RÉPUBLIQUE FRANÇAISE

Autorité de la concurrence

Only the French version is authentic. In the event of any discrepancy, the French version will prevail over the translation.

Decision 25-D-02 of 31 March 2025 regarding practices implemented in the sector for mobile application advertising on iOS devices*

The *Autorité de la concurrence* (section IB),

Having regard to the letter of 23 October 2020 registered under number 20/0098 F, by which the associations Interactive Advertising Bureau France (IAB France), Mobile Marketing Association France (MMA France), 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 Apple Inc. in the sector for mobile app advertising on iOS devices;

Having regard to the supplementary referrals of 17 August 2021 and 3 November 2021;

Having regard to the letter of 16 February 2022 registered under number 22/0012 F, by which the Groupement des éditeurs de contenu et de services en ligne (GESTE) referred to the *Autorité de la concurrence* practices implemented in the sector for the distribution of online press content apps on the iOS App Store in France;

Having regard to the decision of 23 February 2022, by which the Deputy General Rapporteur joined the investigation of cases 20/0098 F and 22/0012 F;

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 102 thereof;

Having regard to Book IV of the French Commercial Code (*Code de commerce*), and in particular Article L. 420-2 thereof;

Having regard to Decision 21-D-07 of 17 March 2021 on a request for interim measures submitted by the associations Interactive Advertising Bureau France (IAB France), Mobile Marketing Association France (MMA France), Union des entreprises de conseil et achat media (UDECAM) and Syndicat des Régies Internet (SRI) in the sector for mobile app advertising on iOS;

Having regard to deliberations 2020-137 of 17 December 2020 and 2022-060 of 19 May 2022 of the French data protection authority (*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 Apple Inc. before the *Autorité de la concurrence*;

Having regard to the letters of 18 October 2023 and 18 June 2024 by which the companies Apple Inc., Apple Distribution International Limited and Apple Operations International Limited contacted the Hearing Adviser;

* public version

Having regard to the reports of the Hearing Adviser of 20 October 2023 and 26 June 2024;

Having regard to the comments submitted by the associations Interactive Advertising Bureau France (IAB France), Mobile Marketing Association France (MMA France), Union des entreprises de conseil et achat media (UDECAM) and Syndicat des Régies Internet (SRI), the Groupement des éditeurs de contenu et de services en ligne (GESTE), the companies Apple Inc., Apple Distribution International Limited, Apple Operations International Limited and Apple Operations Europe Limited, and the representative of the French Ministry of the Economy (*commissaire du Gouvernement*);

Having regard to the other evidence in the case file;

Having regard to the post-hearing observations (*note en délibéré*) submitted by Apple on 31 October 2024;

The case officers (*rapporteurs*), the representatives of the Chief Economist's Team, the Deputy General Rapporteur, the representatives of the associations Interactive Advertising Bureau France (IAB France), Mobile Marketing Association France (MMA France), Union des entreprises de conseil et achat media (UDECAM) and Syndicat des Régies Internet (SRI), of the Groupement des éditeurs de contenu et de services en ligne (GESTE) and of the companies Apple Distribution International Limited, Apple Operations Europe Limited, Apple Operations International Limited and Apple Inc., and the representative of the French Ministry of the Economy (*commissaire du Gouvernement*) having been heard at the hearing of the *Autorité de la concurrence* on 23 October 2024;

Having regard to the minutes of the deliberations held on 5 and 28 November 2024;

Adopts the following decision:

Summary[1]

Under the terms of the present decision, the *Autorité de la concurrence* (hereinafter the "*Autorité*") is sanctioning Apple for having abused its dominant position on the European market for the distribution of mobile apps on iOS devices, in violation of Articles 102 of the Treaty on the Functioning of the European Union (hereinafter ''TFEU") and L. 420-2 of the French Commercial Code (*Code de commerce*).

This decision follows a complaint by the associations Interactive Advertising Bureau France (IAB France), Mobile Marketing Association France (MMA France), Union des entreprises de conseil et achat media (UDECAM) and Syndicat des Régies Internet (SRI) and then a further complaint by the Groupement des éditeurs de contenu et de services en ligne (GESTE) concerning practices implemented by Apple in connection with the introduction of its App Tracking Transparency (hereinafter "ATT") framework.

Apple is a vertically integrated company, which manufactures smart mobile devices (iPhones and iPads) and the iOS operating system that powers them. Apple also distributes apps for its mobile devices via its own App Store, which is pre-installed on its smartphones. Apple's ecosystem is based on a closed system: on the one hand, third-party device manufacturers cannot obtain an iOS licence from Apple to use its operating system on their own smartphones and, on the other hand, until the obligations of the Digital Markets Act (hereinafter "DMA") came into force, app publishers could not distribute their apps on iOS smart mobile devices on any app store other than Apple's App Store.

Based on the App Store, and in light of the criteria set out in decision-making practice and case law to date, the *Autorité* has concluded that Apple is in a dominant position on both the publisher- and consumer-facing sides of the distribution of mobile apps on iOS devices.

Access to Apple advertising identifiers, by which app publishers that distribute their apps on the App Store can access user data and, thereby, add value to their advertising offerings, is subject to GDPR rules. Publishers therefore have to obtain users' consent.

To meet this objective, Apple introduced a framework requiring publishers to obtain users' consent for the collection of their data on third-party apps ("third-party tracking"), the ATT framework or prompt.

According to Apple, the ATT prompt was designed as an interface using simple, standardised wording to facilitate user information and choice as regards third-party tracking. However, the consent obtained is not valid under the applicable data protection regulations, meaning that app publishers must display at least a second consent window, known by industry standards as a consent management platform (hereinafter "CMP"), to authorise third-party tracking on apps downloaded to an iPhone or iPad.

Although Apple is free to enact consumer protection rules that go beyond those imposed by regulation, it may only do so if this legitimate objective is not at odds with competition law, given its specific responsibility as a dominant operator in the market for the distribution of mobile apps on iOS terminals.

[1] The summary is for information purposes only and provides an overview of the following numbered reasons for the decision. Only the French version of the decision is authentic. In the event of any discrepancy, the French version will prevail over the translation.

A dominant operator that runs a digital platform can direct the economic model of the operators listed on its platform, limit their commercial freedom and influence the quality and diversity of the offering to internet users. As a result, the implementation by a dominant operator like Apple of rules for accessing a digital platform that are disproportionate or lack objective justification may affect the functioning of the markets where the economic operators listed on the digital platform are active and, ultimately, harm consumer interests.

However, the *Autorité* found that the design and implementation of the ATT prompt were neither necessary for nor proportionate with Apple's privacy protection objectives.

On the one hand, the fact that publishers that so wish cannot rely on the ATT prompt to comply with their legal obligations means that they must continue to use their own consent collection solutions. The result is that multiple consent pop-up windows are displayed, making the use of third-party applications in the iOS environment excessively complex

On the other hand, the rules governing the interaction between the different pop-up windows displayed automatically undermine the neutrality of the prompt. While ad tracking only needs to be refused once, users must always confirm their consent a second time. The resulting asymmetry prevents companies from obtaining the informed consent that ATT is supposed to facilitate, which is likely to have negative consequences for both users and app publishers, in particular those that depend on advertising for the profitability of their business.

This seems all the less justified given that marginal changes to the ATT prompt, as recommended by the French data protection authority (*Commission nationale de l'informatique et des libertés* – CNIL), would avoid penalising app publishers and advertising service providers, without undermining the appeal of the prompt in terms of privacy protection.

Invited by the *Autorité* to comment as part of the investigation, the CNIL stated that: "*a marginal improvement in how the ATT prompt is configured, which does not affect the readability of the pop-up window, so that the window can be used to obtain valid consent [...] would retain the user protection offered by the ATT prompt [...] (refusal as simple as consent, mention of tracking), without having the disadvantage of creating a complex and excessive system for the user*". Contrary to what Apple maintained as part of the investigation, bringing the ATT prompt into compliance with competition law would not have led to a downgrade in the efficiency of its privacy protection system.

In addition, the investigation found that the ATT prompt penalises smaller publishers in particular. While these operators depend to a large extent on third-party data collection to finance their business, Apple, like the main vertically integrated platforms, is not dependent on third-party tracking insofar as it has access to large quantities of "*proprietary*" personal data within its ecosystem, the collection of which is not affected by ATT.

In view of this, the *Autorité* considered that the rules for implementing the ATT prompt constituted unfair trading conditions within the meaning of Articles 102 TFEU and L. 420-2 of the French Commercial Code, insofar as they were not objective, not transparent and were applied discriminatingly. It has therefore imposed a fine of €150,000,000 on Apple Distribution International Limited, Apple Operations International Limited and Apple Inc., jointly and severally.

CONTENTS

I. Findings

A. THE PROCEEDINGS

1. By letter registered on 23 October 2020 under number 20/0098 F, the associations Interactive Advertising Bureau France (hereinafter "IAB France"), Mobile Marketing Association France (hereinafter "MMA France"), Union des entreprises de conseil et achat media (hereinafter "UDECAM") and Syndicat des Régies Internet (hereinafter "SRI") referred to the *Autorité de la concurrence* (hereinafter the "*Autorité*") practices implemented by Apple during an update to its iOS and iPadOS 14 operating systems (version iOS 14.5 and iPadOS 14.5).

2. The complainants highlighted the fact that on 22 June 2020, Apple had announced at its Worldwide Developers Conference that the next update of the operating system for Apple's mobile devices would include an obligation, for publishers of apps distributed in the App Store on these devices, to request the consent of users within a framework or prompt called App Tracking Transparency (hereinafter "ATT"). In view of the characteristics of the prompt, they argued that Apple had a monopoly on the market for the distribution of apps on iOS and was abusing its market power by imposing, on app developers active on its operating systems, firstly, unfair trading conditions, infringing the provisions of Article 102(a) of the Treaty on the Functioning of the European Union (hereinafter "TFEU") and, secondly, a supplementary obligation that has no connection with the subject of the contracts, in breach of Article 102(d) TFEU. 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*).

3. In Decision 21-D-07 of 17 March 2021, the *Autorité* rejected the request for interim measures and considered that it was necessary to pursue the investigation into the merits of the case.

4. By letter dated 16 February 2022 registered under number 22/0012 F, the Groupement des éditeurs de contenu et de services en ligne (hereinafter "GESTE") referred to the *Autorité* practices implemented in the sector for the distribution of online press content apps on the iOS App Store in France;

5. By decision dated 23 February 2022, the Deputy Rapporteur General joined this complaint to the complaint registered under number 20/0098 F (classification mark 5,541).

B. THE ENTITIES CONCERNED

1. THE COMPLAINANTS

6. The complainants represent the entire online advertising value chain.

a) Interactive Advertising Bureau France

7. IAB France is an association created in 1998 to represent the players in the online advertising ecosystem. IAB France is a member of the international IAB network, which currently has 140 members.

8. 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*"[2].

b) Mobile Marketing Association France

9. MMA France is an association dedicated to marketing, advertising and customer relationship management on mobile devices. Created in 2002, MMA France brings together the main players active on mobile media: mobile marketing agencies, media agencies, publishers, marketing specialists, research and measurement institutes, and mobile operators.

10. IAB France and MMA France merged in 2022 to form a single association, Alliance Digitale[3].

c) Union des entreprises de conseil et achat média

11. UDECAM is an association that brings together media and communication players. Its mission is to defend the interests of its members in dealings with all market players and public authorities. UDECAM represents 90% of media investments in France.

d) Syndicat des Régies Internet

12. Created in 2003, the SRI brings together the players active in advertising monetisation. These players help to develop and professionalise digital advertising in France, in particular by sharing and promoting best practices and ideas.

13. The SRI also represents its members in dealings with the various players in digital advertising, the inter-profession, institutions and public authorities.

e) Groupement des éditeurs de contenus et services en ligne

14. GESTE is a French association that brings together the main online content and service publishers, including most French press groups.

---

[2] Classification mark 11.

[3] https://www.alliancedigitale.org/presentation/ (in French)

2. THE APPLE GROUP

a) Apple's structure and results

15. The Apple group (Apple Inc. and its subsidiaries, hereinafter together "Apple") designs, manufactures and markets mobile communication and media devices, personal computers, tablets and telephones, and sells a range of software, services and peripherals, ad space, digital content and third-party apps.

16. The parent company, Apple Inc., a company under California law founded in 1977, holds direct or indirect stakes in all the group's subsidiaries[4].

17. Apple's products are marketed and distributed in Europe by Apple Distribution International Limited (hereinafter "ADI"), based in Ireland.

18. On 25 September 2016, ADI merged with iTunes Sarl, a company under Luxembourg law, and took over the business of selling and distributing digital content and apps via the internet and other electronic and communications networks for the EMEIA (Europe, Middle East, India and Asia) markets. As such, ADI is responsible for all Apple's digital stores, including the App Store, Apple Music, Apple Books, News+, Fitness, iCloud, TV+, Arcade and the advertising business through Apple Search Ads (hereinafter "ASA").

19. Apple France is a company under French law, headquartered in Paris. Apple France does not sell or distribute products in France. Its role is to provide sales assistance, marketing and communications support, and digital support services in France to ADI, which handles sales.

20. Between September 2023 and September 2024, the group generated revenue of $391 billion, of which $295 billion from sales of devices and $78 billion from services. The revenue figure in September 2020 was around $220 billion[5].

b) Apple's products and services

21. Apple is a vertically integrated company. As the Commission noted in a decision of 18 July 2018, Apple's strategy is based on vertical integration and the sale of higher-end smart mobile devices[6].

i. Devices

22. Apple designs and manufactures smartphones, desktop computers, laptops, digital tablets and the operating systems that run them. In the first quarter of fiscal year 2022, sales of the iPhone smartphone accounted for around 58% of the company's total revenue[7].

23. In France, the vast majority of Apple's revenue comes from hardware[8], more specifically iPhone smartphones, but also iPad digital tablets, connected Apple Watches and Mac, iMac

---

[4] Classification marks 6,231 to 6,244.

[5] https://investor.apple.com/investor-relations/default.aspx

[6] European Commission, 18 July 2018, Google Android, AT.40099, paragraph 508.

[7] Apple's financial results for the first quarter of its fiscal year 2022: 57.8% (and 58.9% for the prior-year period): https://www.apple.com/newsroom/pdfs/FY22_Q1_Consolidated_Financial_Statements.pdf.

[8] Classification mark 8,271.

and MacBook computers[9].

24. All devices with iOS 14.5 and iPadOS 14.5 (and later versions), i.e. the iPhone and iPad, respectively, display the ATT prompt, but this is not the case for Mac devices, Apple TV and Apple Watch.

ii. Operating systems and App Store

25. Apple's operating systems, on which the devices run, are built into the devices and are only compatible with Apple devices. The operating systems for the iPhone and iPad are iOS and iPadOS (the version available at the date of the statement of objections was iOS 16.5).

26. The iOS operating system also determines what types of software can run on the device, including all apps, such as native apps, developed specifically to run in an iOS environment, or websites running in a browser. Apple controls the operating system on its devices and decides which apps are pre-installed. The content and code of the iOS system are neither published nor directly accessible to app developers.

27. Apple's mobile app store, the App Store, distributes iOS mobile apps that are native to the iOS mobile ecosystem, i.e. apps that could not be used on devices that use the Android operating system. Apple defines the App Store as "*an electronic store and its storefronts branded, owned, and/or controlled by Apple, or an Apple Subsidiary or other affiliate of Apple, through which Licensed Applications may be acquired*"[10]. The App Store is pre-installed on all iPhones and iPads, in all successive versions.

28. The App Store serves as infrastructure for intermediary transactions between app publishers and the users of mobile devices who download and use the apps. Until the entry into force of the obligations of the new regulation (EU) 2022/1925 on digital markets (hereinafter "DMA" or "Digital Markets Act")[11], and therefore on the day the statement of objections was sent, the App Store was the only app store accessible to users of iOS devices and the only way for developers to reach iOS users.

29. With regard to app publishers, their access conditions are set out in guidelines, updated frequently and unilaterally by Apple, and in a license agreement imposed by Apple[12]. Any apps must respect this framework or they will be removed from the App Store[13]. However, it follows from clause 6.8 of the license agreement[14] that Apple may, at its sole discretion, reject an app for any reason whatsoever, even if that app meets the requirements of the guidelines and more generally of the App Store operating rules published by Apple.

30. Publishers wishing to propose paid digital content or subscriptions to such content are

[9] Classification mark 2,153.

[10] Apple Developer Program License Agreement, page 2.

[11] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair contracts in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), *Official Journal of the European Union* L 265 of 12 October 2022; page 1.

[12] https://developer.apple.com/terms/

[13] Classification mark 8,683 ([non-confidential version – NCV] 8,909).

[14] Classification mark 8,684 (NCV 8,910).

obliged to use the in-app purchase system as defined in clause 3.1.1 of the guidelines[15], for which Apple charges a commission of 30% on each app sale or in-app purchase, during the first year of subscription, and 15% after the first year of uninterrupted subscription.

31. The App Store proposes around 2 million apps, some of which are pre-installed on devices[16]. While the vast majority of apps are free, the share of paid apps is twice as high in the App Store (7.3%) as in its Android equivalent, Google Play (3.3%)[17].

iii. Services

32. Services account for around 20% of Apple's revenue. Apple offers a range of services for end consumers, including software applications, and also runs an advertising business.

33. Apple introduced, in 2018, the application programming interface (hereinafter "API")[18], SkadNetwork (hereinafter "SKAN"), a free advertising attribution tool whose functionalities are described in paragraphs 115 *et seq*.

34. Apple also offers a range of search (Search) and non-search (Display) advertising services, in particular with its ASA advertising platform launched in France in October 2016[19].

C. THE ADVERTISING ECOSYSTEM ON MOBILE APPS

1. MONETISING AD SPACE: AN ESSENTIAL SOURCE OF REVENUE FOR APP PUBLISHERS

35. As the *Autorité* recalled in Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector, publishers of websites or mobile apps can monetise their content or services by incorporating ad space in their apps.

36. These ad spaces can be distinguished according to whether they are related to a search performed by an internet user (Search) or not related (Display).

37. The adverts related to a search are displayed on the results pages of general or specialised search engines and are collectively called Search[20][21].

38. According to the SRI, in 2021, Search advertising was the largest source of revenue in

---

[15] App Store Review Guidelines, section 3.1.1 In-App Purchase.

[16] Classification mark 8,684 (NCV 8,910).

[17] Autoriteit Consument en Markt (ACM), Market study into mobile App Stores, ID 886, page 29.

[18] According to a definition by the CNIL, an application programming interface (API) is a software interface that allows one software or service to connect to another software or service in order to exchange data and functionalities (https://www.cnil.fr/fr/definition/interface-de-programmation-dapplication-api [in French]).

[19] Classification mark 2,155.

[20] Decision 21-D-11 of 7 June 2021 on practices implemented in the online advertising sector, paragraphs 9 and 10.

[21] See, for example, Observatoire de l'e-pub, FY 2021 Review, 27th edition, January 2022 (https://www.udecam.fr/evenements/27eme-observatoire-de-le-pub/).

France, with advertisers spending €3.2 billion. Advertising on social networks[22] was in second place, with revenue exceeding €2 billion. In turn, Display advertising (excluding social networks) generated €1.5 billion in revenue.

39. All the ad space available for sale at a given time, for a given period, and for a given advertising medium, represents the publishers' inventory.

40. The advertising inventories of a website correspond to the surface area of the ad spaces of each page of this site, multiplied by the number of times this page is opened by various users (internet users, smartphone users or app users). Each time a page of the site is opened, a new ad display surface is available[23]. The inventories are marketed to advertisers and their media agencies.

2. TARGETING USERS AND TRACKING ADVERTISING PERFORMANCE: CRITICAL FOR ADVERTISERS

41. On the demand side, advertisers are companies or organisations that initiate a communication campaign (advertising, marketing, etc.) aimed at promoting their products and services or their brand. As sponsors of ad campaigns, they buy ad space (television spots, displays on the underground, space on websites, etc.).

42. The ability of publishers to monetise their inventories depends, firstly, on advertisers' ability to optimise the delivery of their adverts to internet users likely to be interested in their products and to increase the conversion rate of their adverts (i.e. to convert internet users' interest in the advert into a purchase) and, secondly, to track the performance of their campaigns.

43. To this end, advertisers can use different categories of advertising services that are chosen according to the objectives pursued, i.e. the actions that an advertiser wants internet users to take when exposed to an advert. Advertisers can use a variety of advertising formats and placements that vary depending on the publisher selling the ad space.

44. Like publishers, advertisers depend in this regard on the various companies involved in selling ad space and use data for advertising purposes to target the desired audience as effectively as possible, monitor the conditions under which advertising services are provided and assess the performance of ad campaigns.

---

[22] Definition provided in Observatoire de l'e-pub, 19th edition (SRI): "*Social networks: All of the websites and mobile sites that allow their users to build a network of acquaintances using tools and interfaces designed for interactions, presentations and communication. For the purposes of this study, YouTube is not considered to be a social network*".

[23] Decision 21-D-11, cited above, paragraph 11 and the glossary in Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector.

3. THE NUMEROUS INTERMEDIARY SERVICE PROVIDERS INVOLVED

45. While publishers can market their ad space to advertisers themselves, the vast majority use intermediaries because their space cannot be marketed through a vertically integrated model because the audience is not large enough[24]. In practice, publishers use several types of services:

- ad servers, which enable publishers to manage their ad inventories by evaluating their availability, and automatically select the most relevant and profitable ads available;
- ad networks, which buy advertising inventories from different publishers and then sell those inventories directly to advertisers or through ad exchanges;
- Supply Side Platforms (SSPs), whose aim is to optimise and automate the sale of ad space, and which enable publishers to stipulate the conditions under which their inventories are made available (minimum prices, formats, excluded advertisers, etc.);
- ad exchanges, which are marketplaces where publishers and advertisers buy and sell ad space.

46. On the demand side, advertisers also compete in auctions that may involve multiple SSPs. Among other things, they seek to optimise the delivery of their adverts to internet users likely to be interested in their products, since measuring the conversion rate of ad campaigns is a veritable economic necessity for them. These different objectives bring together numerous intermediation service providers:

- media agencies, which help advertisers to define and implement their communication strategies: they optimise the relationship between the brand and the targeted audience; develop the media strategy and media planning; buy ad space; and use a range of communication techniques and distribution methods;
- trading desks, which are centralised service platforms that can be part of media agencies or independent and are specialised in programmatic buying;
- ad servers, which host advertisers' adverts and track campaigns using statistics and indicators;
- Demand Side Platforms (DSPs), which optimise, automate and control the purchase of ad space either through auctions organised by SSPs or, in some cases, purchases from ad networks or purchases of inventory from vertically integrated players, such as social networks;
- data analytics services, which advertisers use for ad attribution and verification purposes. Attribution consists of determining a causal link between a given event and exposure to an advert and therefore determines the terms and level of remuneration for the various players in the ecosystem. Verification consists of evaluating the visibility of adverts, the context in which they are displayed and whether there is any fraud[25].

[24] Opinion 18-A-03, cited above, paragraph 21.

[25] Decision 23-MC-11 of 4 May 2023 on a request by Adloox for interim measures.

4. THE CENTRAL ROLE OF DATA IN THE EFFICIENCY OF ADVERTISING SERVICES AND THE PROMOTION OF COMPETITION

a) Different data categories and their functions

47. The various companies involved in selling ad space use a lot of data for advertising purposes to enable advertisers to target the desired audience as effectively as possible, monitor the conditions under which advertising services are provided and assess the performance of ad campaigns[26].

48. This data can be grouped into three main categories: user data, device data and analysis data.

49. User data relates to the behaviour and characteristics, including sociodemographic, of the persons targeted by the adverts. In particular, user data can be used to determine the most relevant advert for a given user. Advertisers create audience segments based on user profiles, and cross-reference this data with other sources. The objectives of segmentation and data cross-referencing are to gain knowledge about the user, optimise targeting and personalise the relationship.

50. Device data provides information about the device, the connections and identifiers specific to the device (in particular, the IP address). In particular, device data helps to improve the user experience by adapting the display of advertising to the browsing environment. Device data also enables the same user to be recognised across their different devices (for example, when they into a single e-mail account on their various devices), in order to deliver relevant advertising based on their activity.

51. Analysis data relates to impressions (delivery context, volume, characteristics and quality/visibility/fraud), auctions (placement of a bid, price of the winning bid, number of bids won on placed bids), as well as clicks, views and conversions. Impression tracking collects highly detailed data that can be used to determine which touchpoints have or have not contributed to a conversion (e.g. the purchase of a product) and to propose attribution models that explain conversions based on past events. Programmatic platforms can also use data on ad campaigns to select the winner of the auction, check the characteristics of the inventory and thus minimise cases of fraud and, therefore, the display of the advert in conditions that do not correspond to the campaign. Thanks to the data on ad campaigns at their disposal, advertisers are able to bid according to their needs and publishers to better define their floor prices.

52. Access to quality data can be a significant competitive advantage given its role in the effectiveness of ad campaigns.

53. In this respect, the situation of publishers is characterised by the presence of a large number of players, whose size, business model and degree of dependence on advertising vary to a significant extent.

54. Some of them find themselves in challenging situations, with declining advertising revenue despite the sustained growth in the sector. Those who cannot offer targeted advertising, or only to a limited extent, may find themselves at a disadvantage, while the development of the ecosystem is prompting a number of vertically integrated intermediaries and platforms to capture a very significant share of the value. In this respect, companies such as Google and Meta offer more powerful targeting capabilities across devices than other players, not

[26] Opinion 18-A-03, cited above, paragraph 40.

least because of the "logged-in" nature (see below) of the services they provide to internet users.

55. In response to these challenges, the most powerful publishers, such as Amazon, are developing vertical integration models in order to be able to market their inventories without relying on technical intermediaries, while others have chosen to form alliances, such as Gravity. Gravity is a platform for marketing audience segments and buying ad space launched in 2017[27] on the initiative of Lagardère, Les Echos, SFR and Solocal, and now includes major players in the digital economy, including press bodies with an online presence such as Capital, L'Express, Elle and GQ Magazine.

b) Data collection technologies

56. Data can also be differentiated according to where it comes from.

57. Firstly, data can be differentiated according to whether it is collected by a company directly from the services it provides to internet users (first-party or proprietary data), or from services provided by another company (third-party data).

58. Advertisers and publishers can, in effect, collect their own data, whether this data is voluntarily provided by users or observed (for example, on their websites, through loyalty programmes, etc.), to share with the platforms that run their ad campaigns (for example, DSPs, DMPs[28], etc.). In order to configure their ad campaigns or enable targeting on their inventory, advertisers and publishers may also use any data made available by their advertising intermediaries, including the data of the publisher of the site or app on which the advertising is likely to be displayed.

59. Third-party data may be collected by advertisers, publishers or data suppliers, or may be collected via technologies integrated on third-party sites, such as software development kits (hereinafter "SDKs")[29], pixels[30] or cookies[31]. Data may also be collected via "single sign-on"

---

[27] https://www.cbnews.fr/medias/image-gravity-alliance-data-medias-faire-face-aux-gafa-24655 (in French)

[28] According to a definition by the CNIL, a data management platform (hereinafter "DMP") is a service that collects and manages user data, often from online sources (via cookies, for example), but also offline (importing customer lists from physical stores). DMPs optimise the targeting of individuals and are particularly popular for user targeting in real-time auctions. DMPs can be linked to demand-side platforms (DSPs) or supply-side platforms (SSPs) to activate data on ad campaigns (https://www.cnil.fr/fr/definition/data-management-platform-dmp-ou-plateforme-de-gestion-des-donnees [in French]).

[29] A software development kit (hereinafter "SDK") is a set of programming tools for publishers and developers of mobile apps. Marketing and advertising SDKs are used, in particular, to analyse audiences and behaviour on mobile apps.

[30] Pixel is shorthand for "picture element". Pixels are inserted in a web page in order to collect technical information (IP address, URL, etc.) and measure a behaviour (for example, the number of visits to a web page). The term "impression pixel" is used when the pixel is delivered along with the advert for the purpose of tracking impressions and measuring their effects. In this case, the display of the pixel prompts a cookie to be downloaded on the user's browser, which enables tracking. Conversion pixels can be used to track users' purchases and are generally placed on the web page confirming a conversion process. In this case, the pixel is usually placed on the web page using JavaScript code, which allows for more detailed information to be collected.

[31] A cookie is a text file placed on the hard disk or device of an internet user, either by the server of the site visited (proprietary or first-party cookies) or by a third-party server, i.e. a separate domain (third-party cookies). Cookies contain various data: the name of the server that placed the cookie, an identifier in the form of a unique

functionalities for connecting to third-party sites or apps provided by large platforms (Facebook login, for example)[32].

60. This data may also be collected via advertising services provided to publishers.

61. In Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, the *Autorité* examined the concepts of "*tracking technologies or tools*", which encompass the processing of proprietary data, and that of "*third-party tracking tools*"[33], noting that "*there are many third-party tracking tools*"[34].

62. The Competition and Markets Authority (hereinafter "CMA"), in its report on online advertising of 1 July 2020, also proposed a definition of tracking, which includes tracking on third-party sites and apps but also on sites and apps belonging to the same company: "*We define tracking as the collection and linking of data on a user or device across multiple websites or applications, and the retention, use, or sharing of that data. The goal of tracking for personalised advertising is to link together the activity of a single user across different sessions, properties (webpages and apps) and devices, to build a more complete profile of that user. This user profile could, among other things, help deliver personalised advertising and inform advertisers' spending decisions*"[35].

63. Secondly, another important source of data is specific to authenticated or "logged-in" environments, i.e. those requiring initial identification.

64. In the case of vertically integrated platforms, which provide their services to internet users as part of logged-in environments, user login functions are able to associate all displays and conversions across devices and sessions with a specific user, giving platforms specific measurement capabilities compared to approaches based on cookies (for example, a browser on a laptop that might be shared between different people in a family)[36].

65. On this point, the "Apple Privacy Policy" specifies, for example, that users disclose information to Apple when they purchase a smartphone, during the procedure for activating the device: "*when you create an Apple Account,* [...] *purchase and/or activate a product or device,* [...] *we may collect a variety of information*"[37].

---

number and, usually, an expiration date. Cookies are used to store information (e.g. shopping cart) about and improve users' the browsing experience.

In the advertising buying and selling process, almost all players (ad servers, inventory providers, verification tools, data management tools, etc.) also place their own cookies, in part to ensure that they have fulfilled their role in delivering the advert and also to track the ad campaign.

[32] A definition of single sign-on is provided by the CNIL, here: https://www.cnil.fr/fr/cookies-et-autres-traceurs/regles/alternatives-aux-cookies-tiers (in French).

[33] See, in particular, Opinion 18-A-03, cited above, page 29, paragraph 43.

[34] *Ibid*., paragraph 131.

[35] Competition and Markets Authority, Online platforms and digital advertising market study. Appendix G: The role of tracking in digital advertising, 1 July 2020 (https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study#final-report).

[36] See Opinion 18-A-03, cited above, paragraph 128.

[37] Clauses contained in the "Privacy Policy" (version dated 27 October 2021), available at: https://www.apple.com/legal/privacy/en-ww/.

D. THE OBSERVED PRACTICES

1. INTRODUCTORY REMARKS

66. On 22 June 2020, at its Worldwide Developers Conference, Apple announced a new version of its iOS and iPadOS operating systems, which would include several new features designed to give users more control over their data.

67. In particular, versions 14 of iOS and iPadOS required app publishers wishing to access devices' Identifier for Advertisers (hereinafter "IDFA") to obtain prior authorisation from users via the "ATT prompt". Used on Apple's mobile devices, the IDFA provides third-party advertising services with access to data collected on users and enables advertisers to monetise that data by offering targeted advertising in other apps, based on the information collected in a given app.

68. In practice, the ATT prompt takes the form of a window that appears on a user's iPhone or iPad when they use a given app (previously downloaded via the App Store), when the developer of that app wants to track the user on third-party apps or sites. If the user decides, via the ATT prompt, not to allow the app to track them in other apps or third-party sites, developers and their suppliers will not be allowed to track them, either through their device's IDFA or through any other alternative tracking method based on the user's identification.

69. Hereinafter in the present decision, developments relating to iOS also apply to the iPadOS operating system, in that ATT is also implemented in this system.

70. Apple has designed the ATT prompt with certain fixed, imposed elements that cannot be modified by app developers, while other elements are flexible, allowing developers to adapt the scope and partially customise the content. In addition to customising the ATT prompt itself, developers may display an additional pop-up window before, but also after, displaying the ATT prompt, for example to explain to the user why data tracking is necessary for the correct functioning of the app or to finance it. These pop-up windows are not generated by Apple's operating system. Their format, as well as their content, are freely determined by the developers, in compliance with the rules laid down by Apple.

71. Initially planned for September 2020, at the same time as the launch of iOS 14, Apple ultimately postponed the ATT prompt to 26 April 2021, following large-scale debates sparked by the announcement of its launch among various operators, mobile app developers and online advertising companies, over its legitimacy and the consequences that it was likely to entail.

72. In this respect, it should be noted that Apple's implementation of its own consent system does not enable publishers to comply with the legal and regulatory obligations of the European Union in terms of privacy protection. The evidence in the case file shows that Apple introduced certain technical limitations, preventing publishers that so wish from incorporating the information required by the regulations in the customisable part of the ATT prompt, in order to comply with the law. In practice, app developers have to display a second consent window to obtain users' authorisation for ad tracking on apps downloaded from the App Store, even though such tracking has already been authorised by the user.

73. It should be added that during the period covered by the objections, Apple prohibited any

other company from offering an alternative iOS-compatible app store[38], thereby preventing app publishers from turning to alternative app stores to access users of Apple's mobile devices. This situation is about to change, with the entry into force of the DMA, which aims to enable the distribution of native apps via competing app stores on digital ecosystems owned by gatekeepers.

74. After presenting the technologies used to access data on Apple's mobile devices (2) and the legal framework applicable to their use for advertising purposes (3), the *Autorité* will set out its findings concerning, on the one hand, the implementation of the ATT prompt insofar as it enables advertising service providers to access data (4) and, on the other hand, the data collection conditions implemented by Apple for the provision of its own advertising services (5).

2. DATA ACCESS TECHNOLOGIES ON APPLE DEVICES

a) Data access technologies for mobile app publishers

75. Apple provides advertising industry players with two sets of tools for targeting and assessing the performance of ad campaigns.

76. On the one hand, the IDFA enables user targeting and performance measurement across all apps (***i.***). Alternatively, the Identifier for Vendors (hereinafter "IDFV"), combined with Apple's SKAN service, offers tracking limited to the proprietary apps of a single publisher (***ii.)***. In all cases, collection must be authorised by the user (***iii***.).

i. The IDFA: an identifier that enables the precise collection of proprietary and third-party data across all sites and apps

Functioning of the IDFA

77. Introduced by Apple in 2012 with iOS version 6, the IDFA is a device ID comprising an encrypted device-specific identification number assigned by the mobile operating system of the Apple iOS mobile device (smartphone, tablet, etc.). Unlike cookies, which can be used to track users' web browsing and the value of which is defined independently for each third-party advertiser, the IDFA remains identical for all third parties. The IDFA is assigned randomly and anonymously when the device is first set up.

78. In practice, although the IDFA is attributed to a specific device, it can also be used to identify an individual, to the extent that a smartphone is generally less shared than a computer.

79. The IDFA therefore enables players in mobile advertising networks, including advertisers and mobile app developers, but also advertising intermediation services, to "track" a user's device through their use of apps and, thereby, exploit the data by offering targeted advertising[39].

80. In practice, the use of the IDFA requires user consent to be obtained via several pop-up windows:

---

[38] Classification mark 8,756 (NCV 8,982).

[39] For a description of the use of the IDFA by mobile advertising networks, see Decision 21-D-07, cited above, paragraphs 11 to 15.

- to comply with their legal and regulatory obligations, publishers display a window called a consent management platform (hereinafter "CMP"), asking users to consent to all data use purposes;
- furthermore, since 26 April 2021[40], app publishers wishing to access the IDFA must obtain prior consent from users via the ATT prompt. The display of the ATT prompt and users' consent thereto are therefore necessary, in line with Apple's guidelines. The design and implementation of the ATT prompt are described in more detail below.

A technology deemed essential by many players

81. Various players in the online advertising value chain have stressed the importance of the IDFA and, if ATT consent is withheld, the fact that other tracking technologies cannot be used in third-party mobile apps or websites.

82. The complainants explain that "*the IDFA is the main identification tool used by app developers and their suppliers for all use cases* [...]*, namely targeting, frequency capping, and conversion measurement and attribution* [...]*. The IDFA is also required for user-level attribution services*"[41]. GESTE indicates that "*prior to the implementation of the ATT, the IDFA was the identifier most widely used by publishers and their independent advertising service providers. Readable and transmissible to the entire app ecosystem chain, the IDFA enabled a very high level of precision and granularity, and therefore optimised inventory monetisation, with a major impact on the users for whom it was most relevant*"[42].

83. The vast majority of players interviewed consider that the IDFA plays an important role in the rollout of ad campaigns on Apple devices, and that more limited access to the IDFA is likely to hamper the effectiveness of ad campaigns. Some companies believe that the IDFA is essential for campaigns involving mobile apps.

84. On the demand side, i.e. from advertisers' point of view, several media agencies confirmed the importance of the IDFA.

85. According to Dentsu, the IDFA is "*the central element for all audience planning campaigns such as retargeting, activation of an advertiser's first-party audience or personalisation campaigns*"[43]. Havas believes that, "*without the IDFA, we cannot continue to work 100% deterministically, and the various technologies and partners must integrate a modelling and probabilistic element to continue justifying campaign results. In terms of targeting, certain strategies such as retargeting may no longer be possible*"[44]. Publicis argues that the "*role of an identifier like the IDFA, in the same way as Android ID or cookies on web environments, is essential for targeting audiences, managing repetition and measuring the effectivenesś of Display campaigns*"[45].

---

[40] Until iOS version 14.5 released on 26 April 2021, app publishers could access the IDFA without users' prior consent, with the option enabled by default in the device settings.

[41] Classification mark 21.

[42] Classification mark 12 (referral 22/0012 F).

[43] Classification mark 1,846.

[44] Classification mark 1,443.

[45] Classification mark 1,574.

86. On the ad space side, a majority of mobile app publishers interviewed also stressed the importance of the IDFA.

87. For CMI, "*in the vast majority of cases, advertising technologies are based on the use of the IDFA. The IDFA is essential to the functioning of the technologies and to the technical matching of ad buyers and sellers*"[46]. Various app publishers, including TF1, Voodoo and LinkedIn, confirm that the IDFA is crucial for tracking unregistered users and managing programmatic campaigns.

88. Among the vertically integrated publishers active in the online advertising sector, several social networks have also confirmed the importance of the IDFA.

89. LinkedIn indicated that the IDFA is "*paramount for LAN*[47] *on iOS, as well as for conversion tracking and corresponding audiences*"[48].

90. According to Meta, "*the IDFA is essential for effective advertising within the iOS ecosystem*" and, given the changes in iOS 14, "*not displaying the pop-up window on the* [Facebook and Instagram] *apps and not collecting IDFA for the limited number of users who accept the ATT prompt would cause even more harm to its partners than the damage caused by displaying the pop-up window"*. Not collecting the IDFA through ATT would "*eliminate any residual utility of the IDFA for ad attribution and personalisation on iOS devices*"[49].

91. TikTok explained that it "*typically uses mobile advertising identifiers, such as the IDFA, in the TikTok mobile app for advertising and advertising measurement purposes"*. TikTok mentions several cases in which the IDFA plays an important role: measurement and attribution, personalised audiences, and retargeting campaigns[50].

92. Twitter (now X) states that "*Apple's iOS 14 update to overhaul the IDFA system has reduced and may still reduce the quantity and quality of data and metrics that can be collected or used by Twitter and its partners, or impair Twitter's ability to perform targeted advertising. These limitations have adversely affected, and may still adversely affect, the ability of Twitter and its advertisers to perform effective targeted advertising, and to measure their performance"*. Nevertheless, the social network states that "*the final consequences of these proposed changes on the overall mobile advertising ecosystem, Twitter's business and the developers, partners and advertisers within that ecosystem are not yet clear*"[51].

93. Many companies providing services to advertisers and publishers have a position close to that of publishers and media agencies. Their contributions are summarised in the table below.

[46] Classification mark 1,725.

[47] LinkedIn Audience Network.

[48] Classification mark NCV 8,378 and confidential version (CV) 1,815.

[49] Classification mark 3,817.

[50] Classification marks 8,313 and 8,314.

[51] Classification marks 8,307 to 8,309.

Classification mark	Company	Assessment of the role of IDFA
Classification marks 5,734 and 5,735	Admax	"*In practice, an ad request without the IDFA has very little value and is generally not bought.* [...] *The revenue levels of mobile apps are directly linked to the share of inventory that includes the IDFA".*
Classification marks 6,757 and 6,758	Appsflyer	"*Reduced accuracy without the IDFA exposes app developers to additional ad fraud and reduced revenue*".
Classification mark 3,634	Criteo	"*Access to IDFA data is* [...] *absolutely crucial to our service offering and competitive positioning vis-à-vis Apple".*
Classification mark 3,658.	Ad4screen	"*The IDFA is an essential tool for measuring ad campaigns. Without the latter or an equivalent ID, Ad4Screen finds it difficult to measure and prove the effectiveness of ad campaigns".*
Classification mark 1,792	Adikteev	"*Without the IDFA, it is impossible to run these types of re-engagement campaign on Apple devices*".
Classification mark 6,757	Appsflyer	"*The IDFA is an essential element in accurately measuring the success of adverts. While ad networks primarily use the IDFA to help to track and profile users, AppsFlyer uses the IDFA to ensure accurate measurement".*
Classification mark 3,634	Criteo	"*While tracking and attribution remain possible on a web environment for the time being* [...], *personalisation, tracking and attribution without the IDFA are now impractical in an app environment*".
Classification mark 7,473	Ogury	"*Restricting access to a mobile identifier means that* [...] *Ogury can no longer identify a user and show them an advert. This* [...] *also means that publishers can no longer monetise their inventories* [...]. *Without the IDFA, Ogury has no way of identifying the user. Potentially, this means that the same advert will be shown to a user several times, thereby reducing its effectiveness and, ultimately, that of the ad campaign.* [...] *This restriction on accessing the IDFA impacts level of service provided to advertisers as described in their contracts*".
Classification mark 3,412	Verizon	"*The IDFA is essential for our advertising products, available on apps in the iOS environment, which rely primarily on ad targeting: our ad platforms (*SSP, DSP, Exchange*), our Flurry SDK (*which helps app developers to understand how their apps are used) *and our advertising solutions*".
Classification mark 1,632	Jellyfish	"*The IDFA is the cornerstone of our mobile offering. We use the IDFA to exhaustively measure the performance of app campaigns and the lifetime value of users for our customers. We also use the IDFA to target our customers' [first-party] data in* [retargeting] *campaigns, with the budget allocated to these campaigns depending on the level of coverage possible*".
Classification mark 7,485	Retency	"*Access to a stable individual mobile identifier is essential to our "Drive-to-Store" advertising effectiveness measuring, which is a major part of our business. This effectiveness measuring is based on a comparison between the identifiers of mobile users exposed to an ad campaign and those of mobile users detected in-store".*

94. The importance of the IDFA was also underlined by other companies active in advertising intermediation[52], including Branch, Didomi, Digital Virgo, Madvertise, Magnite, Mediamath, Mobsuccess, Open X, S4M, Smart, Yieldmo and Zeotap.

95. Of the companies interviewed, only Google indicated that it would no longer use the IDFA[53]. Prior to the implementation of the ATT prompt, it used the IDFA for its advertising intermediation services and data processing for ad personalisation and measurement. Google also used IDFA for at least 20 of its own apps[54], but now "*no longer requests access to the IDFA in its mobile apps* "and "*does not combine data from Google and third parties via its iOS apps, to avoid displaying the ATT prompt*"[55].

96. Google explained that it had "*had to redesign its iOS apps to comply with Apple's guidelines without having to display the ATT prompt in its apps, including removing all forms of tracking as defined by the guidelines*", including the display of "*targeted adverts based on user data collected from apps and websites owned by third-party companies*"[56].

97. In conclusion, the responses from the companies interviewed show that:

- the IDFA is used by advertisers, publishers, ad intermediation service providers and vertically integrated platforms (social networks);
- the IDFA plays a key role in ad campaigns (targeting, campaign delivery management, measuring performance), the functioning of third-party technologies such as SDKs and the technical matching of buyers and sellers of ad space;
- the IDFA is also important for specific advertising offerings, such as drive-to-store and retargeting;
- the level of revenue for app publishers appears to be directly linked to the share of inventory that uses the IDFA;
- only Google has decided not to display the ATT prompt and not to use the IDFA to sell ad space for its own apps (with the exception of YouTube, mentioned in the footnote to paragraph 95).

---

[52] Classification mark 5,480 (Branch), classification marks 1,104 and 1,105 (Didomi), classification marks 3,292 to 3,300 (Digital Virgo), classification mark 1,861 (Madvertise), classification mark 1,542 (Magnite), classification mark 1,909 (Mediamath), classification mark 1,066 (Mobsuccess), classification mark 1,056 (Open X), classification mark 1,512 (S4M), classification marks 1,409 and 1,410 (Smart), classification mark 3,495 (Yieldmo) and classification mark 5,363 (Zeotap).

[53] However, YouTube, which is owned by Google, announced in mid-2024 that its app would now display the ATT prompt (https://9to5google.com/2024/06/20/youtube-ios-allow-ads-tracking/, 20 June 2024).

[54] Google Assistant (iGA), Google Chrome, Google Duo, Google Earth, Google News, Google Pay (formerly Android Pay), YouTube, YouTube Studio, YouTube Kids, YouTube Music, YouTube TV, Waze, Waze Carpool, Currents (formerly Google+ for G Suite), IMA Video Suite Inspecter, Looker Mobile, OnDuo, Primer, Socratic and Stadia.

[55] Classification marks 5,581 and 7,554.

[56] Classification mark 5,591.

ii. The IDFV: an identifier for less extensive collection, limited to proprietary data

98. The IDFV, a unique identifier for each device and each publisher, is used by app publishers to track users within their own apps and, where applicable, app groups. It cannot be used to recognise users in other publishers' apps.

99. According to a definition provided by Apple, the IDFV is "*an alphanumeric string that uniquely identifies a device to the app's vendor*". The identifier is different for each developer and for each device and therefore enables developers to match the identity of their users across their different apps, to the exclusion of third-party apps[57].

100. As highlighted by the *Autorité* in Decision 21-D-07, Apple states on its "Developer" web page that "*the ID for Vendors (IDFV), may be used for analytics across apps from the same content provider"*[58]. There is no mention of advertising uses.

101. However, the IDFV is used for advertising purposes, albeit for specific and more limited uses than IDFA. It does not fall within the scope of the ATT prompt.

102. When asked about the use of the IDFV for advertising purposes, Apple stated that "*the IDFV can be used in the same way as the IDFA, but only on the basis of proprietary data. That means the identifier can be used for frequency analysis and capping, based on proprietary data.* [It can also be used] *for attribution and measurement, as these activities can be performed on the basis of proprietary data*"[59]. Lastly, Apple indicates that "*the implementation of the ATT prompt has no effect on the IDFV*"[60].

103. In their supplementary referrals, the complainants consider that the benefit of the IDFV is only fully utilised in the context of groups of companies vertically integrated at different levels of the advertising chain, such as Google[61]. Criteo also considers that the IDFV favours "*companies whose business models rely on proprietary data over third-party data*"[62] and that it therefore "*disadvantages smaller players whose business models rely on third-party data, and which will now find it much harder to reach their target audiences, limiting their growth and ability to compete with larger companies*"[63].

104. In this respect, Meta stated that "*it's in developers' interests to have multiple apps and to share data between these apps. This advantage, which has already been observed, has led to consolidation in the sector"*[64]. Twitter[65] and TikTok[66] find the IDFV to be less relevant.

105. Google uses IDFV for its own apps for limited and specific uses. It stated that it "*uses the*

---

[57] Classification mark 2,210.

[58] Decision 21-D-07, cited above, paragraph 17.

[59] Classification mark 2,211.

[60] Classification mark 2,211.

[61] Classification mark 986.

[62] Classification mark 3,636.

[63] Classification mark 1,780.

[64] Classification mark 4,261.

[65] Classification mark 8,308.

[66] Classification mark 1,957.

IDFV in its own apps to combat fraud and for capping frequency"[67], but that it does not use the identifier "*for ad targeting or measuring the performance of ad campaigns within its apps installed on iOS devices*"[68].

106. According to Voodoo, "*the IDFV is seen as a very useful technical identifier within a publisher's app portfolio, as it enables publishers to track individual behaviours within the apps that they themselves have published*". With regard to advertising practices, using the IDFV "*could benefit publishers with a sufficiently large user base* [...] *or with a diversified range of services and apps*". Voodoo believes that "*the use of the IDFV is therefore likely to benefit the largest players today, compared with IDFA*"[69].

107. While the use of the IDFV is not covered by the scope of the ATT prompt, the opinion of the CNIL of 19 May 2022 makes clear that the IDFV does enable tracking for advertising purposes, and falls within the scope of legal and regulatory obligations relating to consent[70].

108. In its opinion, the CNIL stresses that consent is required for the processing of the IDFV for advertising purposes, in accordance with Article 82 of French law 78-17 of 6 January 1978 on information technology, data files and civil liberties (hereinafter the "French Data Protection Act")[71], which requires prior consent for any reading or writing on users' devices, whether or not personal data is processed[72]. The CNIL specifies that these provisions apply to the IDFV, insofar as its processing involves access to information stored on users' devices, regardless of whether the IDFV is used for ad tracking purposes as defined by Apple.

109. According to the CNIL, "*the IDFV can, in effect, be technically used by app publishers with numerous products for advertising-related uses, such as frequency capping or audience targeting, which type of use is not prohibited by Apple and does not require user consent via the ATT prompt*"[73]. It concludes that "*if the IDFV is used for advertising purposes, in particular for ad targeting and measurement, users' free, specific, informed and unambiguous consent must be obtained beforehand. If the use of the IDFV does not involve ad tracking as defined by Apple, this does not affect the need to obtain consent. The only consequence of such situation would be that the publisher would not be obliged to display the ATT prompt"*[74].

110. On 29 December 2022, the CNIL fined Voodoo for using the IDFV for advertising purposes

---

[67] Classification mark 6,102.

[68] Classification mark 6,102.

[69] Classification marks 1,426 and 1,430.

[70] The CNIL notes that while "*the IDFA offers identical value for all app publishers, the IDFV will only have the same value for apps identified as coming from the same publisher (vendor), i.e. the entity selling the app on the App Store* [...] *Furthermore, the CNIL notes that, according to the documents in the case file at its disposal, the absence of consent for ad tracking via the ATT prompt does not prevent app publishers from accessing the IDFV*" (classification mark 6,161).

[71] Article 82 was introduced into the law by French ordinance 2018-1125 of 12 December 2018 issued in application of Article 32 of French law 2018-493 of 20 June 2018 on the protection of personal data and amending French law 78-17 of 6 January 1978 on information technology, data files and civil liberties and various provisions concerning the protection of personal data. The introduction of Article 82 constituted an extensive redraft of the law in order to bring national law into line with Regulation (EU) 2016/679 (GDPR).

[72] Classification mark 6,161.

[73] Classification mark 6,161.

[74] *Ibid.*

without users' consent[75]. In the case in question, when a user refused ad tracking via the ATT prompt, Voodoo displayed a second window informing the user that only non-personalised adverts would be shown. However, the CNIL found that, despite this refusal, Voodoo continued to read the IDFV and process data linked to the user's browsing for advertising purposes, in contradiction with the information provided and, therefore, in violation of Article 82 of the French Data Protection Act.

111. Lastly, Google's explanations show that some publishers may pass on the IDFV to third-party companies.

112. Google explained that it does not use the IDFV directly for ad targeting or campaign performance measurement, but only for synchronisation with its own identifiers. These identifiers are then used for ad targeting, combating fraud and frequency capping. Google adds the following: "*publishers can transmit the IDFV via the Publisher Provided Identifiers (PPIDs)*[76] *shared via Ad Manager. However, Google does not know what is contained in the data transmitted by encrypted signals from publishers (ESP), as these are designed to ensure that signals shared between advertisers and publishers are not accessible to Google, which therefore cannot use them*"[77].

113. There have been examples of the IDFV being passed on to third parties. For example, OpenX stated that it "*passes on the IDFV to advertisers for media buying decisions only if it is provided by the publisher. This is one way for advertisers to retain addressing capabilities on iOS traffic without the IDFA*"[78].

114. The use of the IDFV requires publishers to request user consent[79] through a CMP. There is no option in the settings of Apple devices to prevent all publishers from accessing the IDFV.

iii. The SKAN attribution service

115. Apple offers publishers that display adverts in their apps a service called SKAN. SKAN is a free ad attribution tool introduced by Apple in March 2018.

116. SKAN enables developers and advertising networks to measure attribution for the installation and reinstallation of apps from the App Store on iOS devices.

117. Apple explains that in SKAN, ad attribution does not combine user or device data across third-party apps and websites. SKAN is therefore more respectful of privacy. According to Apple, "*SKAN APIs are designed to store advertising data on the device, separate from the apps*", without using the IDFA. To use SKAN, apps do not have to use the ATT prompt.

118. With SKAN, attribution is limited to the ad campaign in question and is less granular than with the IDFA. SKAN sends limited data on app installations to the advertising network and advertising conversions linked to a user and attributed to a given ad campaign, on a staggered

---

[75] Decision SAN-2022-026 of the restricted committee of 29 December 2022 concerning Voodoo.

[76] "*The Publisher Provided Identifier (PPID) allows publishers to send Google Ad Manager an identifier for use in frequency capping, audience segmentation and audience targeting, sequential ad rotation, and other audience-based ad delivery controls across devices. For further information on the PPID, Google invites the* Autorité *to refer to the following link:* https://support.google.com/admanager/answer/2880055?hl=en", classification mark 8,734 (NCV 8,960).

[77] Classification mark 6,103.

[78] Classification mark 1,057.

[79] See, in this respect: CNIL, decision SAN-2022-026 of the restricted committee of 29 December 2022 concerning Voodoo.

basis. Conversely, attribution using the IDFA happens in real time.

b) Data collection on the App Store and Apple apps: the ASA service

119. In the context of collecting data for its own advertising services, Apple declares that it ensures the highest level of privacy protection by limiting the amount and type of information collected. To this end, the ASA service (***i.)*** relies on a "privacy by design" methodology implemented directly in each device to exclude all advertising tracking on third-party apps and sites (***ii***.).

i. The ASA service

120. Launched in October 2016 in the United States[80], then in France in 2018[81], the ASA service enables publishers to promote their apps to users when they are looking to download an app, and Apple to sell its advertising inventory on the App Store.

121. On the App Store, ASA adverts are displayed in two places. Until October 2022, the adverts could be displayed in the Search tab in the App Store, under Suggestions[82], or on the search results page[83]. The adverts are only personalised if the user has turned on the targeted advertising parameter in their device's settings[84]. Adverts are indicated by the word "Ad" in a blue box[85].

122. Apple sells ad space on two of its other apps, Apple News and Apple Stocks[86]. Their inventory is made up of Display ads (for Apple Stocks) or Display and Search ads (for Apple News).

123. The ASA service is available in two formats:

- Apple Search Ads Basic, which is accessible only to app publishers acting as advertisers. In this version of ASA, publishers have access to data sets to track the performance of their campaigns, but cannot perform targeting[87], as the match between the advert and the search by the user is automated[88];
- Apple Search Ads Advanced, which is available not only to publishers, but also to advertisers and agencies[89]. In particular, publishers can target a specific audience, using the following criteria: gender, age, location, device type, date and user type (all users, only new users, or those who have already downloaded other apps from this

[80] Classification marks 2,743 and 8,694 (NCV 8,920). See also: https://developer.apple.com/news/?id=09282016a

[81] Classification mark 8,694 (NCV 8,920).

[82] Classification mark 2,123. Advertising in the Search tab has been available in France since 4 May 2021.

[83] Classification mark 4,329.

[84] Classification marks 7,406 and 7,407.

[85] Classification mark 2,124.

[86] In France, however, Apple News is not available and Apple does not sell advertising space on Apple Stocks.

[87] Classification mark 4,337.

[88] Classification mark 2,231.

[89] Classification mark 8,695 (NCV 8,921).

publisher)[90]. To this end, publishers can combine these criteria to create segments, i.e. groups of at least 5,000 users with various common characteristics[91].

124. Both formats of ASA offer "smart" automation[92] for displaying the adverts most likely to interest users[93]. To do this, Apple explains that it relies on its own proprietary data, i.e. account information, age, gender, location, content downloaded from Apple apps and, where available, publications viewed and subscriptions to Apple News[94].

125. Apple also makes the Apple Search Ads Attribution API[95] available to publishers that use its ASA service, which enables app publishers to measure and attribute app downloads from the App Store originating from ASA campaigns[96].

126. Apple explains that when a publisher plans a campaign to target a specific audience, if the targeting uses demographic criteria, users who have declined to see personalised adverts will not be exposed to the ad campaign[97].

ii. Limited data collection based on a "privacy by design" mechanism

127. In addition to its scope limited to proprietary data, according to Apple, ASA does not allow for the collection of user or device data by third parties intending to build consumer profiles for advertising purposes[98].

128. In the "Apple Advertising & Privacy" document available on its website[99], Apple states on this point: "*Apple's advertising platform does not track you, meaning that it does not link user or device data collected from our apps with user or device data collected from third parties for targeted advertising or advertising measurement purposes*". The same document specifies that Apple can use information linked to users' purchases, downloads and subscriptions to assign users to a "segment", and adds: "*we don't allow targeting based on downloads of a specific app or purchases within a specific app (including subscriptions) from the App Store, unless the targeting is done by that app's developer*".

129. Apple states that "*Apple does not share any personal data with third parties*"[100] and that personal data is only used for the advertising activity of ASA.

130. It explains that it does not use either the IDFA[101] or the IDFV[102] to provide its advertising

---

[90] Classification mark 8,269.

[91] Classification mark 8,269.

[92] Classification marks 8,269 and 8,270.

[93] Classification mark 2,122.

[94] Classification mark 2,123 (screenshots).

[95] Classification mark 4,360.

[96] Classification mark 8,698 (NCV 8,924).

[97] Classification marks 4,437 and 2,117.

[98] Classification mark 2,157.

[99] Classification mark 8,698 (NCV 8,924).

[100] Classification marks 2,123 and 2,158.

[101] Classification mark 2,209.

[102] Classification mark 2,214.

services, but three other identifiers, used at different stages of ad personalisation: the Directory Services Identifier (hereinafter "DSID"), the Device Pack Identifier (hereinafter "DPID") and the Advertising Identifier (hereinafter "iADID")[103].

131. The DSID is the technical identifier of a user's Apple account (Apple ID). It is generated on Apple's servers when the account is created.

132. It is used to collect data and, in addition to "*the user's identity and other personal data (e.g. e-mail address)*"[104], collects data linked to the user's activity, such as downloads or purchases, associated with the DSID[105].

133. To prevent ad personalisation and display from relying directly on the DSID, the DPID and iADID replace the DSID for ad personalisation and display in the context of searches in the App Store.

134. As such, when a user performs a search on the App Store, a request is sent to Ad Platforms[106]. The Ad Platforms servers determine which adverts to display based on the search keywords, the DPID, the iADID and the segments to which the user has been assigned[107].

135. According to Apple, replacing the DSID with two random identifiers on the user's device prevents Ad Platforms from making any link between the DSID (the data set collected on a user) and the identifiers that Ad Platforms receives. Apple stresses that its Ad Platforms staff are also bound by a confidentiality obligation for the purpose of the same objective[108].

136. Since 20 September 2021, the release date of version 15 of the iOS, the collection of data on the App Store by Apple is subject to obtaining user consent, the modalities for which are set out below in paragraphs 178 *et seq*.

3. THE LEGAL FRAMEWORK GOVERNING THE USE OF DATA FOR ADVERTISING PURPOSES

a) Legislative and regulatory obligations

137. Using data for advertising purposes is subject to various rules derived from European Union law. The relevant laws are 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 (known as the "General Data Protection Regulation", hereinafter "GDPR") and 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 (hereinafter the "ePrivacy Directive"). The ePrivacy Directive was amended on 25 November 2009 following the adoption of Directive 2009/136/EC.

---

[103] Classification marks 8,700 and 8,701 (NCV 8,926 and 8,927).

[104] *Ibid.*

[105] *Ibid.*

[106] *Ibid.*

[107] Classification mark 7,407.

[108] Classification marks 8,700 and 8,701 (NCV 8,926 and 8,927).

138. In French law, the French Data Protection Act was amended on the basis of the two above-mentioned legal texts[109].

139. The GDPR requires controllers to obtain users' freely given, specific, informed and unambiguous consent before any processing of their personal data. Moreover, users must be able to withdraw their consent, at any time, just as easily.

140. Article 5(3) of the ePrivacy Directive lays down a similar principle of consent. Before any information is stored on their device or any information already stored on their device is accessed, users must give their consent, unless such actions are strictly necessary for the provision of an online communication service expressly requested by the user or are carried out exclusively for the purpose of enabling or facilitating a communication by electronic means.

141. Article 82 of the French Data Protection Act transposes this rule to cases where an operator carries out write or read operations on a user's device, i.e. when it accesses information already stored on the user's device by means of electronic transmission (e.g., an advertising identifier), or records information on it.

142. The *Autorité* recalled the legislative and regulatory framework in more detail in paragraphs 43 to 53 of the above-cited Decision 21-D-07.

143. In two opinions dated 17 September 2020, the CNIL published a recommendation and guidelines for the application of Article 82 of the French Data Protection Act[110].

144. In particular, the opinions provide a framework for obtaining the user's consent in the event of a read or write operation on their device, in particular by placing cookies or other trackers[111]. They reiterate that the consent interface proposed by the publisher to this end must be neutral, both in form and wording, so that the user is not misled. Furthermore, when a cookie is used for multiple purposes, some of which do not fall within the scope of the exemptions based on exclusive purpose or strictly necessary nature mentioned above, the user's consent must be obtained for the use of this cookie.

145. The GDPR refers to the concept of monitoring users' behaviour on the internet, but does not limit this concept to ad tracking by a company on websites and mobile apps that are owned by third-party companies. For example, under the terms of recital 24 of the GDPR, in order to "*determine whether a processing activity can be considered to monitor the behaviour of*

---

[109] The French Data Protection Act was amended via French law 2018-493 of 20 June 2018 on the protection of personal data. All the texts transposing the ePrivacy Directive, as well as the amending directive of 2009, are available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000337468/ (in French) and https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000021492156 (in French).

[110] CNIL, opinions 2020-092 of 17 September 2020 adopting a recommendation proposing practical methods of compliance in the event of use of "cookies and other trackers" and 2020-091 of 17 September 2020 adopting guidelines on the application of Article 82 of the French law of 6 January 1978 as amended to read and write operations on a user's device (including "cookies and other trackers") and repealing opinion 2019-093 of 4 July 2019.

[111] In opinion 2020-091 of 17 September 2020, the CNIL specifies the scope of the guidelines as follows: "*HTTP cookies, through which these read or write actions are most often performed, but also other technologies such as "local shared objects", sometimes called "Flash cookies", "local storage", implemented within the HTML 5 standard, identifications by device fingerprinting, identifiers generated by operating systems (whether advertising-related or not: IDFA, IDFV, Android ID, etc.), hardware identifiers (MAC address, serial number or any other device identifier), etc. For the purposes of these guidelines, the word "cookie" covers all systems likely to be covered by Article 82 of the Act*".

data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes".

146. In France, the CNIL does not use the notion of monitoring to determine whether companies are subject to the obligations of the legislative and regulatory framework. In its first opinion of 17 December 2020, issued at the request of the *Autorité*, it found that "*the advertising-related processing carried out by Apple requires consent insofar as it involves reading or writing operations on the user's device*"[112].

b) The development by the industry of a standardised procedure for obtaining consent: CMPs

147. In order to obtain users' consent for the collection and use of their data, app publishers display several pop-up windows.

148. In order to comply with their legal and regulatory obligations, publishers display a CMP window requesting user consent all data use purposes.

149. The CMPs are developed in the context of the Transparency and Consent Framework (hereinafter "TCF").

150. The TCF is a set of rules drawn up by one of the complainants, namely the IAB, in April 2018, and supplemented in a second version in August 2019, for the purpose of facilitating compliance, by players of the online advertising ecosystem, with the obligations that derive from the regulations on advertising processing. This facilitation amounts to standardising interactions between the various players involved on the matter of compliance with the regulatory framework.

151. While the TCF is not mandatory, compliance with the framework is required for online advertising players registered with the Alliance Digitale (the result of the merger of the IAB and the MMA), the body responsible for monitoring the TCF.

c) The rules governing the collection of data on devices sold by Apple

152. In addition to the rules detailed above, app publishers are subject to the contractual obligations imposed by Apple for use of the App Store. These obligations include various provisions on personal data protection that apply both to app publishers (***i.***) and to Apple when collecting data for its own services (***ii***.).

i. The conditions imposed on mobile app publishers

Conditions for being listed in the App Store

153. Listing an app in the App Store is subject to a number of conditions.

154. To be able to distribute their apps in the App Store, publishers must accept the Apple Developer Program License Agreement[113]. Only then can a publisher access software

[112] CNIL opinion of 17 December 2020, page 12, referral 20/0099 M, classification mark 1,739.

[113] Apple Developer Program License Agreement, classification mark 8,710.

development kits for Apple devices and development services made available by Apple. Apple's user licence also contains rules on data collection and the provision of information to users on data processing (paragraphs 3.3.7 to 3.3.11), the use of the IDFA (paragraph 3.3.12) and user consent for the collection and use of their geolocation data (paragraphs 3.3.13 to 3.3.17).

155. All apps developed by publishers must also comply with the rules set out in the App Review Guidelines, which constitute the reference framework used by Apple to monitor app compliance[114].

156. A sub-section dedicated to other business model issues ("3.2. Other Business Model Issues*"*) distinguishes between acceptable and unacceptable business models according to Apple. In particular, it is unacceptable under this sub-section for an app to require users to authorise tracking in order to access functionality or content, or simply to use the app[115]. In the guidelines in force at the date of the present decision, this rule is framed, in a slightly modified form, in Article "3.1.2 (a) Permissible uses"[116].

157. Sub-section 5.1 recalls certain legal requirements relating to data collection and storage, data use and sharing, geolocation data and special categories of data (children's data and health data). In this sub-section, Article 5.1.1 sets out the conditions for informing users and obtaining their consent. It explicitly refers to the GDPR rules and adds that "*apps must respect the user's permission settings and not attempt to manipulate, trick, or force people to consent to unnecessary data access*"[117].

158. Other rules in this sub-section include the obligation to include a link to the app's "privacy policy" in the App Store Connect metadata field (Article 5.1.1 (i)), to collect only data relevant to the core functionality of the app and to use only data that is required to accomplish the relevant task (Article 5.1.1 (iii)), and not require users to enter personal information to function the app (Article 5.1.1 (v)).

The introduction of App Tracking Transparency to authorise tracking on third-party sites and apps

159. Article 5.1.2 of the App Review Guidelines, which defines the conditions under which app publishers may use the data or share the data collected on users, provides for the implementation of the ATT pop-up to collect users' consent for the tracking of their activity on third-party sites and apps, which Apple defines simply as "tracking"[118].

160. Apple defines "tracking" as "*the act of linking user or device data collected from your app with user or device data collected from other companies' apps, websites, or offline*

---

[114] App Review Guidelines, classification mark 8,710 (NCV 8,936).

[115] "*(vi)* [...] *Apps should not require users to rate the app, review the app, watch videos, download other apps, tap on advertisements, enable tracking, or take other similar actions in order to access functionality, content, use the app, or receive monetary or other compensation, including but not limited to gift cards and codes*" (emphasis added).

[116] "*Apps must not force users to rate the app, review the app, download other apps, or other similar actions in order to access functionality, content, or use of the app*" (https://developer.apple.com/app-store/review/guidelines/).

[117] Article 5.1.1 (iv).

[118] Article 5.1.2 requires publishers to "*receive explicit permission from users via the App Tracking Transparency APIs to track their activity*".

properties for targeted advertising or advertising measurement purposes. Tracking also refers to sharing user or device data with data brokers"[119].

161. Furthermore, Apple defines the concept of "*user or device data collected from third parties*" as any information that is specific to an individual or device, and which therefore allows for data relating to the same end-user or device to be linked across different companies' apps, websites or offline properties[120]. Apple cites the IDFA as an example of device data.

162. According to its "Developer" web page, the following actions are considered tracking[121]:

- displaying targeted advertisements in an app based on user data collected from apps and websites owned by other companies;
- sharing device location data or email lists with a data broker;
- sharing a list of emails, advertising IDs or other IDs with a third-party advertising network that uses that information to retarget those users in other developers' apps or to find similar users;
- placing a third-party SDK in an app that combines user data from the app with user data from other developers' apps.

163. In addition, Article 5.1.1 of the App Review Guidelines states that paid functionality must not be dependent on a user granting access to their data or require a user to do so, while Article 5.1.2 prohibits "*attempt*[s] *to surreptitiously build a user profile*" based on data collected in an anonymised, aggregated or otherwise non-identifiable way, whether collected by the app publisher or by a third party on the same app.

164. Apple also prohibits publishers from using "fingerprinting"[122], a technique for uniquely identifying a user using the technical characteristics of their device or browser (language, operating system version, time zone, device model, etc.). In the "Frequently asked questions" section on the "User Privacy and Data Use" page, Apple explicitly links this restriction to its user licence[123].

165. The ATT prompt and user consent are mandatory for publishers wishing to share user data with third parties. Without consent, developers and their suppliers will not be able to track the user, either through the IDFA or through any other alternative tracking method such as e-mail address hashing or fingerprinting (see paragraphs 193 *et seq.* below).

---

[119] Classification mark 2,184.

[120] Classification mark 2,157.

[121] Classification mark 8,699 (NCV 8,925).

[122] 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 that can be used to "recognise" a user and, in particular, 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.

[123] Classification mark 8,714 (NCV 8,940).

Apple's review of the conditions for being listed in the App Store

166. Compliance with the listing conditions set out in the guidelines is verified by a team of around [confidential] people[124]. This "App Review Team" is responsible for monitoring new apps, as well as updates to already listed apps.

167. The complainants explain that "*the review procedure is a mandatory, prior procedure whereby the app publisher has to submit its modification or update proposal to Apple's Review Team. This team is difficult to reach other than by email, as Apple disclaims* [*sic*] *any responsibility or any form of assistance to app publishers in the main contract, and it usually responds by referring to specific paragraphs of Apple's guidelines*"[125].

168. According to the complainants, this process, which can take several weeks or even months, can either lead to approval, outright rejection, suspension until the publisher makes changes, or can elicit no reaction at all[126].

169. The complainants also indicate that if approval is not given, in the event of rejection or suspension, or pending a decision by the App Review Team, the app's monetisation capacity is compromised, thereby preventing full exploitation of its inventory. For independent providers of services to publishers, in particular in terms of attribution, conversion events cannot be correctly attributed, valued or remunerated, thereby leading to "*tangible and immediate consequences*"[127].

170. The Review Team can approve or reject the new version of the app, which cannot be published until this review has been carried out. However, an update to the app may be provisionally accepted by the Review Team, if this update corrects a major error, pending a subsequent submission concerning compliance.

171. When publishers' proposed updates are deemed not to be in compliance with the App Store guidelines, the Review Team sends the publishers the corresponding article of the guidelines. Developers can ask questions and get clarification, or request a phone call to clarify the changes to be made. They can also appeal to the App Review Board.

172. Even without any updates, Apple also performs an in-depth review of apps distributed on the App Store. [confidential][128]. [confidential][129].

173. During this *a posteriori* review, when a violation of the policies or guidelines is identified, Apple may suspend the distribution of the app on the App Store until the violation has ceased, or ban the app if the violation is repeated or sufficiently serious. For example, several French media outlets, including *Le Figaro*, were temporarily barred from the App Store, with Apple explaining that these apps were supplying geolocation data to third parties without users' consent[130], a sufficiently serious violation in Apple's view.

---

[124] Classification mark 8,296.

[125] Classification mark 978.

[126] *Ibid.*

[127] Classification mark 990.

[128] Classification mark 8,297.

[129] Classification mark NCV 8,297 and classification mark CV 6,224.

[130] Jaimes Nicolas, "Datas de géolocalisation: Apple éjecte plusieurs médias français de l'App Store", Journal du Net, 4 May 2018: https://www.journaldunet.com/ebusiness/publicite/1209184-datas-de-geolocalisation-apple-ejecte-plusieurs-medias-francais-de-l-app-store/ (in French), classification mark 8,715 (NCV 8,941).

174. Lastly, Apple reserves the right to remove from the App Store[131] apps that "*no longer function as intended* [...] *or are outdated*".

ii. The rules governing data collection on the App Store

175. Prior to September 2021, consent for using data for advertising purposes was enabled by default in the settings of Apple's mobile devices.

176. Since 20 September 2021, the release date of iOS version 15, Apple has implemented, for ad tracking on its own apps, a pop-up window whose format and content are different than the format and content of the ATT prompt for third-party apps.

177. This pop-up window, presented like an advert, is called "Personalized Ads". It provides an explanation of personalised adverts *("Personalized ads in Apple apps such as the App Store and Apple News help you discover apps, products and services that are relevant to you"*) and offers two action buttons: "Turn on" or *"*Turn off" personalised adverts.

4. CONDITIONS OF ACCESS TO DATA FOR ADVERTISING SERVICE PROVIDERS IN THE CONTEXT OF THE IMPLEMENTATION OF APP TRACKING TRANSPARENCY (ATT)

178. According to Apple, ATT is a necessary measure to strengthen the effectiveness of users' consent to their activity being tracked on third-party sites and apps (**a**). However, the investigation highlighted difficulties arising from the implementation and design of the prompt (**b**), and the findings made by the Investigation Services were largely in line with those made by the CNIL in two opinions (**c**).

a) Functioning of and justification for the ATT prompt according to Apple

i. A prompt specifically targeting the collection and use of third-party data

Failure to provide users with sufficient information on the existence and importance of third-party data collection, according to Apple

179. Apple claims that users are not provided with sufficient information about their data being shared with third parties[132].

180. According to Apple, the ATT prompt is therefore designed to "*empower users*"[133] by giving users the ability to decide, *"developer by developer*", how their data will be used.

181. As such, the aim of the ATT prompt is not to enable developers to comply with their legal obligations, but to offer "*greater transparency and additional choice for consumers, to complement the measures taken by individual developers*"[134].

182. On this point, Apple maintains that the ATT prompt will have positive effects on competition, as the ability for users to decide, app by app, will encourage developers to

[131] Classification mark 8,715 (NCV 8,941).

[132] Classification mark 2,204.

[133] Classification mark 4,366.

[134] Classification mark 425 (referral 20/0099 M).

improve privacy to gain users' trust[135].

The exclusion of all proprietary data from the scope of the ATT prompt

183. As the definition of tracking is limited to tracking on third-party apps and websites underlying the ATT prompt, the prompt does not apply to ad tracking or to the use of cookies by app publishers on their own websites and mobile apps.

184. On this point, several companies interviewed during the investigation consider that the introduction of the ATT prompt could favour companies offering services in logged-in environments, which, as described in paragraphs 63 and 64, require user authentication via a user account (e.g. an e-mail address).

185. Criteo believes that "*apps that require login or registration (which requires consent for the supply and use of data, outside the device) are likely to benefit from a significant advantage*"[136].

186. According to Voodoo, "*it is possible that these restrictions could encourage the development of logged-in environments where collecting users' e-mail addresses could make up for the absence of identifiers that allow for individual behaviour to be tracked between third-party apps*". Voodoo considers that the collection of e-mail addresses, which are persistent identifiers by nature, offers fewer guarantees for the protection of user privacy than the collection and use of the IDFA, "*which can be reset and stay under the control of users*"[137].

187. Ad4screen argues that "*certain players with the ability to know which user is connected to a given app at a given time, have the possibility of* [tracking] *users without using the IDFA. For example, users of Google services* (...). *The same goes for Facebook. Players with their own data "ecosystem" will therefore be able to leverage their position to strengthen their offering without using the IDFA or cookies*"[138].

188. Apple had already expressed this idea with regard to Meta's services, when a Facebook user downloads another app and logs in with their Facebook ID: "*Facebook can use Facebook IDs to link the data collected between its different apps, without having to ask users for permission to track them (since all the data used is proprietary data)*"[139].

189. However, Apple specifies that this is not the case if *"a Facebook user connects to a third-party app via their Facebook ID, which gives Facebook to access personal data from that app developer*". A response to the ATT prompt is then necessary[140]. Nonetheless, even in this scenario, obtaining consent in compliance with the GDPR is necessary, as illustrated by the fine imposed on Meta on 4 January 2023 by the Irish Data Protection Commission[141].

---

[135] Classification mark 4,366.

[136] Classification mark 1,780.

[137] Classification mark 1,430.

[138] Classification mark 3,279.

[139] Classification mark 2,123 (referral 20/0099 M).

[140] Classification mark 2,122 (referral 20/0099 M).

[141] https://dataprotection.ie/en/news-media/data-protection-commission-announces-conclusion-two-inquiries-meta-ireland, 4 January 2023.

ii. A prompt intended to facilitate user choice

A pop-up window whose purpose is not to obtain consent within the meaning of the regulatory framework

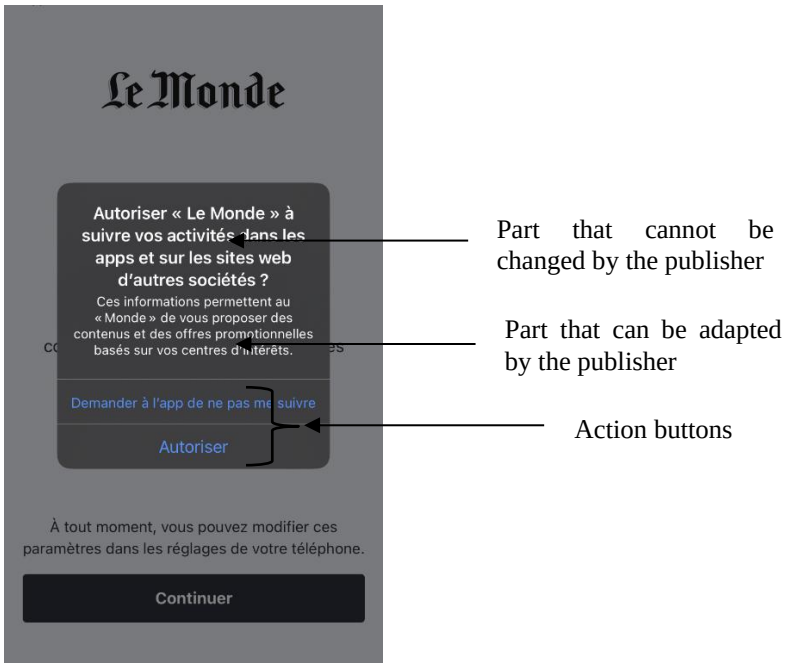
190. The ATT prompt takes the form of a pop-up window when an app previously downloaded from the App Store is opened. It was designed to include certain elements that cannot be modified by publishers, imposed by Apple, and others whose content and scope can be determined by publishers.

191. The graphic framework and the interface of the ATT prompt are imposed by Apple. According to its "Developer" web page, the title of the prompt, which includes the name of the app, is generated automatically. Only the "purpose string" message can be personalised: *"Accurately and concisely explaining to the person why your app needs access to sensitive data, typically in one complete sentence, lets the person make an informed decision and improves the chances that they grant access* […]"[142].

192. The three parts of the prompt, namely the wording of the prompt, the purpose string and the action buttons can be seen in the screenshot below:

- the wording of the prompt, which cannot be modified and appears in bold type, which says: "*Allow* [app] *to track your activity across other companies' apps and websites*";
- the purpose string, which consists of non-bold-type text that can be customised by publishers;
- the third part of the ATT prompt, which consists of two action buttons whereby the user can choose between allowing or not allowing tracking.

Screenshot of the ATT prompt displayed in the *Le Monde* app



Source: Autorité de la concurrence, *April 2023, iOS 16.3*

[142] Classification mark 2,118 (referral 20/0099 M).

A technical solution enabling effective refusal by the user

193. In Decision 21-D-07, the *Autorité* stated in paragraph 30 that "*if the user makes the choice in the ATT prompt not to allow the app to track them in other apps 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*[143]*. The methods concerned include, for example: the hash of the e-mail address or telephone number*[144]*, or the technique of digital fingerprinting*".

194. In particular, on the "User Privacy and Data Use" page of its website, Apple explains that app publishers cannot use digital fingerprinting to identify a device or a user: "*Per the Apple Developer Program License Agreement, you may not derive data from a device for the purpose of uniquely identifying it. Examples of user or device data include, but are not limited to: properties of a user's web browser and its configuration, the user's device and its configuration, the user's location, or the user's network connection. Apps that are found to be engaging in this practice, or that reference SDKs (including but not limited to Ad Networks, Attribution services, and Analytics) that are, may be rejected from the App Store*"[145].

iii. The information provided by Apple during the interim measures proceedings concerning the options for personalising the ATT

195. During the interim measures proceedings, Apple indicated that publishers would be able to partially personalise the text of the ATT prompt, choose when it would be displayed (provided this was before any user tracking), and add an additional information window, even if the user refused tracking.

196. Apple explained that, firstly, developers could modify the "non-bold" text in the ATT pop-up to provide additional information to obtain informed consent within the meaning of Article 4(11) of the GDPR; secondly, they were free to explain how users' data would be used and to try to convince users to accept tracking; and thirdly, the documentation guided developers on the possibilities of personalisation, limited to the purpose string[146].

197. Apple specified that developers could design, themselves, the information windows to be added before or after the ATT prompt[147]. As an example, the windows could offer additional explanations to users, even after tracking is refused, of how to modify their choices. According to Apple, "*the combination of the ATT prompt and these additional windows allows for greater transparency and better information for users*"[148]. Lastly, Apple stated that "*the user can change their 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*

---

[143] Information available in the "Frequently asked questions" section on the "User Privacy and Data Use" page at https://developer.apple.com/app-store/user-privacy-and-data-use/, classification mark 8,727 (NCV 8,953).

[144] 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.

[145] Classification mark 8,728.

[146] Classification mark 2,118 (referral 20/0099 M).

[147] Classification marks 2,119 and 2,120 (referral 20/0099 M).

[148] Classification mark 2,121 (referral 20/0099 M).

has to do is insert a link in the information window that takes the user directly to the relevant settings on their device"[149].

198. These personalisation options were expressly taken into account by the *Autorité* in its decision on the request for interim measures.

199. In particular, the *Autorité* noted that developers could "*freely modify the description of the usage (purpose string), 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;* [and] *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*"[150].

b) Limitations of the ATT prompt identified during the investigation

200. The evidence in the case file contradicts Apple's statements during the investigation of the request for interim measures, according to which "*developers design these pop-up windows themselves*" and "*freely decide their structure, format and content*"[151].

201. Firstly, the possibilities to personalise the ATT prompt are limited, which makes the use of third-party apps by users complicated because publishers have to combine the ATT prompt with their CMP or even with other pop-up windows (***i.***). Secondly, Apple's rules governing the interaction between the different pop-up windows create an asymmetrical system that makes refusal of tracking more likely (***ii.***). Lastly, the evidence in the case file indicates that Apple's position concerning the scope and implementation of ATT has fluctuated considerably, adding to the difficulties encountered by publishers in implementing the prompt (***iii.***).

i. Limited possibilities to personalise the prompt that complicate the user experience

202. The complainants argued that, because of the limitations of the ATT prompt, users of Apple devices "*will be flooded with multiple requests for consent (since the Apple pop-up window is not GDPR-compliant)*"[152]. In this respect, several of the companies interviewed highlighted the constraints created by the rules governing the implementation of the ATT prompt, whether in terms of the limited possibilities for personalisation, or the possibility given by Apple of adding additional pop-up windows to specify the content thereof.

The obligation for publishers to systematically display a CMP in addition to the ATT prompt

203. With regard, <u>firstly</u>, to the text that cannot be personalised, some companies argue that the scope of the ATT prompt is likely to be limited to a single method of data collection and use, namely tracking of activities on third-party websites and apps, even though the legal and

[149] Classification marks 2,936 and 2,937 (referral 20/0099 M).

[150] Decision 21-D-07, cited above, paragraph 152.

[151] Classification mark 2,120 (referral 20/0099 M).

[152] Classification mark 9.

regulatory framework also applies to the use of proprietary data.

204. As a result of this limitation, publishers may be obliged to display a CMP in order to collect and use data, especially proprietary data.

205. In this respect, Ogury argues, for example, that "*the ATT is incomplete, as it only allows for consent to be given for targeted ad tracking through apps. However, Ogury has to request consent for other purposes not covered by ATT* [and must] *therefore display a second pop-up window to request consent from the user in order to ensure compliance with the obligations of the GDPR and the ePrivacy Directive*"[153].

206. Secondly, with regard to the part of the text that can be modified, the ATT prompt does not enable publishers to comply with their legal and regulatory obligations, which Apple does not dispute, since, as recalled in paragraphs 190 *et seq.* above, such compliance is not an objective of the ATT prompt.

207. Apple states on its "Developer" web page that, for the purposes of complying with the GDPR and the French Data Protection Act, publishers can include separate pop-up windows from the ATT prompt, by adding additional requests for consent[154].

208. It appears that publishers must therefore display several pop-up windows in order to comply with the GDPR, a situation which several players describe as unnecessary and excessive.

209. According to Didomi, the ATT prompt "*duplicates the CMP*" and presents "*very few possibilities for personalisation (at best a small message in small print and a prior screen that acts as a 3rd chance to refuse)*"[155].

210. S4M explains that ATT "*in no way enables the user to make informed choices, as the information presented by Apple is far too limited* [sic] *to accurately convey the various ways in which the data collected can be used. Moreover, ATT does not enable a publisher to comply with the GDPR, since the principles of transparency and specific consent are ignored by Apple.* [...] *Publishers must ask for users' consent again, even after the user has already consented to the use of tracking technologies*"[156].

211. Prisma, with reference to the CNIL guidelines of 17 September 2020[157], says that while "*ATT allows the user to exercise a general choice to accept or refuse tracking",* the prompt is not enough to enable valid collection of consent given that "*consent is presumed not to have been freely given if separate consent cannot be given to different personal data processing operations*"[158].

---

[153] Classification mark 7,474

[154] Classification mark 8,745 (NCV 8,971).

[155] Classification mark 1,742.

[156] Classification mark 1,514.

[157] Opinion 2020-091 of 17 September 2020 adopting guidelines on the application of Article 82 of the French law of 6 January 1978 as amended to read and write operations on a user's device (including "cookies and other trackers") and repealing opinion 2019-093 of 4 July 2019, in particular paragraph 19.

[158] Classification marks 1,597 and 1,598.

The possibilities for personalisation offered by adding pop-up windows before or after the ATT prompt only make the user experience even more complex.

212. As noted in the decision rejecting the request for interim measures, Apple indicated that developers could *"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*" (emphasis added)[159].

213. However, the information in the case file indicates that, in practice, this possibility does not simplify the user experience.

214. Firstly, this can be seen with regard to the insertion of a pop-up window before the ATT prompt, or pre-prompt.

215. Even supposing that such a pop-up window enables valid consent to be obtained in the context of the ATT prompt, the publisher must still, as explained above in paragraphs 203 *et seq.* above, display their CMP for collecting proprietary data.

216. In this case, inserting a pre-prompt obliges the publisher to display at least three pop-up windows in succession, a situation highlighted by several companies in the course of the investigation.

217. Google claims to have refused to implement ATT on the grounds that displaying multiple prompts would be disruptive to users[160].

218. Others, such as S4M and Smart, highlight the cumbersome nature of the process, with up to four successive windows popping up before the user can access the app[161]. Amaury confirms this assertion, stating that "*the ATT/CMP chain (incomprehensible to anyone outside tech) makes it even more difficult for a publisher to make sure that users understand what is being asked of them. The brand's image is tarnished, and the publisher's aim of maintaining a quality service is also affected"*[162].

219. Secondly, displaying a pop-up window after the ATT prompt, or a post-prompt, giving the user the opportunity, if they so wish, to change their mind regarding the refusal given via the ATT prompt, cannot by definition simplify the user experience compared with a situation where only the ATT prompt and the publisher's CMP are displayed.

ii. An asymmetrical system that makes refusal easier than consent

220. The complainants maintain that the order in which the ATT prompt and CMP pop-up appear was gradually standardised by Apple after a period of considerable uncertainty: "*the contradictory, incomprehensible and chaotic feedback of the first few months was quickly structured by Apple, which uniformly determined the order in which the publisher's CMP and the ATT prompt appear*"[163]. They argue that the rules imposed by Apple in this respect result in a system that makes it easier to refuse tracking on third-party sites and apps than to consent to such tracking. On this point, the investigation found that while Apple stipulates

[159] Decision 21-D-07, cited above, paragraph 152.

[160] Classification mark 5,579.

[161] Classification marks 1,514 and 1,411.

[162] Classification mark 1,526.

[163] Classification mark 6,058.

that publishers cannot display a second prompt if a user refuses tracking (via the ATT prompt or a CMP), similar constraints do not seem to apply when a user authorises ad tracking in a first pop-up window.

The impossibility to reconsider an initial refusal of tracking on third-party sites and apps

♦ *The prevailing situation when refusal is given via the ATT prompt*

221. The case file contains several examples of a publisher being prevented from displaying an additional pop-up window to ask users to reconsider their choice given via the ATT prompt.

222. In several cases, however, Apple clarified that a CMP limited to uses other than tracking on third-party apps and sites could be displayed after a user refuses tracking via the ATT prompt. It can also be noted that in its exchanges with publishers, Apple does not address the legal and technological implications of incorporating a modified CMP, which is only displayed when tracking has already been refused.

223. In some cases, Apple recommended that publishers display the CMP first in order to avoid displaying a modified CMP. For example, the app [confidential] received the following message:

"[confidential]".

224. However, this solution is not systematically offered to all publishers, and is not mentioned on the Apple website.

♦ *The prevailing situation when refusal is given in the publisher's CMP*

225. Secondly, it is clear from several statements (e.g. [confidential]) that Apple does not allow the ATT prompt to be displayed once tracking has been refused via the CMP[164].

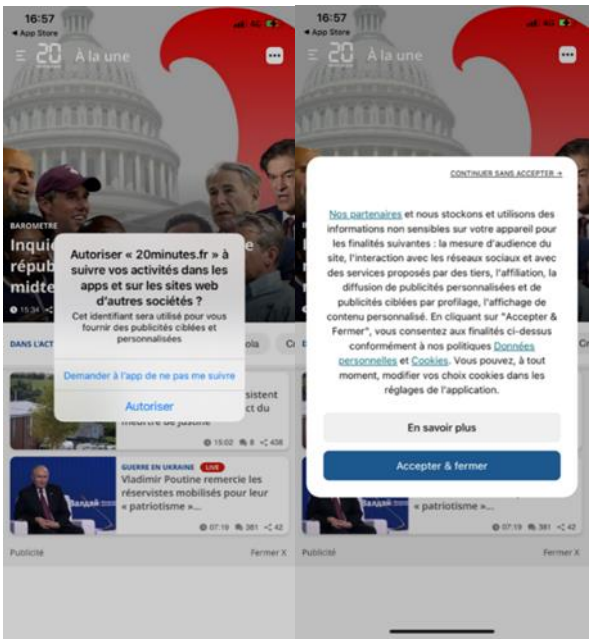
226. In these messages, Apple requests that publishers do not obtain consent a second time for the same purpose, a position compatible with that expressed by the CNIL in its opinion of 19 May 2022, discussed in more detail in paragraphs 271 *et seq.* below.

[164] Classification marks CV 6,918 and NCV 7,204.

The obligation for publishers to always obtain consent for tracking twice on third-party sites and apps

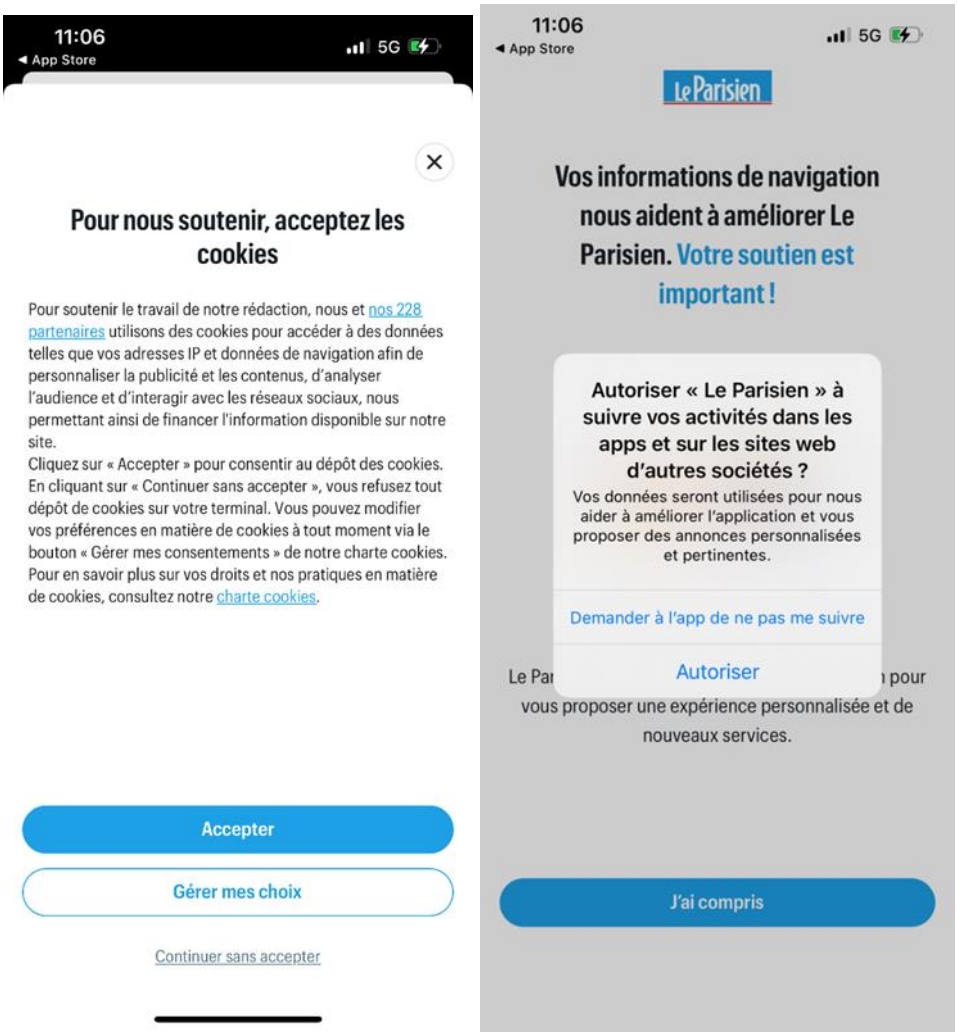
227. On the App Store (in the case, for example, of the *20 Minutes*, *Le Parisien*, etc. apps), it was observed that when tracking is authorised for the first time, a second window appears, the CMP or the ATT prompt.

Consent process in the *20 Minutes* app



Source: Autorité de la concurrence

Consent process in the *Le Parisien* app



Source: Autorité de la concurrence

228. This situation is partly due to the limitations of the ATT prompt described above and partly due to Apple's rules for displaying the ATT prompt.

♦ *Display of the ATT prompt required by Apple if tracking on third-party sites and apps is authorised via the CMP*

229. Apple has introduced a hierarchy between prompts, defining an obligation to respect the response given by the user via the ATT prompt, even if the ATT prompt does not allow for informed consent to be obtained, as explained above.

230. The "Frequently asked questions" section sets out the rules concerning the possibility of using a CMP (under "*Can I add other permission requests in order to comply with regulations […]?*"):

"*You can choose to include screens in order to comply with government regulations. However, your app must always respect the user's response to the AppTrackingTransparency prompt, even if their response to other prompts conflicts. Guideline 5.1.1 (iv) states: "Apps must respect the user's permission settings and not attempt to manipulate, trick, or force people to consent to unnecessary data access". This includes altering a user's AppTrackingTransparency response by only respecting their response to*

other permission requests. <u>You can use third-party Consent Management Platforms to add these permission requests, as long as no tracking takes place from such use</u>" (emphasis added)[165].

231. According to the complainants, the ATT prompt is always displayed when the user has answered "Yes" to the publisher's CMP. In their view, "*the ATT only disrupts a user's consent for a third-party app other than Apple, when that user has already consented to tracking for advertising and other purposes*". They add that refusal of ATT takes precedence over any other decision by the user, who can only reverse their decision, if necessary, "*via a necessarily complicated and inconvenient path through the settings*"[166]. In the course of its exchanges with Apple, [confidential] confirmed that only when the user consents to tracking – and not when tracking is refused – is the ATT prompt displayed, in accordance with Apple's requirements: "[confidential]".

232. In its response, Apple did not indicate that it was disputing the display of the ATT if the user had previously accepted ad tracking, but simply replied that the publisher should not display the ATT after a user has already refused tracking: "[confidential]".

233. According to TF1, *"if the user accepts everything in the CMP, ATT consent is requested. But if the user refuses everything in the CMP, ATT consent is not requested. However, ATT consent is what determines the publisher's access to the IDFA ("yes" ATT = IDFA sent to the publisher; "no" ATT = IDFA not sent to the publisher). As such, by imposing that the ATT consent request be displayed in second place, and only in the event of CMP consent, the publisher's chance of accessing the IDFA is significantly reduced*"[167].

234. In response to a message from Apple, [confidential] described its consent process as follows: "[confidential]".

235. The explanation on Apple's site does not refer to the situation described by [confidential], but only to the need to "*respect the user's response to the AppTrackingTransparency prompt*"[168], without distinguishing between refusal and consent for ad tracking.

236. It should be remembered that the CNIL addressed this issue in its opinion of 19 May 2022 (see paragraphs 271 *et seq.* below).

- ♦ *The obligation to confirm acceptance of ATT via a CMP in order to obtain consent for regulatory requirements*

237. Insofar as the conditions for implementing the ATT prompt as defined by Apple do not allow for valid consent with regard to the GDPR to be obtained, consent must be given a second time via the publisher's CMP.

238. GESTE believes in this regard that "*app publishers have legal and regulatory obligations that cannot be met by a prompt such as ATT, while requiring that such prompt takes priority in the event of a dispute, at the risk of the app being rejected and excluded from the App*

[165] Classification mark 8,748 (NCV 8,974).

[166] Classification mark 6,058.

[167] Classification marks 2,047 and 2,048.

[168] Classification mark 8,748 (NCV 8,974).

Store"[169].

iii. Lack of clarity in the positions communicated by Apple to publishers on the implementation of the ATT

239. The rules published by Apple on the implementation of the ATT prompt, and their application by its teams, are characterised by a certain inconsistency. In this regard, several of the companies interviewed reported having encountered difficulties with the reviews on the platform.

Classification mark	Company	Assessment of the lack of transparency in the rollout of the ATT
Classification mark 5,414	Branch	"*We didn't have the opportunity to discuss the implementation of the ATT with Apple, as their product and development teams are known for not accepting any outside input*".
Classification mark 3,414	Verizon	"*Apple rolled out the ATT too quickly, with insufficient guidelines and before important aspects of the app policies/rules had been developed and implemented; market players and their advertising partners were therefore unable to adapt properly and in good time*".
Classification mark 1,866	Madvertise	"*Any ticket opened at* [Apple] *never gets answered* (...). *Nevertheless, to emphasise, Apple rejects any submitted app with a CMP that is displayed after its ATT pop-up".*
Classification mark 1,655	Leboncoin	"*In the end, the ATT was integrated into version 14.5 on 26 April 2021. The lack of prior information about a change in Apple's applicable rules, without any advance notice or technical information for app publishers, contributed in no small measure to the setbacks in rolling out this functionality".*
Classification marks 2,051 and 3,524	TF1	"*Exchanges with Apple are limited to verbal exchanges, which are never made formal other than through the App Store development console. The only formal elements come from the responses of the US App Review Team, taken from the App Store console (see the screenshots provided to substantiate the answer to question 8) and mean that requests cannot be followed up and refusals cannot be challenged, and any refusals are never explained".*
Classification mark 2,067	M6	"*Our experience of the rollout of the ATT has been a string of "unpleasant surprises", a lack of clarity about what is expected in technical terms and vis-à-vis the user, and the impression that we are being coerced without the possibility of discussion.* (...) *If we do not implement what Apple expects, we are immediately penalised, because our app will no longer be listed in the App Store; if we do implement what Apple expects, we are also penalised in terms of our ad revenue (even though we are compliant and already meet our obligations as regards user data protection via our CMP)*".
Classification marks 1,429	Voodoo	"*During the tense period of preparation for the launch of ATT, we were confronted with numerous rejections from Apple's teams for a variety of*

[169] GESTE finds that "*asking users two times back-to-back for consent to the collection and use of their data is disruptive to their experience of accessing content, a source of consent fatigue and even a source of contradictory, irrational responses due to the cognitive biases that this dual prompt induces*" (classification mark 40 [referral 22/0012 F]).

Classification mark	Company	Assessment of the lack of transparency in the rollout of the ATT
and 1,430		*reasons, including:* • *a ban on mobile app publishers offering a paid alternative to accepting ad tracking;* • *not being able to influence users' choice via specific information windows explaining the reasons for the ATT prompt;* • *clarifying to users that refusing ad tracking did not affect the collection of personal data that was essential for the service provided by Voodoo and the display of non-personalised adverts.* (...) *Nevertheless, and although the system currently used by Voodoo has been accepted on numerous occasions, we are still regularly confronted with rejections by Apple's teams*".
Classification mark 1,557	Publicis	"*When we ask app developers, they explain that Apple has changed its rules several times, requiring the ATT prompt to be displayed before the publishers' CMP, then – conversely – the CMP to be displayed first followed by the ATT prompt, before Apple changes its mind again. We've also heard from some developers that Apple isn't as firm as usual in enforcing its rules, and that some apps haven't incorporated the ATT prompt but have not been penalised by Apple, at least for the time being".*

240. In its report on mobile ecosystems published in June 2022, the CMA gathered feedback comparable to that of the companies cited above, indicating that: "*many developers complained that the explanation they receive for the rejection of an app or update often does not provide them with enough information on Apple's reasoning. This means that they do not understand how to address Apple's concern and make their app compliant.* […] *Developers raised the issue of inconsistency in the interpretation of the App Store Review Guidelines*"[170].

241. In the context of the investigation into the merits of the case, an examination, of the messages sent by Apple to publishers shows that, while Apple refers to the articles of the guidelines, it does not generally explain precisely which restriction has not been complied with. In many cases, the information provided does not enable a publisher to entirely understand what the alleged violation is and how to remedy that violation.

242. Apple's positions were also liable to change without prior notice to publishers, a fact not disputed by Apple, which sometimes tells publishers that its guidelines are a "*living document*"[171].

243. Apple's changeable positions regarding the link between the ATT and the publisher's CMP can, for example, be illustrated by exchanges with the publisher of the [confidential] app.

244. This publisher wrote the following message to Apple, pointing out that, at the latter's request, it still displayed the ATT after a refusal via a CMP: "[confidential]"[172].

245. Numerous exchanges with publishers also show issues concerning the use of proprietary data, the lack of data exchange with third parties and the obligation to display the ATT.

---

[170] Competition and Markets Authority, Mobile ecosystems. Market study final report, 10 June 2022, page 195, paragraphs 6.48 and 6.49.

[171] Classification mark CV 6,918 and NCV 7,204.

[172] Classification marks CV 6,918 and NCV 7,204.

246. Some publishers have challenged whether ATT is applicable to their data collection and use practices. It appears that Apple's interpretation of the notion of tracking as applicable to publishers is broader than that which it applies to itself, limiting even the collection of proprietary data when a user refuses tracking via the ATT prompt.

247. For example, in response to Apple's questions, [confidential] stated that no personal data was sent to third parties, and that its data was stored and used internally.

248. Apple nevertheless rejected this version of the app, saying it was "[confidential]"[173]. Apple gave an identical response to the publishers of the [confidential] app. However, Apple's definition of tracking is supposed to be limited to "*activity across other companies' apps and websites*"[174], and not to websites and web content also owned by the app publisher.

249. Moreover, Apple did not explicitly respond to the publisher's subsequent questions about the need to display the ATT prompt if the app collects data on webviews from sites that it does not own.

250. On its website, Apple provides the following guidance: "*If tracking occurs within a webview inside an app, do I need to use the AppTrackingTransparency prompt? Yes. If you are using a webview for app functionality, it should be treated the same way as native functionality in your app, unless you are enabling the user to navigate the open web*"[175]. As such, using webviews requires the ATT to be displayed when there is tracking, i.e. on third-party, non-proprietary sites and apps. Nevertheless, Apple asked the publisher to display the ATT and remove its own pop-up window.

251. The publisher of the [confidential] app gave Apple the following response: "[confidential]"[176].

252. Apple simply replied that it was continuing its review, but did not comment on these explanations.

253. The publisher of the [confidential] app informed Apple that [confidential]. It therefore asked Apple: "[confidential]"[177]. In response, Apple thanked [confidential] for having considered the remaining issues, approved the submission and offered to help fix the bugs for users[178].

254. In two messages, [confidential] sent several observations to Apple, which had criticised the former for implementing "[confidential]".

255. In a second message, [confidential] added: "[confidential]"[179].

256. In its response, Apple simply stated that "[confidential]"[180].

257. Similarly, [confidential] argued that it was not required to display the ATT because it does not use IDFA and does not exchange data with third parties. After receiving a rejection

---

[173] *Ibid.*

[174] Classification mark 8,779 (NCV 9,005).

[175] *Ibid.* and classification mark 8,780 (NCV 9,006).

[176] Classification marks CV 6,918 and NCV 7,204.

[177] *Ibid.*

[178] *Ibid.*

[179] *Ibid.*

[180] *Ibid.*

message, it wrote to Apple as follows:

"[confidential]"[181].

258. [confidential] received a second standardised message from Apple, stating that it was in breach of Article 5.1.2, again linked to not displaying the ATT. Following two further messages and an appeal against Apple's decision, [confidential] finally implemented the ATT, without however changing its position. [confidential] replied to Apple's second message: "[confidential]".

259. Apple replied: "[confidential]"[182]. Apple did not respond to the question of whether the tracking performed by the app, which according to [confidential] was not for advertising purposes, fell within the scope of the ATT.

260. In a final response to a message from Apple asking the publisher of the [confidential] app to remove its proprietary pop-up window and display the ATT, it sent the following message, to which Apple did not reply: "[confidential]"[183].

c) CNIL opinions on whether ATT is compliant with the regulatory framework

i. Opinion of 17 December 2020 on the planned implementation of the ATT prompt presented by Apple

261. In the context of the request for interim measures, the *Autorité* asked the CNIL to comment on the personal data protection issues likely to arise in connection with the introduction of the ATT prompt.

262. In its opinion of 17 December 2020[184], issued prior to the rollout of ATT, the CNIL made a number of observations about the prompt.

263. Firstly, the CNIL stated that even assuming that Apple were not regarded as a joint controller of processing operations, "*the GDPR and the national provisions transposing the ePrivacy Directive in no way prohibit software designers from providing, or even imposing* [their] *design on the pop-up window to obtain user consent. In fact, the regulations strongly encourage software designers to take data protection into account when developing and designing their products"*.

264. In this respect, the CNIL noted that "*data protection regulations do not prevent Apple from implementing a framework that prohibits app developers from tracking users without their consent, especially when this is required by regulations*".

265. Secondly, the CNIL considered that the ATT prompt designed by Apple differs "*positively*" in certain respects from a large number of website interfaces or mobile apps that do not comply with the regulations.

266. In this respect, the CNIL emphasised that the ATT prompt will allow the user to accept or refuse tracking with the same level of simplicity, thanks to the "*Allow*" and "*Ask app not to track*" buttons, both located at the same level and in the same format. Referring to its above-mentioned recommendation on cookies and other trackers from 2020, the CNIL

[181] *Ibid.*

[182] *Ibid.*

[183] *Ibid.*

[184] Classification marks 1,725 to 1,741 (NCV 3,324, 3,325 and 3,329 for 1,727, 1,728 and 1,732, respectively).

deemed this to be a simple and clear way for the user to refuse tracking as easily as to give their consent.

267. The CNIL also endorsed the fact that tracking is mentioned in the ATT prompt, as such mention is "*essential information to make the user aware of the potential scale of the data collection that will feed into their profile for advertising purposes, by highlighting that users must therefore be informed about the scope of their choice*". It added that because ATT enabled consent to be obtained on each of the apps concerned, the prompt also helped to ensure that users are fully aware of the scope of their consent.

268. With regard to app publishers, the CNIL considered that ATT would help the smaller players "*to comply with the obligation laid down by the provisions of Article 82 of the law* [French Data Protection Act] *by providing a simple tool for collecting valid consent for their ad tracking operations*", provided that certain changes are made to the prompt.

269. Thirdly, the CNIL took note of the possibility, announced by Apple, for publishers to supplement the ATT prompt in order to obtain valid consent within the meaning of the applicable regulations. It noted that, based on the information presented to it, the ATT prompt would enable app publishers, "*provided they include the legally required information* [...] *to collect informed consent as required by the applicable regulations*", specifying that the legally required information was that set out in Article 2 of the guidelines on "*Cookies and other trackers*".

270. The CNIL also took note of the clarification provided by Apple according to which users would be able to reconsider the choice made via the prompt, "*app by app*" within the settings of the operating system, in such a way that refusing tracking required of the user no more effort than giving consent by a simple "click" on the ATT prompt.

ii. Opinion of 19 May 2022 on the prompt actually implemented by Apple at that date

271. During the investigation into the merits of the case, the CNIL issued a second opinion at the request of the *Autorité* on 19 May 2022, in which it examined the practical implementation of ATT after iOS version 14.5.

272. As a preliminary point, the CNIL started by recalling that the views expressed in its previous opinion of 17 December 2020 were based in particular on the clarification provided by Apple that developers would have "*complete freedom*" to modify the customisable part of the ATT pop-up, in order "*in particular, but not exclusively, to inform users how the data collected via cookies will be used*"[185].

273. The CNIL then examined the ATT prompt actually implemented since iOS version 14.5 and noted that "*the ATT prompt does not allow for a publisher to directly add the information necessary for collecting informed consent within the meaning* [of Article 82 of the French Data Protection Act and the GDPR]".

274. On this point, the CNIL noted that ATT "*suffers from a double limitation: on the one hand, the length of the text appears limited and in practice means that all the required information cannot be added, in particular the information required by Articles 12* et seq. *of the GDPR; on the other hand, the pop-up window does not appear to allow for a clickable hypertext link to be inserted, enabling the user to access information on a second level* [...]. *Thus, the ATT prompt would in practice require the publisher to display a CMP to the user for*

[185] Classification mark 6,156.

purposes that include the purpose covered by the ATT prompt. In other words, the user is presented with two successive windows requesting their consent for the same thing" (emphasis added).

275. In this context, the CNIL found that the rules laid down by Apple regarding the link between the ATT prompt and the publisher's CMP lead to two different situations, depending on whether the user refuses or accepts:

- on the one hand, the CNIL indicated that, whatever the order in which the two windows pop up, "*a user who has answered "no" to the first should not be presented with the second, for the same processing purpose, as this would necessarily affect the validity of the consent of this user, who has just refused tracking*"[186]. The CNIL nevertheless specified that *"if the user answers "no" to the ATT prompt, there is nothing to prevent the publisher from requesting their consent, through a CMP, to read/write operations on the device for other purposes*"[187] (emphasis added);
- on the other hand, the CNIL noted that, if the user answers "yes" to the first window, the processing operation can only take place if they also answer "yes" to the second window.

276. The CNIL believed that *"making publishers systematically collect user consent twice for the same purpose constitutes an unnecessary and artificial complexity, insofar as it seems that the ATT prompt could easily, subject to a few modifications, also be used to collect the consent required by French law and the GDPR , especially if a hyperlink could be inserted*".

277. It stressed that, with regard to the consent required by those provisions, "*it has always advocated collecting consent once, via a single interface instead of two successive interfaces, in order to simplify and clarify things for the user*".

278. There would therefore be several advantages to collecting valid consent within the meaning of the GDPR for ad tracking directly in the ATT pop-up: easier user choice, a clear, set wording and a standardised prompt for small publishers.

279. Consequently, the CNIL concluded that "*a marginal improvement in how the ATT prompt is configured, which does not affect the readability of the pop-up window, such that it can be used to obtain valid consent (in particular by including a clickable hyperlink), would maintain the level of user protection offered by the ATT prompt [...] (refusal as simple as consent, mention of tracking), without having the disadvantage of creating a complex and excessive system for the user*".

[186] Classification mark 6,159. In this regard, the CNIL specifies that "*obtaining consent in accordance with the requirements of the GDPR means there is no doubt as to the intention of the data subject to consent to the processing of their data for the purpose concerned: the user must be able to make their choice in an informed and unambiguous manner, regardless of the order in which the two windows pop up*".

[187] Classification mark 6,159.

5. DATA COLLECTION BY APPLE FOR THE PROVISION OF ADVERTISING SERVICES

280. Although ad tracking by Apple can be described as significant (**a**), Apple did not introduce a framework for obtaining consent for data collected in the App Store until iOS version 15, released in September 2021 (**b**). The CNIL confirmed the obligation to obtain consent and fined Apple in a decision dated 19 December 2022 (**c**).

a) Significant ad tracking of users in the context of Apple's advertising services

281. Apple's ad platform enables adverts to be displayed on the App Store in France, as well as on the Apple News and Stocks apps in a number of other countries, including the UK. In France, Apple markets search-related ad space in the App Store and, since May 2021, "Display" ads. Apple has also recently introduced advertising in Apple Music[188]. In order to display these ads, Apple directly performs ad tracking within the meaning of the GDPR.

282. The evidence in the case file shows that Apple is able to collect and use data of various types and sources for advertising purposes.

283. Firstly, Apple uses sociodemographic and contextual data on users and devices for advertising purposes. Apple provides information for French users on the French version of the "Apple Advertising & Privacy" web page[189], which pertains to its entire ad platform and adverts displayed in the App Store, Apple News and Stocks: "*Contextual information may be used to serve ads to you, such as;* […] *We create segments to deliver personalized ads on the App Store, Apple News, and Stocks. Segments are groups of people who share similar characteristics*". The web page states: "*Apple's advertising platform receives information about the ads you tap and view against a random identifier not tied to your Apple Account".*

284. Secondly, the data used by Apple is collected in a logged-in environment, linked to the Apple ID, in which behavioural and sociodemographic data can be linked to an ID. The Apple ID is a personal account that enables access to Apple services, such as iCloud, the App Store and other Apple online stores, iMessage and FaceTime, and to a user's content on all their devices and on the internet. It includes login information, as well as contact details, payment information and security data such as "*trusted*" phone numbers or security questions, which are needed to use Apple services. According to Apple's website[190]: "*Your Apple Account information is used to enable Apple services when you sign in, including iCloud Backup,* [...] *Your Apple Account and all Apple services are designed from the ground up to protect your privacy. We work hard to collect only the data we need to make your experience better*".

285. Data collected in logged-in environments and sociodemographic data are generally characterised by a high level of reliability. They are obtained via a platform to which users log in with a username and password.

286. Sociodemographic data is factual, descriptive data on individuals and their lifestyles (age range, gender, occupation, address, etc.). When Apple provides a service to a user in such an environment, data is sent directly to Apple via the Apple ID and then linked to a random

---

[188] https://www.01net.com/actualites/apple-music-impose-desormais-publicites-service-payant.html (2 June 2022) (in French)

[189] Classification mark 8,799 (NCV 9,025).

[190] Classification mark 8,800 (NCV 9,026).

ID (see paragraphs 130 *et seq.*). Through behavioural data, user identification is almost certain, because users log into accounts that are assumed to be personal.

287. Moreover, these environments enable user identification across multiple devices[191], enhancing ad targeting capabilities and the assessment of campaign effectiveness. Unlike cookies and pixels, data from logged-in environments is not temporary and takes into account the user's activity on all devices[192].

288. Sociodemographic data is also very important, especially for targeting campaigns[193]. The targeting segments most commonly offered to advertisers are sociodemographic[194], as shown by the example of Facebook[195]. In addition, the data is long-lasting and does not lose much value over time[196]. Sociodemographic characteristics can be combined with other data for targeting, such as behavioural data like browsing history or words entered into a search engine[197].

289. Thirdly, Apple uses data for advertising purposes from sources that are not limited to the data generated on its advertising inventories, namely the App Store, Apple News and Stocks.

290. On the one hand, Apple stated that it uses information from other Apple services for advertising purposes, i.e. in order to display adverts in the App Store. Those services, which include the iTunes Store, the Apple Book Store, the Apple TV app and Apple Music[198], were not, at the time of the company's response, used to display and market ad space. Data from the Safari search engine is not used for advertising purposes[199].

291. On the other hand, Apple collects user data generated from content and services provided by third-party companies, including data linked to third-party apps on the App Store[200]. According to the "Apple Advertising & Privacy" page, Apple reserves the right to use in-app purchase data for advertising purposes. In response to a request for information on the categories of downloads, purchases and subscriptions taken into account to create its segments, Apple replied that "*although in-app purchases in a specific app are listed on the Advertising & Privacy page as a potential category of information that can be used by advertisers (that have developed the app concerned) for personalising adverts, Apple has not to date made that information available to advertisers as an explicit targeting criterion*"[201].

292. Apple has challenged the CMA's findings such as reported on 14 December 2021. The CMA

---

[191] Opinion 18-A-03, cited above, page 56, paragraph 128.

[192] *Ibid*., paragraph 138.

[193] Competition and Markets Authority, Appendix F to the Online platforms and digital advertising market study, 1 July 2020, page 20, paragraph 75.

[194] *Ibid.*, paragraph 76.

[195] *Ibid.*, paragraph 258.

[196] *Ibid.*, paragraph 201.

[197] *Ibid.*, paragraph 345.

[198] Classification mark 2,189.

[199] Classification mark 2,191 (NCV 4,412).

[200] In other countries, the same applies to data linked to informational content offered by third-party publishers on Apple News and Stocks.

[201] Classification mark 2,165.

observed that "*Apple uses data such as account information (e.g. birth year, gender, location), app and content downloads and purchases (e.g. from Apple Music, Apple TV, Apple Books and App Store's app categories) and the types of news stories they read on Apple News. We understand that this includes data on downloads, purchases and in-app purchases for all third-party apps, segmented by App Store category*"[202].

293. In response, Apple stated that the "*quoted text was written by the Competition and Markets Authority and therefore represents its interpretation of the information provided by Apple and available on the Apple Advertising website. The interpretation of the Competition and Markets Authority ignores several key facts. As previously mentioned, targeting based on downloads and in-app purchases within a given app is limited to use by the developer of that app. To select which ad to display from the set of ads that a user can receive based on the advertiser's targeting criteria, in the case of a user with Personalized Ads enabled, Apple may use summary and general information about the categories of apps and content that a user purchases and downloads*"[203].

294. When Apple informs its users on its "Apple Advertising & Privacy" page that there is no ad tracking on its platform, it refers only to the fact that there is no link between "*user or device data collected on our apps*", without distinguishing between its own apps and third-party apps, and "*user or device data collected from third parties*"[204]. On the basis of its responses to requests for information, it appears that Apple considers all the data that it collects for advertising purposes to be proprietary data, which it defines as "*all data collected by an app developer in the course of using its own apps, such as information that a user communicates to the developer*".[205]

295. However, in the relationship between users and content and app providers, Apple regards itself as a third party. The Apple Developer Program License Agreement requires developers to state in their end-user licence agreement that Apple is a third party in the relationship between the user and the app developer[206]. However, it is clear that Apple, notwithstanding its status as a third party in the contractual sense, has an interest in the contract, insofar as it links user data collected on apps for which it is not the publisher for advertising purposes, in particular.

296. Fourthly, Apple's vertical integration and the exclusive distribution rights that it imposes on apps through the App Store allows for the collection of vast quantities of data.

297. In this respect, as explained in paragraph 332 below, the CNIL found that Apple processes data "*on a significant scale, given the dominant position of the Apple operating system on the French mobile operating system market*[207]. It also noted that Apple makes significant use of browsing and profile data from the App Store for targeting based on users' interests and habits.

---

[202] Competition and Markets Authority, Mobile ecosystems. Market study interim report, 14 December 2021, paragraph 6.232. See: https://www.gov.uk/government/publications/mobile-ecosystems-market-study-interim-report.

[203] Classification mark 5,571.

[204] Classification mark 277, 2,156 and 4,377.

[205] Classification mark 2,173.

[206] See Apple Developer Program License Agreement, EXHIBIT D) Instructions for Minimum Terms of Developer's End-User License Agreement, page 82.

[207] Classification marks 7,419 and 7,420.

298. As the App Store is the only mobile app store on iOS devices, and users are required to enter their Apple ID to access other Apple services, the data available to Apple for advertising purposes is all the more significant. Similarly, Apple is able to mine data linked to third-party apps, which must be listed in the App Store and use Apple's payment infrastructure to be downloaded, or for the sale of in-app products or services.

b) Changes to the rules for obtaining user consent for data collection on the App Store

299. Apple changed its own conditions for obtaining consent for data collection for advertising purposes in September 2021, when iOS version 15 was introduced. The conditions for obtaining consent before (i) and after (ii) the iOS 15 update are presented below.

i. Prior consent not obtained before the release of iOS version 15 in September 2021

300. In their supplemental referral in November 2021, the complainants objected that "*Apple's targeted advertising has always been activated by default, without the user's prior consent. France Digitale has also complained to the CNIL about this lack of consent and the opt-out mechanism; the complaint is currently being investigated and, according to the complainants, may explain why the new consent pop-up window was introduced by Apple in iOS 15*"[208].

301. Apple explained in post-hearing observations (*note en délibéré*) why it relied "*on an opt-out system, rather than an opt-in system, to obtain user consent for its Apple Search Ads service*"[209], stating:

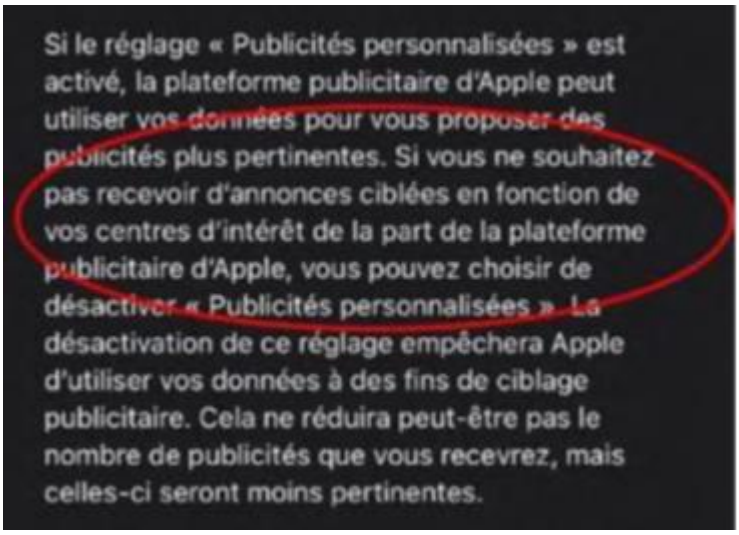
- that it does not track users, i.e. "*Apple does not aggregate data collected by a developer about a user or their device, with data collected on apps, websites or offline by other developers*", for advertising purposes for sharing with data brokers;
- that in "*Apple Search Ads, a limited amount of proprietary data can be used, including some data from the App Store, such as downloads and demographic information*";
- that, lastly, "*Apple only uses its users' personal data when it has a valid legal basis that complies with the GDPR*", the said legal basis consisting of users' consent, the need for processing to fulfil its contractual obligations to them, "*legitimate interests*" or "*the protection of users' fundamental interests*", according to Apple.

302. Apple had indicated, however, in its response submitted on 2 November 2021, that "*at the first launch of the App Store and periodically after major software updates, users receive information explaining how first-party data may be used for advertising on the App Store and how to opt out of personalised advertising on iOS devices*"[210]. The relevant passage is shown below (in French).

[208] Classification mark 3,540.

[209] Classification mark 3,030.

[210] Classification mark 2,176.



303. Apple added that users can limit the use of their first-party data for ad personalisation. It argued that it applies a more stringent standard than that of many other advertising platforms, by offering users the option of refusing this personalisation[211]. To disable personalised adverts, users can go to the privacy settings at any time, or "*click on "Advertising" at any time to access the settings*"[212].

304. The screenshots generated by Apple show there is no request for consent by Apple, but simply a statement telling the user that "*if you do not want to receive ads targeted to your interests from Apple's advertising platform, you can choose to turn off Personalized Ads*", as well as a link to a page "Learn more about Apple Advertising & Privacy"[213].

305. Furthermore, accessing the "Privacy" page from the "Welcome to the App Store" page involves clicking on a link in small type, "Find out how your data is managed", and not on the blue "Continue" button, which allows access to the App Store without reading the "Privacy" page and which is much bigger and more visible than the link to the "Privacy" page.

306. Even though adverts were activated by default, the conditions in which users could access functionalities intended to disable data collection for ad targeting purposes differed from other features offered by Apple on its devices, such as publisher ad tracking.

307. On the one hand, as the diagram below (in French) illustrates, to turn off personalised adverts and data collection for advertising purposes, it was and still is[214] necessary to select the "Settings" icon on the device, scroll down the menu and click on "Privacy", and then scroll down the sub-menu and click on "Apple Advertising". The "Apple Advertising" sub-section is invisible when the "Privacy" section is opened, whereas the "Tracking" sub-section, in which users can manage ad tracking by third-party app publishers, is the second sub-section and therefore visible.

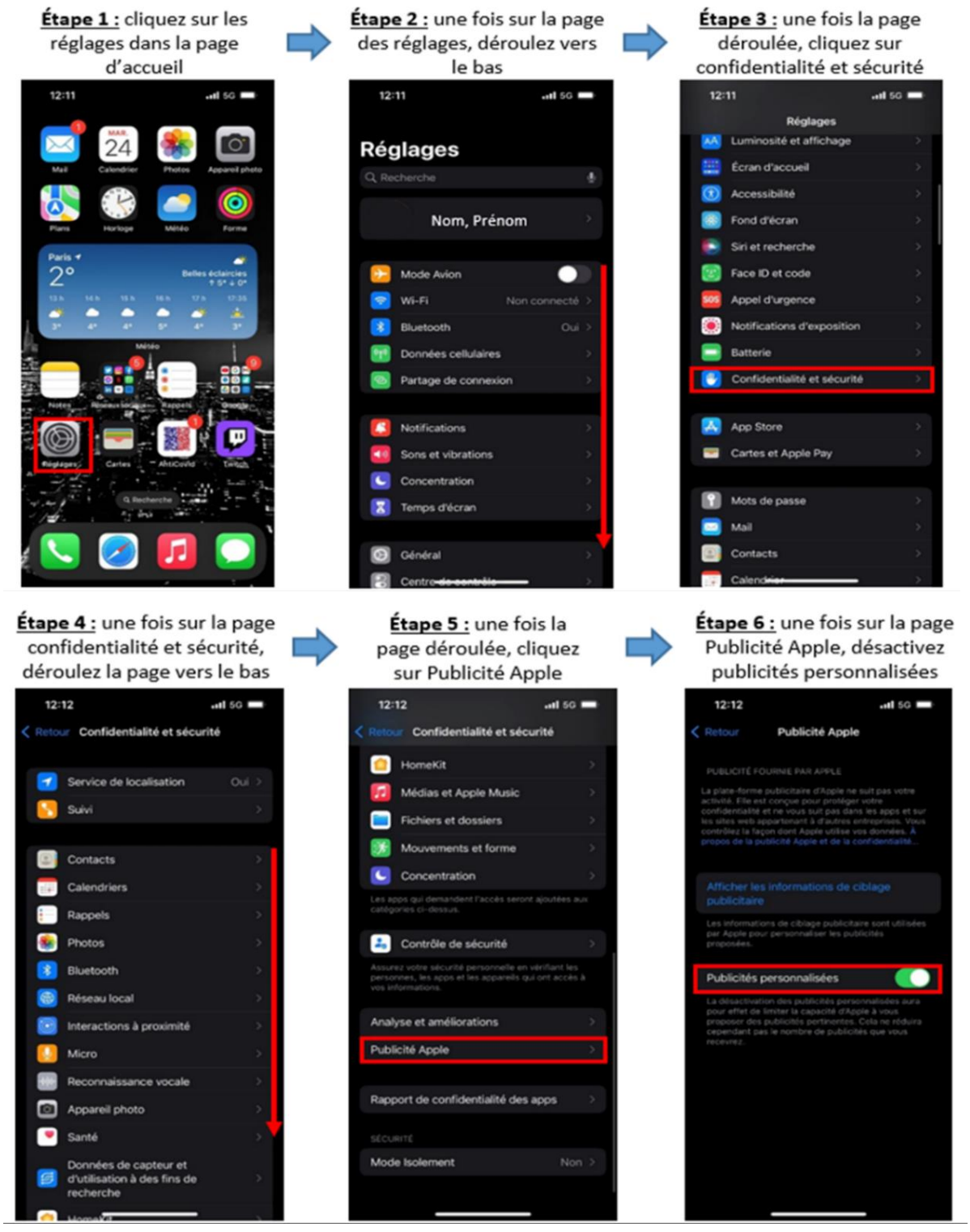
[211] Classification marks 2,176 and 2,177.

[212] *Ibid.*

[213] Classification mark 3,036. See screenshots in classification marks 2,176, 2,187, 2,276 and 2,285.

[214] These conditions were not modified by Apple with the launch of iOS version 15.

How to turn off personalised adverts



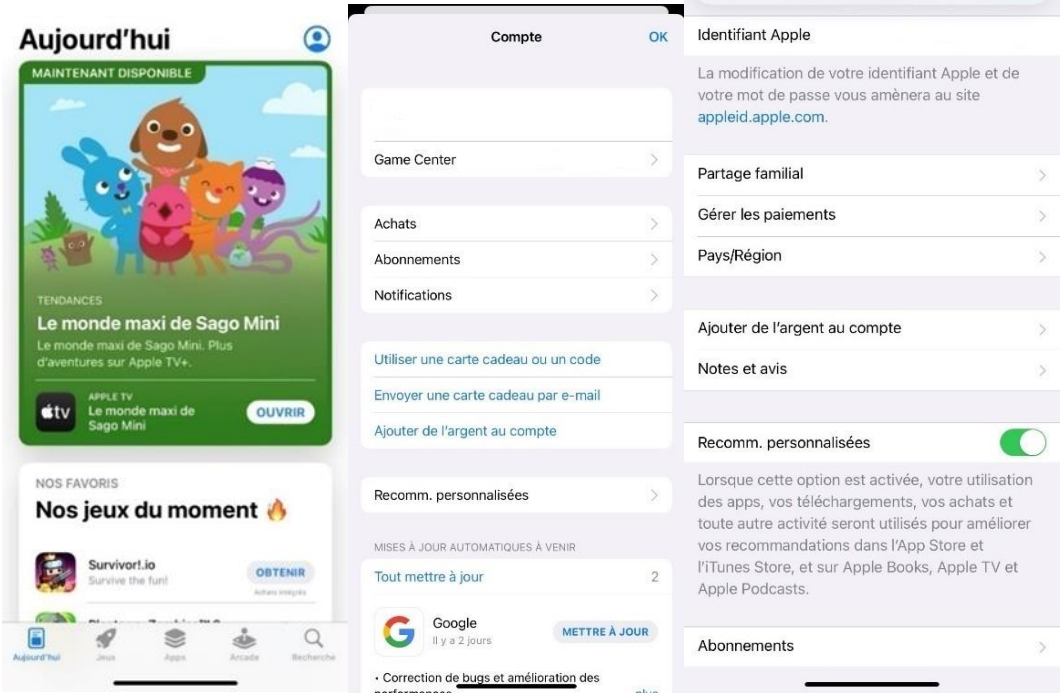
Source: Autorité de la concurrence, *from an iOS version later than 16.0, February 2023*

308. Apple was asked about the "Apple Advertising" sub-section appearing last in the "Privacy" section. In response, it stated that where items appear in the section does not affect their accessibility, as all items are "*equally visible and accessible*". It also indicated that the "Apple Advertising" sub-section should not be compared to the "Tracking" sub-section at the top of the menu, as the latter involves third-party data, whereas Apple does not perform

tracking. Apple stated that it goes further than many other companies in offering users the option of refusing personalised adverts based on its own data, offering this option in iOS 15[215]. Apple did not respond to the Investigation Services' request for internal documents supporting this choice.

309. On the other hand, for purposes other than advertising, such as personalised recommendations, Apple enables users to manage how their data is used directly in the App Store, unlike Apple advertising. For example, in the "Account" section of the App Store, Apple has not included a sub-section for turning off personalised adverts, whereas it has created a sub-section for managing and turning off data collection for "Personalized Recommendations", as illustrated in the figure below. A direct link to the account settings is provided.

Login and account pages in the App Store[216]



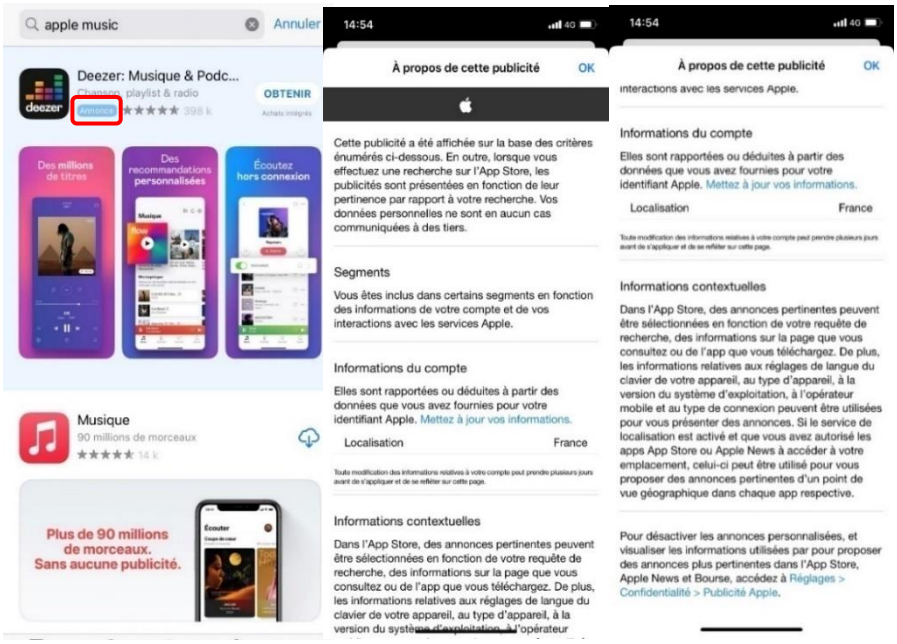
Source: Autorité de la concurrence

310. Within the App Store, on the other hand, users can access the "Apple Advertising" sub-section by clicking on the word "Ad" on Apple ads. However, the link to the "Apple Advertising" sub-section is likely to be invisible on the first screen displayed, in which case the user also has to scroll down and read the entire page to see the link to click on.

[215] Classification mark 2,183.

[216] Certain personal information has been blurred in the screenshots.

Information provided by Apple when clicking on the "Ad" button



Source: Autorité de la concurrence

311. The "Apple Advertising" sub-section presents information on how data is used in two different places, thereby encouraging users not to turn off personalised adverts. On the first page of the sub-section, Apple provides the following information under the heading "Apple-Delivered Advertising": *"The Apple advertising platform does not track you. It is designed to protect your privacy and does not follow you across apps and websites owned by other companies. You have control over how Apple uses your information.*

    [...] *Turning off personalized ads will limit Apple's ability to deliver relevant ads to you but will not reduce the number of ads you receive".*

312. The first statement restricts tracking to third-party websites and apps. The assertion, "*you have control over how Apple uses your information*", is likely to encourage the user to turn on personalised adverts and does not provide information on the reality and means of such control. Indeed, the "Personalized Ads" button is the only way to exercise choice over how Apple uses data.

313. Lastly, the sentence, "*but will not reduce the number of ads you receive*", minimises the influence of the user's choice on their expected experience, and is therefore likely to encourage the user to leave the option of their data being used activated.

314. More generally, there is no specific information on the first page of the "Apple Advertising" sub-section on the categories of data and how they are used for advertising purposes. To obtain additional information, the user must click on two separate links that open the "About Apple Advertising & Privacy" and "View Ad Targeting information" pages. Users can give their consent without having to read these pages.

315. The "Apple Advertising & Privacy" page, accessible by clicking on the "About Apple Advertising & Privacy" link, restates the information given on the first page and provides information on the design objectives of Apple's ad platform, on ad locations (App Store, Apple News, Stocks), on the fact that there is no tracking, on the kinds of data collected, on ad segments, on the fact that data is not shared with third parties or transferred to such parties, and on advertising preferences.

316. Apple restates on its "Apple Advertising & Privacy" page that it does not track users across apps and websites owned by other companies, and that it "*does not link user or device data collected from* [its] *apps with user or device data collected from third parties for targeted advertising or advertising measurement purposes*".

317. Similarly, Apple states at the top of the "Apple Advertising & Privacy" page that it "*does not share user or device data with data brokers*" and at the bottom of the page that it "*does not share any personal data with third parties*", although it does "*make certain non-personal data available to* [...] *strategic partners who work with Apple*". Although Apple communicates globally about its privacy policy in a uniform manner, it does not indicate that publishers that monetise their content on Apple News can use third-party tracking technologies for advertising measurement purposes directly on the Apple News app.

318. Information on location data and geographically targeted ads can be found on the "Apple Advertising & Privacy" page, which can be accessed via the link in the "Apple Advertising" sub-section. However, the user has to go to "Location Services" and open the App Store-specific page to partially or totally turn off the collection of location data[217]. Apple has not, however, included a link in the "Apple Advertising & Privacy" page to facilitate access to the "Location Services" sub-section.

319. When asked why turning off location-based ads is a separate action from turning off personalised adverts, Apple replied that it **"***thought that it was more relevant to provide users with a single menu to set all their geolocation permissions, whether these apply to Apple advertising or to the use of a user's location for any other purpose (for example, so that Google Maps can provide its location services, so that Uber can find out where a user is waiting for ride hailing services, etc.). Users set geolocation permissions on an app-by-app basis, so it makes more sense for the geolocation permissions in the App Store to govern the use of location for advertising on the App Store, rather than adding another check that could be confusing for users*"[218].

320. When asked whether users were aware that their geolocation data was used for advertising purposes, Apple added that "*when the App Store is first launched, new users are presented with a location authorisation prompt and are asked to choose whether to authorise the App Store to use their approximate location*"[219]. The prompt has the same wording as that used in the settings: "*The information is used by Apple to deliver more relevant ads*"[220]. It therefore appears that users are only asked about the use of their geolocation data once, when the App Store is launched; it is therefore unlikely that a user will withdraw their consent.

321. When Apple rolled out ATT, the design of iOS was such that "Personalized Ads" were enabled by default and could only be turned off by following several steps in the device "Settings". There was no change in the "Settings" with the introduction of the prior collection of consent by Apple with the release of iOS version 15 in September 2021.

---

[217] For use in ad targeting.

[218] Classification mark 2,179.

[219] Classification mark 2,181.

[220] *Ibid.*

ii. Apple's introduction of prior collection of consent in iOS 15

322. Apple changed the way consent is collected with iOS 15, which was released at the end of 2021. With the update to iOS 15, according to Apple, "*users will see a more visible and unavoidable choice between turning personalized ads on or off*", in particular when opening the App Store[221]. Apple states that, unlike many other developers and ad platforms, it offers its users this choice to limit the use of their data for advertising purposes: "*It's important to note that this is an option that many other developers and ad platform providers don't display – because they don't even offer their users the choice to limit that developer's use of its proprietary data for advertising purposes*"[222]. Screenshots have been provided to illustrate this presentation[223].

Pop-up windows for obtaining consent to use data for advertising purposes presented during the migration to iOS 15

Source: Apple

323. The text in the "Personalized Ads" pop-up window is as follows:

"*Personalized ads in Apple apps such as the App Store and Apple News help you discover apps, products, and services that are relevant to you. We protect your privacy by using device-generated identifiers and not linking advertising information to your Apple ID.*

Turning on Personalized Ads increases the relevance of ads shown by letting us use data like account information, app and content purchases, and where available, the types of News stories you read.

Apple does not track you or share your personal information with any third parties.

---

[221] Classification mark 2,177.

[222] *Ibid*.

[223] Classification mark 2,178.

Find out more".

324. Apple says that with iOS 15, "*the prompt related to personalized ads served by Apple appears during the initial launch of the App Store for new users and for existing users with personalized ads enabled. Furthermore, including before iOS 15, at the first launch of the App Store and periodically after major software updates, users receive information explaining how proprietary data may be used for advertising on the App Store and how to turn off personalized ads on iOS devices*"[224].

325. Apple summarises its position as follows: "*Apple does not perform tracking, but if it did, it would respect the ATT prompt and display the ATT prompt before performing any tracking* [and] *abides by stricter rules* [insofar as] *with iOS 15, it goes one step further than the ATT prompt and proactively offers a choice to new and existing users to activate personalized ads that, unlike the ATT prompt, applies to proprietary data*"[225].

326. Apple introduced prior collection of consent for the use of advertising data less than six months after the interim measures requested by the complainants were rejected. Apple did not inform the *Autorité* of its intention to modify consent collection methods. The company had explained the absence of an opt-out system by highlighting the development of technologies that were better at protecting privacy. In the investigation into the merits of the case, Apple did not provide any internal document supporting the introduction of prior collection of consent with the launch of iOS 15.

327. According to the complainants, Apple has "*decided, from now on, to request consent to enable personalised ads within the App Store, in order to comply with the legal requirements of the GDPR in particular, based on the CMPs of app publishers. This is an admission of non-compliance.* [...] *Over and above the fact that persistent violation of legal obligations may constitute a form of anticompetitive abuse consisting in circumventing the rules by not applying them, Apple admits at the same time that the situation between app publishers and Apple is still unbalanced, and this creates substantial anticompetitive effects for all companies providing online advertising services*"[226].

328. The new iOS 15 prompt features text on the front page that promotes personalised adverts, but does not reveal the specific categories of data that are used, nor the sources of data collection. For further information, users have to go to the "Apple Advertising & Privacy" page via the "Find out more" link. This prompt is displayed when a user whose device is configured to enable personalised adverts launches the App Store after updating their iOS software to iOS 15. It is also displayed to users of new devices.

329. As with the "Apple Advertising" sub-section in "Settings", the user has the option of turning "Personalized Ads" on or off without reading the information about the categories and sources of data used by Apple.

330. Moreover, Apple displays this prompt solely when the App Store is opened. As for the apps and services on which Apple collects data used for advertising purposes (iTunes Store, Apple Book Store, Apple TV and Apple Music), the said prompt is not displayed when any of them are opened. This finding is confirmed by Apple[227].

---

[224] Classification mark 2,178.

[225] Classification mark 4,395.

[226] Classification mark 3,541.

[227] Classification mark 2,189.

c) CNIL decision of 29 December 2022 concerning data processing on the App Store

331. Following a complaint filed on 10 March 2021 concerning the personalisation of adverts displayed in the App Store, the restricted committee of the CNIL, in a decision dated 29 December 2022, imposed an administrative fine of €8 million on ADI[228].

332. In the decision, the CNIL observed that "*the company processes data on a significant scale, given the dominant position of the Apple operating system on the French mobile operating system market and the proportion of telephone users in France who use smartphones*"[229]. It also noted that "*this targeting is based on people's interests and lifestyles and that the company's use of browsing and profile data from the App Store to perform ad targeting is therefore significant*". As a result, it stressed "*the absolute necessity for users to retain control over their data, and for them to be put in a position to give valid consent*"[230].

333. In this decision, the CNIL found that "*the company had failed to comply with the obligations stemming from Article 82 of the French Data Protection Act in the past on version 14.6 of the operating system, since it was incumbent on the company to obtain the consent of users prior to writing and/or reading information on their device, for the purposes of personalising ads intended to promote mobile apps on the App Store*"[231]. However, with regard to version 15 subsequently released, it noted that Apple had "*shown evidence of having taken measures to comply with the obligations stemming from Article 82 of the French Data Protection Act, which does not, however, change the fact that the company was delinquent in the past*"[232].

334. With regard to devices with iOS version 14.6, the CNIL considered that, in order to authenticate the DSID of a user account registered as active on its servers, Apple performs read and/or write operations on user devices. Furthermore, in order to send requests to Ad Platforms servers, it also reads the DPID and iAdID. However, for these actions, Article 82 of the French Data Protection Act requires that the user's consent be given by an affirmative act, except in specific cases where consent can be waived ("*exclusive purpose*" and "*strictly necessary*" as described in paragraph 144 above).

335. Considering that the DSID, DPID and iAdID were "*multi-purpose identifiers*" and that the use of the same cookie for multiple purposes, some of which do not fall within the scope of these exemptions, requires the prior consent of data subjects, the CNIL examined whether an exemption from the requirement to obtain consent was justified.

336. The CNIL observed:

- that access to information linked to the DSID has several purposes, namely to authenticate and then keep the user within the authenticated confines of the App Store (strictly necessary for the provision of a service) and to track their activity within the App Store in order for them to be assigned or reassigned to one or more segments that

[228] Decision SAN-2022-026 of the restricted committee of 29 December 2022 concerning Apple Distribution International (classification marks 7,401 to 7,424).

[229] Classification mark 7,420.

[230] Classification mark 7,420.

[231] *Ibid*.

[232] *Ibid.*

will subsequently be used to send them personalised adverts (subject to the collection of consent);[233]

- that the purpose of reading the DPID and iAdID stored in the device and sending them to Apple's servers is to display adverts for targeted apps based on the user's profile, and that this advertising purpose does not fall within the scope of the consent exemption;
- that while the "*steps for replacing information linked to the DSID with the DPID and iAdID are implemented in such a way as to uphold the principles of privacy protection and, without them, Apple would be able to link information relating to adverts displayed to the identity of the user*"[234], these measures designed to protect privacy do not warrant circumventing the rule laid down by Article 82 of the French Data Protection Act.

337. The CNIL also analysed the "Apple Advertising" section in the device "Settings" and noted that, since consent is by default, ad targeting operations cannot be considered as having been accepted by an affirmative act on the part of users. In addition, it noted that consent collection is a late stage in the process of setting up the phone, involves several preliminary steps and, as it is not part of the phone's initialisation process, is optional. As a result, "*it is difficult for the user to validly accept or refuse these operations, insofar as a user who has completed their phone's initialisation* (...) *may legitimately believe there are no other configurations to complete before consulting the App Store*"[235].

338. With regard to devices with iOS version 15, released on 20 September 2021, the CNIL recognised that the "Personalized Ads" pop-up window is an improvement in terms of collecting consent, insofar as it invites the user to choose between "*Turn on Personalized Ads*" and "*Turn off Personalized Ads*"[236].

339. It also noted that "*no identifiers are used for ad personalisation purposes on the App Store before this pop-up window is displayed to the user*" and that, according to Apple's statements, the message "*Apple does not track you*" was supplemented before March 2023 by the message: "*on apps and websites owned by third-party companies*"[237].

---

[233] According to the CNIL, if this identifier is created for each user account on Apple's servers, information is read on the user's device to enable requests made to be linked to a user account (i.e. the fact that the user makes a search, downloads or buys apps in the App Store) and, later, to assign this unique user to segments within an environment that requires authentication (the so-called "logged-in" environment), in this case the App Store. It considered that even if the main function of this information was to allow for authentication of a user within a logged-in environment – and was qualified as an essential purpose because it was strictly necessary for the provision of an online communication service expressly requested by the user –, the fact that the information collected thanks to these cookies may be used for segmentation for advertising purposes means that Apple's cookies do not fall into the categories of cookies for which reading is exempt from the requirement to obtain consent under Article 82 of the French Data Protection Act.

[234] Classification mark 7,419.

[235] *Ibid*.

[236] Classification mark 7,417.

[237] Classification mark 7,417.

E. THE OBJECTIONS

340. On 25 July 2023, the *Autorité* issued the following statement of objections:

"*Objections are raised against Apple Distribution International Limited (ADI) and Apple Inc., as principal infringing companies, and Apple Operations Europe Limited, Apple Operations International Limited and Apple Inc., as parent companies, for having abused their dominant position on the European markets for the distribution of mobile apps on iOS devices, by implementing discriminatory, non-objective and non-transparent conditions regarding the use of user data for advertising purposes since April 2021 and up to the date hereof:*

- by unfairly requiring publishers of mobile apps authorised in the App Store to implement the App Tracking Transparency prompt;

- by granting itself more favourable conditions for using data to display adverts in the App Store.

The above practices are an infringement of the provisions set forth in Article L. 420-2 of the French Commercial Code and Article 102 TFEU, and may have effects on several related markets, namely the markets for:

- online non-search advertising services, whether on social media or apart from social media by mobile app publishers and by Apple on the App Store;

- online search advertising services by Apple on the App Store;

- online advertising attribution services;

- ad server services and non-search advertising intermediation services;

- smart mobile devices;

- mobile apps".

II. Assessment

A. THE PROCEEDINGS

1. ON BIAS IN THE INVESTIGATION

a) Arguments of the parties

341. Apple considers that the objections should be annulled because of the biased nature of the investigation[238]. To substantiate this allegation, Apple argues that the Investigation Services primarily interviewed members of the complainant trade associations to establish their objections. Apple argues that the Investigation Services failed to interview consumer associations, which should be largely in favour of the ATT prompt[239], and disregarded exculpatory evidence provided by Apple during the investigation[240].

342. Apple also claimed the Investigation Services set particularly tight deadlines for replying, by scheduling its hearing two days after it had submitted its rejoinder to the statement of objections, which was deemed unsatisfactory by the *Autorité*'s due process mediator (*conseiller auditeur*), in terms of rights of the defence. It also denounced the Investigation Services' refusal to grant a one-month extension to submit a rejoinder to the report, despite the due process mediator's recommendation.

b) The *Autorité*'s response

343. The right to a fair trial, enshrined in Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), includes the right to be judged by an impartial tribunal. This impartiality requirement applies to the case officer (*rapporteur*) appointed to investigate a complaint or referral concerning facts likely to constitute anticompetitive practices, when these facts may lead to the imposition of a sanction having the nature of a punishment.

344. As a preliminary point, it should be recalled that subjective impartiality is presumed until proven otherwise[241], while objective partiality can be demonstrated, but not alleged.

345. Furthermore, it is settled case law that the *Autorité*'s case officers have discretionary powers in the conduct of their investigations[242], and that they base the statement of objections on the facts which they deem to be of such a nature as to establish those objections' validity, and are not required to respond to all the arguments put forward by the parties[243].

---

[238] Classification mark 9,466.

[239] Classification mark 9,468.

[240] Classification mark 9,467.

[241] See, in this respect, the judgments of the European Court of Human Rights of 26 October 1984, De Cubber v. Belgium, no. 9186/80, paragraph 25, and of 1 October 1982, Piersack v. Belgium, no. 8692/79, paragraph 30.

[242] Judgment of the French Supreme Court (*Cour de cassation*), Commercial Chamber of 15 June 1999, no. 97-15.185, published in the Bulletin.

[243] Judgment of the Paris Court of Appeal of 24 January 2006, Marseille Bar Association, page 3.

346. In the present case, Apple's complaint of there being an inculpatory investigation refers to the requirement for subjective impartiality on the part of the case officers and the obligation for the latter to conduct their investigation fairly.

347. As the Paris Court of Appeal has already ruled[244], the fact that case officers retain inculpatory evidence presented by the companies and dismiss exculpatory evidence presented by the accused cannot be construed as unfairness on the part of the Investigation Services, since their role is to investigate and describe in the statement of objections, and subsequently in the report, what in their view should lead to the qualification and punishment of anticompetitive practices. It is therefore legitimate for the case officers to refer only to the documents, or passages of documents, which they deem useful, either to support their observations with those documents, or to explain how those documents do not contradict their analysis. This does not constitute a lack of impartiality, given that the parties are free to make use of all the documents in the case file, including those not mentioned, or not exhaustively mentioned, by the case officers in the report.

348. In this respect, only unfairness in the interpretation or presentation of documents, or in the manner of interviewing the persons concerned or third parties, can prove the assertion that the parties' rights of defence have been infringed, which has not been demonstrated in the present case.

349. Firstly, it is incorrect to claim the Investigation Services did not take account of the information provided by Apple, since the factual findings in the statement of objections consist of some 13 pages of information provided by Apple.

350. Secondly, the fact that two-thirds of the companies questioned were members of the complainant associations can be explained by the fact that these associations represent a very significant proportion of online advertising companies, and not as an effort on the part of the case officers to direct their requests for information primarily to companies that opposed the ATT prompt.

351. Thirdly, the fact that the case officers did not send requests for information to consumer associations does not constitute a breach of the requirement for impartiality on the part of the Investigation Services. In accordance with case law to date, the path that an investigation takes is at the discretion of the case officers, meaning that the companies under investigation cannot demand that additional investigative actions be conducted. Furthermore, it should be noted that the CNIL, an independent administrative authority responsible for the protection of privacy, has published two opinions on the ATT prompt in the course of these proceedings, so Apple's claim that privacy protection objectives were ignored by the Investigation Services is unfounded.

352. Fourthly, with regard to the due process mediator's reports, it should be noted that the case officers took account of the first report dated 20 October 2023, by postponing the date of Apple's hearing to approximately one month after the submission of its written rejoinder to the statement of objections. However, the General Rapporteur refused to grant Apple a one-month extension to respond to the report. In his report dated 26 June 2024, the due process mediator stated that such an extension could be granted to Apple as a gesture of goodwill, while acknowledging that the legal conditions justifying such an extension had not been met in the present case. Since the due process mediator himself emphasised that the elements put forward by Apple did not constitute exceptional circumstances likely to lead to the

[244] Judgments of the Paris Court of Appeal of 11 July 2019, Janssen-Cilag and others, no. 18/01945, paragraph 118, and of 17 May 2018, Umicore France and others, no. 2016/16621, paragraph 86.

application of the provisions of Article L. 463-2 of the French Commercial Code, the General Rapporteur cannot be deemed remiss for not having followed this opinion, which is in any case non-binding.

2. ON THE COMPETENCE OF THE INVESTIGATION SERVICES AND THE SCOPE OF DECISION 21-D-07

a) Comments from the parties

353. Apple claims that the Investigation Services went beyond their competence, by notifying objections contrary to Decision 21-D-07 rejecting the complainants' request for interim measures[245]. According to Apple, Decision 21-D-07 constitutes a rejection of the complaint within the meaning of Article L. 462-8 of the French Commercial Code, under which the Board of the *Autorité* considered that the implementation of the ATT prompt was not likely to constitute unfair trading conditions. Apple concludes that, since there had been no new legal or *de facto* developments following Decision 21-D-07, the Investigation Services were bound by the Board's conclusion that there was no conflict between ATT and Article 102(a) TFEU, and ought to have restricted their investigation to the scope determined by the Board, which, according to Apple, was limited to self-preferencing practices[246].

b) The *Autorité*'s response

354. It is undisputed that a decision on a request for interim measures, made during the course of an investigation, "*constitutes a provisional decision that does not establish an infringement. Consequently, at the end of the investigation into the merits of the case, the* Autorité de la concurrence *may have a different analysis of the practices*"[247].

355. In addition, it is worth recalling the case law to date of the Paris Court of Appeal, according to which "*the Conseil* [now the "*Autorité*"] *is always notified* in rem *of all facts and practices affecting the functioning of a market and may, without having to start proceedings* ex officio*, retain practices uncovered by its investigations that, although not expressly mentioned in the complaint, have the same object or effect*"[248]. Pursuant to the foregoing principle, the Paris Court of Appeal ruled that the *Autorité* has the option of responding favourably to a complaint, if such complaint is not supported by sufficiently convincing evidence, on the basis of information gathered by the Investigation Services[249].

356. In the present case, the *Autorité*'s analysis in Decision 21-D-07 did not consist in establishing an anticompetitive practice as such, but in assessing facts which, at the date of the decision, were "*likely*" to constitute such a practice, in the context of a provisional decision issued

---

[245] Classification mark 9,469.

[246] Classification mark 9,470.

[247] Decision 09-D-36 of 9 December 2009 on practices implemented by Orange Caraïbe and France Télécom in various telecommunication services markets in the *départements* of Martinique, Guadeloupe and Guyane, paragraph 277.

[248] Judgment of the Paris Court of Appeal of 26 January 2012, Beauté Prestige International and others, no. 2010/23945, page 16; see also the judgment of 30 January 2007, A.A Le Foll TP and others, no. 06/00566, page 8.

[249] Judgment of the Paris Court of Appeal of 27 January 2011, no. 2010/08945.

pending a decision on the merits.

357. As regards the scope of the investigation, it cannot be limited, as it is claimed, to the investigation of so-called "*self-preferencing*" practices. Such a limitation is not to be found either in the operative part or in the grounds of the decision on the request for interim measures.

358. Indeed, Article 1 of the operative part of Decision 21-D-07 states unambiguously that the *Autorité* intended to continue the investigation into the merits of the case: "*The investigation into the merits of the complaint registered under number 20/0098 F should be continued*" (emphasis added).

359. Furthermore, paragraph 163 of the decision rejecting the request for interim measures states that "*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*". The use of the term "*in particular*" indicates that the scope of the investigation into the merits of the case should include, among other things, an examination of whether there are self-preferencing practices, and did not imply that there should be any restriction to that type of abusive practice.

360. Similarly, in paragraph 164 of the same decision, with regard to the potentially unfair nature of Apple's trading conditions, the *Autorité* states that "*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*" and "*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*" (emphasis added).

361. This paragraph, which expressly states that the *Autorité*'s analysis is being conducted "*at this stage of the investigation*" on the basis of "*the evidence produced by the complainants*", in no way foretells the qualification that may emerge from the analysis performed on the merits.

362. As indicated in paragraph 355 above, the fact that the *Autorité* states that the complainant has not provided sufficiently convincing evidence in its complaint at the stage of the decision on the request for interim measures in no way prevents the Investigation Services from remedying this shortcoming in the course of an investigation into the merits of the case.

363. Consequently, contrary to Apple's assertion, the preliminary analysis of a decision on a request for interim measures cannot have any binding effect on the Investigation Services in the context of their investigation into the merits of the case.

364. This is all the more so in this instance, as the objections notified by the Investigation Services relate to practices implemented by Apple after the adoption of Decision 21-D-07.

365. In this respect, it should be noted that the actual rollout of the ATT prompt took place during April 2021, whereas this technology had not yet been launched on the date of the decision on the request interim measures, which was issued on 17 March 2021. The investigation into the merits of the case is therefore based on new facts and legal elements, which the decision rejecting the request for interim measures in March 2021 could not take into consideration, including:

- the opinion of the CNIL of 19 May 2022, which considered, on the basis of the evidence presented during the debates, that ATT did not allow for the collection of informed consent within the meaning of the GDPR and the French Data Protection

Act[250]; and

– the decision of the CNIL of 29 December 2022 fining Apple €8 million for data processing on the App Store that was not compliant with the legislative and regulatory framework applicable to the collection of user consent[251].

3. ON THE FOCUS OF THE STATEMENT OF OBJECTIONS

a) Comments from the parties

366. Apple accuses the Investigation Services of having formulated vague and imprecise objections that cover both the imposition of unfair trading conditions – which falls under Article 102(a) TFEU – and self-preferencing practices – which fall under the same article. According to Apple, the statement of objections does not clearly explain the link between those two practices, making it impossible to determine whether the statement of objections is based on the cumulative or alternative application of the two practices. Apple also argues that the notified objections make a generic reference to Article L. 420-2 of the French Commercial Code and Article 102 TFEU, without specifying whether the applicable legal standard is that relating to restrictions on unfair trading conditions or that of restrictions on discrimination.

367. According to Apple, the Investigation Services deliberately attempted to group together separate and substantially different practices under the single standard of Article 102(a) TFEU, in order to circumvent the requirements of the legal test for abusive discriminatory practices, which are not met in the present case. In this respect, Apple notes that the statement of objections contains only nine paragraphs concerning self-preferencing practices, those elements alone, which were the subject of a decision by the Board to order further investigation, having – in its view – been analysed in the light of unfair trading.

368. Apple concludes that the deliberate lack of clarity and focus in the statement objections constitutes a serious breach of the adversarial principle and of Apple's rights of defence, as well as an abusive application of Article 102(a) TFEU.

b) The *Autorité*'s response

369. As the *Autorité* indicated in Decision 21-D-09 "*the statement of objections is a summary document that contains a precise description of the alleged facts, their date, their attributability and their qualification, and then, ultimately, summarises the objections themselves in concise wording. It constitutes the indictment and must therefore be precise (Paris Court of Appeal, 29 March 2005, Filmdis Cinésogar), although such requirement*

---

[250] According to the CNIL, "*it would appear that a publisher cannot directly insert, in the ATT prompt, the information required to obtain informed consent within the meaning of these two articles, as the ATT prompt suffers from a dual limitation: on the one hand, the length of the text appears limited and in practice means that all the required information cannot be added, in particular the information required by Articles 12* et seq. *of the GDPR; on the other hand, the pop-up window does not appear to allow for a clickable hypertext link to be inserted, enabling the user to access information on a second level (with in particular the list of partners)*" (page 5 of the opinion).

[251] Decision SAN-2022-026 of the restricted committee of 29 December 2022 concerning Apple Distribution International (classification marks 7,401 to 7,424).

*does not preclude appeal judges and the French Supreme Court (*Cour de cassation*) from investigating the scope of the objections in the body of the statement of objectives itself (French Supreme Court [*Cour de cassation*]) 6 April 1999, ODA)*"[252].

370. The Paris Court of Appeal recalled that "*respect for the fundamental principles of proceedings, namely the adversarial process, the rights of the defence and the right to a fair trial, requires that the facts be formulated with sufficient precision and the incriminating practices supported by sufficient evidence for the parties to be able to prepare their defence effectively*"[253].

371. In the present case, the statement of objections specifies the alleged facts, the duration of the practices, their legal qualification and the companies to which the statement is addressed. The statement therefore meets the requirements recalled by the Paris Court of Appeal.

372. With regard to the facts of which Apple is accused, the statement of objections specifies that the two practices constituting the abuse identified by the Investigation Services concern the conditions of access to data by advertising service providers in connection with the implementation of the ATT prompt, and the specific conditions of access to data in connection with the provision of Apple's advertising services[254]. Over 100 pages are devoted to expounding on these conditions.

373. With regard to the legal qualification of the practices, the statement of objections establishes that the implementation of the ATT prompt, on the one hand, is not necessary and proportionate to achieve the objective of protecting users' privacy and, on the other hand, is unjustified and discriminatory insofar as it does not apply to Apple's own advertising services.

374. The final wording of the objections, which refers to Article 102 TFEU and Article L. 420-2 of the French Commercial Code in their entirety – as, for example, the operative part of Decision 19-D-26[255] – states that the implementation of the ATT prompt not only lacks objectivity and transparency, but is also discriminatory, and has two distinct elements, the first relating to the imposition of unfair conditions, and the second to self-preferencing practices.

375. As they have not been examined on the basis of self-preferencing alone, the practices are therefore likely to be qualified as abuses of a dominant position under Article 102(a) TFEU.

376. Moreover, Apple's written rejoinder to the statement of objections show that Apple was able to prepare its defence effectively and respond specifically to each element of the objections in its rejoinder, in separate developments of almost 50 pages[256], taking into account the applicable principles of case law.

377. The objections notified to Apple therefore enabled it to identify the abusive practices of

---

[252] Decision 21-D-09 of 24 March 2021 on practices implemented in the sector for the manufacturing and marketing of own-brand sandwiches (decision upheld by the Paris Court of Appeal on 15 June 2023).

[253] Judgment of the Paris Court of Appeal of 7 March 2024, RG 20/13093, paragraph 676.

[254] See paragraphs 182 *et seq.* of the statement of objections.

[255] "*Article 1: It is established that Alphabet Inc., Google LLC, Google Ireland Ltd and Google France have infringed the provisions of Articles L. 420-2 of the French Commercial Code and 102 of the TFEU by defining and applying the Google Ads (formerly AdWords) Advertising Platform Rules in a non-transparent, non-objective and discriminatory manner*".

[256] See sections 4.2 and 4.3 of Apple's rejoinder to the statement of objections.

which it is accused, namely imposing the ATT prompt on app publishers, and the conditions under which Apple obtains users' consent for the use of their data for advertising purposes.

B. THE APPLICATION OF EU LAW

378. On the basis of settled case law, and in light of the Notice of the European Commission (hereinafter the "Commission") on the effect on trade concept contained in Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 TFEU)[257], the *Autorité* 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).

379. In the present case, given the worldwide dimension of the alleged practices, the practices in any event cover all French territory. Furthermore, the practices alleged by the complainants are likely to make it more difficult to enter the European market for the distribution of apps on iOS. Therefore, they are liable to affect trade between Member States.

380. Lastly, since the practices involve a global player whose revenue far exceeds the *de minimis* threshold in the above-mentioned Commission Notice, they are liable to affect trade between Member States to an appreciable extent and therefore to be qualified under Article 102 TFEU.

C. THE RELEVANT MARKETS AND APPLE'S POSITION

1. THE RELEVANT MARKETS

381. Apple is a vertically integrated company, which manufactures smart mobile devices (iPhones and iPads) and designs the operating systems (iOS and iPadOS) that power them. Apple also distributes apps, including its own apps, for its mobile devices via its own App Store, which is pre-installed on its smartphones. Apple's ecosystem is based on a closed system: on the one hand, third-party device manufacturers cannot obtain an iOS licence from Apple to use its operating system on their own smartphones and, on the other hand, until the obligations of the DMA came into force, app publishers could not distribute their apps on iOS smart mobile devices on any app store other than Apple's App Store.

a) Applicable principles

i. Definition of product and geographic markets

382. The application of Article L. 420-2 of the French Commercial Code and Article 102 TFEU, which prohibit abusive practices, requires, first of all, that the relevant markets on which the company in question enjoys dominance be defined. In matters of abuse of a dominant

[257] Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJEU C 101, 27 April 2004, page 81.

position, "*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*"[258].

383. In its revised Notice on the definition of the relevant market for the purposes of Union competition law of 22 February 2024[259], the Commission stresses that "*the relevant product market comprises all those products that customers regard as interchangeable or substitutable to the product(s) of the undertaking(s) involved, based on the products' characteristics, their prices and their intended use*". The assessment of substitutability is usually made on the demand side, as demand substitution "*constitutes the most effective and immediate disciplinary force on the suppliers of a given product*", but it may also take into account supply-side substitutability.

384. The relevant geographic market comprises the geographic area in which the undertakings involved supply or demand relevant products, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from other geographic areas, in particular because conditions of competition are appreciably different in those areas. The definition of the geographic market does not require that conditions of competition between traders or service providers be perfectly homogeneous. It is enough for them to be similar or sufficiently homogeneous and, therefore, only areas in which conditions of competition are "heterogeneous" cannot be considered to constitute a uniform market.

385. In France, following the former *Conseil de la concurrence*, the *Autorité* recalled that "*the market, as understood in competition law, is defined as the place where supply and demand for a specific product or service meet.* [...] *Full substitutability between products or services rarely occurs. The* Conseil *therefore considers as substitutable and belonging to the same market any products or services that can reasonably be considered by consumers as alternatives between which they may choose to meet the same demand*"[260].

ii. Definition of related markets

386. The Court of Justice of the European Union (hereinafter "CJEU") has held that there is "*no doubt, therefore, that an abuse of a dominant position on one market may be censured because of effects which it produces on another market. It is only in the different situation where the abuse is found on a market other than the dominated market that Article 86 of the Treaty is inapplicable except in special circumstances".*[261]

387. More recently, in its judgement of 7 April 2022 on unfair trading conditions, the Paris Court of Appeal stated that, with regard to "*the effects on related markets, it should be noted, first*

---

[258] Judgment of the General Court of 6 July 2000, Volkswagen AG/Commission, T-62/98, paragraph 230.

[259] Published in the OJEU of 22 February 2024 (C/2024/1645), it revises the Notice on the definition of the relevant market for the purposes of Community competition law of 9 December 1997, published in the OJEU of 9 December 1997, C 372, page 6.

[260] See, in particular, Decision 10-D-19 of 24 June 2010 on practices implemented in the markets for the supply of gas, heating installations and the management of heating networks and collective boiler rooms, paragraphs 158-159, Decision 10-D-13 of 15 April 2010 on practices implemented in the container handling sector at the port of Le Havre, paragraph 220, and the judgment of the Paris Court of Appeal of 20 January 2011, Perrigault, no. 2010/08165.

[261] Judgment of the Court of First Instance of 12 December 2000, Aéroports de Paris, T-128/98, paragraph 164.

of all, that case law to date accepts that an undertaking in a dominant position on a given market may be reproached for an abuse, the effects of which affect other markets, provided the market on which the undertaking is dominant and the markets on which the abuse has its effects are sufficiently connected"[262]. In that case, the related nature was demonstrated on the downstream markets because of the specific advertising offering associated with internet users' searches, and Google's practices were therefore likely to produce effects on all the markets in which publishers operate.

388. As such, the Paris Court of Appeal deduced in paragraph 297 of the aforementioned judgement that "*it is not necessary, in order to demonstrate the effects of the practices, to exhaustively define all the downstream markets related to the online search advertising market*".

b) Application to the present case

389. The present decision concerns the implementation of the ATT prompt imposed by Apple on publishers of apps that are distributed on mobile devices equipped with iOS. The developments below will focus first on defining the market for smart mobile devices (i) and the market for the distribution of mobile apps operating on iOS, on which Apple imposes the ATT prompt (ii), as well as on defining the online advertising markets on which Apple's practices are likely to produce effects (iii).

i. The primary market for smart mobile devices

390. Smart mobile devices are mobile devices with advanced internet browsing, multimedia and app capabilities. They are available in a variety of designs, and with a range of different features and hardware components. There are, in particular, two types of smart mobile devices: smartphones and tablets.

391. Smartphones are wireless phones that incorporate hardware and software features that enable them to fulfil many of the functions traditionally associated with state of the art computing. There is no industry standard definition of a smartphone, but rather a spectrum of functionalities. Smartphones vary in terms of size, weight, durability, screen size, audio quality, web speed, camera size/zoom, computer processing power, memory, ease-of-use, optical quality, casing quality/design, and additional multimedia offerings[263].

392. Tablets are mid-sized mobile devices between a smartphone and a personal computer (hereinafter "PC"). Tablets are based on similar hardware to advanced touch-screen based smartphones, and provide a rich multimedia experience along with many of the functions of a PC[264]. The distinction between smartphones and tablets is not necessarily clear-cut.

---

[262] Judgment of the Paris Court of Appeal of 7 April 2022, 20/03811, paragraph 295.

[263] Commission decision of 26 June 2014 in Case COMP/M.7202 – Lenovo/Motorola Mobility, paragraph 14. Smartphones vary in terms of size, weight, durability, screen size, audio quality, camera size/zoom, web speed, computer processing power, memory, ease-of-use, optical quality, casing quality/design and additional multimedia offerings.

[264] Commission decision of 18 July 2018 in Case COMP/AT.40099 – Google Android, paragraph 77.

393. According to the Commission's decision-making practice, basic and feature phones[265], on the one hand, and smart mobile devices, on the other hand, belong to separate product markets[266]. The differences in price, functionality and usage between the two product categories justify this segmentation. In particular, conventional phones do not offer consumers pre-installed mobile app stores.

394. As regards a possible differentiation between smartphones and tablets, the Commission left open the question of whether there is a single market for smart mobile devices, or whether there are separate markets for smartphones and tablets. From a demand perspective, the devices are not entirely interchangeable, as smartphones offer certain functionalities, such as the ability to make phone calls, which are not available under the same conditions on tablets[267], while tablets can be used more for other purposes, such as watching videos. On the other hand, smartphones and tablets generally run on the same mobile operating system, offering many similar features, despite several differences depending on their use. In the Microsoft/Nokia case, the Commission considered that apps for tablets are comparable, in terms of functionality, features and price, to those for smartphones, and that most apps are developed for both types of device, although some are customised or configured differently because of the size of the device (smartphone or tablet). In this respect, it should be noted that ATT and Apple's conditions for obtaining consent are implemented in a similar way on smartphones (iPhones) and tablets (iPads).

395. As regards the geographic dimension of the markets, it is clear from the Commission's prior decision-making practice[268] that the relevant geographic market for smart mobile devices is at least European (European Economic Area, hereinafter "EEA"), if not worldwide.

396. In conclusion, for the purposes of the decision concerning Apple's potential market power on the App Store vis-à-vis app publishers and consumers, a market for the sale of smart mobile devices should be defined without there being any need to examine separate product markets for different smart mobile devices. The relevant geographic market is at least European (EEA-wide).

ii. The secondary market for the distribution of mobile apps on iOS devices

The Commission's decision-making practice in the matter

397. In the Google/Android case, the Commission considered that the supply of app stores for the Android mobile operating system constituted a relevant market distinct from that of the supply of app stores for non-licensed mobile operating systems, such as iOS. While this decision examined the market primarily from the perspective of original equipment manufacturers, it provides useful pointers for defining the relevant markets from the

---

[265] A basic phone is a category of mobile phone that can only make voice calls and send text messages. A feature phone is a category of mobile phone that adds minimal smartphone-like functionality to that of a basic phone, such as rudimentary internet browsing capabilities.

[266] Commission decision of 4 December 2013, COMP/M.7047 – Microsoft/Nokia, paragraphs 15 and 18.

[267] While some tablets include SIM cards and can make phone calls without using a communication service such as WhatsApp or iMessage, the size of tablets nevertheless reduces consumer usage in situations of mobility.

[268] Commission decisions of 4 December 2013 in Case COMP/M.7047 – Microsoft/Nokia, paragraph 72, of 13 February 2012 in Case COMP/M.6381 – Google/Motorola Mobility, paragraphs 43 to 47, and of 2 July 2008 in Case COMP/M.4942 – Nokia/Navteq, paragraph 140.

perspective of app publishers. In particular, the Commission underlines the complementary nature of app stores that are compatible with iOS and Android operating systems from the perspective of publishers, noting that "*a large percentage of Google Android developers already develop apps for both Google Android and iOS*"[269]. The Commission also concludes that there is no substitutability between app stores from the perspective of publishers, in that "*app developers are unlikely to stop developing for Google Android and develop exclusively for iOS*"[270].

398. In its Apple/Spotify decision[271], the Commission examined the market for the distribution of apps on iOS smart mobile devices from the perspective of publishers of music streaming apps. The Commission considered that the relevant market was the one in which Apple provided publishers of music streaming apps with a distribution platform on iOS devices, i.e. the developer-facing side of the App Store[272]. The Commission specified that the consumer-facing side of the App Store constituted a separate market, but linked to the developer-facing side of the market for the distribution of mobile apps on iOS devices[273]. In this decision, the Commission emphasised that, although the practices in question specifically concern music streaming apps, the considerations underlying the analysis of market definition may not necessarily differ depending on the type of apps[274], given that the App Store is the only conduit through which native apps can be distributed to iOS users and that all developers that wish to sell native apps to iOS users have do so through Apple's App Store. Consequently, the Apple/Spotify decision provides a relevant analytical framework for defining the markets in the present case.

On the relevance of segmenting the market for iOS smart mobile devices and the market for the distribution of apps on mobile iOS devices

399. Apple disputes the merits of differentiating between a market for smart mobile devices, on the one hand, and a market for the distribution of iOS apps, on the other, insofar as there is no demand for app stores – and therefore for the App Store – separate from demand for Apple's mobile devices[275]. It argues that iOS smart mobile devices are integrated devices, including the device and the App Store, which compete with other smart mobile devices that generally always incorporate the Android app store, such that it would be artificial to separate the App Store from the Apple mobile devices on which the store is installed.

400. Digital ecosystems can in some circumstances be considered as consisting of a primary basic product and several secondary digital products, the consumption of which is connected to the primary basic product, for example through technological links or because of the interdependence between these different products.

401. The Notice on the definition of the relevant market for the purposes of Union competition

---

[269] Commission decision of 18 July 2018 in Case COMP/AT.40099 – Google Android, paragraph 555.

[270] *Ibid*., paragraph 556.

[271] Commission decision of 4 March 2024 in Case COMP/AT.40437 – Apple App Store practices (music streaming).

[272] *Ibid.*, paragraphs 260 to 311.

[273] *Ibid*., paragraph 264.

[274] *Ibid*., paragraph 274.

[275] Classification mark 9,481.

law of 22 February 2024 provides various indications as to whether the market should be defined globally as a "*system market*", comprising both primary and secondary products, or whether there are dual markets, comprising a market for the primary product and a separate market for the associated secondary product.

402. To determine whether a market can be defined as a "*system market*", the Commission identifies four criteria to guide the analysis. It therefore considers that "*the definition of a system market may be more appropriate: (a) the more likely it is that customers take the whole-life costs into account when purchasing the primary product; (b) the higher the expenditure on (or the value of) the secondary product(s) compared to the expenditure on (or the value of) the primary product; (c) the higher the degree of substitutability between primary products and the lower the switching costs between primary products; (d) when there are no or few suppliers specialised only in the secondary product(s)*"[276].

403. With regard to the first two criteria, the *Autorité* had already noted in Decision 21-D-07 that "*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*"[277].

404. The CMA study of 10 June 2022 on mobile ecosystems notes that the three main reasons for choosing an iPhone over another type of smartphone are brand, price and privacy and security, confirming the *Autorité*'s finding that expenditure on the purchase of apps is not one of the main factors taken into account by a user when purchasing their iOS device[278].

405. Other evidence in the case file shows that the cost of purchasing apps over the lifetime of the device is between 5% and 20% of the price of the device, which, in the light of decision-making practice, is not sufficient to consider that this cost is high in relation to the cost of the primary product.

406. With regard to the third criterion, Decision 21-D-07 stated that the market for the distribution of apps is characterised by limited substitutability from the perspective of consumers, as the latter are unlikely to switch ecosystems if the price of paid apps on iOS rises or the quality of apps falls. This is due to Apple users' strong attachment 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's products are on average significantly more expensive than those of the rest of the market[279]. These findings are largely confirmed by the CMA study and the Commission's Apple/Spotify decision, and are developed in the section on the analysis of Apple's dominant position (see paragraphs 431 *et seq.* below).

407. With regard to the fourth criterion concerning the presence of suppliers specialising solely in the secondary product, it should be noted that all the main app store suppliers also have another business (Google, Apple, Amazon, Huawei, Samsung), based in particular on manufacturing devices or programming operating systems.

408. Of the four characteristics identified by the Commission in its Notice (see paragraph 402 above), only the one relating to the specialisation of suppliers is therefore likely to result in the definition of a global market, with the other three ruling out such a definition.

---

[276] Commission Notice of 22 February 2024, cited above.

[277] Decision 21-D-07, cited above, paragraph 115.

[278] Competition and Markets Authority, Mobile ecosystems. Market study final report, 10 June 2022, page 45.

[279] Decision 21-D-07, cited above, paragraph 111.

409. The analysis made in the present decision therefore results in the definition of a primary market for the sale of smart mobile devices and a secondary market for the distribution of mobile apps on iOS devices. This market definition is consistent with the Commission's approach in the Apple/Spotify decision[280].

On the relevance of segmenting the market for the distribution of apps on iOS mobile devices between the publisher-facing side and the consumer-facing side

410. In Opinion 18-A-03 on data processing in the online advertising sector, the *Autorité* stated that "*the markets and positions of players must be analysed taking into account any links between markets or the multisided nature of these markets*"[281]. In its Merger Control Guidelines, the *Autorité* also stress that "*in the event of a two-sided market, the economic equilibrium in one market cannot be assessed independently of the prevailing conditions in the other market. Though potentially separate, both markets operate interdependently, which is a specific feature that can be taken into account either at the market delineation stage or during the analysis of the effects of the transaction on competition and of the efficiency gains*"[282]. In Decision 18-DCC-18, the *Autorité* reiterated that a two-sided market can therefore be examined by defining a single market with two inseparable sides, or by analysing the two separate sides as two related markets[283].

411. App stores, such as the App Store, are two-sided digital platforms, whose infrastructure facilitates transactions between two distinct user groups: publishers, that use the platform to distribute their apps to consumers, and consumers, that search for apps to download, often for a fee, onto their mobile devices. For publishers, app stores are digital distribution platforms for marketing their apps to consumers. For consumers, app stores are for downloading, installing and managing a wide range of different apps from a single point within the interface of their smart mobile devices. App stores generate indirect network effects: publishers benefit from the increase in the number of consumers, while consumers benefit from the diversity of apps on offer, because the more publishers sell their apps in the app store, the broader the consumer choice.

412. Following the approach adopted by the Commission in the Apple/Spotify decision, the *Autorité* considers that the "*publisher-facing side*" and the "*consumer-facing side"* of the App Store constitute two related but distinct markets, insofar as the prices and conditions applied by Apple, the competitive constraints and the substitution patterns differ between the two sides of the App Store.

413. Firstly, the contractual and financial conditions of access to the App Store are different for publishers and consumers.

414. Publishers that wish to sell their apps via the App Store have to join the Apple Developer Program by paying an annual fee and accepting the Apple Developer Program License

---

[280] Commission decision of 4 March 2024 in Case COMP/AT.40437 – Apple App Store practices (music streaming), paragraphs 260 to 311.

[281] Opinion 18-A-03, page 98, cited above.

[282] Revised Merger Control Guidelines of 23 July 2020, paragraph 599.

[283] Decision 18-DCC-18 of 1 February 2018 on the acquisition of sole control of Concept Média by the Axel Springer group.

Agreement, a non-negotiable membership contract[284].

415. Consumers using the App Store are subject to separate contracts, in particular the "Apple Media Services Terms and Conditions" and Apple's "End-User License Agreement".

416. Secondly, demand substitution patterns for the App Store also differ between publishers and consumers.

417. Consumers who wish to download mobile apps will generally use a smartphone or tablet running the same operating system (either Android or iOS/iPadOS), placing them in a single-homing situation. If the distribution conditions of a mobile app deteriorate, thereby affecting an operating system, consumers can, in theory, decide to change their mobile device in order to access another operating system that runs a different app store, although such a change comes with significant barriers and costs (see paragraphs 469 *et seq.* below).

418. On the other hand, publishers generally seek to distribute their apps to as many consumers as possible. To do this, they need to adopt a multi-homing strategy, offering their apps on both iOS and Android devices, which account for almost all active mobile devices on the European market. According to the CMA study, the largest app developers consider that distribution through both app stores (App Store and Google Play Store) in parallel as essential[285].

419. Indeed, for an app publisher that already distributes its apps on iOS devices, removing its app from the App Store in order to distribute it exclusively on Google Play Store would not be a rational economic decision, as it would result in the loss of access to a significant proportion of smartphone and tablet users in Europe. Moreover, the distribution of services and content via the web is not likely to constitute an alternative that could compensate for being refused access to the App Store. In this regard, the CMA study notes that development and usage of other ways to access content on mobile devices, such as using web apps, is substantially lower than native apps, and they are not currently regarded as a viable alternative by many app developers[286]. In terms of advertising revenue, the majority of non-search advertising revenue are generated via mobile devices and mobile apps[287].

420. As such, the publisher- and consumer-facing sides of the market for the distribution of apps on iOS mobile devices – affected by the practices linked to the implementation of the ATT prompt – constitute two distinct product markets, even if they are closely related.

421. As regards the geographic scope of these markets, the *Autorité* believes that they are at least EEA-wide. On the day the statement of objections was sent, Apple's license agreements with publishers, the App Store's general conditions of use for consumers, the conditions for implementing the ATT prompt, as well as the guidelines explicitly prohibiting the creation of alternative app stores for iOS devices, were uniform throughout this territory.

[284] Classification mark 8,832 (NCV 9,058).

[285] Competition and Markets Authority, Mobile ecosystems. Market study final report, 10 June 2022, page 82.

[286] *Ibid.*

[287] Classification mark 8,833 (NCV 9,059).

iii. Advertising markets related to the app distribution market

422. Various advertising services markets, which are related to the market for the distribution of mobile apps on iOS devices, are likely to be affected by the implementation of the ATT prompt.

423. Firstly, the identified practices are likely to affect online advertising markets.

424. With regard to the segmentation of online advertising markets, the Commission[288] and the *Autorité*[289] consider that online search advertising belongs to a separate market from online non-search advertising for the following reasons:

- online search advertising is distinct from other forms of online advertising. It is based on an active search by the internet user;
- online search advertising has particular features in terms of format;
- the degree of substitutability between search advertising and other forms of online advertising is also limited from the perspective of the suppliers.

425. In the present case, the identified practices are likely to affect the market for online non-search advertising and, to a lesser extent, that for online search advertising. Apple does not dispute this point.

426. However, contrary to what the complainants maintain, the *Autorité* considers that it is not relevant to define, within the online non-search advertising market, a market restricted to advertising for the installation of mobile apps on iOS. The installation of mobile apps is just one of the campaign objectives, among others, offered by advertising service providers. Furthermore, according to the decision-making practice of competition authorities, online advertising markets are not defined according to the operating system used by consumers. The majority of advertising service providers for advertisers offer ads on both iOS and Android devices.

427. Secondly, Apple's practices are also likely to affect other markets for intermediation services and advertising technologies, where services are provided to publishers and advertisers.

428. The implementation of the ATT prompt has a bearing on the activities of advertising networks, SSPs and DSPs, ad server providers and suppliers of campaign performance measurement services (attribution, verification, etc.), which are provided in particular by Mobile Measurement Partners (hereinafter "MMPs"). In their responses to requests for information, some intermediation service providers consider that they are in competition with the ASA service. OpenX said that it and Apple "*compete for advertising budgets dedicated to the resale of ad inventory for app install campaigns, which is at the heart of Apple's advertising and represents one of the segments OpenX addresses*"[290]. In addition, Apple provides ad attribution services, in particular via SKAN, which are considered to compete with those of certain MMPs[291].

---

[288] Commission decision of 20 March 2019, AT.40411 – Google Search (Adsense), paragraph 137.

[289] Decision 19-D-26 of 19 December 2019 on practices implemented in the online search advertising sector.

[290] Classification mark 1,058.

[291] Classification mark 3,204. AppsFlyer said that it "*provides attribution and marketing analytics services ("Services") that allow advertisers and mobile app developers to measure and analyse the effectiveness of their marketing campaigns via a suite of measurement solutions*" (classification mark 6,754). "*Apple's SKAN is an attribution service available to all app developers, and is therefore a competitor service to independent*

429. In its Google/Fitbit decision, the Commission defined several markets for advertising technology services (Ad Tech), although the results of its market test were inconclusive regarding the exact segmentation of the markets: search ad network services; display ad network services; display ad SSP services[292]; display ad DSP services; display ad server services for publishers; display ad server services for advertisers; and data analytics services. It considers that, in geographic terms, there is no evidence to challenge its decision-making practice, at least regarding the European dimension of these markets[293].

430. Lastly, in the Outbrain/Teads[294] decision, the *Autorité* confirmed that within the markets for the provision of intermediation services for online non-search advertising, there were differences between demand-side and supply-side platforms. It therefore conducted its analysis on both the supply side (SSP) and the demand side (DSP). The *Autorité* considered that these markets covered at least the EEA.

D. DOMINANT POSITION

1. APPLICABLE PRINCIPLES

431. Dominance is defined as "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*"[295].

432. A dominant position may derive from a combination of several factors which, taken separately, are not necessarily determinative[296], among which a highly important one is the existence of very large market shares[297]. As such, it is settled case law that very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. According to the case law to date of the CJEU, a market share of 50% constitutes in itself a clear indication, and save in exceptional circumstances, of the

MMPs. App developers could choose to rely solely on the attribution data they receive via SKAN for iOS measurement, and some do. Fortunately for MMPs, their value proposition extends beyond basic attribution (e.g. advanced information, deep links, fraud, multi-touch, etc.). Moreover, SKAN could be complicated to manage, and iOS is only one part of the mobile ecosystem (Android being the other significant part). As such, while MMPs may not have the same precise measurement capabilities as Apple via SKAN, app developers may still look for a centralised location to manage all their app marketing data and SKAN data, as well as to benefit from the other advantages provided by MMPs" (classification mark 6,766).

[292] DSPs are defined by the Commission as platforms that allow advertisers to buy ad inventory from many sources (ad exchanges, ad networks and SSPs). See Commission decision of 17 December 2020, Google/Fitbit, case M.9660.

[293] Commission decision of 17 December 2020, Google/Fitbit, case M.9660.

[294] Decision 24-DCC-263 of 10 December 2024 on the acquisition of sole control of Teads by Outbrain.

[295] Judgment of the Court of Justice of 14 February 1978, United Brands and United Brands Continentaal BV v. Commission, 27/76, paragraph 65.

[296] *Ibid.*, paragraph 72.

[297] Judgments of the General Court of 12 December 1991, Hilti v. Commission, T-30/89, paragraph 90, and of 25 June 2010, Imperial Chemical Industries v. Commission, T-66/01, paragraphs 255 and 256.

existence of a dominant position[298].

433. In addition to the level of market shares of the undertaking concerned, the ratio of the market shares held by the undertaking concerned to those held by its competitors must also be taken into account. An undertaking that has a very large market share and holds it for some time, by means of the volume of production and the scale of supply which it stands for – without those having much smaller market shares being able to meet rapidly the demand from those that would like to break away from the undertaking that has the largest market share – is by virtue of that share in a position of strength that makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position[299].

434. The General Court of the European Union (hereinafter the "General Court") has ruled that, in recent, fast-growing sectors characterised by short innovation cycles and a dynamic environment, high market shares are not necessarily indicative of market power[300]. On the other hand, the criterion of high market share remains relevant in the case of a fast-growing market that shows no sign of marked instability during the period at issue, and where a rather stable hierarchy has been established[301].

435. Other important factors in assessing dominance are the existence of countervailing buyer power and barriers to entry or expansion, preventing either potential competitors from gaining access to the market, or actual competitors from expanding their activities in the market[302]. These barriers can result from a number of factors, including exceptionally large capital investments that competitors would have to match, network externalities that would entail additional costs to attract new customers, economies of scale from which new market entrants can derive no immediate benefit, and the actual costs to enter the market[303]. Changeover costs are therefore just one possible type of barrier to entry and expansion.

436. The fact that a service is offered free of charge is also a relevant factor in assessing a dominant position. Another relevant factor is whether there are any technical or economic constraints that might prevent users from switching providers[304].

437. In the case of a multi-sided platform that brings together two distinct but interconnected user

---

[298] Judgment of the Court of Justice of 3 July 1991, AKZO v. Commission, C-62/86, Rec. P. I-3359, paragraph 60.

[299] Judgment of the Court of Justice of 13 February 1979, Hoffmann-La Roche v. Commission, 85/76, paragraph 41; and judgments of the General Court, Van den Bergh Foods v. Commission, T-65/98, paragraph 154, of 25 June 2010, Imperial Chemical Industries v. Commission, T-66/01, paragraph 256, and of 30 January 2007, France Télécom v. Commission, paragraph 100.

[300] Judgment of the General Court of 11 December 2013, Cisco Systems, Inc. and Messagenet SpA v. Commission, T-79/12, paragraph 69.

[301] Judgment of the General Court of 30 January 2007, France Telecom v. Commission, T-340/03, paragraphs 107 and 108.

[302] Judgments of the Court of Justice, cited above, United Brands and United Brands Continental v. Commission, 27/76, EU: C: 1978:22, paragraph 122, and Hoffmann-La Roche v. Commission, 85/76, EU: C: 1979:36, paragraph 48.

[303] Judgment of the Court of Justice, cited above, United Brands and United Brands Continental v. Commission, 27/76, EU: C: 1978:22, paragraphs 91 and 122.

[304] Judgment of the General Court, cited above Cisco Systems, Inc. and Messagenet SpA v. Commission, T-79/12, EU: T: 2013:635, paragraph 73.

groups, constraints on the operator's market power vis-à-vis one group may also come from the other group of users on the platform.

438. In markets where users have to purchase a primary product separately in order to benefit from complementary services (for example, a smartphone and an app), it is relevant to examine how consumers make their decisions to purchase this primary product. The criteria defined for the analysis of secondary markets provide a useful grid for exploring the interactions between the primary product and secondary products.

439. As regards secondary markets, competition on the primary market can limit the market power of the producer of the primary product on the secondary market, despite the latter's high market shares on the secondary market. If, when purchasing a primary product, a customer takes into account all the important factors relating to a secondary product, including, for example, price and costs over the life of the primary product and the life-cycle pricing of secondary products, and if, at the same time, market conditions on the primary market are sufficiently competitive for customers to switch if price rises for the secondary product, then dominance on the secondary market may not be established. Various criteria for assessing dominant position were upheld by the General Court in the EFIM case[305]. In order to conclude that the primary and secondary markets are interdependent and that competition in the primary market limits market power in the secondary market, four conditions must be cumulatively met:

- customers can make an informed choice, including the prices they will face in the future;
- customers are likely to make such an informed choice at the time of purchase;
- a sufficient number of consumers will adapt their purchasing behaviour on the primary market in the event of price rises or a deterioration in quality on the secondary market; and
- such adaptation of their purchasing behaviour will take place within a reasonable timeframe.

2. APPLICATION TO THE PRESENT CASE

a) On Apple's market share

440. On the day the statement of objections was sent, unlike Google, which allowed other app stores to be listed on Android devices, Apple was the sole provider of an app distribution platform for iOS users, both for publishers and consumers. Consequently, Apple enjoyed a stable market share of 100% on both sides of the market for app distribution platforms on iOS devices at EEA level. These levels of market share are strong indicators of Apple's dominant position on both markets.

[305] Judgment of the General Court of 24 November 2011, T-296/09, European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v. Commission, EU: T: 2011:693.

b) Barriers to entry and expansion

441. On the day the statement of objections was sent, it was impossible, on iOS devices, for third parties to enter the markets for mobile app distribution and challenge Apple's position.

442. All apps distributed to iOS users are subject to Apple's individual guidelines and approval.

443. During the period covered by the objections, Apple exercised strict control over its ecosystem, prohibiting any other company from offering an alternative app store that was compatible with iOS. Article 3.2.2 (i) of the App Review Guidelines in force on the day the statement of objections was sent stated that "*creating an interface for displaying third-party apps, extensions, or plug-ins similar to the App Store or as a general-interest collection*" was unacceptable[306].

444. Since Apple did not allow the use of alternative app stores on iOS devices for purchasing and downloading native apps, it was impossible for third parties to enter this market and compete with Apple's position. Apple therefore created and maintained insurmountable barriers to entry for third-party app stores for iOS devices or for the distribution of apps to iOS users by publishers throughout the period in question. Competition is now possible, with the entry into force of the DMA.

c) Network effects

445. In 2021, the App Store offered more than [confidential] apps worldwide, including [confidential] free apps[307]. In 2021, consumers downloaded more than [confidential] apps, including [confidential] free apps[308].

446. The platform benefits from positive indirect network effects, to the extent that the value of the service for users on one side of the platform (publisher-facing side) increases with the number of users on the other side (consumer-facing side). If a third party were to offer an alternative app store for iOS users, which is now possible with the entry into force of the DMA, it would be faced with simultaneously attracting enough users from both sides of the chain to trigger the positive indirect network effects already enjoyed by the App Store. These indirect network effects therefore protect and strengthen Apple's market position.

447. While the existence of network effects could be such that players whose presence generates a positive externality might gain a certain level of market power, this is not the case here. On the one hand, the fact that there is no alternative for iOS users means there is no competition between platforms for these users. On the other hand, on other systems where there is an alternative, network effects generate a tipping effect rather than increased competition to attract publishers. On Android devices, app stores competing with the Play Store have a low market share. In the UK, app stores other than the Play Store and the App Store represent less than 5% of net revenue earned by apps through consumer billings[309].

448. On the publisher side, the market can be seen to be highly fragmented, with app publishers' interests differing to a significant extent depending on their business model. This means that despite the indirect network effects mentioned above, which could also benefit Apple, the

---

[306] Classification mark 8,833 (NCV 9,059).

[307] Classification mark 4,334.

[308] Classification mark 4,334.

[309] Competition and Markets Authority, Mobile ecosystems. Market study final report, 10 June 2022, page 95.

latter retains significant market power.

d) The counterweight of publishers

449. Because of the lack of alternatives for distributing apps to iOS users, Apple enjoys significant market power vis-à-vis publishers that wish to market their apps to iOS users.

450. Apple essentially decides unilaterally on the rules for accessing the App Store and app distribution to iOS users, with no possibility for publishers to negotiate different terms. Any changes to these rules are at Apple's sole discretion.

451. Under its Developer Program License Agreement, Apple has the right to disable or restrict access to its services at any time without notice and at its sole discretion.

452. Article 2.8 states that "*Apple reserves the right to change, suspend, deprecate, deny, limit, or disable access to the Apple Services, or any part thereof, at any time without notice (including but not limited to revoking entitlements or changing any APIs in the Apple Software that enable access to the Services or not providing You with an entitlement). In no event will Apple be liable for the removal of or disabling of access to any of the foregoing. Apple may also impose limits and restrictions on the use of or access to the Apple Services, may remove the Apple Services for indefinite time periods, may revoke Your access to the Apple Services, or may cancel the Apple Services (or any part thereof) at any time without notice or liability to You and in its sole discretion*"[310].

453. Article 3.2. states that Apple has full discretion to grant or deny an app for its devices: "*Applications for iOS, iPadOS, tvOS, visionOS, and watchOS developed using the Apple Software may be distributed only if selected by Apple (in its sole discretion) for distribution via the App Store, for beta distribution through TestFlight, or through Ad Hoc distribution as contemplated in this Agreement*"[311].

454. Furthermore, Article 6.9 gives Apple discretion to refuse any app, even if that app complies with the required documentation: "*You understand and agree that if You submit Your Application to Apple for distribution via the App Store, Custom App Distribution, or TestFlight, Apple may, in its sole discretion:*

(a) determine that Your Application does not meet all or any part of the Documentation or Program Requirements then in effect;

(b) reject Your Application for distribution for any reason, even if Your Application meets the Documentation and Program Requirements; or

(c) select and digitally sign Your Application for distribution via the App Store, Custom App Distribution, or TestFlight.

Apple shall not be responsible for any costs, expenses, damages, losses (including without limitation lost business opportunities or lost profits) or other liabilities You may incur as a result of Your Application development, use of the Apple Software, Apple Services, or Apple Certificates or participation in the Program, including without limitation the fact that Your Application may not be selected for distribution via the App Store or Custom App Distribution"[312].

---

[310] Classification mark 8,844 (NCV 9,070).

[311] *Ibid.*

[312] *Ibid.*

455. In conclusion, the above elements show that app publishers as a whole have little countervailing power vis-à-vis Apple.

e) Constraints on the consumer-facing side of the App Store

456. The constraint exerted by the consumer-facing side of the market for the distribution of apps on iOS mobile devices on Apple's market power vis-à-vis app publishers may, from a theoretical point of view, result from consumers' reaction to a perceived deterioration in the conditions of distribution of apps available on iOS devices. App publishers could, for example, charge consumers for the distribution of apps or content integrated into those apps as a result of the implementation of the ATT prompt, to compensate for a reduction in their advertising resources. Such changes affecting the attractiveness of apps on iOS devices could – at least in theory – make the App Store less attractive to consumers and prompt negative reactions on their part.

457. Given that, at the date of the statement of objections, users of iOS mobile devices could only download apps via the App Store, the only constraint they could exert in the event of a deterioration in the conditions for distributing apps on iOS devices would be to turn to other smart mobile devices that are not subject to the access conditions imposed by Apple, such as Android smartphones.

458. Apple argues that even if a secondary market for the distribution of iOS apps were defined, which it disputes (see paragraph 399 above), the competitive pressure existing on the primary market for the sale of mobile devices would be enough to deprive it of a dominant position on this secondary market, despite its monopoly situation. In this respect, Apple disputes the existence of a "*premium*" market for the sale of mobile[313] devices, arguing that the four cumulative conditions set out in the EFIM case law have been met.

459. In Decision 21-D-07, the *Autorité* rejected these arguments, noting that: "*the conditions listed* [in the EFIM case law] *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 apps in the App Store, since such a change would imply, for some iOS users, the loss of their investment in Apple's ecosystem*"[314].

460. The *Autorité*'s preliminary analysis was largely upheld by the Commission in the recent Apple/Spotify decision[315].

[313] Classification mark 9,488.

[314] Decision 21-D-07, cited above, paragraphs 114 and 115.

[315] Commission decision of 4 March 2024 in Case COMP/AT.40437 – Apple App Store practices (music streaming), paragraphs 360 to 520.

i. On the limited degree of competition in the primary market for smart mobile devices

461. Apple has a significant share of the European market for the sale of smart mobile devices, with an estimated market share of 33% for smartphones[316] and 48% for tablets in 2023[317]. Moreover, Apple's market share, in value terms, for smartphones and tablets exceeds that based on sales volumes. In 2021, in the EEA, Apple's market share for smart mobile devices (smartphones and tablets combined) represented between 30% and 40% of units sold, while in terms of sales value, Apple held an estimated share of between 50% and 60%. This difference can be explained by Apple's positioning, selling high-end products at prices that are generally higher than average. In the high-end segment, Apple holds a very strong position globally, with an estimated market share of between 60%[318] and 75%[319].

462. Apple's commercial strategy is based on positioning its models in the high-end segment, thereby limiting competition from the majority of manufacturers that use the Android operating system. These manufacturers offer a wider range of products, including many entry-level devices, to appeal to a more budget-conscious clientele.

463. In its Apple/Spotify decision, the Commission highlighted that Apple's significantly higher operating profits compared to its direct competitors demonstrates its capacity, to some extent, to avoid price competition from Android-based smartphone makers[320]. Apple is, in effect, able to maintain higher prices and margins than its competitors. This limited price competition between iOS and Android devices has also been confirmed by the CMA, which emphasised in its report that Apple's iOS devices dominate sales of high-priced devices, while devices using Android dominate the sales of low-priced devices[321].

464. The above developments show that Apple holds a strong position on the European smart mobile device market, particularly in the high-end segment.

465. Apple's position is all the stronger in that the migration rate of Apple customers to other brands is still very low.

466. Apple produced a financial study as part of its observations in response to the report, with a view to disputing its dominance. According to this study, there is a high degree of substitutability between primary products, and the cost of switching from one primary product to another is low. To support this argument, the study relies on a survey of users who have already switched phones. However, the analysis of users who have changed operating systems is biased, since it excludes all users who have not made the switch, i.e. a large proportion, focusing instead on those for whom substitutability is higher and/or the cost of switching is lower. As such, the analysis ignores the psychological barriers to switching that some other users may feel, and which contribute to their costs of switching.

---

316 https://gs.statcounter.com/vendor-market-share/mobile/europe

317 https://gs.statcounter.com/vendor-market-share/tablet/europe

318 https://www.servicesmobiles.fr/les-ventes-des-smartphones-haut-de-gamme-apple-domine-79315

319 https://www.counterpointresearch.com/insights/premium-market-captures-half-global-smartphone-revenue-2022-first-time

320 Commission decision of 4 March 2024, cited above, in Case COMP/AT.40437 – Apple App Store practices (music streaming), paragraph 376.

321 Commission decision of 4 March 2024, cited above, in Case COMP/AT.40437 – Apple App Store practices (music streaming), paragraph 379.

467. Conversely, a recent study by CIRP[322] of the US market revealed very strong brand loyalty among iPhone users, as for more than 90% of customers purchasing a new iPhone, their previous smartphone was also an iPhone[323]. Furthermore, the survey conducted by the CMA in the UK in June 2022 found that 8% of users who purchased an iPhone had previously owned an Android smartphone, while only 5% of users who chose an Android smartphone had previously owned an iOS device.

468. As indicated by the *Autorité* in Decision 21-D-07, this can be explained by the fact that Apple brand products are part of 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 seems unlikely that iOS users will switch to an alternative offering on the primary market, in the event of price rises or a deterioration of the quality of apps in the App Store, since such a change would imply, for some iOS users, the loss of their investment in Apple's ecosystem.

469. The evidence gathered by the Commission in the Apple/Spotify decision largely validates the *Autorité*'s preliminary findings, and confirms that the costs of switching mobile devices between the iOS and Android ecosystems, whether monetary or non-monetary, present significant obstacles for users[324].

470. Firstly, changing operating systems can, in some situations, involve considerable monetary costs. In addition to purchasing a new device, users sometimes have to replace specific Apple accessories, such as an Apple Watch or HomePod, which are incompatible with another ecosystem. These investments can sometimes exceed the cost of the smartphone itself. In addition, some users may face early termination costs for phone plans[325]. Lastly, certain apps or content already purchased, such as e-books, often have to be repurchased.

471. Secondly, switching from one operating system to another also requires an investment of time and effort. Users have to familiarise themselves with a new environment, which includes learning a different interface, transferring data or apps, and adapting to new routines.

472. Thirdly, with regard to the transfer of data, although progress has been made thanks to dedicated tools, the process of switching from one operating system to another is still imperfect. Some content, such as subscriptions or in-app purchases made via Apple In-App Purchase (IAP), is non-transferable and users need to repurchase or re-subscribe. For music subscriptions, for example, users often need to cancel the old contract before taking out a new one on an Android device. This complexity raises concerns about potential loss of data, and makes the process more difficult for many users.

473. Fourthly, even after switching from one operating system to another, synchronisation between devices may be compromised. Users accustomed to Apple's integrated services, such as iCloud or continuity features (Handoff, AirDrop), forfeit these advantages when they

---

[322] Consumer Intelligence Research Partners (CIRP) provides research data and information on various companies and markets, including Apple. See https://www.cirpllc.com.

[323] https://9to5mac.com/2021/10/28/iphone-loyalty-rate-data-switchers/

[324] Commission decision of 4 March 2024, cited above, in Case COMP/AT.40437 – Apple App Store practices (music streaming), paragraphs 388 *et seq.*

[325] Users may have purchased their smartphone on a plan with their telecoms providers, subject to a fixed-term contract, with early termination costs and outstanding payments for the phone.

leave the iOS ecosystem. Moreover, many proprietary apps, such as iMessage or FaceTime, are not available on Android.

474. In conclusion, while iOS and Android smart mobile devices are part of the same market for the sale of devices, substitutability between these devices is limited by these factors, which appear to constitute high barriers, beyond the monetary cost, for consumers. According to the CMA, these barriers appear to be higher among iOS users than Android users[326].

ii. On the absence of any disciplinary effect of the primary market for smart mobile devices on the secondary market for the distribution of apps

475. Insofar as it has not been established that Apple enjoys a dominant position on the primary market for the sale of smart mobile devices, it is necessary to examine the four cumulative conditions identified by the Commission in the Pelikan/Kyocera decision[327] and upheld by the successive decision and judgement in the EFIM case[328].

476. The *Autorité* considers that the four cumulative criteria set out in the Pelikan/Kyocera decision, and recalled in the EFIM case law, were not met in the present case during the period of the practices, which was before the entry into force of the DMA.

477. Firstly, consumers of smart mobile devices are unable to make an informed choice about the conditions of purchase and use of apps downloaded from the App Store.

478. The cost of apps throughout their lifecycle is generally much less transparent at the time of the decision to purchase a mobile device, compared, for example, with mobile phone plans. Prices for apps and in-app content are not systematically available when and where the purchase decision is made, regardless of whether consumers buy their devices in a physical store or online. Furthermore, there are no effective comparison tools or sites for consumers to easily and systematically compare app prices or in-app subscription conditions between different app stores and mobile operating systems. Lastly, the mobile apps market is a multi-product market in continual evolution, in particular because apps are launched and then withdrawn or there are changes linked to their conditions of use or pricing. As users' preferences and needs in terms of apps are likely to evolve over the lifetime of their phone, they will not easily be able anticipate their app consumption over this lifetime and estimate the total cost of this consumption.

479. Secondly, even supposing that consumers are able to easily compare the distribution costs of mobile apps, access to and use of an app store does not appear to be a decisive factor in the purchasing process and in the competitive functioning of the market for smart mobile devices (see paragraphs 403 *et seq.* above).

480. Thirdly, users rarely change their mobile operating system and remain, to a large extent, captive to their ecosystems (see paragraphs 465 *et seq.* above).

481. Fourthly, the vast majority of consumers are unaware of the differences between the different mobile devices as regards app prices and app distribution conditions. Even if they were aware of these differences and overcame the substantial costs of switching when changing the operating system of their mobile device, any change would occur with a very significant

---

[326] Competition and Markets Authority, Mobile ecosystems. Market study final report, page 80, paragraph 3.177.

[327] Commission decision of 22 September 1995, Pelikan/Kyocera, IV/34.330.

[328] Judgment of the General Court, cited above, T-296/09, European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v. Commission, EU: T: 2011:693.

delay, i.e. within an unreasonable timeframe.

482. In conclusion, Apple's market power in the distribution of mobile apps is not limited by competition in the primary market for smart mobile devices, where Apple also enjoys strong market power. In light of the criteria set out in decision-making practice and case law to date, and the elements presented above, it can be concluded that Apple is in a dominant position on both sides of the distribution of mobile apps on iOS devices (publisher- and consumer-facing sides).

E. ON THE MERITS OF THE STATEMENT OF OBJECTIONS

1. APPLICABLE PRINCIPLES

483. Any undertaking, including those in a dominant position, enjoys, by virtue of freedom of trade and industry, the possibility of freely determining the rules and principles governing the functioning of the products and services that it makes available to the public.

484. 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 undertaking in question. In this regard, an operator in a dominant position is free to enact rules providing for additional protections for internet users over and above what is otherwise required by regulation.

485. However, this freedom is limited by compliance with the laws and regulations otherwise applicable and, more specifically with regard to competition law, may not be implemented if it is contrary to competition rules, in particular if it is anticompetitive by object or effect.

486. 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 a result, the implementation by a dominant operator of rules for accessing a digital platform that are disproportionate or lack objective justification may affect the functioning of the markets where the economic operators listed on the digital platform are active and, ultimately, harm consumer interests.

487. Article 102(2)(a) TFEU provides that practices that may be qualified as abusive include, in particular, "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions*".

488. It is clear from the wording of this provision that it is likely to apply to any type of condition imposed by a dominant operator, whether price-related or not[329].

489. The Court of Justice has held, for example, that the imposition by a collective management organisation of "*commitments that are not essential to the achievement of its object and which therefore unfairly restrict a member's freedom to exercise its copyright*" may

[329] See, for example, the judgments of the Court of Justice of 5 October 1988, Société alsacienne et lorraine de télécommunications et d'électronique ("Alsatel")/Novasam, C-247/86 and of 16 July 2015, Huawei Technologies, C-170/13, or Decision 19-D-26, cited above.

constitute an abuse contrary to Article 102(a) TFEU[330].

490. Similarly, in a judgement of 5 October 1988, the Court of Justice held, with regard to the provisions included in a maintenance lease requiring the installer to be contacted exclusively for any modification of the leased property, that "*the fact that the price of the supplements to the contract entailed by those modifications is not determined but is unilaterally fixed by the installer and the automatic renewal of the contract for a 15-year term if as a result of those modifications the rental is increased by more than 25% may constitute unfair trading conditions prohibited as abusive practices by Article 86 of the Treaty* [now Article 102 TFEU]"[331].

491. According to case law to date, the application of Article 102(a) TFEU requires three conditions to be met.

492. Firstly, the trading conditions implemented by the dominant undertaking must be directly or indirectly imposed.

493. Secondly, these conditions must be "*unfair*" in nature, which is assessed by examining whether the dominant undertaking's conduct has been carried out to a "*reasonable extent*"[332].

494. With regard to this second condition, both Union case law to date[333] and that of the French Supreme Court (*Cour de cassation*)[334], call in particular for an examination of whether the conditions imposed by the dominant operator are both necessary and proportionate to achieve the objective pursued by the dominant undertaking or the realisation of its corporate object[335], evidence which in principle is up to the undertaking in a dominant position to provide by virtue of its "*special responsibility*" under Article 102 TFEU[336].

495. Thirdly, with regard to the effects of the practice, it must be established that the trading conditions are unfavourable for commercial partners, consumers or third-party companies.

496. As such, abuse is characterised when the trading conditions imposed by the dominant operator unreasonably affect parameters of competition such as price, choice, quality or innovation, to the detriment of the interests of the dominant undertaking's commercial partners, consumers, or third-party companies that do not necessarily have direct commercial

---

[330] Judgment of the Court of Justice of 21 March 1974, Belgische Radio en Televisie and Société belge des auteurs, compositeurs et éditeurs ("BRT") v. SV SABAM, C-127/73, paragraph 15.

[331] Judgment of the Court of Justice of 5 October 1988, Société alsacienne et lorraine de télécommunications et d'électronique ("Alsatel") v. Novasam, C-247/86, paragraph 10.

[332] See Decision 19-D-26, cited above, paragraphs 351-352, and Decision 21-D-07 of 17 March 2021 on 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 for mobile app advertising on iOS, paragraph 143.

[333] A policy pursuing legitimate objectives can only be justified if it does not put in place barriers, the result of which exceeds the objective to be achieved.

[334] Judgment of the French Supreme Court (*Cour de cassation*), Commercial Chamber, 25 September 2024, no. 22-19.527, paragraphs 34 to 36, which specifies that the trading conditions imposed by a company in a dominant position are unfair "*only if the latter has not acted to a reasonable extent*", in particular to protect its commercial interests, i.e. that "*its behaviour was neither necessary nor proportionate to the objective pursued*".

[335] Judgment of the General Court of 6 October 1994, Tetra Pak, T-83/91, paragraphs 138-140, and judgment of the Court of Justice, cited above, BRT, paragraphs 8-11.

[336] Judgment of the General Court of 30 September 2003, Atlantic Container Line and others v. Commission of the European Communities, T-191/98 and T-212/98 to T-214/98, EU: T: 2003:245, paragraph 1,120.

relations with the dominant undertaking.

497. Furthermore, Union case law to date does not stipulate that a causal link has to be demonstrated between dominance and the conditions imposed by the dominant operator[337].

2. APPLICATION TO THE PRESENT CASE

498. As a preliminary point, the *Autorité* notes that, as highlighted in Decision 21-D-07 on the request for interim measures, the implementation by a dominant gatekeeper platform of measures intended to enhance the protection of personal data and the effectiveness of its users' consent is, *a priori*, legitimate and does not, in principle, raise any objections under competition rules.

499. As highlighted by the CNIL in its opinion of 17 December 2020, reiterated by the *Autorité* in Decision 21-D-07, the ATT prompt has several positive effects for users, in that it gives *"users more control over their personal data by allowing them to make their choices in a simple and informed manner and by technically and/or contractually preventing app publishers from tracking the user without their consent*".

500. While the principle of the ATT prompt is not problematic in terms of the likely benefits for users as regards privacy protection, how the prompt is implemented in practice must not undermine the principle of free competition.

501. Indeed, as the *Autorité* recalled in its decision on the request for interim measures, the freedom enjoyed by a dominant operator like Apple to define consumer protection rules does exempt that undertaking from its specific responsibility to implement such policy in conditions compatible with Article 102 TFEU.

502. However, the evidence in the case file shows that the ATT prompt imposed by Apple (**a**) creates, because of the conditions for its implementation, constraints for mobile app publishers that are neither necessary nor proportionate to achieve the legitimate privacy protection objectives underlying the system (**b**) and has detrimental consequences for operators in the sector (**c**) without any objective justification (**d**).

a) The fact the ATT prompt is imposed

503. Apple stipulates that app publishers must comply with various contractual conditions and guidelines that make displaying the ATT prompt mandatory, whenever publishers wish to share their users' data with third parties.

504. These conditions require publishers to display the ATT prompt when they perform ad tracking on third-party sites and apps from their mobile app on users' iOS devices.

505. As stated in the findings, Article 5.1.2 of the App Review Guidelines stipulates that publishers wishing to share the data they collect with third parties must obtain users' consent via the ATT prompt. If an app fails to meet this requirement, it may be suspended or banned.

506. Users are therefore required to give a response via the ATT prompt when the "Allow Apps

[337] *Ibid.*, paragraph 1124, and Commission decision of 4 March 2024, cited above, in Case COMP/AT.40437 – Apple App Store practices (music streaming), paragraphs 540 to 546.

to Request to Track" setting is activated in "Settings"[338].

507. In practice, the imposed nature of the ATT prompt is heightened by the review by Apple's Review Team of mobile apps in the App Store, which can result in the app being suspended or modifications to the publisher's data usage conditions. This review concerns the display conditions of the ATT prompt itself, but also the display conditions of publishers' CMPs or additional pop-up windows.

508. Apple does not dispute the fact that mobile app publishers are required to implement ATT for ad tracking on third-party sites and apps.

509. However, it emphasises that operators in the sector had time to anticipate the prompt. In this regard, it recalls that Decision 21-D-07 on the request for interim measures found the complainants' criticism of the sudden and non-transparent implementation of the ATT prompt to be unfounded, as Apple had postponed the implementation of the ATT prompt to allow developers to update their apps and practices[339]. It contests any causal link between its dominant position and its capacity to impose the ATT prompt[340], which it claims stems from "*Apple's long-standing commitment to privacy protection*"[341].

510. The *Autorité* considers these arguments to be unfounded.

511. On the one hand, the fact that publishers were able to anticipate the introduction of ATT and provide feedback on how the prompt functions does not change the fact that the prompt is imposed.

512. On the other hand, it is precisely because of its monopoly position on the market for the distribution of mobile apps on iOS devices that Apple has been able to impose access rules for its App Store, including the mandatory implementation of the ATT prompt[342]. This monopoly has also allowed Apple to impose ATT on users, as well as the conditions for turning off tracking in "Settings" on Apple devices.

513. As a result, Apple has been able to impose the ATT prompt on publishers because of its dominant position on the market for the distribution of mobile apps on iOS devices.

---

[338] When "Allow Apps to Request to Track" setting is turned off in "Settings", the ATT prompt is no longer displayed, but in such cases, publishers are likely to display their CMP, to collect user consent for the same purpose as well as for other purposes.

[339] Decision 21-D-07 of 17 March 2021 on 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 for mobile app advertising on iOS, paragraph 20.

[340] Response to the Report, paragraphs 452-454, classification marks 12,362 and 12,363.

[341] Response to the Report, paragraph 454, classification mark 12,363.

[342] Judgment of the Court of Justice, cited above, 27/76, United Brands and United Brands Continental v. Commission, EU: C: 1978:22, paragraph 231.

b) The ATT prompt is neither necessary for nor proportionate with the legitimate objectives that Apple claims to pursue

i. Apple's arguments

514. Apple argues, on the one hand, that the ATT prompt is necessary to address a "market failing" stemming from the fact that the current rules do not allow users to exercise sufficient control over the collection and use of their personal data in the context of third-party ad tracking.

515. As users are not, according to Apple, sufficiently aware of the large-scale and "*surreptitious*"[343] nature of this type of tracking, the ATT prompt would allow them "*to make an informed choice regarding the protection of their privacy*"[344]. It argues that the prompt is based on an objective criterion that applies indiscriminately to all publishers in the same situation[345].

516. On the other hand, it argues that the ATT prompt is proportionate with the objectives of obtaining "*free and informed choice*" and protecting privacy, insofar as it provides a simple technical solution[346], the outcome of which could not be achieved by a less restrictive technical or contractual measure. Apple argues that the ATT prompt reconciles the interests of publishers and users by giving the former more leeway[347] and the latter "*free and informed choice*"[348]. It adds that the prompt can be sufficiently personalised[349], "*minimises consent fatigue*"[350], and stresses that the proportionality of the prompt is apparent from numerous statements in the case file[351].

517. It also argues that, in its opinions and draft recommendations on mobile apps, the CNIL neither called into question the fact that the ATT prompt appears along with a request for consent via a CMP, nor imposed any conditions for approving the ATT prompt[352].

518. Lastly, it considers that, in view of these elements, the Investigation Services did not sufficiently balance the interests of consumers in receiving a clear, standardised prompt against the interests of app publishers in tracking consumers[353].

---

[343] Response to the Report, paragraphs 66 *et seq.*

[344] Classification marks 12,331 *et seq.*

[345] Response to the Report, paragraph 387, classification mark 12,345.

[346] Classification mark 12,367, paragraph 476.

[347] Classification mark 12,371.

[348] Classification mark 12,370.

[349] Classification mark 12,371.

[350] Classification mark 12,372.

[351] Classification marks 12,370 and 12,371.

[352] Classification marks 12,252 to 12,254.

[353] Response to the Report, paragraphs 446 to 448, classification mark 12,361.

ii. The Autorité*'s response*

519. The *Autorité* considers that none of the arguments put forward by Apple prove that the ATT prompt is necessary and proportional.

520. In the first instance, developers are not able to rely on the ATT prompt to comply with their legal obligations, should they wish to, and must necessarily continue to rely on their own solutions for obtaining consent.

521. Apple's argument that the ATT prompt is necessary to remedy a market failure in terms of privacy protection therefore appears especially questionable, given that Apple's prompt does not even meet the minimum standards required by the regulations to achieve this objective.

522. Indeed, the limitations inherent in the ATT prompt, defined unilaterally by Apple, require publishers to design at least one second pop-up window to collect consent for cross-app/website ad tracking in order to comply with the regulations.

523. As mentioned above (see paragraph 269), in its opinion of 17 December 2020, the CNIL considered that, in view of the information at its disposal, the prompt proposed by Apple would enable app publishers to obtain informed consent, in compliance with the applicable regulations, provided the legally required information was included. In particular, the CNIL stressed that the ATT prompt would help the smaller publishers "*to comply with the obligation laid down by the provisions of Article 82 of the law* [French Data Protection Act] by *providing a simple tool for collecting valid consent for their ad tracking operations*"[354].

524. However, the constraints imposed by Apple on the design and implementation of the ATT pop-up still do not enable publishers to insert the information required to obtain consent, a point not disputed by Apple.

525. In its opinion of 19 May 2022, the CNIL described the ATT prompt as "*unnecessarily complex and artificial*", insofar as it requires publishers to systematically obtain users' consent twice for the same purpose, even though "*a marginal improvement in how the ATT prompt is configured, which does not affect the readability of the pop-up window, so that the window can be used to obtain valid consent [...] would retain the user protection offered by the ATT prompt [...], without having the disadvantage of creating a complex and excessive system for the user*"[355].

526. The design and implementation of the ATT prompt therefore generate excessive constraints that go against the objectives that are supposed to justify it. These constraints are the result of a deliberate choice by Apple, which knowingly refrained from introducing the marginal changes recommended by the CNIL to remedy the situation.

527. Secondly, given its specific responsibility as a dominant undertaking, Apple must ensure the prompt's neutrality, so as not to unjustifiably penalise one method of obtaining consent over another.

528. However, the combination of the limitations of the ATT pop-up and Apple's rules for implementing the prompt automatically undermines the prompt's neutrality, insofar as, while ad tracking only needs to be refused once, the user must always confirm their consent a second time.

---

[354] Classification mark 1,738.

[355] Classification mark 6,160.

529. Indeed, when the user refuses tracking in an initial pop-up window, the requirement to obtain unambiguous consent means they cannot immediately be asked to make their choice again[356]. Moreover, according to the CNIL, the same applies even when tracking is refused via the ATT prompt and does not, as such, constitute sufficient consent within the meaning of the GDPR.

530. The design and implementation of the ATT prompt therefore artificially complicate the acceptance of third-party tracking versus refusal, contrary to Apple's stated aim of enabling "*effective and informed*" choice. This asymmetry is likely to have negative consequences for both users and app publishers, in particular those who depend on advertising for the profitability of their business (see paragraphs 547 *et seq.*)

531. On this point, the CNIL highlights the risk of "*consent fatigue*" associated with ad tracking on third-party sites and apps, insofar as such tracking requires "*artificially prompting the user's consent twice for the same purpose*". While this risk is traditionally associated with obtaining an internet user's consent for such tracking against their will, it can also play a role in encouraging their refusal. There is no reason why an Internet user who agrees to allow their advertising data to be tracked in an ATT pop-up should, on account of the design of the ATT prompt as designed by Apple, be obliged to confirm their choice in a second CMP window.

532. The *Autorité* notes that between refusal and acceptance, one option is favoured over another, a situation that undermines the prompt's neutrality and is entirely the result of choices made intentionally and unilaterally by Apple.

533. In this context, and in the third instance, the necessary and proportionate nature of the constraints thus generated by the implementation of the ATT prompt for publishers, in particular for the smallest players, must be assessed in the light of the processing performed by Apple in the context of its own data collection.

534. On this point, the requirement for double consent from users for tracking on third-party sites and apps contrasts with the lack of information provided to users regarding Apple's collection of data on its own apps, as noted by the CNIL in its decision of 29 December 2022[357].

535. Until the implementation of iOS 15, Apple did not request users' consent, which prompted the CNIL to impose a fine on Apple for violating Article 82 of the French Data Protection Act transposing the ePrivacy Directive. In its decision, the CNIL considered that when Apple introduced the collection of consent with iOS 15, the statement "*Apple does not track you*" displayed as part of the "Personalized Ads" window was misleading, unlike the statement "*Apple does not track you on third-party apps and websites*", the addition of which means the prompt "*constitutes a mechanism for collecting valid consent beforehand*"[358].

536. This asymmetry in treatment between Apple and publishers remains today, insofar as Apple has implemented a single "Personalized Ads" window for collecting user consent for its own data collection, while continuing to require double consent for third-party data collection by publishers.

537. In this respect, the *Autorité* notes that this double standard may seem contradictory in view of Apple's commitment to protecting users' consent and privacy.

---

[356] Classification mark 6,159, CNIL opinion of 19 May 2022, paragraph 19.

[357] Classification marks 7,402 to 7,424.

[358] Classification mark 7,420.

538. Indeed, the risks inherent in the processing and collection of third-party data do not appear, in all circumstances, to be greater than the risk of a single company combining data from its own proprietary data.

539. While Apple disputes this as regards its own tracking, insofar as it does not "*combine data across its ecosystem*"[359], the investigation has shown that the logged-in environment offered by Apple results in the collection and processing of particularly reliable and precise data, meaning that users can be identified with virtual certainty, insofar as they log on to an account that is supposedly personal. Unlike cookies and pixels[360], users can be identified in this way across multiple devices, permanently[361]. As the Paris Court of First Instance (*Tribunal judiciaire de Paris*) found[362], it cannot be ruled out that a significant amount of the data used by Apple for advertising purposes may qualify as personal data. In its first decision of 17 December 2020, the CNIL recalled that "*according to the terms of the law, data can be qualified as personal data when that data relates to an identified or identifiable person, directly or indirectly, in particular by reference to an identifier (an advertising identifier, for example) or to several elements that are specific to that person*"[363].

540. In this respect, the CNIL considered that Apple processes data processing on a "*significant scale*", given the dominant position of the Apple operating system, and that its targeting services for advertisers are based on people's interests and lifestyles[364].

541. This makes it all the more unjustifiable to require double consent for the collection and processing of third-party data, in view of the differences between the way that data is processed and the way Apple processes data itself.

542. Furthermore, in this context, the ATT prompt seems even less conducive to user consent integrity, as various factors call into question whether there is a clear-cut distinction between proprietary and third-party data when it comes to risks to consumer privacy.

543. On the one hand, according to the CNIL, the legal and regulatory provisions governing the collection of user consent apply, indiscriminately, to all types of tracking. Indeed, the CNIL has never made a distinction between proprietary and third-party data as regards the obligation to obtain user consent.

544. The evidence provided by Apple[365] does not show that consumers are any less concerned about their privacy being respected by a publisher using proprietary data for ad targeting than in the context of tracking on third-party sites and apps.

545. For example, a survey conducted in the UK by Invisibly found that 70% of respondents do not consent to being tracked online for advertising purposes, without differentiating between

---

[359] Classification mark 12,348.

[360] Competition and Markets Authority, Appendix G to the Online platforms and digital advertising market study, 1 July 2020, page 7, paragraph 23.

[361] Opinion 18-A-03, cited above, page 60, paragraph 138.

[362] Judgment of the Paris Court of First Instance (*Tribunal judiciaire de Paris*) of 9 June 2020, no. RG 16/09799.

[363] Classification mark 1,731 (referral 20/0099 M).

[364] Classification mark 8,804 (NCV 9,930).

[365] Classification marks 12,646 to 12,653.

proprietary and third-party data collection[366]. Another survey, organised by Cheetah Digital, shows that users prefer to receive targeted advertising on social networks from third-party data rather than via a chatbot with access to purchases made on the same site[367], with the difference in acceptance being around 10 percentage points[368]. Similarly, the study by Lin (2021)[369] discusses the sharing of proprietary data with the maker of a connected watch, which is different from third-party tracking.

546. On the other hand, in any event, the particular sensitivity of users to third-party ad tracking is also contradicted by the fact that the rate of consent for the "Personalized Ads" pop-up window, which relates to proprietary tracking by Apple, is, according to estimates provided by Apple, close to 20% and, as such, lower than that of the ATT prompt[370].

c) The ATT prompt's harm to operators in the sector

547. Lastly, the evidence in the case file shows the implementation of the ATT prompt penalised publishers and intermediaries in the sector for advertising on iOS devices (***i***.), with Apple providing no evidence to disprove this finding (***ii***.).

i. The ATT prompt's harm to app publishers and advertising service providers

Publishers' situation

548. Firstly, the investigation shows the rate of user consent for the use of data for advertising purposes has generally been significantly lower since the implementation of the ATT prompt.

549. The investigation found that the consent rates for the CMPs of companies that responded to the Investigation Services' requests for information ranged from 65% to 83%[371]. These figures are consistent with the statistics provided by the trade press[372], which estimate consent rates in the 70% to 80% range, and with those of certain advertising players[373].

550. The 2022 report by the French research centre CREDOC on the spread of information and

---

[366] Classification mark 12,647. Invisibly (2 August 2021). 3 Out of 4 People Want Companies to Use Consumer Consented Data. Invisibly. Retrieved 24 October 2023, from https://www.invisibly.com/insights/consumer-consented-data. The article analyses the results of an Invisibly/Realtime survey conducted online among 2,240 people of all ages.

[367] Which is first-party data.

[368] See page 69 of the Cheetah study referred to in classification mark 12,647.

[369] Lin, T. (2022). Valuing intrinsic and instrumental preferences for privacy. Marketing Science, 41(4), 663681. https://doi.org/10.1287/mksc.2022.1368, classification mark 11,618.

[370] Classification mark 12,610 (NCV 15,676) (Amaury).

[371] See, in particular, classification marks 6,669 to 6,673, 6,679, 6,680, 6,683, 6,684, 8,326 to 8,328, 8,331, 8,332, 8,335 to 8,337 and 8,338 to 8,341 (CMI), 6,651 to 6,662 (Prisma), 6,625 to 6,629 and 8,408 to 8,411 (Le Figaro), 6,569 to 6,570 and 8,368 to 8,372 (Amaury), 6,616 to 6,624 (M6), 6,584 to 6,599 (Deezer), 6,556 to 6,557, 6,562 and 8,355 to 8,358 (LBC), and 7,222 to 7,227 (Facebook and Instagram).

[372] See, for example: https://www.mindmedia.fr/adtechs-martechs/directives-de-la-cnil-un-an-apres-quel-bilan-des-editeurs-sur-le-recueil-de-consentement/ (in French).

[373] https://blog.didomi.io/fr/recommandations-cnil-taux-de-consentement (in French).

communication technologies in French society, conducted on behalf of public authorities[374], concluded that 65% of people on websites and apps regularly or systematically accept cookies. According to the CNIL, the consent rate for cookies on websites is 59%[375]. The CNIL considers this rate to be high and comparable with that of the 2022 Digital Barometer (*Baromètre du numérique*) by CREDOC.

551. By way of comparison, according to information provided to the Investigation Services by publishers, the rate of user consent for the ATT prompt was between 35% and 47% in 2022[376]. This range is lower than the consent rates observed for CMPs, and corresponds to the figures observed by external sources concerning the consent rate for the ATT prompt, of less than 50%[377].

552. Furthermore, over the period 2019-2022, the rate of sharing of the IDFA fell sharply as from the implementation of the ATT prompt in May 2021[378]. DMG Media reported that for the Daily Mail, the availability of the IDFA fell in May and June 2021 from 68% to 33%, followed by a drop of a few more percentage points over the next six months[379]. As such, at the time of the responses in October 2022, the average availability of the IDFA was 27% for all ad requests[380]. The rate of sharing of the IDFA has fallen all the more since the IDFA is only available on condition the user has given consent for both the ATT and the CMP. This explains why the availability rate of the IDFA is lower than the consent rate for the ATT prompt.

553. In this respect, the *Autorité* notes that the effects of refusing tracking via the ATT prompt is all the more significant as this refusal tends to be permanent. Indeed, while publishers of websites and mobile apps regularly ask internet users for permission to collect their data for advertising purposes via their CMP, the ATT prompt is generally only displayed once, and users have to go to their device settings to change their choice.

554. The investigation also found that the introduction of the ATT prompt is likely to affect

---

[374] 2022 Digital Barometer (*Baromètre du numérique*), survey on the spread of information and communication technologies in French society (https://www.economie.gouv.fr/cge/barometre-numerique-2022) (in French).

[375] https://www.cnil.fr/fr/evolution-des-pratiques-du-web-en-matiere-de-cookies-la-cnil-evalue-limpact-de-son-plan-daction (in French)

[376] See, in particular, classification marks 6,669 to 6,683, 6,684, 8,326 to 8,328, 8,335 to 8,337 and 8,338 to 8,341 (CMI), 6,651 to 6,662 (Prisma), 6,621 to 6,629 and 8,408 to 8,411 (Le Figaro), 8,368 to 8,372 (Amaury), 6,616 to 6,624 (M6), 6,584 to 6,599 (Deezer), 6,556 to 6,557 (LBC) and 6,678 to 6,680 7,219, 7,222 to 7,223 (Facebook and Instagram).

[377] https://www.flurry.com/blog/att-opt-in-rate-monthly-updates/

https://tracker.my.com/blog/208/att-tracking-requests-in-ios-14-5-by-country-and-app-category-after-1-year?lang=en

https://www.inmobi.com/blog/how-to-increase-your-att-opt-in-rates and https://go.inmobi.com/idfa/

https://www.statista.com/statistics/1281345/apple-att-opt-in-rate-by-app-category/

https://iapp.org/news/a/report-att-opt-in-rates-at-25-overall/

https://www.mediapost.com/publications/article/385059/privacy-update-att-opt-in-rate-now-up-to-29.html.

[378] This range excludes CMI's rate, which averages 14% on the three press apps CMI operates, even lower than the range indicated.

[379] Classification mark 6,995.

[380] Classification mark 6,995.

publishers in different ways, depending on whether or not they have substantial proprietary data, and on the extent to which they rely on advertising to promote their products and earn revenue. These factors are likely to penalise smaller publishers more severely[381].

555. Secondly, many publishers have reported that ATT has done harm to their businesses.

556. Some large publishers, in particular, stated in their reports to the U.S. Securities and Exchange Commission (hereafter "SEC") for 2022 that the implementation of the ATT prompt had had negative effects on access to data and tracking capabilities, used in particular for targeting, the price of adverts, publisher costs and demand for non-search adverts. These statements confirm those made by publishers during the investigation, concerning the importance of the IDFA and comparable identifiers for the sale and marketing of ad space by publishers of mobile apps.

557. On the one hand, many of the leading social media companies have highlighted the effects of the ATT prompt on their advertising business. For example, the Observatoire de l'e-pub indicated that in 2022, "*social is seeing more moderate growth (+10% vs. +22%), in particular due to the impact of Apple's ATT prompt*"[382].

558. In this respect, Pinterest states in its 2022 report to the SEC that the ATT prompt affects its ability to track users' actions outside its platform and link their interactions to advertising on the platform. According to Pinterest, delivering the most relevant adverts to its users, measuring the effectiveness of advertising on its platform, and targeting and optimising that advertising is more difficult. In its view, this may result in advertisers spending less, or not at all, on its platform and in preferring larger platforms such as Facebook and Google, which have more capabilities to help advertisers measure their conversions[383].

559. Snap considers that the implementation of the ATT prompt has had a negative bearing on its targeting, measurement and optimisation capabilities and, consequently, on its ability to target adverts and measure their effectiveness. In its view, ATT has caused, and is likely to continue to cause, a drop in demand and prices for its ad products, which could seriously harm its business[384].

560. Lastly, Meta[385] argues that the drop in the average price per advert was driven by lower demand for advertising, which is primarily due to cuts in spending caused by more difficult macroeconomic circumstances, as well as by the limitations that changes to the iOS and the regulatory environment have imposed on its targeting and measurement tools. It believes[386], as does Twitter[387], that ATT reduces their and other iOS developers' ability to target and

---

[381] Classification mark 11,535 (NCV 11,873).

[382] https://www.sri-france.org/wp-content/uploads/2022/12/20230130_Observatoire-E-Pub-FY-2022_VF.pdf (in French)

[383] Pinterest report to the SEC for 2022, page 23: https://www.sec.gov/ix?doc=/Archives/edgar/data/1506293/000150629323000023/pins-20221231.htm.

[384] Snap report to the SEC for 2022, pages 16 and 36: https://www.sec.gov/ix?doc=/Archives/edgar/data/1564408/000156440823000013/snap-20221231.htm.

[385] Meta report to the SEC for, pages 19 and 70: https://www.sec.gov/ix?doc=/Archives/edgar/data/1326801/000132680123000013/meta-20221231.htm.

[386] *Ibid*.

[387] Twitter report to the SEC 2022, pages 14 and 41: https://www.sec.gov/ix?doc=/Archives/edgar/data/0001418091/000141809122000029/twtr-20211231.htm.

measure advertising, which has weighed, and will continue to weigh, on the scale of budgets that advertisers and agencies are willing to commit to ad platforms, whether theirs or others.

561. On the other hand, publishers active in sectors other than social media also highlighted the adverse effects of the ATT prompt in their reports to the SEC for 2022.

562. Match Group, the publisher of around a dozen services, in particular dating services[388], told the SEC, for example, that ATT has affected, and may continue to affect, its advertising services offering. In its view, advertisers' ability to accurately target and measure the effectiveness of their campaigns at user level has been limited, and has had to contend with rising cost-per-registration[389].

563. Bumble, which also publishes a dating app, believes that its ability to accurately target, track and measure its ad campaigns at user level has become limited, and could become more so, and that it could be faced with a rise in cost-per-registration and/or falls in ROI on ad expenditure[390].

564. In various other sectors, companies have also told the SEC that the implementation of the ATT prompt has impinged on their advertising activities.

565. This is the case for media service providers Entravision Communications[391] and iHeartMedia[392]. They highlight the potential effects of the ATT prompt on revenue, due in particular to a decline in the quality of targeted adverts. Casino games publisher SciPlay states that the implementation of ATT has resulted in a decline in the quantity and quality of data, and emphasises the adverse effects on its ability to sell targeted adverts, increased costs for acquiring new users and reduced advertising ROI[393]. Yelp also states that the ATT prompt has negatively affected its ability to target and measure ad campaigns[394].

566. All these factors show that the ATT prompt has penalised sales of mobile apps, to the detriment of publishers and consumers alike.

The situation of providers of advertising services to publishers and advertisers

567. The implementation of the ATT prompt has had detrimental business consequences for various categories of providers of advertising services to publishers and advertisers.

---

[388] Tinder, Hinge, Match, Meetic, OKcupid, Pairs, Plenty of Fish, Azar, Hakuna Chispa, BLK and The League.

[389] Match Group report to the SEC for 2022, page 16: https://www.sec.gov/ix?doc=/Archives/edgar/data/0000891103/000089110323000013/mtch-20221231.htm.

[390] Bumble report to the SEC for 2022, page 17: https://www.sec.gov/ix?doc=/Archives/edgar/data/1830043/000095017023005080/bmbl-20221231.htm

Bumble highlights its limited ability to assess the effect of ad campaigns and the returns on investment linked to the implementation of the ATT prompt.

[391] https://www.sec.gov/ix?doc=/Archives/edgar/data/1109116/000095017023008445/evc-20221231.htm, pages 14 and 15.

[392] https://www.sec.gov/ix?doc=/Archives/edgar/data/1400891/000140089123000008/ihrt-20221231.htm, page 20.

[393] https://www.sec.gov/ix?doc=/Archives/edgar/data/1760717/000176071723000010/scpl-20221231.htm, pages 15 and 16.

[394] https://www.sec.gov/ix?doc=/Archives/edgar/data/0001345016/000134501623000009/yelp-20221231.htm, page 25.

568. Firstly, a number of providers of intermediation services for publishers have stated that the implementation of the ATT prompt has impaired, or was likely to impair, their ability to perform targeted advertising.

569. Index Exchange, one of the leading SSPs active in the ad intermediation market for publishers[395], reported that ATT has led to a decline in user consent for the collection and processing of the IDFA in particular. According to Index Exchange, as soon "*the IDFA* [is received] *in the Data Stream, the identifier is automatically included in the Bid Requests sent to partners. Including an IDFA increases the likelihood that IX will receive a Bid Response from DSPs wishing to serve an Advert to a User. IX observes a direct correlation between the inclusion of the IDFA and its ability to facilitate the supply of Targeted Adverts. IX can confirm that the changes made by Apple above have had a direct impact on its service. From April 2021 to mid-August 2021 (a period of around 4 months), IX saw a 40% drop in Publisher Requests originating from Apple devices and including the IDFA. If this trend continues, IX anticipates a loss of USD 2.1 million in annual ad spend via the Platform from Apple devices, resulting in a proportional drop in Commissions for IX*"[396]. The data reported by Index Exchange for September 2022 confirms a significant drop in impressions with an IDFA[397].

570. According to Magnite, which is a direct competitor of Index Exchange, "*the reduced frequency of the IDFA for iOS app-based transactions or the availability of third-party cookies in Safari-based web transactions can lead to less value for the advertiser and therefore less revenue for the app developer/website owner*"[398]. OpenX, which also operates an SSP and ad exchange, stated that the effects of the implementation of the ATT prompt were visible from Q3 2021 onwards, with ad spending on iOS devices down 50% in Q3 2021 compared with Q2 2021. In its view, the decline is all the more "*dramatic*" given that, historically, ad spending increases from one quarter to the next[399]. The ad exchange Yieldmo explains that the launch of the ATT prompt made app traffic on Apple devices less attractive to advertisers, and notes that advertisers are embracing new ad measurement and targeting strategies (such as SKAN)[400]. It believes that ATT has made its offering less attractive, compared to platforms with in-built tracking capabilities such as Google, Meta and Apple[401].

571. Teads, whose product offering enables inventory sales without an identifier, also notes a significantly lower inventory fill rate for want of an identifier.

---

[395] See Decision 21-D-11, cited above, paragraph 262.

[396] Classification mark 4,706.

[397] Classification mark 8,387.

[398] Classification mark 1,542.

[399] Classification mark 1,056.

[400] Classification mark 3,499.

[401] Classification mark 3,496.

	Ensemble de l'in-app		iOS uniquement	
Trimestre	Taux de remplissage inventaire AVEC MAID	Taux de remplissage inventaire SANS MAID	Taux de remplissage inventaire AVEC IDFA	Taux de remplissage inventaire SANS IDFA
2021-Q1	33%	23%	35%	21%
2021-Q2	52%	38%	56%	38%
2021-Q3	54%	39%	56%	39%
2021-Q4	66%	51%	66%	50%
2022-Q1	51%	32%	50%	32%
2022-Q2	58%	33%	55%	35%
2022-Q3	44%	20%	43%	22%

Source: Teads[402]

572. Admax, which provides ad intermediation services to publishers, reported that "*the implementation of the ATT prompt has had a negative impact on the level of revenue earned on iOS by our mobile app customers.* [...]

We have observed the following:

- *a large proportion of ad requests on iOS leaving if there is no IDFA;*
- *a reduction in prices for ad space on iOS;*
- *a decline in the volume of purchases for ad space on iOS;*
- *and, therefore, lower overall advertising revenue on iOS.*

At the same time, on Android:

- *an increase in prices for ad space on Android;*
- *higher revenue for ad space on Android.*

There has therefore been a partial transfer of investment from iOS to Android, but unfortunately the increase in revenue on Android has not compensated for the loss on iOS"[403].

573. Secondly, on the advertiser demand side, the DSP MediaMath argues that Apple's implementation of the ATT prompt has reduced the available ad inventory and limited the selection of inventories available to its customers. This change has affected MediaMath's ability to present its customers with a varied selection of ad inventories and, thus, adversely affected its service offering[404].

574. The DSP Mobsuccess also states that "*the implementation of the ATT prompt has had a negative impact on our business, an impact that will only get worse in the future. Not having proprietary data like the Big Tech companies means that we have to work in collaboration with different providers that are directly impacted by the implementation of the ATT prompt within iOS devices*"[405].

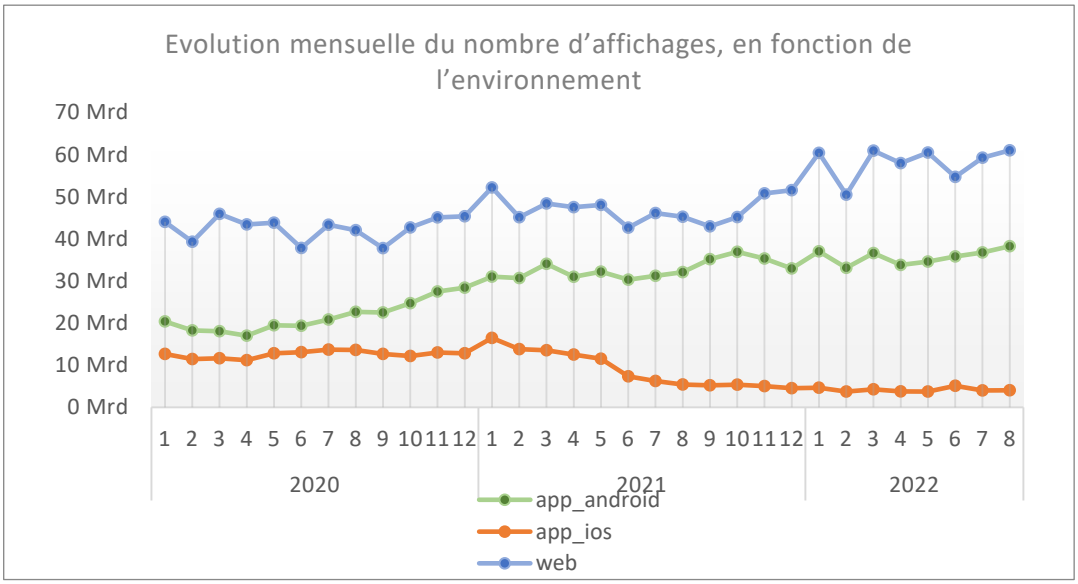
[402] Classification marks 7,182 to 7,189.

[403] Classification mark 5,721.

[404] Classification mark 1,909.

[405] Classification mark 1,067.

575. In its response, Criteo states that its activity on iOS has fallen following the introduction of the ATT prompt in April 2021. Various measures were proposed, all of which show a decrease. The figure below shows the number of impressions intermediated by Criteo. Based on this data, there was a 61% drop in the number of impressions on iOS between February and August 2021, while this number is up 5% on Android and is stable on the web.



Source: Criteo[406]

576. Smaller players have also highlighted the effects of the ATT prompt on their businesses. Addict Mobile reported that it has "*sometimes lost customer budgets, which have shrunk because our customers can no longer track their performance as they used to be able to*"[407]. Adikteev, which provides retargeting services to mobile app publishers, stated that "*the decision to impose App Tracking Transparency (ATT) on app publishers has jeopardised part of Adikteev's business.* [...] *Since the effective implementation of the ATT prompt and the rollout of iOS version 14.5 and subsequent versions, Adikteev's iOS sales have fallen by 67%, while Android sales have continued to grow by 47%*"[408].

577. Ad4Screen stated that "*some advertisers have decided to limit their ad investments on apps because they feel there is too much uncertainty regarding the possibility to track ad campaigns: our sales with the latter have fallen*"[409]. The loss of business for smaller players should be contrasted with "*players with their own data "ecosystem" [that] can leverage their position to strengthen their offering without using the IDFA or cookies*", as Ad4Screen[410] points out, citing the example of Meta and Google, which can track users' journeys after they have seen an advert.

578. Lastly, several providers of campaign effectiveness measurement services also highlighted the effects of the ATT prompt on their business.

---

[406] Classification mark 7,883.

[407] Classification mark 3,295.

[408] Classification mark 1,792

[409] Classification mark 3,276 (NCV 3,658)

[410] Classification mark 3,279.

579. Appsflyer stated that "*because of the ATT prompt, MMPs have had to invest significant resources to try to keep providing added value to customers despite the limitations introduced by Apple*"[411]. It noted that SKAN "*only really became relevant after the ATT prompt, as it was the only way to measure with deterministic precision without the consent of the end user. In order to receive information traditionally provided by independent MMPs, app developers can now only go through Apple. Since Apple's policies extend beyond apps obtaining consent exclusively for the IDFA, MMPs are also unable to use other data that may be legally collected by an app in order to perform mobile measurements. Instead, developers of mobile measurement apps/services are required to register with the SKAdnetwork and receive the information collected and analysed only by Apple after Apple has "cleaned" the data of its uniquely identifiable properties in order to provide customers with measurement reports*"[412]. It added that "*SKAdnetwork undermines the efforts of MMPs to prevent ad fraud. A key role of mobile measurement services is to identify fraudulent ad activity, in particular from non-human actions. In order to identify such activity, mobile measurement services need accurate information from the devices and the ability to remove potential bad actors. By obliging all apps to share data with Apple and "anonymise" all attributes via the SKAdnetwork, the ability of mobile measurement services to detect ad fraud has been impaired*"[413].

580. Chartboost explains that "*the ATT prompt and SKadnetwork have affected Chartboost's ability to manage attribution correctly. The use of SKadnetwork has considerably reduced the efficiency of working with MMPs, with which Chartboost has spent the last decade building/integrating attribution solutions. Implementing SKadnetwork in the Chartboost platform took a year of work from Chartboost's engineering and product teams – for a less efficient result*"[414].

581. S4M stated that "*with regard to current impact figures, we see that iOS 14 currently accounts for 53% of ad inventory from Apple devices and 19% of all the ad inventory we receive. Of course, we expect these figures to continue to rise. We have also seen a decline in the number of iOS inventories featuring the IDFA and geolocation. We now only get 31% of this type of inventory, compared with 48% in April*"[415].

582. Ogury, which provides data collection and mining services for advertisers, and which uses the IDFA not for targeting but for campaign performance measurement, reckons that since "*the rollout of iOS 14 and the launch of the ATT prompt, we only have access to 30% of Apple users' IDFA, forcing us to develop other identification techniques in-house that are compatible with Apple's new measures, in a very short space of time, and with no guarantee of results and performance*"[416]. It also notes, based on the services it provides, that ad requests with the IDFA fell from 35% in September 2021 to 10% in June 2022[417].

583. These practices are liable to have several consequences for intermediation services offered

[411] Classification mark 3,201.

[412] Classification mark 3,199.

[413] Classification mark 3,200.

[414] Classification mark 3,580.

[415] Classification marks 1,514 and 1,515.

[416] Classification mark 7,474.

[417] Classification mark 7,024.

by certain companies.

584. Firstly, intermediation companies are seeing their ability to offer certain targeting and attribution services diminish, resulting in a loss of diversity in the advertising services on offer for publishers and advertisers, and increased difficulty in matching supply and demand for ad space. Competition is likely to be distorted, as larger players with an ecosystem at their disposal are less affected than smaller companies.

585. Secondly, an app publisher without any proprietary data is less able to use an intermediary to monetise its inventory through targeted advertising than an app publisher with proprietary data, or a publisher whose ad inventory allows for contextual targeting. For example, CMI notes that the ATT prompt's influence has varied depending on the magazines' themes, which, consequently, has affected ability to sell inventory without programmatic sales[418].

586. Thirdly, certain data, which *de facto* must be collected from third parties, becomes unavailable to all market participants, including, for example, app usage and purchase data. In addition to the fact that the loss of such data is likely to create difficulties in measuring performance, offering targeting based on app-use time or the users' propensity to make in-app purchases is therefore more difficult.

587. While companies like Meta can still compete with Apple based on their proprietary data, they are potentially at a disadvantage compared with Apple as regards consumer data on iOS.

ii. Apple has not produced any evidence that calls into question the detrimental consequences of the ATT prompt

588. Apple has put forward a number of arguments demonstrating, in its view, the absence of detrimental consequences of the ATT prompt on publishers and ad service providers[419]. It highlights the average rate of consent for the ATT prompt is close to [50-60]%[420], and claims the ad tech sector has adapted to the prompt and is growing strongly[421]. It also asserts that there is "*no sign of higher barriers to entry or a lower quality and diversity of the apps on offer*"[422]. Lastly, Apple argues that any effect caused by the ATT prompt would in any case stem from consumer choice and not from the prompt itself.

589. None of these arguments is convincing.

590. Firstly, even if it were true, as Apple asserts, that the consent rate t for the ATT prompt is close to [50-60]%[423] – and, as such, higher than suggested by the complainants' statements[424] –, it remains in any case significantly lower than the consent rate for the CMP as recalled in paragraph 551 above.

---

[418] Classification mark 8,331.

[419] Classification marks 12,412 *et seq.*

[420] Classification mark 12,414 to 12,419 (NCV 15,517 to 15,522).

[421] Classification mark 12,419 *et seq.* (NCV 15,522, 15,525 and 15,527 to 15,529 for classification marks 12,419, 12,422 and 12,424 to 12,426, respectively).

[422] Classification mark 12,427.

[423] Classification mark 12,419 *et seq.* (NCV 15,522, 15,525 and 15,527 to 15,529 for classification marks 12,419, 12,422 and 12,424 to 12,426, respectively).

[424] *Ibid*.

591. Thus, there can be little doubt about the abovementioned detrimental effect of the ATT prompt on publishers, in particular smaller ones.

592. Secondly, as noted in paragraphs 528 *et seq.*, this effect results not from consumer choice[425], but from the rules unilaterally laid down by Apple concerning the design of the ATT prompt and its implementation.

593. Thirdly, Apple's arguments as to the sector having "*adapted to the paradigm shift in privacy protection*"[426] are not convincing.

594. Firstly, Apple essentially justifies this claim by looking at the situation of major companies such as Google, Amazon, Meta, TikTok, YouTube, M6, TF1, CANAL+ and France Télévisions[427], which were not harmed and continued to grow after the ATT prompt was launched[428]. However, smaller publishers are grouped together in the same "*Other*" category, with no further details.

595. This approach, however, is not without flaws, as the effects of the implementation of the ATT prompt were bound to vary, depending on companies' ability to use an alternative targeting method: for the reasons set out in paragraphs 47 to 65 above, the consequences of implementing the ATT prompt varied significantly from one app publisher to another.

596. On the one hand, as explained above, the ATT prompt has affected publishers differently depending on whether or not they have proprietary data.

597. Deezer, for example, states that "*we have logged-in first-party data that enables us to maintain our prices, and we sell mainly direct or via programmatic deals. Our case is specific in that we are a music streaming platform with a 100% logged-in audience.* [...] *Again, the fact that we have logged-in first-party data enables us to precisely identify our users who have consented to the CMP and not to be dependent on the IDFA*"[429].

598. Conversely, and as already discussed, as a publisher with less proprietary data, CMI[430] explained that the ATT prompt's influence has varied depending on the magazines' themes, which, consequently, has affected ability to sell inventory without programmatic sales.

599. Lastly, the biggest loss is seen for apps that depend on an intermediary to market their inventories. For example, Teads reports lower inventory fill rates when marketing its inventories without identifiers[431].

600. On the other hand, the evidence in the case file shows that the ATT prompt upsets app publishers differently, depending on their need to use advertising to promote their products[432] on the advertiser-facing side of the advertising market.

---

[425] Classification mark 12,414 (NCV 15,517), paragraph 637.

[426] Classification mark 12,419 *et seq.* (NCV 15,522, 15,525 and 15,527 to 15,529 for classification marks 12,419, 12,422 and 12,424 to 12,426, respectively).

[427] Classification mark 12,424 and 12,425 (NCV 15,527 and 15,528).

[428] Classification mark 12,671 (NCV 15,737).

[429] Classification marks 6,593 and 6,594.

[430] Classification marks 6,681 and 6,682 (NCV 8,331 and 8,332).

[431] See paragraph 1,031 of the Report.

[432] See paragraph 1,010 of the Report.

601. In a recent article, Aridor et al. (2024)[433] note that the companies most dependent on Meta to promote their product saw their revenue fall by 39.4%, in particular because of a drop in new customer acquisitions, the ultimate effect depending on the advertiser's ability to switch to another advertising platform such as Google.

602. Secondly, and in any case, the fact that operators were able to adapt to the ATT prompt has no bearing on the prompt's disadvantageous nature. In fact, even if such adaptation were proven (*quod non*), it would simply bear witness to resilience of the companies in the sector in the face of a constraint that has affected their situation, and says nothing about the situation that would have prevailed if there had been no ATT prompt.

603. Lastly, the same applies to Apple's argument as to the ATT prompt having neither lowered the quality or diversity of the apps on offer, nor raised barriers to entry[434].

604. It follows from the above that the ATT prompt has had detrimental consequences for ad tech publishers and intermediaries.

605. As mentioned in paragraph 422 above, these different players are active on advertising markets that are related to the market for the distribution of mobile apps on iOS devices, on which Apple has a dominant position. Apple is therefore liable under Article 102 TFEU[435].

d) On the lack of objective justification

606. Potentially abusive conduct may avoid the prohibition under Article 102 TFEU where the dominant undertaking can sufficiently demonstrate that such conduct is objectively justified.

607. This condition implies the conduct is either objectively necessary to achieve a legitimate objective (which may stem from legitimate commercial considerations[436] or be related to product quality[437]) or produces efficiency gains that counterbalance or even outweigh the negative effect of said conduct on competition[438].

608. Moreover, in both cases, the dominant undertaking must demonstrate that the effects

---

[433] Aridor, G., Che, Y. K., Hollenbeck, B., Kaiser, M., & McCarthy, D. (2024). Evaluating the Impact of Privacy Regulation on E-Commerce Firms: Evidence from Apple's App Tracking Transparency. CESifo Working Paper No. 10928.

[434] Classification marks 12,427 *et seq.*

[435] Judgment of the Paris Court of Appeal of 7 April 2022, 20/03811.

[436] Judgment of the Court of Justice of 10 November 2021, Google and Alphabet v. Commission (Google Shopping), T-612/17, EU: T: 2021:763, paragraph 552.

[437] Judgment of the Court of Justice of 10 November 2021, Google and Alphabet v. Commission (Google Shopping), T-612/17, EU: T: 2021:763, paragraph 552.

[438] Judgment of the Court of Justice of 27 March 2012, Post Danmark, C-209/10, EU: C: 2012:172, paragraphs 40 and 41 and cited case law ; judgment of the General Court of 30 January 2020, Generics (UK) and others, C-307/18, EU: T: 2020:52, paragraph 165; judgment of the Court of 12 May 2022, Servizio Elettrico Nazionale and others, C-377/20, EU: C: 2022:379, paragraph 84; and judgment of the Court of 21 December 2023, European Superleague Company, C-333/21, EU: C: 2023:1011, paragraphs 201 and 202. The examples provided in this section do not constitute an exhaustive list of objective justifications that may be invoked in cases falling within the scope of Article 102 TFEU.

resulting from its conduct are proportionate to the objective[439] or to the purported efficiency gains[440], a condition which is not met when the same objective could be achieved by other means, with less competition restriction[441].

609. Apple considers that these conditions have been met in the present case, and has levelled criticism against the Investigation Services' analysis on a number of accounts.

610. It criticises the Investigation Services for "*obliging*" it to sufficiently establish the efficiency gains of the ATT prompt, as well as its necessity and proportionality at the stage of the qualification of the alleged infringement, and for having, in so doing, "*inverted the burden of proof*"[442].

611. It also claims that the ATT prompt generates efficiency gains by efficiently responding to a market demand that has given rise to a "*new parameter of competition*"[443], and stresses that the ATT prompt has been welcomed by consumer associations as well as by the French and Italian data protection authorities[444]. It also argues that ATT prompt is necessary and proportionate[445].

612. Firstly, the *Autorité* notes that the charge that the Investigation Services inverted the burden of proof stems from a misinterpretation of the applicable case law principles referred to above.

613. It follows from these principles that an examination of the criteria of necessity and proportionality is not a means of justifying, but rather of establishing whether or not practices are unfair under Article 102 TFEU.

614. Secondly, the *Autorité* found that the design and implementation of the ATT prompt were neither necessary nor proportionate in view of the objectives that Apple claims to pursue, insofar as they excessively complicate the use of third-party apps by users and skewed the prompt's neutrality.

615. This assessment necessarily means that any objective justification for the prompt can be ruled out, in accordance with the principle set out in the paragraph above.

616. This exclusion is all the more relevant insofar as the marginal modifications suggested by the CNIL would have allowed Apple to achieve the objectives pursued by the ATT prompt, without necessarily calling into question the very principle of using a pop-up window for collecting consent using simple, standardised wording. In this respect, the CNIL notes that these marginal modifications "*would retain the user protection offered by the ATT prompt*

---

[439] Judgment of the Court of Justice of 12 May 2022, Servizio Elettrico Nazionale and others, C-377/20, EU: C: 2022:379, paragraph 103. See, to this effect, judgment of the General Court of 14 September 2022, Google and Alphabet v. Commission (Google Shopping), T-604/18, EU: T: 2022:541, paragraph 883.

[440] Judgment of the Court of Justice of 17 February 2011, TeliaSonera Sverige, C-52/09, EU: C: 2011:83, paragraph 76.

[441] Judgment of the Court of Justice of 12 May 2022, Servizio Elettrico Nazionale and others, C-377/20, EU: C: 2022:379, paragraph 103. See, to this effect, judgment of the General Court of 14 September 2022, Google and Alphabet v. Commission (Google Shopping), T-604/18, EU: T: 2022:541, paragraph 883.

[442] Classification mark 12,428.

[443] Classification mark 12,429.

[444] *Ibid*.

[445] Classification mark 12,430.

[...] *without having the disadvantage of creating a complex and excessive system for the user*"[446].

617. On this point, with regard to Apple's argument concerning the increased level of user privacy protection afforded by the ATT prompt, the *Autorité* notes that ATT is not intended to enable publishers to comply with their regulatory obligations, but is in addition to the privacy protection mechanisms that allow publisher compliance therewith. Apple itself does not claim that ATT is designed to collect valid consent within the meaning of the regulations, which the CNIL confirmed in its second opinion of 19 May 2022[447].

618. This element is relevant for assessing the proportionality of the ATT prompt insofar as, although Apple is free to enact consumer protection rules that go beyond those imposed by regulation, it may only do so if this legitimate objective is not at odds with competition law, given its specific responsibility as a dominant operator.

619. Ultimately, bringing the ATT pop-up into compliance with competition law would not have led to a downgrade in the efficiency of Apple's privacy protection system. If it decides to maintain its ATT prompt, it will have to make the necessary changes to avoid the disadvantages stemming from the prompt's limitations in its current form, if need be in consultation with the competent authorities.

F. ON THE ATTRIBUTABILITY

1. REMINDER OF THE PRINCIPLES

a) On the attributability of a practice to an economic unit

620. It is settled case law that Articles 101 and 102 TFEU and Articles L. 420-1 and L. 420-2 of the French Commercial Code relate to infringements committed by undertakings. The concept of an undertaking and the rules deriving from this concept, by virtue of which the conduct of one undertaking can be attributed to another, in particular to its parent company, fall within the scope of the substantive rules of EU competition law. The interpretation given by the EU courts is therefore binding on the national competition authority and national courts when applying Articles 101 and 102 TFEU alongside domestic competition rules[448].

621. According to EU case law to date, an undertaking is any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed[449]. It should be

---

[446] Classification mark 6,160.

[447] Classification mark 6,158, for example.

[448] Judgment of the Court of Justice of 4 June 2009, T-Mobile Netherlands BV and others, C-8/08, paragraphs 46, 49 and 50; judgment of the Paris Court of Appeal of 29 March 2012, no. 2011/01228, Lacroix Signalisation and others on Decision 10-D-39 of 22 December 2010 on practices implemented in the vertical road signs sector, page 18.

[449] See, in particular, the judgments of the Court of Justice of 28 June 2005, Dansk Rorindustri A/S and others v. Commission, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02P, paragraph 112, of 10 January 2006, Ministero dell'Economica e delle Finanze, C-222/04, paragraph 107, of 11 January 2006, Federacion Espanola de Empresas de Tecnologia Sanitaria (FENIN) v. Commission, C-205/03 P, paragraph 25, and of 20 January 2011, General Quimica SA and Others v. Commission, C-90/09 P, paragraph 34.

understood as designating an economic unit, even if, in law, that economic unit consists of several persons, natural or legal[450]. It is this economic entity that must, when it infringes the competition rules, answer for that infringement according to the principle of personal liability[451]. Union case law to date specifies that, in order to engage this liability, the infringement must be unequivocally attributed to a legal person that is liable to be fined, and to which the objections must be communicated.

b) Attributability in the event of company transformation

622. According to settled case law to date, as long as the legal person responsible for the operation of the undertaking that has engaged in anticompetitive practices remains in existence, it must be held liable for these practices. If this legal person has changed its corporate name or legal form, it is still liable for the infringement committed[452].

623. On the other hand, when the legal person responsible for the operation of the undertaking has legally ceased to exist, the practices must be attributed to the legal person to which the undertaking has legally been transferred, i.e. the entity that has received the rights and obligations of the person that committed the infringement, or, in the absence of such transfer, to the person that in fact ensures its economic and functional continuity[453].

624. In French law, it is also considered that "*as long as the legal person responsible for the operation of the undertaking that has engaged in anticompetitive practices remains legally in existence, it is this person that bears responsibility for these practices, even if the material and human elements that contributed to these practices have been transferred to a third* party"[454].

---

[450] See, in particular, the judgments of the Court of Justice of 14 December 2006, Confederacion Espanola de Empresarios de Estaciones de Servicio, C-217/05, paragraph 40, of 10 September 2009, Akzo Nobel NV and Others v. Commission, C-97/08 P, paragraph 55, of 20 January 2011, General Quimica SA and others v. Commission, C-90/09 P, paragraph 35, of 29 March 2011, ArcelorMittal Luxembourg SA v. Commission, C-201/09 P and C-216/09 P, paragraph 95, of 29 September 2011, Elf Aquitaine SA v. Commission, C-521/09, paragraph 53, and of 29 September 2011, Arkema SA v. Commission, C-520/09 P, paragraph 37; see also the judgment of the Paris Court of Appeal, Lacroix Signalisation and others, cited above, page 18.

[451] See, in particular, the judgments of the Court of Justice, General Quimica, cited above, paragraph 36, Akzo Nobel NV and others v. Commission, cited above, paragraph 56, ArcelorMittal Luxembourg SA v. Commission, cited above, paragraph 95, and Elf Aquitaine SA v. Commission, cited above, paragraph 53; see also the judgment of the Paris Court of Appeal, Lacroix Signalisation and others, cited above, pages 18 and 20.

[452] Judgment of the Court of Justice, Aalborg Portland A/S and others v. Commission, cited above, paragraph 59.

[453] Judgment of the General Court, 14 December 2006, Raiffeisen Zentralbank Österreich AG and others v. Commission, joined cases T-259/02 to T-264/02 and T-271/02, paragraph 326; see also the judgment of the French Supreme Court (*Cour de cassation*) of 23 June 2004, BNP Paribas and others, no. 01-17896 and 02-10066 and the judgment of the Paris Court of Appeal of 14 January 2009, Eurelec Midi Pyrénées and others, no. 2008/01095, page 5.

[454] See, in particular, Decision 08-D-09 of 6 May 2008 on practices implemented in the funeral services sector in Lyon and the surrounding area, paragraph 211, upheld by the Paris Court of Appeal decision of 31 March 2009, Agence funéraire lyonnaise pompes funèbres Viollet, no. 2008/11353, page 24; see also French Supreme Court (*Cour de cassation*), Commercial Chamber, 20 November 2001, SACER and others, appeals no. 99-16776 and 99-18253, ruling on Decision 98-D-33 of 3 June 1998 on practices implemented in connection with the award of public contracts for roads and other networks in the Hérault *département*; see also Decision 01-D-14 of 4 May 2001 on practices identified in markets for the manufacturing and deployment of asphalt on the departmental roads of Isère, page 19.

c) On the attributability within a group of companies

625. In French law, as in Union law, within a group of companies, the conduct of a subsidiary may be attributed to the parent company where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard to the economic, organisational and legal links between those two entities[455].

626. According to well-settled case law to date, where a parent company holds, directly or indirectly through an intermediary company, all or almost all of the share capital of its subsidiary that has committed an infringement, there is a presumption that the parent company has a decisive influence on the conduct of its subsidiary. In this hypothesis, it is sufficient for the competition authority to provide proof of this share capital holding in order to attribute the conduct of the subsidiary responsible for the practices to the parent company. It is possible for the parent company to rebut this presumption by providing sufficient evidence that, to the contrary, its subsidiary acts independently on the market. If the presumption is not rebutted, the competition authority will be able to hold the parent company jointly and severally liable for the fine imposed on its subsidiary[456].

2. APPLICATION TO THE PRESENT CASE

627. It has been shown that the practices were carried out between 26 April 2021 and 25 July 2023 by Apple Distribution International Limited (ADI) and Apple Inc., the infringing companies.

628. From 26 April 2021 to 1 April 2023, the entire share capital of ADI was held by Apple Operations Europe Limited (hereinafter "AOE"), a company under Irish law, whose share capital was 100% owned by Apple Operations International Limited (hereinafter "AOI"), a company under Irish law and a wholly-owned subsidiary of Apple Inc.

629. According to information provided by Apple, the Group's organisation was changed [confidential][457].

630. Consequently, pursuant to the above principles, the practices will be attributed for the entire period to AOI and Apple Inc., as parent companies presumed to have exercised decisive influence over ADI. The practices will not be attributed to AOE, which legally ceased to exist on the date of the present decision.

631. Apple, for its part, does not contest the question of attributability.

---

[455] Judgments of the Court of Justice, Akzo Nobel and others v. Commission, cited above, paragraph 58, General Quimica v. Commission, cited above, paragraph 37, and Lacroix Signalisation and others, cited above, pages 18 to 19.

[456] Judgments of the Court of Justice, Akzo Nobel, cited above, paragraphs 60 and 61, General Quimica, cited above, paragraphs 39 and 40, and Lacroix Signalisation and others, cited above, pages 19 to 20.

[457] Classification marks 9,165 and 9,166 (NCV 9,225 and 9,226).

G. ON THE PENALTY

1. ADOPTION OF A FIXED-SUM METHOD

632. The provisions of Article L. 464-2 I of the French Commercial Code and Article 5 of Council Regulation (EC) No 1/2003 of 16 December 2002[458] empower the *Autorité* to impose a financial penalty on companies and bodies that engage in anticompetitive practices prohibited by Articles L. 420-2 of the French Commercial Code and Article 102 TFEU.

633. The third paragraph of Article L. 464-2 I stipulates that "*the financial penalties shall be assessed with regard to the seriousness and duration of the infringement, the situation of the association of undertakings or the undertaking sanctioned or of the group to which the undertaking belongs, and any repetition of the practices prohibited hereunder. The penalties shall be determined individually for each undertaking or body sanctioned and a reasoned decision shall be given for each penalty*".

634. Under the terms of the fourth paragraph of Article L. 464-2 I, "*the maximum amount of the penalty is, for an undertaking, 10% of the highest worldwide revenue, excluding tax, in any financial year since the financial year preceding that in which the practices were implemented"*. The revenue taken into account is that shown, where applicable, in the consolidated or combined accounts of the consolidating or combining company.

635. The *Autorité* assesses the legal criteria set out above in accordance with the procedures described in its Notice of 30 July 2021 on the method for determining fines, updated on 15 November 2021 (hereinafter the "Notice on Fines"*).* The *Autorité* states "*the law confers on the* Autorité *a broad discretionary power to determine on a case-by-case basis, under the legal requirement of adapting the case to the individual situation and in accordance with the principle of proportionality, the financial penalties to be imposed pursuant to the criteria set out in section I of* [the aforementioned] *Article L. 464-2*"[459].

636. While the Notice on Fines describes a "*coherent method that guides the determination of the financial penalties imposed by the* Autorité", it specifies that the latter "*may, however, after an overall analysis of the specific circumstances of the case, in particular with regard to the characteristics of the practices in question, the activity of the parties concerned and the economic and legal context of the case, or for reasons of general interest, decide to depart from this method, stating the reasons for doing so*"[460].

637. In view of the circumstances of the present case, the *Autorité* has decided not to apply the method described in the Notice on Fines. Applying this method would result in a fine that was not proportionate to the seriousness of the facts and clearly did not adequately reflect the economic scale of the infringement or Apple's weight in the sector.

638. In order to ensure that the basis for the fine is proportionate to the economic extent of the infringements in question, and to the relative weight of the companies involved in the sectors or markets concerned, the Notice on Fines takes, for reference, the value of sales, i.e. "*the value of all categories of products or services directly or indirectly related to the*

---

[458] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJEU, L 1, page 1).

[459] Notice on Fines, paragraph 7.

[460] *Ibid*., paragraph 6.

infringement (...) *sold by the company*" during the last accounting period in which it committed the infringement.[461]

639. In the present case, the practices were implemented on the market for the distribution of mobile apps on iOS devices. In view of the way the prompt works and its purpose, the ATT prompt has been an integral part of the App Store since April 2021, and is an unavoidable constraint for app developers. In this respect, as explained in paragraphs 422 *et seq.*, the implementation of the ATT prompt represented a new constraint on several of the advertising markets related to the app distribution market. Consequently, Apple's revenue from the App Store alone, if used as the basis for the fine, would not adequately reflect the economic extent of the infringement. This approach would result in a fine that was not proportionate with the need for deterrence.

640. However, the context of these practices shows the importance of the deterrent function of the fine to be imposed on Apple. The ATT prompt is part of a global strategy whereby the company claims to pay special attention to protecting consumer privacy. The prompt is nevertheless imposed by Apple, despite the significant harm that it automatically does to a very large number of companies that depend on the iOS ecosystem, and without adequately taking into account the warnings of the CNIL about certain difficulties that it presented.

641. Consequently, for the purposes of proportionality and deterrence, the fine shall be determined on a fixed-sum basis.

2. FIXED-SUM DETERMINATION OF THE FINE

642. With regard to the criteria set out in section I of the aforementioned Article L. 464-2, the seriousness of the infringement (a), the duration of the infringement (b) and the situation of the sanctioned company or the group to which this company belongs (c) will now be examined in turn.

a) On the seriousness of the practices

643. In order to assess the seriousness of the practices in the present case, it is necessary to examine the nature and characteristics of the infringement, as well as the status of the persons likely to be affected.

i. Apple's arguments

644. Apple denies that the infringement can be considered to be in any way serious, pointing to the privacy benefits for users and, in its view, the absence of any specific anticompetitive effect[462].

645. In particular, Apple notes the implementation of the ATT prompt, which is designed to improve consumer choice in terms of privacy protection, does not fall into any pre-existing category of anticompetitive practices. In this respect, Apple claims to be pursuing a legitimate objective, as stated in the aforementioned Decision 21-D-07, in which the *Autorité* found that "*the implementation of such a strategy does not appear to be anticompetitive in*

[461] *Ibid.*, paragraphs 21 and 22.

[462] Apple's Response to the Report, paragraphs 703 to 718.

itself, and in principle is a legitimate exercise of Apple's commercial policy"[463].

646. Apple highlights several features of the ATT prompt that, in its view, demonstrate the lack of gravity.

647. Firstly, it is limited in scope, insofar as it does not restrict the ability of publishers and advertisers to use their own (or proprietary) data for advertising purposes, as long as this data is not shared with third parties.

648. Secondly, Apple does not apply any different treatment between itself and third parties. In this respect, after the fine imposed by the CNIL in December 2022, it was quick to ask device users more clearly for express permission for its own personalised advertising.

649. Thirdly, the practices are limited to a small portion of online advertising (in-app advertising in iOS apps and adverts on the App Store).

650. Fourthly, the benefits of the ATT prompt have been acknowledged by public authorities such as the CNIL and by consumer associations.

651. Apple also claims the Investigation Services exaggerate the importance of the ATT prompt. For example, to consider that all publishers and all users of iOS devices are exposed to the prompt would only be possible by artificially defining a relevant market for the distribution of apps on iOS/iPadOS.

652. Moreover, the ATT prompt does not make it more difficult for publishers to access the App Store.

653. Apple also maintains that the practices have no proven anticompetitive effect, which should *ipso facto* rule out any seriousness at all.

654. Lastly, with regard to certain developments in the ad tech sector, Apple claims that the practices are harmless: it states that after three years since the launch of ATT, growth in this sector is strong[464] and [confidential]. The very existence of the ATT prompt therefore encourages publishers to protect consumer privacy.

655. Similarly, Apple argues that, according to the CNIL, the ATT prompt differentiates itself by the free and informed choice offered to users with regard to ad tracking, unlike many CMPs[465].

ii. The Autorité's response

656. As is clear from case law to date on abuse of a dominant position, which falls into the category of exploitative abuse, the fact that a practice is novel, i.e. not belonging to any pre-existing category of anticompetitive practice, does not make that practice any less of an infringement, nor therefore any less serious.

657. The French Supreme Court (*Cour de cassation*) has ruled that the fact that the qualification as an abuse of a dominant position is novel "*does not eliminate or even mitigate the infringement of competition law by the reported practices* (...), *with the attendant*

[463] Decision 21-D-07, paragraph 147.

[464] Apple's Response to the Report, paragraph 653.

[465] In its opinion of 17 December 2020, the CNIL stressed that "*the pop-up window designed by Apple differs from the interfaces currently seen on a significant number of websites and mobile apps that do not comply with the regulations*" (paragraph 23), referral 20/0099 M, classification mark 1,733.

consequences in terms of liability"[466]. In this judgement, the French Supreme Court (*Cour de cassation*) upheld the decision of the Paris Court of Appeal not to impose the symbolic fine requested by the operators concerned.

658. Similarly, in the above-mentioned Google Gibmedia case, the Paris Court of Appeal derived from certain "*special circumstances*", namely the competition concerns expressed by the *Autorité* regarding the non-transparent, non-objective and discriminatory nature of the rules governing Google's online search advertising service, as well as from various alerts issued by French government services, that the company "*could not* (...), *even if its conduct had not yet been qualified and sanctioned prior to the adoption of* [the *Autorité's*] *decision, have been unaware of the risks with regard to competition rules*". In this respect, it considered that "*the fact that the practices implemented are an infringement does not present any unforeseeable character likely to justify not imposing a fine or limiting its amount*"[467].

659. In the present case, during the proceedings on the request for interim measures, the CNIL and the *Autorité* pinpointed certain risks associated with the implementation of the ATT prompt.

660. The CNIL, first of all, in its opinion of 17 December 2020, noted that the ATT prompt would only allow for the collection of fully informed consent if Apple adapted the prompt, something that Apple set out to do but did not do.

661. While the *Autorité* considered in Decision 21-D-07 that the ATT prompt appeared, at first glance, to be neither excessive nor disproportionate in terms of consumer interests, it nevertheless stressed the need for Apple to allow publishers to supplement the information pop-up window for the purposes described by the CNIL. The *Autorité* also highlighted the risk from the fact that the ATT prompt is not displayed in its own advertising service ASA, in particular in that such absence might not be justified with regard to the privacy protection objective claimed by Apple.

662. However, it is clear from the case file that Apple merely relied on the position stated by the *Autorité* in Decision 21-D-07, acting as if said decision, even though handed down at a preliminary stage and before the launch of the ATT prompt, ruled out *a priori* any incompatibility with competition law, and as if the objective of protecting privacy were grounds for ignoring the other warnings issued by the CNIL and the *Autorité*, as explained in paragraphs 525 *et seq.*

663. As for the other circumstances put forward by Apple, they have not been proven, and in any case, according to the *Autorité*'s analysis, in no way mitigate the gravity of the practices.

664. Firstly, with regard to the scope of the prompt purportedly limited to the IDFA, the investigation showed not only that the ATT prompt was not limited to the IDFA, but also concerned other methods of data collection by publishers (notably e-mail hashing and fingerprinting[468]), but also that the restrictions on accessing the IDFA, more than any other identifier, penalised publishers (paragraphs 81 to 97 and 548 to 566).

665. Secondly, Apple's claim that it does not apply any different treatment between itself and third parties is belied by several elements in the case file, as demonstrated in paragraphs 535 *et seq*.

---

[466] Judgment of the French Supreme Court (*Cour de cassation*) of 5 April 2018, appeals no. 16-19.186 and 16-19.274, page 7.

[467] Judgment of the Paris Court of Appeal of 7 April 2022, 20/03811, paragraphs 360 to 365.

[468] See Decision 21-D-07, cited above, paragraph 30.

666. Thirdly, Apple's argument that the ATT prompt is limited to advertising in iOS apps and on the App Store, i.e., according to Apple, to a small portion of online advertising, is invalid. Advertising plays an important role in the market defined in the present decision, in which Apple holds a dominant position and has rolled out the ATT prompt. The fact that it might represent a small proportion of advertising compared to other markets is therefore irrelevant.

667. Fourthly, the fact that the benefits of the ATT prompt have been acknowledged, to some extent, by the CNIL and by organisations that Apple describes as consumer associations is counterbalanced by other elements already set out above, concerning the lack of objective justification (paragraphs 520 *et seq.*) and the failure to take into account all the CNIL's recommendations (paragraphs 525 *et seq.* above).

668. Fifthly and lastly, with regard to Apple's final arguments concerning the limited effects of the ATT prompt on the sector in general and on app publishers in particular, reference is made to the discussion in paragraphs 548 to 566 above.

669. In this regard, in assessing the gravity of the infringement, the type of persons likely to be affected must be taken into account. However, as demonstrated above, the ATT prompt is more likely to penalise the business model of smaller app publishers, which do not have substantial proprietary data and are relatively more dependent on advertising (see paragraph 554).

670. It follows from the above that, contrary to Apple's claims, the practices in question, which create unfair trading conditions for many of its partners, despite the benefits for consumers professed by Apple, reflect an abusive exploitation of its position on a market that it dominates. They are therefore serious by nature.

b) On the duration of the infringement

671. Apple recalls that Decision 21-D-07, in referring the case back to the investigation, was aimed in particular at self-preferencing practices. It therefore considers that any practice for which it could be held responsible in this respect would have come to an end, in any event, in September 2021, when the "Personalized Ads" prompt was launched.

672. The beginning of the practices covered by the objections must be set at 26 April 2021, the date when iOS version 14.5 was launched, the first version of the operating system in which the ATT prompt was implemented. Contrary to Apple's assertion, as has been demonstrated, the practices continued after and in spite of the introduction of the "Personalized Ads" prompt, at least until the date the statement of objections was sent, 25 July 2023. As the ATT prompt has been an integral part of the App Store in successive versions of iOS, the practices must be deemed to have continued without interruption between these two dates, for a period of two years and three months.

c) On the adaptation of the fine to the size of the group

673. The assessment of the individual situation of the sanctioned company may prompt the *Autorité* to take into account the latter's size or that of the group to which it belongs[469]. Similarly, Union case law to date considers it legitimate to take account of a company's global revenue, which gives an indication of its size, economic heft and resources[470] at the time the decision is adopted[471]. The considerable financial heft of a company may justify setting the fine at a higher level, to ensure that it has a deterrent effect and is proportionate.

674. In the present case, the infringement has been attributed to ADI and Apple Inc., as perpetrators, and to AOI and Apple Inc., as parent companies. Taken together, these companies constitute an undertaking within the meaning of competition law.

675. It should be noted that, firstly, Apple Inc. reported consolidated pre-tax revenue of USD 383 billion for the year ended 30 September 2023[472] and, secondly, along with Microsoft and Nvidia, has one of the three largest market capitalisations in the world[473], having surpassed USD 3 trillion in December 2023.

676. These elements demonstrate the company's size and financial heft, which justify a significant increase in the amount of the fine.

d) On the amount of the fine

677. In view of the seriousness of the facts, the duration of the infringement and Apple's economic heft, Apple Distribution International Limited (ADI) and Apple Inc., as perpetrators, and Apple Operations International Limited and Apple Inc., as parent companies, are fined €150,000,000.

678. This amount does not exceed the applicable legal maximum of 10% of Apple's consolidated worldwide revenue excluding VAT.

3. ON THE NON-FINANCIAL PENALTIES

679. In view of the facts established and the practice sanctioned, on the basis of Article L. 464-2 of the French Commercial Code, the summary on pages 3 to 5 of the present decision shall be published within two months of its notification. This summary shall be accessible via an html link entitled "*Apple condamnée par l'Autorité de la concurrence française*" (Apple sanctioned by the French Competition Authority), at the top of the home page of the

---

[469] Judgment of the French Supreme Court (*Cour de cassation*) of 28 April 2004, Colas Midi-Méditerranée and others, no. 02-15203.

[470] See, in particular, the judgment of the Court of 26 June 2006, Showa Denko v. Commission, Case C-289/04, paragraphs 16 and 17.

[471] Judgment of the Court of 4 September 2014, YKK Corporation, C-408/12, paragraph 86.

[472] https://www.apple.com/newsroom/pdfs/fy2023-q4/FY23_Q4_Consolidated_Financial_Statements.pdf

[473] https://www.zonebourse.com/cours/action/MICROSOFT-CORPORATION-4835/actualite/Microsoft-detrone-Apple-pour-devenir-la-premiere-entreprise-mondiale-en-termes-de-capitalisation-45738832/?utm_source=copy&utm_medium=social&utm_campaign=share (15 January 2024) (in French)

https://companiesmarketcap.com/

www.apple.com website accessible in France, in font size 14, and for a period of seven consecutive days. This link may be followed by a statement that the company has filed an appealed against the decision before the Paris Court of Appeal.

680. Under the terms of use set out on the Apple website accessible in France on the date of the present decision[474], "*the Site is the property of Apple Inc. ("Apple") and its licensors*". Therefore, Apple Inc. will be responsible for this publication. The latter will inform the Procedure and Documentation Unit of the *Autorité* that this text has been published online, on the day of publication.

[474] https://www.apple.com/legal/internet-services/terms/site.html

DECISION

Article 1: It is established that the companies Apple Distribution International Limited and Apple Inc., as infringing companies, and Apple Operations International Limited and Apple Inc., as parent companies, respectively, of Apple Distribution Limited and Apple Operations International Limited, have infringed the provisions of Article L.420-2 of the French Commercial Code and Article 102 TFEU, from 26 April 2021 to 25 July 2023 inclusive, by abusing their dominant position on the European markets for the distribution of mobile apps on iOS devices, by implementing discriminatory, non-objective and non-transparent conditions regarding the use of user data for advertising purposes.

Article 2: Apple Operations Europe Limited, which has been wound up, is exonerated. There is therefore no grounds, under Article 5 of Regulation 1/2003, for pursuing the proceedings against this company, whether under Union or domestic law.

Article 3: For the practice referred to in Article 1, a fine of €150,000,000 is imposed on Apple Distribution International Limited, Apple Operations International Limited and Apple Inc., jointly and severally.

Article 4: Apple Inc. is ordered to publish a summary of the present decision in the manner described in paragraph 679.

Deliberated on the oral report by Mathieu Guennec and Samuel Daudey, case officers (*rapporteurs*), and the contributions of Eshien Chong and Jean-Christophe Thiebaud, representing the Chief Economist's Team, and Julien Neto, Deputy General Rapporteur, by Benoît Cœuré, President, Irène Luc, Fabienne Siredey-Garnier, Vivien Terrien and Thibaud Vergé, Vice-Presidents, and Savinien Grignon-Dumoulin, Fabien Raynaud and David Rousset, Board members.

For the hearing secretary, unable to attend,

The Head of the Procedure and Documentation Unit — The President

Thierry Poncelet — Benoît Cœuré