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**Apple Inc. – Paramount significance for competition across markets formally determined**

Sector: Digital economy

File number: B9-67/21

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In its decision of 3 April 2023 the Bundeskartellamt determined pursuant to Section 19a(1) of the German Competition Act (GWB) that Apple Inc. including its affiliated companies within the meaning of Section 36(2) GWB (in the following: Apple) is of paramount significance for competition across markets. The validity of this decision is limited to five years from the date on which it becomes final.

**Background**

In January 2021, the 10th Amendment to the German Competition Act (GWB Digitalisation Act) entered into force. A key new provision (Section 19a GWB) enables the Bundeskartellamt to intervene earlier and more effectively, in particular against the practices of large digital companies. The main purpose of Section 19a GWB is to capture special positions of market power and their possible anti-competitive effects on and threats to competition in the area of “digital ecosystems” in which individual companies may have a so-called gatekeeper function. Large digital companies which offer a wide variety of products and services can hold an economic position of power across markets which is difficult for competitors to contest and gives rise to a scope of action that allows the relevant company to further consolidate, expand or otherwise use this position to its own advantage without sufficient control by competition. Such positions of power and their expansion are enhanced by the dynamics of the digital and internet economy, which especially on markets within the meaning of Section 18(3a) GWB lead to accelerated and increased concentration and bring about conglomerate or vertically integrated business structures in which cross-market systems of products and services, which often are scalable and – through the bundling of the data collected, for example – connected in various ways, can be operated and expanded; for all of the above, see the explanatory memorandum to the 10th amendment to the GWB, Bundestag printed paper 19/23492, p. 73. Based on the new provision under Sec-

tion 19a GWB the Bundeskartellamt can in a two-step approach prohibit companies which are of paramount significance for competition across markets from engaging in anti-competitive practices. The first step is to establish the relevant company's status as addressee of Section 19a(1) GWB.

### **Apple's paramount significance for competition across markets**

When all relevant circumstances in the individual case are considered together, Apple has a position of cross-market economic power, which allows for a scope of action across markets that is not sufficiently controlled by competition. The company operates a wide-ranging digital ecosystem which is of great importance to competition not only in Germany, but also throughout Europe and the world. Based on its central hardware products Apple operates this ecosystem through the vertically integrated levels of its own proprietary operating systems, the Apple App Store, which is the only digital software distribution platform that is so far available on the devices, as well as through a large number of other products and services. In this system the company holds key positions across markets for the interaction and use of digital business models and offers while specifically tying its users to Apple across all levels of the company's system.

The company's focus is not at all limited to the development of high-quality and innovative hardware products. Apple is also one of the companies focusing on digital business models, which according to the legislator's intention are to be norm addressees of Section 19a(1) GWB. With its operating systems, above all iOS, and the Apple App Store as well as various other services, Apple is active to a significant extent on multi-sided markets within the meaning of Section 18(3a) GWB.

In an overall assessment of all relevant circumstances the Bundeskartellamt examined whether Apple is of paramount significance for competition across markets and whether this finding can be formally determined. For the identification as norm addressee particular account had to be taken of the criteria set out in Section 19a(1) sentence 2 GWB without these having to be fulfilled cumulatively. The results of an overall assessment of all relevant circumstances in the present case showed that Apple has the characteristics of an undertaking which the legislator intended to address with the concept of special abuse control pursuant to Section 19a GWB.

In the Bundeskartellamt's view, Apple has dominant or at least powerful market positions on all vertically integrated levels based on its hardware (at least smartphones, tablets and smartwatches) and proprietary operating systems as well as its App Store, which is the only digital distribution platform available on Apple devices to both app publishers and users of apps and other software products (Section 19a(1) sentence 2 no. 1 GWB). The company is active on a large number of different markets which

are related through vertical integration or otherwise (no 3). Based on its activities it is significantly relevant for third-party access to supply and sales markets (no 5). In addition, Apple has excellent access to data relevant for competition (no 4) as well as significant financial strength and access to other resources (no 2).

In its assessment of market dominance the Bundeskartellamt took into account that with products ranging from hardware and operating systems to its digital distribution platform, the App Store, Apple is active on several separate markets which are vertically interrelated. However, dominance on the hardware markets exists irrespective of the question whether the operating systems for smartphones, tablets and smartwatches represent separate relevant product markets to be distinguished from their respective hardware or whether – at least in view of the opposite market side, the end users – a uniform market is to be assumed for hardware including the respective operating system. Apple's revenue-based market shares on the relevant markets for smartphones, tablets and smartwatches have constantly and clearly exceeded the threshold of 40 per cent at which single firm dominance is assumed to exist, and this trend has been increasing over the last few years. This applies largely irrespective of whether the assessment is based on German, European or worldwide market structure data. At the same time Apple enjoys a continuously strong market share lead over all other suppliers of smartphones, tablets and smartwatches on all of the three hardware markets. According to the Bundeskartellamt's investigations, customers wishing to switch supplier face considerable barriers; hardware products based on other operating systems, like the widely used Android operating system, are at best distant competitors and cannot exert sufficient competitive pressure, or in any case not on Apple.

One of the reasons why these barriers to switching exist is the fact that users can bundle the different products and services of the Apple system, which leads to significant lock-in effects. Users can benefit from even greater synergy effects when using the hardware due to the smooth interconnectivity of the different products and services and because functions are standardised by uniform user identification within the ecosystem. Multi-homing involving several suppliers of services such as those provided by Apple is less attractive and rarely used. The structure of a closed ecosystem increases the potential to counteract third parties' options for attracting Apple users and offering them their own hardware products, services and a combination of both. Largely irrespective of the pricing and product policies of its competitors, Apple can enforce substantial, continuously increasing price differences

compared to competing products in the market. Even if these price increases are accompanied by improved products and better quality, they are proof of Apple's significant competitive advantages and show that the company's scope of action is not sufficiently controlled by competition.

From the perspective of both end users and the opposite market side, the app publishers, Apple's operating systems and its App Store have a monopoly position as platforms within Apple's ecosystem. Apple's operating systems and its App Store are proprietary systems which, in contrast to Google's Android operating system and the widely used Google Play Store, are not licensed to third parties. To date the App Store is the only digital software distribution platform on Apple devices. Apple's dominant position with regard to its operating systems and the distribution of apps on its devices can be determined irrespective of whether their vertical integration with end devices is already taken into account within the framework of defining the market as a uniform market or within the context of the assessment of market power.

Apple has a worldwide installed base of more than 2 billion actively used devices at its disposal. Its operating systems and the App Store, i.e. platforms that are vertically related to its hardware, generate network effects which are not only relevant in terms of platforms, but also have additional effects across products, services and markets. These effects strengthen Apple's scope of action which is not sufficiently controlled by competition, both vis-a-vis third-party suppliers, for example app publishers, and also vis-a-vis advertisers, mobile providers and the users themselves. The network effects resulting from this continuously improving access to customers extend to the entire ecosystem, which leads to self-reinforcing effects. Apple's already widely used offers are becoming ever more attractive while Google Android and the Google Play Store are not in a position to challenge this appeal. This applies both with regard to end users who must switch to another mobile device if they want to use an alternative option, and app publishers who in any case generally programme apps both for Apple's and Google's mobile operating systems due to economic considerations. In this respect, the Bundeskartellamt considers Apple to be dominant on these platform markets as well.

For determining a paramount significance for competition across markets within the meaning of Section 19a(1) GWB, it may ultimately be left open whether Apple is dominant on the above markets within the meaning of Section 18(1) GWB. Even if Apple were not dominant on these markets within the meaning of Section 18(1) GWB, there would be no reason to doubt that, in view of the market structures described above, Apple at least has a strong market position or position of power on these markets. Such a market position or position of power – located in a "grey area" of the traditional concept of market dominance – can also be taken into account for the purposes of Section 19a(1) sentence

2 no 1 GWB. Moreover, this position can already be taken into account in the overall assessment that must be carried out when examining the criteria of Section 19a(1) GWB.

In the present case the assessment of the market structure as part of the examination of Section 19a(1) sentence 2 no 1 GWB, which per se is a market-related examination, already illustrates that the strategy used by Apple to offer its products and services is based on a deep, vertical integration of and strategic connection between products and services (Section 19a(1) sentence 2 no 3 GWB). This results in competitive advantages for Apple, either in the business areas it already occupies and dominates or in the expansion of its activities to new business areas. From the outset Apple's strong position is first of all based on the tight vertical integration of its mobile devices through the respective proprietary operating systems and Apple's own mobile software distribution platform. With its range of products and services the company is in many cases active on upstream or downstream market levels or in conglomerate, integrated business areas within the meaning of Section 19a(1) sentence 2 no 3 GWB and can thus benefit from economies of scope or occupy key positions.

On the one hand, Apple covers the entire value chain relating to high-quality mobile digital end devices, partly also developing its own central components, such as processors. As a well-resourced company Apple has repeatedly carried out this backward integration by means of external acquisitions and by acquiring key technologies. Although the hardware devices – in particular smartphones, tablets or smartwatches – cater to different markets and user needs, their areas of use often complement each other within Apple's ecosystem. The seamless integration of the devices under the "continuity" concept serves many different areas of application from the combination of data, joint clipboards and storage spaces to the integral control of devices and digital cross-device payment systems (Apple Pay), in particular where devices are registered to a single Apple ID. On the other hand, Apple is also very much a forward integrated company, in particular with regard to software distribution, the App Store, services financed by subscriptions and (pre-installed) apps in the area of application software. The Siri voice control software is just one example which currently records high growth rates.

The combination between key positions held in a largely proprietary, vertically integrated, comprehensive conglomerate system with special user retention across all levels of the Apple system's value chain establishes the basis for the relevance of Apple's activities for third-party access to supply and sales markets and the company's related influence on the business activities of third parties (Section 19a(1) sentence 2 no 5 GWB). Due to the lack of alternative options, third parties wishing to access this ecosystem are faced with a strong position of economic power at the levels of mobile operating

systems and app stores, which are indispensable for the distribution of apps. According to the Bundeskartellamt's investigations, app publishers generate more than 60 per cent of their total revenue achieved in app stores through Apple's App Store. The remaining 40 per cent are accounted for by the Google Play Store. Apple widely controls third-party access to Apple customers and structures this access based on its rules and economic framework conditions. Access to Apple users is equally important for advertisers. The widespread use of smartphones, tablets and computers as well as the intensity of their use has given digital advertising, in particular targeted advertising, a decisive push. Advertisers can hardly reach Apple users outside the Apple ecosystem, although they are a very important group of customers. In-app advertising plays a major role when mobile end devices are used. According to user surveys, smartphone users spend more than 90 per cent of their screen time using apps. Whenever Apple customers use a web browser, the vast majority of them prefer Apple's own browser, Safari. This illustrates how Apple acts as a bottleneck for access to customers from the perspective of service providers placing advertisements, content providers which do not have their own apps or search engine providers.

The fact that Apple fulfils a hybrid function with its iOS and App Store platforms also contributes to the company's paramount significance across markets. On the one hand, Apple operates proprietary mobile operating systems and its software distribution platform including the related technical and operational intermediary services. On the other hand, the company also provides software and services. This opens up the possibility to use self-preferencing and leveraging strategies, which could give rise to the dangers associated with such practices. The App Store includes 1.7 million apps. Although Apple only offers a few dozen of these apps, users spend 30 to 40 per cent of their total usage time (depending on which calculation method and data survey is used) in and with Apple apps. At the same time, the company has sole control over how third-party suppliers of apps, devices or advertising and their users interact with this ecosystem and how they interact with one another within the system. The conditions for access to the App Store, which is a digital distribution platform on which users and app publishers meet, thus represent a crucial element of Apple's power to act as an intermediary or to set rules for access to a large number of supply and sales markets.

For example, by setting rules for data transfer and by influencing the range and quality of third-party app functionalities, Apple at least gains the potential within the meaning of Section 19a(1) GWB to favouring its own products while competing for the sale of apps to users. The contractual obligation to solely use the IAP in-app payment system contributes to establishing Apple's position as an intermediary between app publishers and end users and to strengthening the App Store's current position as

the sole distribution channel for apps and other software products within the ecosystem. Another example is the configuration of the algorithms developed by Apple, which determine the order in which generic search results are displayed in the App Store. This can influence the visibility and marketing of third-party apps, for example when users download ad-funded apps for free or purchase paid apps.

Access to user data for advertising purposes is a further example of Apple's opportunities and power to set rules. With its App Tracking Transparency Framework (ATTF), Apple has unilaterally set rules which all app publishers have to obey in order to be admitted to Apple's App Store. For third-party app publishers, Apple makes access to the data of app users dependent on obtaining the users' additional and express consent. In May 2022, the Bundeskartellamt initiated a proceeding under Section 19a(2) GWB to examine Apple's tracking rules and the ATTF. In particular, the authority is looking into the issue of whether the tracking rules could favour Apple's own offers and/or impede other companies. Moreover, in its examination under Section 19a(1) sentence 2 no 5 GWB, the authority established that Apple has the power to set rules for the access to technical interfaces and for the distribution of its own devices via mobile providers.

Apple's significance for third-party access to markets across several vertically integrated levels of its value chain and Apple's power to set rules are secured and underpinned by its outstanding financial strength and access to resources (Section 19a(1) sentence 2 no 2 GWB) as well as by privileged access to data relevant for competition (Section 19a(1) sentence 2 no 4 GWB).

All financial indicators and developments based on revenues, increases in revenue, profits and increases in profits that can be observed as well as a cash flow exceeding 100 billion USD and very substantial liquid funds, all of which which resulted in a top rating for Apple, show a picture of paramount financial strength. Based on its stock market value, Apple is the most valuable company in the world. Its strong resources are not only based on the company's access to great financial means. Apple can also use its wide user base and the strong market value of the "Apple" brand. The company can and does in fact make specific use of its resources to expand its ecosystem, either by investing heavily in R&D, continuously increasing its number of staff in pioneering business areas or acquiring companies with a particular focus on technologies for the expansion of business areas or improvement of existing services or products.

Moreover, Apple has privileged access to data relevant for competition, which the company obtains in particular from app publishers as well as users of the ecosystem. Apple's business model allows users to have uninterrupted, comfortable and easy access to user profiles and data as they are exchanged between hardware devices. Irrespective of how these data are processed, Apple potentially has access

to a wide range of personal and non-personal data. These range from address data and information on personal interests to users' location and usage data. In the App Store itself, information is available in particular on the exchange between app developers and users, payments and the economic success of apps.

Apple has the potential to draw additional information from this to be used as "sharable input" for developing new products, optimising existing products and penetrating additional markets. Such information would not be available from a separate analysis of the different data sets, or not to the same extent or quality. It was found that there are tendencies to make more commercial use of data that are relevant for competition, for example in marketing personalised advertising. In this context Apple points out that its business model is based on the protection and minimisation of data. However, for the determination of a paramount significance for competition across markets in terms of scope of action, it is irrelevant whether, within the framework of Apple's actual data processing activities, the company is actually using its potential for data access established by the Bundeskartellamt to the fullest extent. The Bundeskartellamt's decision does not include any statements on the issue of Apple's actual data processing and use of data.

Ultimately, when all relevant circumstances are considered, Apple has a position of economic power across markets which allows for a scope of action across markets that is not sufficiently controlled by competition. The particular risk potential associated with this scenario of a company being able to further consolidate, expand or otherwise use its position to its own advantage without sufficient control by competition may make it necessary to intervene quickly with the measures set out in Section 19a(2) GWB to effectively prevent damage to competition which cannot be remedied or is difficult to remedy.

### **Course of the proceeding**

The Bundeskartellamt initiated the proceeding to determine Apple's paramount significance for competition across markets within the meaning of Section 19a(1) GWB on 21 June 2021. The authority then conducted extensive investigations not only of Apple itself, but also among hardware manufacturers, app publishers and mobile operators. After the right to be heard was exercised, Apple and the Bundeskartellamt exchanged views on and discussed possibilities for reaching a settlement that would include a waiver of Apple's right to appeal. However, no agreement could ultimately be reached. In its



decision of 3 April 2023 the Bundeskartellamt determined that Apple is of paramount significance for competition across markets.