECTION ISSUES RAISED BY THE COMPLAINT

54. In the context of the present complaint, on 9 November 2020, the *Autorité* solicited the observations of the CNIL on the questions likely to be raised by the practices reported in the complaint in terms of personal data protection.

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[30] See in particular paragraph 47 of the present decision.

[31] See for example the deliberation of 21 January 2019 in which the CNIL sanctioned the company GOOGLE LLC with a fine of €50 million, upheld by a ruling of the French Administrative Supreme Court (*Conseil d'État*) dated 12 June 2020, No. 430810; see also the deliberation of 7 December 2020 in which the CNIL sanctioned the company GOOGLE LLC with a fine of €60 million and GOOGLE IRELAND LIMITED with a fine of €40 million, in particular for having installed advertising cookies on the computers of users of the search engine google.fr without prior consent or by satisfactorily informing them; the French Administrative Supreme Court (*Conseil d'État*) dismissed, in decision no. 449212 of 4 March 2021, the summary proceedings in which the companies GOOGLE LLC and GOOGLE IRELAND LIMITED requested the suspension of this deliberation of 7 December 2020.

55. In its opinion of 17 December 2020, the CNIL held that the ATT prompt designed by Apple, in some respects "*differs from the interfaces currently seen on a significant number of websites and mobile apps which do not comply with the regulations*."

56. According to the CNIL, the ATT prompt will allow the consumer to accept or refuse the tracking with the same level of simplicity, by including "*Allow tracking*" and "*Ask app not to track*" buttons, both located at the same level and in the same format. The CNIL believes that these procedures are a simple and clear way to allow the user to express their refusal as easily as their consent[32].

57. With regard to the terms used, the CNIL noted in particular that the wording used by Apple in the ATT prompt is neutral and does not make it possible to prove that one option would be preferred over another. In the currently available French version, the option "*Autoriser le suivi*" (Allow tracking) is more visible than the option "*Demander à l'app de ne pas suivre mes activités*" (Ask app not to track).

58. The CNIL endorses the fact that the ATT prompt mentions the tracking, and believes that this is essential information to make the user aware of the potential scale of the collection of data which will feed into their profile for advertising purposes, while noting that the user must therefore be informed about the scope of their choice. In this respect, the CNIL adds that the fact that the ATT prompt makes it possible to obtain consent on each of the apps concerned by the tracking also helps ensure that the user is fully aware of the scope of their consent[33].

59. Moreover, the CNIL considered that the ATT prompt would allow "*app publishers, subject to integrating the legally required elements of information, which the CNIL recalled in article 2 of its draft recommendation "Cookies and other trackers", to collect informed consent as required by the applicable regulation*".

60. Regarding the initiative taken by Apple to implement its own requesting of consent for the collection of IDFA, the CNIL considered that: "*the GDPR and the national provisions transposing the ePrivacy Directive do not in any way prohibit software designers from providing, or even imposing, their design on the prompt to register choices. The regulation strongly encourages them to take into account data protection rights when developing and designing their products, and to ensure that controllers and processors are able to fulfil their obligations in terms of data protection*".[34]

61. In the CNIL's opinion, in the event that Apple is not legally required to obtain user consent for ad tracking by app developers, "*data protection regulation does not prevent Apple from implementing a mechanism to prohibit app publishers from tracking the user without the latter's consent, especially when such consent is required by regulation*".[35]

62. In this respect, the CNIL noted that the changes proposed by Apple can be of genuine benefit to both users and app publishers.

63. In its opinion, the ATT prompt "*would give users more control over their personal data by allowing them to make their choices in a simple and informed manner (subject to the caveats*

[32] Paragraph 24 of the opinion of the CNIL of 17 December 2020, classification mark 1733.

[33] Paragraph 27 of the aforementioned opinion, classification mark 1734.

[34] Paragraph 43 of the aforementioned opinion, classification mark 1737.

[35] Paragraph 48 of the aforementioned opinion, classification mark 1738.

recalled above) and by technically and/or contractually preventing app publishers from tracking the user without their consent".[36]

64. With regards to app publishers, the CNIL held that the ATT prompt would help the smaller players "*to comply with the obligation laid down by the provisions of Article 82 of the law "Informatique et Libertés" by providing them with a simple tool enabling them to collect valid consent for their ad tracking operations*".[37]

D. THE COMPANIES INVOLVED

1. THE INTERACTIVE ADVERTISING BUREAU

65. The IAB France is an association founded in 1998, with a three-pronged remit: to structure the internet communications market, to promote the use thereof and to optimise the effectiveness thereof. The IAB France represents the actors in the online advertising ecosystem and aims to "*support the development of a dynamic advertising economy that generates value for all players*"[38].

66. In this context, the IAB France provides tools "*to help marketers and their consultancies to effectively integrate the Internet into their marketing strategy, and offers standards and examples of professional practices to new players entering the online advertising market*" [39]. The IAB France is a member of the international IAB network, which currently has 140 members.

2. THE MOBILE MARKETING ASSOCIATION

67. The MMA France is an association dedicated to marketing, advertising and customer relationship management on mobile phones. It was created in 2002 and federates the main players active on the mobile media: mobile marketing agencies, media agencies, publishers, marketing specialists, research and measurement institutes, and mobile operators. MMA France has over 140 members.

3. THE UNION DES ENTREPRISES DE CONSEIL ET ACHAT MEDIA

68. The UDECAM is an association that brings together various media and communication players, and its mission is to defend the interests of its members *vis-à-vis* all market actors and public authorities. The UDECAM represents 90% of media investments in France.

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[36] Paragraph 45 of the aforementioned opinion, classification marks 1737 and 1738.

[37] Paragraph 46 of the aforementioned opinion, classification mark 1738.

[38] Classification mark 11.

[39] Classification mark 11.

4. THE SYNDICAT DES RÉGIES INTERNET

69. Created in 2003, the SRI federates market actors engaged in complementary or technological activities of advertising monetisation. These actors help develop and professionalise digital advertising in France, in particular by sharing and promoting best practices and ideas. The SRI also ensures that its members are represented among the various actors in the digital advertising world, the inter-profession (ARPP, Autorité de Régulation de la Publicité Professionnelle), the Union des Marques, UDECAM, IAB, etc.), institutions (CESP, Centre d'étude des supports de publicité, Médiamétrie, etc.) and the authorities.

5. APPLE

70. Apple Inc. is an American company that designs, manufactures and markets mobile communications and media devices, personal computers, portable music players, and sells a range of software, services and peripherals, networking solutions, digital content and third-party apps related to these products.

71. In 2019, Apple generated more than $260 billion in product sales (iPhone, Mac, iPad, wearable connected devices, connected devices for the home, and accessories) and services, which include the App Store, Apple Music, Apple Pay, Apple Care, and more.

E. THE REPORTED PRACTICES

72. The complainants submit that, by imposing unfair trading conditions (1) and the obligation to use ATT prompt (2), Apple is in breach of Article 102 TFEU, which provides that '*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*

> *a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,*
>
> *b) limiting production, markets or technical development to the prejudice of consumers,*
>
> *c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,*
>
> *d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*".

1. ON IMPOSING UNFAIR TRADING CONDITIONS

73. According to the complainants, Apple is engaging in abusive practices on the market for the distribution of apps on iOS, by requiring app developers to use a non-customisable prompt for obtaining consent from internet users, with the sole aim of dissuading users from giving them access to their IDFA, which would constitute unfair trading conditions.

74. In this regard, they argue that the requirement to use the ATT prompt is not a necessary and proportionate measure to the objective of protecting the privacy of iOS device users that Apple claims to pursue.

75. Hence, in their opinion, Apple's implementation of its own system for obtaining consent would be both redundant and illegitimate.

76. On the one hand, app developers whose user base is in the European Union are already subject to the GDPR, "*which lays down a robust data protection framework. Consequently, in order to process user data, they must have the "freely-given, specific, informed and unambiguous consent of that user or have legitimate interests in such processing.*[40]". As such, deploying the ATT prompt would not be justified, given that the GDPR and the e-Privacy Directive already guarantee the protection of users' privacy, by putting the onus on app developers to obtain their users' consent.

77. On the other hand, according to the complainants, companies specialising in the supply of CMP software are able to develop solutions that are just as effective as, or even more effective than, the one designed by Apple in order to protect the privacy of users and respect their choice. Therefore, in order to meet the requirements of the regulations on personal data, the actors in the industry have developed the TCF, under the conditions stated above, which companies can use to ensure they comply.

78. Moreover, the ATT prompt may not be in compliance with the requirements imposed by the GDPR, as it "*does not provide the information required by Articles 13 and 14 of the GDPR for consent to be valid*."[41] As a result, developers would not be able to rely on the ATT prompt to comply with their legal obligations, should they wish to, and would necessarily have to continue to rely on their own solutions for obtaining consent. Furthermore, the ATT prompt would not allow "*users to revoke their consent for the tracking as easily as they granted it, where applicable (as required by the GDPR)*."[42]

79. Finally, the complainants add that the protection of privacy cannot be put forward by Apple as justification for the introduction of the ATT prompt, insofar as Apple does not display this information prompt, or any other form of explicit obtaining of consent (opt-in system) for the Apple Search Ads service. With regard to its own advertising services, Apple requires users to go to their iPhone settings and uncheck certain pre-checked boxes if they do not wish to be subjected to these targeted ads, which would, according to the complainants, be in breach of the GDPR.

80. For all these reasons, the complainants believe that the obligation imposed on developers to use the ATT prompt is not a necessary measure to protect the privacy of users.

81. Furthermore, the complainants add that the ATT prompt cannot be regarded as a measure that is proportionate to the objective pursued by Apple.

82. In this regard, they highlight the fact that the ATT prompt introduces inefficiencies to the detriment of app developers, by adding an additional layer of consent gathering, which is of limited marginal value[43], for the reasons discussed above.

83. Moreover, the complainants argue that the lack of customisation of the wording of the ATT prompt (e.g., with respect to the wording of the purpose of the prompt) prevents app

[40] Classification mark 69.

[41] Classification mark 70.

[42] *Ibid.*

[43] Classification mark 71.

developers from providing users with the necessary information to fully understand the purpose of such data collection.

84. Finally, they argue that the deployment of the ATT prompt will have significant, negative consequences on the user experience: the user will be faced with a variety of consent requests, and risks both being "lost" and having a negative experience on the app.

85. The complainants highlight the fact that, although the case law does not require proof of an anticompetitive effect as regards unfair trading conditions, the practice implemented by Apple on the market for the distribution of apps on iOS is likely to produce foreclosure effects on two adjacent markets on which Apple competes with the app publishers. These are, firstly, the market for app install ads on iOS devices, and secondly, the market for app installation attribution services on iOS devices.

86. According to the complainants, the introduction of the ATT prompt will limit app developers' ability to carry out customised advertising and measure the efficiency of advertising campaigns for app install ads. This is likely, firstly, to favour Apple's advertising activity based on "Apple Search Ads", a specialist tool for installing apps on iOS, to the detriment of app developers, and secondly, to exclude third-party attribution service providers in favour of its own attribution solution, the "SKAdNetwork".

87. Finally, the complainants argue that the fall in advertising revenue which, in their view, will necessarily result from the introduction of the ATT prompt, is likely to favour business models based on user payments, which may be considered as an anticompetitive strategy on the part of Apple. Indeed, some app developers, who are currently financed exclusively by advertising, which is the dominant model[44], could be prompted to switch to a model financed by user payments. In fact, Apple would have a financial incentive in encouraging such a development, as it receives a 30%[45] commission on app purchases in the App Store, whether on upfront payments or on paid subscription models (e.g. Deezer premium), and also on in-app purchases (e.g. to buy games or game accessories on a game app, such as Candy Crush).

88. The complainants believe that implementing the ATT prompt will have a highly susbtantial impact on their business, since the take-up rate of users is likely to be low, and could be as low as 10 to 20%. Some industry players expect their iOS revenues to drop by as much as 50% as a result. The complainants highlight the risk of a degradation of the available apps, their financing model through targeted advertising being called into question. App developers, who earn on average twice as much revenue from personalised advertising as from contextual advertising[46], are also likely to see their revenues affected by the disabling of third-party cookies.

2. APPLE ALLEGEDLY IMPOSED A SUPPLEMENTARY OBLIGATION IN BREACH OF ARTICLE 102

89. The complainants argue that the application of Article 102 TFEU does not, in principle, require that it be demonstrated that Apple's conduct falls within a specific legal category

[44] Classification mark 105. See also https://www.statista.com/statistics/1020996/distribution-of-free-and-paid-ios-apps/

[45] Apple stipulates in its remarks that the commission is 15% for the first year and then 30%, and that with the "small business" programme, the commission is 15% for any developer generating less than $1 million on the App Store.

[46] Classification mark 105.

listed in that article. However, if an opposite approach were to be adopted by the *Autorité*, the obligation imposed on app developers to use the ATT prompt could be analysed, according to the complainants, as having imposed a supplementary obligation, in breach of the provisions of Article 102(d) TFEU.

90. In their opinion, imposing such an obligation is unrelated to the distribution of apps on iOS devices and the agreements between Apple and app developers.

91. Indeed, according to the complainants, app developers who wish to distribute their apps on iOS devices must sign the Apple Developer Program License Agreement and comply with the App Store Review Guidelines, as violations of these clauses may result in the app being banned from the App Store and the termination of the developer's account.

92. However, they argue that the requirement for app developers to use the ATT prompt "*does not appear explicitly in the Apple Developer Program License Agreement or in the App Store Review Guidelines*".[47]

93. The complainants further argue that this obligation "*is clearly unrelated to the distribution of apps on iOS devices, either in nature or in commercial use [...] which is likely to produce foreclosure effects on (a) the market for app install ads on iOS devices (since Apple will be the only channel through which marketers will be able to roll out personalised app install campaigns on iOS and measure their performance) and (b) the market for app install attribution services on iOS devices (since Apple will be the only actor providing attribution services through its SKAdNetwork, Mobile Measurement Partners[48] being relegated to the role of data aggregators)*".[49]

94. Finally, the complainants highlight the fact that this conduct is not justified insofar as the GDPR and the e-Privacy Directive guarantee the protection of users' privacy.

F. THE REQUEST FOR INTERIM MEASURES

95. In addition to their complaint on the merits of the case, the complainants have filed a request for interim measures, demanding that Apple be ordered to:

- desist from requiring the use of the ATT prompt to obtain user permission for the tracking, until a decision on the merits of the case is reached, or until an acceptable solution is found, following negotiations between Apple and industry stakeholders, in accordance with the second requested interim measure;

- engage in a constructive dialogue with industry stakeholders to find an acceptable solution for obtaining permission/consent for user tracking that complies with the requirements of European privacy legislation (in particular the GDPR and the ePrivacy Directive), and that is less intrusive to users and less harmful to competition in the relevant markets.

[47] Classification mark 82.

[48] MMPs are attribution service providers that help advertisers measure the effectiveness of their ad campaigns.

[49] Classification marks 82 and 83.

II. Assessment

96. After examining the applicability of European Union law **(A)**, defining the relevant markets concerned by the complaint **(B)**, and examining the position that Apple is likely to hold on the relevant markets **(C)**, it will be necessary to rule on the reported practices in the context of the complaint on the merits of the case **(D)**, and then on the request for interim measures **(E)**.

A. THE APPLICABILITY OF EU LAW

97. Article 102 TFEU states that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. On the basis of settled case law, and in light of the European Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 TFEU), the *Autorité de la concurrence* considers that three elements must be present in order for practices to appreciably affect trade between Member States: the existence of trade, or at least potential trade, between Member States in the services in question (i), the existence of practices that are capable of affecting such trade (ii), and the appreciable nature of that possible effect (iii).

98. In the present case, given the worldwide dimension of the reported practices, it should be noted that if they were proven, these practices would in any event cover all French territory. Furthermore, the practices reported by the complainants are likely to make it more difficult to enter the market for the distribution of apps on iOS. Therefore, they are liable to affect trade between Member States.

99. Moreover, since they involve a global player whose turnover far exceeds the *de minimis* threshold of the Notice, they are liable to affect trade between Member States to an appreciable extent and therefore examined under Article 102 TFEU.

B. THE RELEVANT MARKETS

100. The relevant markets must first be defined prior to an analysis of the conduct in question in the light of Article L. 420-2 of the French Commercial Code (*code de commerce*) and Article 102 of the TFEU. Indeed, in matters of abuse of dominance, "*the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined*".[50].

101. The following arguments will focus first on defining the market for the distribution of apps on iOS, on which Apple allegedly engages in abusive practices (a), and secondly on defining

[50] Judgment of the EU General Court (Fourth Chamber) of 6 July 2000, Case T-62/98, Volkswagen AG / Com., paragraph 230.

the markets for app install ads on iOS (b) and for mobile app install attribution services (c) on which these practices allegedly produce their effects.

a) The market for the distribution of mobile apps on iOS

102. In its Notice on the definition of the relevant market *for the purposes of Community competition law of 9 December 1997*,[51] the Commission stresses that *"a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*" (point 7). The assessment of substitutability is usually made on the demand side, "*the most immediate and effective disciplinary force on the suppliers of a given product'*" (point 13), but it may also take into account supply-side substitutability.

103. In the same document, the Commission also defines the market from a geographical perspective, stating that "*The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area[s]*".

104. Following the same approach, the *Autorité* recalled that *"the market is defined as the place where supply and demand for specific products or services meet, considered by buyers or users to be substitutable for each other but not for other goods and services offered"*[52].

105. In the context of the present case, the complainants argue that there is a market for the distribution of apps on iOS.

106. Several elements prompt us to believe, at this stage of the investigation, that a relevant market for the distribution of apps on iOS could be defined. In this respect, it can be noted that, unlike its competitors, Apple is a vertically integrated company[53]. Indeed, on the one hand, Apple manufactures smartphones and the operating system that powers them; on the other hand, it distributes apps for its mobile devices through its own online App Store, which is pre-installed on its smartphones, tablets and touch-screen digital media players.

107. In its Google Android decision of 18 July 2018,[54] the Commission noted the specific features which characterise the development of apps under the Android operating system. In particular, it noted that Google, as the provider of Android, a licensed operating system open to third-party device manufacturers, does not belong to the same market as vertically integrated developers such as Apple[55]. In effect, third-party device manufacturers cannot obtain the iOS license from Apple to use the operating system on their own smartphones. Furthermore, it added that Apple's competition did not exert sufficient pressure on Google from an end-user perspective.

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[51] Published in the OJEC of 9 December 1997, C 372, p. 5.

[52] See in particular (French only) Decision 11-D-09 of 8 June 2011 regarding practices implemented by EDF and RTE in the electricity sector, paragraph 143; Decision 13-D-11 of 14 May 2013 regarding practices implemented in the pharmaceutical sector, paragraph 285.

[53] Paragraph 508 of the decision of the European Commission on Google Android of 18 July 2018.

[54] Decision of the European Commission on Google Android of 18 July 2018, no. 40099.

[55] Paragraph 238 of the decision of the European Commission on Google Android: "*The Commission concludes that non-licensable smart mobile OS such as iOS and BlackBerry do not belong to the same product market as licensable smart mobile OSs*".

108. Therefore, the Commission held that the dominant position of Google's Play Store on the Android online app store was not impeded by Apple's App Store, which is only available on iOS devices.

109. With regard to the definition adopted by the Commission in that decision, it cannot therefore be ruled out that Apple's App Store may constitute a product market separate from that of app stores operating under the Android operating system.

110. Moreover, it can be noted from a demand perspective that the Apple App Store is the only distribution channel for mobile apps on iOS devices for developers, as Apple does not allow the download of apps outside its App Store.

111. This market is characterised by a lack of substitutability from the perspective of the user, as users are unlikely to switch ecosystems if the price of paid apps on iOS rises or the quality of apps falls. This is due to the strong attachment of Apple users to the brand's products, which is reflected, among other things, in the very high rate of renewal of the iOS ecosystem, even though Apple products are on average significantly more expensive than those of the rest of the market. For example, in 2017, more than 90% of owners of an Apple-branded device chose an Apple-branded device again when they renewed their smartphone[56].

112. From the perspective of app developers, Apple's App Store is the only store that allows them to reach iOS users. It should also be noted that iOS users are a particularly strategic and attractive "target" for developers, as they generate more revenue than users on Android[57]. This is primarily due to the fact that owners of iPhones and other Apple mobile devices generally belong to the highest income bracket[58].

113. In its written remarks, Apple noted that the competitive pressure in the primary market for the sale of mobile handsets was sufficient to deprive it of a dominant position in the secondary market for the distribution of apps.

114. In this respect, it should be noted, pursuant to the criteria identified in the *Pelikan/Kyocera*[59] decision of the Commission, that in the absence of a dominant position on the primary market, a dominant position on the secondary market can be ruled out if four cumulative conditions are met: (i) consumers can make an informed choice including the prices they will face in the future; (ii) consumers are likely to make such a choice accordingly; (iii) a sufficient number of consumers would adapt their purchasing behaviour at the level of the primary market in the event of a price increase or quality deterioration on the secondary market; (iv) this adaptation will take place within a reasonable timeframe.

115. In the current case, and as the investigation stands, the *Autorité* holds that the conditions listed above for ruling out a dominant position on the secondary market are not met: a consumer's choice of a mobile device is primarily influenced by its price, and expenditure on the purchase of apps is not a determining factor. Moreover, beyond the primary market of the iPhone, Apple users also belong to a complete ecosystem, based on hardware devices (iPad, Apple Watch, iMac) as well as software (iTunes, Apple TV+, AirPlay for example), for which full compatibility as well as the user experience is only guaranteed within the Apple product range. As such, it is unlikely that iOS users will switch to an alternative offering on the primary market, in the event of price rises or a degradation of the quality of

[56] https://www.phonandroid.com/apple-92-pourcent-comptent-acheter-iphone.html

[57] Analysis by Sensor Tower estimated that in 2020, global spending on the App Store was $72.3 billion and $38.6 billion on the Play Store.

[58] https://www.begeek.fr/avoir-un-iphone-un-signe-exterieur-de-richesse-selon-un-organisme-282160

[59] Commission decision of 22 September 1995, *Pelikan/Kyocera*, °IV/34.330.

apps in the App Store, since such a change would imply, for some iOS users, the loss of their investment in Apple's ecosystem[60]. High costs in the event of a change of environment is therefore a strong barrier to switching.

116. In light of all the above elements, it cannot be ruled out at this stage of the investigation that the market for the distribution of mobile apps on iOS constitutes a relevant market.

117. With regard to the geographic scope of the relevant market, Apple sells mobile devices running the iOS operating system on a worldwide basis, without adapting the hardware or software to the geographic areas in which they are distributed. The App Store, which is an integral part of the iOS operating system, is therefore the only distribution channel for apps on iOS available around the world. At this stage of the investigation, such a market could therefore be considered to be global in scope.

b) The market for mobile app install ads on iOS

118. The complainants argue that there is a specific market for mobile app ads on iOS, where these appear in the iOS apps themselves and are directly aimed at promoting installation by the user on their device. Such a market would exclude ads with the same objective but appearing outside an app, for example on a newspaper publisher's website.

119. This market has never been defined, either by the decision-making practice of the competition authorities or by case law. App install ads are ads in the online advertising industry that are visible within apps (so-called "in-app" ads), which, when clicked, invite the user to download an app (usually redirecting the user to an app store).

120. According to the complainants, app install ads on iOS devices are not substitutable for ads that appear on an inventory of websites, including in the context of browsing the internet from an iPhone, because "(...) *on mobile devices, studies show that the average user spends 90% of their time on apps (instead of the mobile web). In-app ads are therefore essential for marketers to reach consumers and generate downloads*." (classification mark 59)[61].

121. Within mobile advertising, app install ads have several unique characteristics. Like contextual ads[62], they make it possible to target an audience through specific media, depending on the context in which the user is exposed to the message. Nevertheless, they offer the advantage of being able to generate a direct action of the user on the ad, namely the downloading of the app which is the subject of the ad.

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[60] Decision of the *Autorité de la concurrence* 20-D-04 of 16 March 2020 regarding practices implemented in the Apple products distribution sector: "*Secondly, although they are very diversified, Apple products are highly interoperable in the sense that their respective hardware and software functionalities are designed to work best when they are used together. They also have common functionalities and physical characteristics, partly linked to their specific design. Finally, limiting the interoperability of Apple products with competing equipment can increase transfer costs for Apple customers wanting to switch from one supplier to another.*"

[61] The study referred to in paragraph 109 of the complaint (classification mark 59) is the following: Yoram Wurmser, "US Time Spent with Mobile 2019," *eMarketer*, 30 May 2019, https://www.emarketer.com/content/us-time-spent-with-mobile-2019.

[62] Opinion of the *Autorité de la concurrence* 18-A-03 of 6 March 2018 on data processing in the online advertising sector - footnote page 28: "(...) *Contextual advertising is a form of targeting based on the content of the page where the ad is displayed. Sociodemographic targeting is a strategy that displays ads by using available demographic data (age, gender, income, nationality). Time-based targeting lets advertisers display their ads only on certain days or at specific times. Geotargeting is used to deliver ads to users based on their location.*"

122. The ads that correspond to the market described above are purchased by publishers who want to increase downloads of their apps and thus attract new users. Ad install apps can appear on the App Store itself, as well as on third-party apps that are available on iPhone.

123. From a publishers' point of view, install ads on iOS apps do not appear to be substitutable with those that appear on Android apps, since each system has its own app store, and caters to a different type of consumer. An iOS user would also be more likely to spend more on apps and on in-app purchases.

124. From the demand side, the possibility of direct consumer interaction with the ad is an important feature, as it allows the advertiser to benefit from the consumer's impulsiveness in terms of downloading an app. This advantage is difficult to reproduce on another medium. For some of the advertisers who value these specific technical features or the different user experience, there would therefore be little in the way of substitutability of demand. This characteristic would be reinforced by the fact that users of mobile devices prefer browsing on apps to browsing on the mobile Internet.

125. At this stage of the investigation, the definition of a possible market for mobile app install ads limited to iOS can be left open. Such a market could, where appropriate, be considered national in scope[63].

c) The market for attribution services for mobile app installations on iOS

126. Attribution helps advertisers measure the efficiency of their campaigns by connecting conversion events, such as app installs or other events (such as app purchases), to the media campaign that led to that conversion event. Attribution services for mobile app installations on iOS aim to identify whether a user who has been exposed to an ad encouraging them to download an app has actually downloaded the app and, if so, which campaign can be attributed as being responsible for that "conversion". In digital advertising, "conversion" can be defined as the fact that a visitor exposed to an ad or the addressee of a campaign performs the desired action, such as a purchase. Conversion can also take the form of an action performed outside the Internet, such as a phone call or a visit to a store. Which action is considered a conversion depends on the context of the campaign, the nature of the activity and the objectives assigned to a target or campaign[64].

127. On the supply side, there are various providers offering attribution solutions that work on both operating systems. Indeed, the actors offering this type of advertising technology are not specific to any operating system: almost all of them provide their services on both iOS and Android[65]. Standard market practice is that app developers use the same ad technology partners on both OSs. Furthermore, the European Commission, in its Google Android decision, indicated that a significant proportion of app developers on Android also develop their products on iOS. In particular, it notes that 92 of the 100 most popular third-party apps available on Google Play Store are also available on the App Store[66].

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[63] Decision 10-MC-01 of 30 June 2010 on the request for interim measures submitted by Navx.

[64] https://seodigitalgroup.com/what-is-a-conversion/

[65] Classification mark 1771. Response of 22 December 2020 from the complainants to the *Autorité de la concurrence* (translated): "(...) *there is no actor (DSP, MMP) whose turnover depends exclusively or at least predominantly on iOS, since the actors offer their services on both iOS and Android*".

[66] Paragraph 555 of the decision of the European Commission on Google Android of 18 July 2018, quoting an article by Marco Iansiti, Harvard University, Assessing the relevant markets for licensable mobile operating

128. The companies interviewed during the investigation stated that this market was at least Europe-wide in scale.

129. At this stage of the investigation, attribution services for app installation on iOS and Android would be likely to constitute a market, at least Europe-wide in scale.

C. APPLE'S MONOPOLY POSITION IN THE RELEVANT MARKET

130. Apple's practices took place in the distribution market for apps on iOS. Given that Apple's App Store is the only distribution channel for mobile apps on iOS devices, Apple appears likely, at this stage of the investigation, to have a monopoly on this market. It is not necessary at this stage of the investigation to consider Apple's position in the markets where the possible effects of the practices may occur.

D. ON THE POTENTIALLY ANTICOMPETITIVE NATURE OF THE REPORTED PRACTICES

131. According to the case law of the French Supreme Court (*Cour de Cassation*), "*interim measures may be decided when the reported practices might be considered , on the basis of the evidence presented during the proceedings, to constitute a practice in breach of Articles L. 420-1 or L. 420-2 of the French Commercial Code (code de commerce), directly and clearly causing serious and immediate harm to the interests protected by Article L. 464-1 of the French Commercial Code (code de commerce); (...) the characterisation of such a practice is not required at this stage of the proceedings*" (Judgement of the French Supreme Court (*Cour de Cassation*) of 4 October 2016, Orange, No. 15-14158). Prior to an examination of the criteria provided for in Article L. 464-1 of the French Commercial Code (*code de commerce*), it is therefore necessary to verify whether the reported practices in the main proceedings might be considered, on the basis of the evidence presented during the proceedings, to constitute a practice in breach of Articles L. 420-1 or L. 420-2 of the French Commercial Code (*code de commerce*)[67].

132. The complainants submit that Apple's decision to implement the ATT prompt, which is scheduled to be rolled out in March or April 2021, constitutes an abuse of a dominant position, in that it imposes unfair trading conditions within the meaning of Article 102(a) TFEU, insofar as the prompt is neither necessary nor proportionate to achieve Apple's objective of protecting users' privacy.

133. The complainants believe that Apple's conduct is also likely to infringe Article 102(d) TFEU, which prohibits: "*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*".

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systems and Google Android compatible app stores: "the Apple App Store and the Google Play Store have significant overlap among top apps: 92 of the top 100 third party iOS apps are also available on Google Play Store. *By the same token, 90 of the top 100 third party Google Play Store apps are available on Apple App Store.* This finding suggests that consumers can find the most popular apps on either app store, and that most developers of popular apps multi-home on the Google Play Store and the Apple App Store".

[67] Com, 8 November 2005, Société Neuf Télécom n° 04-16.857.

a) The dominant operator's freedom to set rules for access and retention on the digital platform

134. Any undertaking, including those in a dominant position, enjoy, by virtue of freedom of trade and industry, the possibility of determining the rules and principles governing the operation of the products and services which it makes available to the public. This freedom pertains in particular to the technical rules enabling the product or service to function optimally, and may also correspond to the commercial differentiation policy of the company in question. However, this freedom is limited by compliance with the laws and regulations otherwise applicable and, more specifically with regard to competition law, cannot be implemented if it is contrary to competition rules, in particular if it is anticompetitive by object.

135. In its Communication of 24 February 2009 on the priorities for the application of Article 102 TFEU, the European Commission stated that it "*starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property*". [68]

136. In accordance with this principle, an operator in a dominant position is free to lay down the rules it deems useful for conditioning access to its goods or services, provided that implementation thereof does not have the object or effect of distorting competition. This principle of commercial freedom also applies to so-called "structuring platforms"[69], which have considerable market power in the market in which they are primarily active, but also in neighbouring markets, due to their status as "gatekeepers", provided that the rules governing access or the continued presence of economic operators on these platforms do not have the object or effect of distorting competition.

137. The *Autorité* had opportunities to apply these principles in the case of a consumer protection policy adopted by a dominant operator in the online search advertising sector. It held, with regard to the definition by Google of rules defining the conditions of access to the AdWords service (then Google Ads), that such conduct is not in itself anticompetitive and falls within the legitimate exercise of the dominant operator's commercial freedom[70]. In this regard, the latter remains free to enact rules providing for additional protections for Internet users over and above what is otherwise required by regulation.

138. However, the freedom of the dominant operator to define, for example, consumer protection rules, does not exempt that undertaking from the obligation to implement that policy under objective, transparent and non-discriminatory conditions. Indeed, a dominant operator that runs a digital platform can direct the economic model of the economic operators listed on its platform, limit their commercial freedom, and influence the quality and diversity of the offering to Internet users. The dominant operator is therefore subject, by virtue of the power it exercises on the market, to a special responsibility not to undermine effective and undistorted competition by its conduct. As such, the fact that a dominant operator implements rules of access to a digital platform that are disproportionate or lack objective

[68] Communication from the Commission of 24 February 2009 — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), paragraph 75.

[69] See the contribution of the *Autorité de la concurrence* to the debate on competition policy and digital issues, 19 February 2020.

[70] Decisions 19-D-26 of 19 December 2019 regarding practices implemented in the sector of online search advertising sector, paragraphs 334 to 336 (under appeal before the Court of Appeal (*Cour d'appel*) at the date of the present decision); No. 13-D-07 of 28 February 2013 on a referral from the E-kanopi company, paragraph 46.

justification may affect the functioning of the markets where the economic operators listed on the digital platform are active, and ultimately harm the interests of consumers.

b) Can Apple be said to have imposed unfair trading conditions?

On the applicable principles

139. Article 102 TFEU states that "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*".

140. More specifically, Article 102(2)(a) of the TFEU provides that such abuse may, in particular, consist in "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*".

141. As the *Autorité* noted in its Decision 19-D-26[71], the application of these provisions is not limited to the qualification of unfair or excessive prices, as Article 102 also refers to other unfair trading conditions. Decision-making practice in France and in Europe provides several examples of cases in which conditions other than prices have been considered abusive on account of their unfair nature.

142. In a judgement of 21 March 1974, BRT/SABAM and Fonior[72], the Court of Justice based itself[73] on Article 102(a) of the Treaty, ruling that "*the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article 86 [which became Article 102 TFEU] imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse*".[74]

143. The standard of proof adopted by the case law consists, on the one hand, in examining the conditions under which the transaction was concluded, the terms of Article 102(a) specifying that the abusive practice may consist in "*imposing*" conditions, and on the other hand, in assessing the unfairness of these conditions, by examining more particularly whether the conduct of the dominant undertaking was carried out to a "*reasonable extent*". The case law specifies in this respect *"that while it is true (...) that the existence of a dominant position cannot deprive an undertaking in such a position of the right to safeguard its own commercial interests when these are attacked, and that it must be allowed, to a reasonable extent, to take such action as it considers appropriate to protect its interests, such conduct cannot be permitted when its object is precisely to strengthen that dominant position and to abuse it*[75]. With regard to an assessment of the reasonableness of the practice imposed, the

[71] Decision 19-D-26 of 19 December 2019 regarding practices implemented in the sector of online search advertising sector, paragraph 346.

[72] Judgment of the Court of 21 March 1974, Belgische Radio en Televisie and Société belge des auteurs, compositeurs et éditeurs ("BRT") v SV SABAM, C-127/73

[73] The case concerned a company holding a monopoly for the management of copyright, which issued and implemented rules applied to third-party companies, the members of the management company.

[74] *Ibid*, point 15.

[75] Judgment of the Court of 14 February 1978, United Brands and United Brands Continentaal BV/Commission, 27/76, point 189.

case law examines whether it is both necessary and proportionate to achieve the objective pursued by the dominant undertaking or the realisation of its corporate purpose[76].

On Apple's objective of protecting personal data

144. Apple argues, in response to the complaint, that the introduction of the ATT prompt is part of a long-standing priority given to the protection of privacy, and more specifically aims to provide users of its products (in particular the iPhone) with enhanced protection against the collection and processing of their personal data. Apple also argues that privacy is an inherent part of its brand image and that the development of specific tools and policies, hardware and software is intended to meet the expectations of consumers who purchase its products.

145. The evidence presented during the proceedings confirms, firstly, that the protection of personal data is part of Apple's long-term strategy, since Apple has in the past implemented various measures enabling users to benefit from enhanced protection of their personal data (in particular by encrypting data specific to the iPhone or its user) and to have better control over the use made of it. For example, in 2005, Apple implemented a private browsing mode on its Internet browser (Safari) to allow its users to block cookies by default. In 2017, Apple implemented Intelligent Tracking Prevention ("ITP") on Safari to detect and delete third-party cookies in certain circumstances.

146. Moreover, it appears that this privacy protection policy meets a growing demand from consumers. According to an IFOP survey carried out by the CNIL, 70% of respondents consider it essential that market players obtain their consent before their browsing data can be used via trackers[77]. Various consumer and privacy associations support the introduction of the ATT prompt[78], as Apple has argued.

147. For its part, the *Autorité* considers that the objective aimed out with the introduction of the ATT prompt is in line with the choices made by Apple to protect the privacy of users of iOS products. The implementation of such a strategy does not appear to be anticompetitive in itself, and in principle is a legitimate exercise of Apple's commercial policy.

On the necessity and proportionality of the ATT prompt

148. The Opinion of the CNIL of 17 December 2020 stated that the ATT prompt proposed by Apple will allow the consumer to accept or refuse tracking with the same level of simplicity, by including "*Allow tracking*" and "*Ask app not to track*" buttons, which are located at the same level and with the same format[79].

149. The wording used by Apple in the ATT prompt is neutral and does not make it possible to prove that one option would be preferred over another. In the currently available French version, the option "*Autoriser le suivi*" (Allow tracking) is more visible than the option "*Demander à l'app de ne pas suivre mes activités*" (Ask app not to track). This can be seen, for example, when installing the Reuters News app, which already displays the ATT prompt[80] (see paragraph 23 above).

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[76] Decision 19-D-26 of 19 December 2019 regarding practices implemented in the sector of online search advertising sector, paragraph 352; Judgment of the Court of First Instance (Second Chamber) of 6 October 1994, Tetra Pak, T-83/91, points 138-140; Judgment of the Court, BRT, above-mentioned, points 8-11.

[77] https://www.ifop.com/publication/les-francais-et-la-reglementation-en-matiere-de-cookies/.

[78] Natalie Maréchal, Ranking Digital Rights, 6 October 2020, "*Apple must implement antitracking*". See also classification mark 2800.

[79] Classification mark 1733.

[80] See also Classification mark 2315.

150. The procedure for making a choice in the ATT prompt is a simple, objective and transparent way for users to confirm their refusal or consent to be tracked for advertising purposes, by providing access to their IDFA.

151. The claim by the complainants that the ATT prompt, by referring to the fact that users may be tracked, has "*an alarming tone which is likely to scare the user*" does not appear to be well-founded. The phrase describes the ATT prompt objectively, without discouraging the user from responding positively. It should be noted, subsequently, that the CNIL, in its aforementioned opinion of 17 December 2020, insists, on the contrary, on the need to refer to this notion of tracking in order to properly inform the consumer of the scope of their choice: "*[the CNIL] considers that the mention of tracking within the various app and websites used by the latter and held by other publishers is essential information to make the user aware of the potential scope of the data collection that their profile will supply for advertising purposes and therefore to be informed on the scope of their choice*."[81]

152. Providing users with a specific feature that allows them to make a separate choice on an app-by-app basis will also allow the apps they are most familiar with and trust to have higher take-up rates in response to the ATT prompt. Moreover, it should be taken into account the fact that Apple will be allowing app developers to personalise, in part, the ATT prompt, in order to allow them to explain the reasons why they wish to access the IDFA, and to convince the maximum number of users to accept their tracking for advertising purposes.[82] Publishers will therefore be able to:

    - freely modify the description of the usage, composed of a text in non-bold characters, which is displayed in the ATT prompt;
    - choose at what point the ATT prompt is displayed, in order to maximise the proportion of consumers who will want to be tracked (for example, by displaying it after the consumer has familiarised him or herself with the app's features and is therefore able to appreciate its usefulness);
    - have a window pop up before the ATT prompt, to explain in more detail how the user data such as the IDFA will be used and for what type of tracking, and another pop-up window after the ATT prompt appears, in the event that the user refuses the tracking. Apple specified that, if they wish, the app publisher can display these two pop-up windows cumulatively[83].

153. The ATT prompt implemented by Apple therefore appears to be neither excessive nor disproportionate to the interests of consumers, who wish to have control over the use of their personal data for advertising purposes, and of app developers, at a time when a large number of companies developing and operating apps finance their services through the use of personalised ads.

154. Furthermore, the *Autorité* highlights the fact that the implementation of this prompt was initially scheduled to take place in September 2020, in parallel with the launch of iOS 14, but was postponed by Apple to March or April 2021, in order to allow app developers to adapt to this new method of obtaining consent. At the time of the *Autorité*'s decision, the prompt was not therefore introduced without notice, the app developers had been informed of it several months beforehand.

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[81] Classification mark 1734.

[82] Classification marks 2315 and 2316.

[83] Classification marks 499, 500, 2315 and 2316.

155. Finally, the allegations made by the complainants that the ATT prompt would not allow the consent of Internet users to be obtained in accordance with the requirements of the GDPR do not appear to be of such a nature as to establish a potentially abusive nature of the practice. First of all, it should be noted that the implementation of the ATT prompt is not presented by Apple, neither to the actors of the online advertising ecosystem, nor to consumers, as something that makes it possible to collect the consent required under the GDPR. It is presented as a complementary measure intended to provide additional protection for the user, without in itself replacing the consent that may be obtained by other actors for the collection and processing of their personal data.

156. Secondly, and in any event, competition rules do not prohibit Apple from implementing its own mechanism to obtain consent, in addition to the consent platforms used by developers to meet the requirements of the GDPR, as long as such a decision is guided by the legitimate objective of protecting users' privacy. On this point, Apple indicated that it does not intend the ATT prompt to replace the mechanisms by which developers obtain consent from users and that the ATT prompt was designed to complement the interfaces already used by developers, and to allow users to make a more informed choice.[84]

157. Apple's position that an operator can envisage personal data protection measures in addition to those provided for by regulation does not appear to be inconsistent with the letter or spirit of the GDPR. This was also the analysis of the CNIL, which specified in its opinion of 17 December 2020 that: "*the GDPR and the national provisions transposing the ePrivacy Directive do not in any way prohibit software designers from providing, or even imposing, their design on the pop-up window to register choices. The regulation strongly encourages them to take into account data protection rights when developing and designing their products, and to ensure that controllers and processors are able to fulfil their obligations in terms of data protection*".[85] It concluded that even if Apple was not required to obtain users' consent for ad tracking by app developers on the basis of a legal obligation , "*data protection regulation does not prevent Apple from implementing a mechanism to prohibit app developers from tracking the user without the latter's consent, especially when such consent is required by regulation*".

158. In its opinion of 17 December 2020, the CNIL also took note of the clarifications provided by Apple according to which app publishers will, in fact, be able to complement Apple's information pop-up window, inter alia in order to inform users about the use that will be made of the data collected *via* the trackers and attempt to invite them to consent to this use. In view of these elements, the CNIL notes that, under certain conditions, obtaining consent for the ATT could allow app publishers to collect informed consent, which could in such a case, which has not yet occurred, result in the ATT prompt being substituted for other prompts made by the publisher. It concludes by stating that *"the mechanism proposed by the company Apple would allow app developers, subject to integrating the legally required elements of information, which the CNIL recalled in article 2 of its draft recommendation "Cookies and other trackers", to collect informed consent as required by applicable regulation*".

159. Finally, while the complainants have criticised the rigidity of the ATT prompt, in its current form, in that part of the text of the pop-up window is fixed and cannot be modified by the developer, the *Autorité* notes that Apple's decision to use such standardisation does not

[84] Classification marks 2306.

[85] Classification mark 1737.

appear to be non-objective or disproportionate. The fact that the ATT prompt window is partly "standardised" may, in particular, facilitate the choice of the consumer.

160. Finally, the fact that Apple does not display the ATT prompt in the context of its own Apple Search Ads service does not, in the light of the evidence presented during the proceedings, make it possible to conclude that that measure is not justified in light of the objective of protecting privacy put forward by Apple.

161. In this regard, Apple considers that the ATT prompt does not have to be applied to its own advertising service, to the extent that it does not use individual tracking techniques, as Apple Search Ads only uses a limited amount of proprietary data generated by the use of Apple's services, in order to group users into cohorts of at least 5,000 people.

162. On this point, the *Autorité* found, at the preliminary stage of the examination of the interim measures, that it did not follow from the evidence in the case that Apple would apply, by imposing the ATT prompt on the market participants intending to use the tracking of user activity on third-party sites, a more rigorous treatment than that which it would apply to itself for similar processing.

163. However, the investigation of the complaint on the merits of the case will make it possible to ascertain whether this treatment constitutes an anticompetitive practice or not, in particular in that it would result in a form of discrimination (or "self-preferencing") on the part of Apple, to its advantage.

164. In conclusion, the evidence produced by the complainants does not make it possible to establish that the implementation of the ATT prompt constitutes an unreasonable practice by Apple that is not necessary and proportionate to pursue the objective of protecting the personal data of users of iOS product. Apple's decision to introduce the ATT prompt does not therefore appear, at this stage of the investigation, that it might be constituting an abuse to be regarded as having imposed unfair trading conditions.

c) Has Apple imposed a supplementary obligation on app developers in breach of Article 102 TFEU?

On the applicable principles

165. Article 102(d) TFEU provides that abuse by one or more undertakings of a dominant position may consist in: "*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*".

166. In the Google/Android decision, the Commission specified the four cumulative conditions that must be met in order for conduct that makes the conclusion of a contract concerning a product or service subject to the acceptance of a supplementary obligation to be liable to be caught by the prohibition under Article 102 TFEU: (i) the supplementary obligation is unrelated to the subject of the contract; (ii) the undertaking concerned is dominant in the market on which it offers the product or service; (iii) the supplementary obligation leaves the other party with no choice to obtain the product or service other than by accepting the supplementary obligation; and (iv) the supplementary obligation is capable of restricting competition[86].

[86] Decision of the European Commission, Case AT.40099, Google/Android, paragraph 1011.

167. According to settled case law, the list of abusive practices in Article 102 TFEU is not exhaustive, meaning that the practices mentioned therein are only specific examples of abuse of a dominant position, expressly designated as such by the Treaty[87]. As a result, an undertaking in a dominant position imposing a supplementary obligation may infringe Article 102 TFEU, even though that conduct does not correspond to the example mentioned in Article 102(d) TFEU.

Assessment of the present case

168. The introduction of the ATT prompt, whereby Apple merely provides a standardised framework for consumers to choose how their data will be used, is not intended to require app developers to provide an additional benefit or product within the meaning of Article 102(d) TFEU.

169. Furthermore, since 2012, consumers using Apple's iPhone products can decide whether to allow developers to track them via the "Limit Ad Tracking" setting, which is one of the settings offered by the device. The ATT prompt is therefore a new way of implementing a pre-existing mechanism.

170. Finally, contrary to what the complainants claim, it appears that the ATT prompt is linked to the main service of distributing apps in the App Store. The distribution of apps involves providing a number of ancillary services to consumers, so that they can download apps from the App Store in complete confidence. In this respect, it appears from the evidence in the case that, as stated above, privacy protection meets a growing expectation on the part of consumers, who care increasingly about the use of their personal data and the privacy policy of operators offering digital services.

171. In the light of the foregoing, the complainants have not, as the case stands, provided any evidence to establish that the deployment of the ATT prompt might be considered to constitute a practice imposing supplementary obligations on Apple's partners that would be in breach of the provisions of Article 102 TFEU.

172. Consequently, it does not appear necessary to analyse the foreclosure effects generated by deploying the ATT prompt in the markets for app install ads and app install attribution services, since it has not been established, at this stage of the investigation, that such effects would result from practices by Apple that might be considered as constituting an abuse qualified as anticompetitive.

E. ON THE INTERIM MEASURES

173. In the *Autorité*'s view, the complainants have not provided evidence to suggest that the introduction of the ATT prompt might be considered as constituting an abuse as having imposed unfair trading conditions for additional services on developers of apps for iOS, in breach of Article 102 TFEU.

174. It follows that none of the practices reported by the complainants might be considered, on the basis of the evidence submitted during the proceedings, to constitute an anticompetitive practice.

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[87] Judgment of the Court of 21 February 1973, Europemballage and Continental Can v Commission, 6/72, Rec. p. 215, point 26, and judgment Compagnie maritime belge transports and Others v Commission, point 229 above, point 112.

175. Consequently, the request for interim measures submitted by the complainants should be dismissed, without it being necessary to verify whether the conditions required by Article L. 464-1, paragraphs 1 and 2, of the French Commercial Code (*code de commerce*) are met in this case.

DECISION

Article 1: The investigation into the merits of the complaint registered under number 20/0098 F should be continued.

Article 2: The request for interim measures registered under No 20/0099 M is dismissed.

Deliberated on the oral report of Mr Olivier Héry and Ms Melynda Matoura, Case handlers, and the statement of Ms Pascale Déchamps, Deputy General Rapporteur, by Ms Isabelle de Silva, Chairperson, Ms Valérie Bros and Mr Christophe Strassel, members.

Hearing secretary,	The Chairperson,
Caroline Orsel	Isabelle de Silva