

Dutch enforcer launches payment apps probe

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The Dutch competition authority is investigating whether payment apps have been unlawfully restricted from accessing software in smartphones needed to provide contactless payment services.

The Netherlands' Authority for Consumers and Markets announced today that it has opened a probe to examine if payment apps are able to access near field communication (NFC) in smartphones, which is the software that enables customers to make contactless payments using their smart device.

Some smartphones only allow the software developers' payment app to connect to NFC, preventing rival payment apps from offering services on

those devices, the authority said. This may stifle innovation in the payment app market and reduce choice among consumers and businesses, it said.

The authority said it became aware of these concerns during its payment market study, the findings of which were [published](#) on Monday.

The enforcer declined to name or disclose how many companies it is investigating as part of the probe. But it said in a press release earlier this week when announcing the findings of its study that Apple, Facebook, Amazon and Alibaba “must ensure that their platforms or devices are suitable for different providers of payment services”.

The four companies did not respond to a request for comment clarifying whether they are being investigated by the authority.

Apple is also facing scrutiny from the European Commission, which [opened](#) an investigation into the company in June to determine if it breached competition rules by limiting contactless payments on its devices by excluding rivals from offering contactless payment services through their own apps.

The Dutch agency originally [began](#) studying the Dutch payments sector in October 2019. Its report published on Monday found that Apple is the leading e-wallet provider through Apple Pay, while other large tech companies – like Google, Facebook, Amazon, Alibaba and Tencent – have a small but growing presence in the national and EU payment sector.

The Dutch enforcer also recommended in its report that the European Commission use its [proposed new gatekeeper rules](#) to prevent large companies from dominating the market.

The Dutch authority is already [investigating](#) Apple based on concerns that it abused its dominant position by discriminating against app developers that compete with its own pre-installed apps. The agency [launched](#) that probe in April 2019 following a study of the mobile app store market.

“Unlikely that Apple will be ignored”

Maverick Advocaten partner Martijn van de Hel in Amsterdam said the Dutch authority’s investigation is surprising, as its market study found that payment apps do not yet play an important role in the Netherlands and big tech companies “are far from dominant” in the country’s payment sector.

The “key question” will be whether there is a real competition law issue or if the agency has been “too eager” in choosing to begin its probe “too soon”, van de Hel said. He predicted that the authority is unlikely to “be able to establish a violation of the competition rules”.

But Alvaro Pliego Selie at Freshfields Bruckhaus Deringer in Amsterdam said it is clear from the enforcer’s study that the Dutch payments sector “is actually quite crowded and competitive”, because several operators have entered the market and started innovating over the past few years.

That said, contactless payments via smart devices make up only 5% of total in-store payments, so “it may not be obvious” for the enforcer to identify a problematic market power or credible consumer harm, he said.

The authority has been “very vocal” about the need for additional competition rules to ensure that digital infrastructure owned by the major technology companies is available to third-parties to provide their digital services, Selie said. But the authority “is now seeking to apply its existing competition law framework, in a sense suggesting that this is still quite fit for purpose”, he said

The authority has presented the probe as a broad one, so it will likely focus on various manufacturers of NFC-enabled smart devices, including phones and watches, Selie added.

CMS partner Edmon Oude Elferink in Brussels and Amsterdam said the probe is “another reminder” that the enforcer’s market studies are usually followed up by a full investigation.

It has only been three days since its most recent market study was released, but the authority “could not wait to inform the public about its investigation”, he said.

The authority appears to be concerned “that the access restrictions constitute an abuse of dominance”, although it “tends to be reluctant to launch investigations into abuse in light of its poor track record” before the courts, he said.

“Last year’s [defeat](#) in the Dutch Railways case must still be fresh in their memory, but the authority seems somehow to have gained confidence and has decided to pursue this matter,” Oude Elferink said.

It is unlikely that the enforcer will solely focus on Apple, because of the European Commission’s ongoing probe into the same company, so other smartphone manufacturers using the NFC technology will also be examined, he predicted.

“On the other hand, it is unlikely that Apple will be ignored,” Oude Elferink said.

The Dutch enforcer’s investigation and market study show that it “wants to be the front runner where it concerns big tech developments in the digital world”, he added.

Bas Braeken, a partner at bureau Brandeis in Amsterdam, said it is encouraging that the enforcer is closely following developments in digital markets and is not afraid “to take up the fight against” big tech companies.

But it is unclear how the authority could address possibly unlawful behaviour, because the conduct it appears to be investigating is “clearly transnational”, he said.