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Preview

The French Competition Authority fines a big tech and its wholesalers a record €1,24 billion for their series of vertical restrictions within the distribution network and their abuse of economic dependence *(Apple / Tech Data / Ingram Micro)*

ANTICOMPETITIVE PRACTICES, FRANCE, DISCRIMINATORY PRACTICES, DISTRIBUTION/RETAIL, DISTRIBUTION AGREEMENT, INVESTIGATIONS / INQUIRIES, INTERIM MEASURES, RESALE PRICE MAINTENANCE, VERTICAL RESTRICTIONS, REBATES, PRICE COORDINATION, SANCTIONS / FINES / PENALTIES, ABUSE OF ECONOMIC DEPENDENCE, UNFAIR COMPETITION, EFFECT ON COMPETITION, ANTICOMPETITIVE OBJECT / EFFECT, CONSUMER PROTECTION, ONLINE PLATFORMS, BIG TECH

French Competition Authority, *Apple / Tech Data / Ingram Micro*, Press Release, 16 March 2020
French Competition Authority, *Apple / Tech Data / Ingram Micro*, 20-D-04, 16 March 2020 (French)

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e-Competitions News Issue Preview

In a decision of March 16, 2020, the French Competition Authority (Autorité de la concurrence, hereinafter "FCA") imposed a €1,1 billion fine on the Apple group ("Apple") for (i) engaging in a series of vertical restrictions of competition within its distribution network and (ii) abusing the economic dependence of its premium independent resellers (the Apple Premium Resellers or "APRs") with regard to its products other than the Iphone in France. The FCA also fined Apple's two wholesalers, the companies Tech Data and Ingram Micro, for engaging in one of the anticompetitive practices, €76,1 million and €62,9 million respectively. This decision followed a complaint filed in April 2012 by the company eBizcuss.com ("eBizcuss"), a distributor with the APR status, and an 8-year investigation by the FCA which involved dawn raids at the headquarters of Apple and its wholesalers in June 2013.

By imposing the heaviest fine on a single economic player in its history, the FCA took obviously into account the extraordinary size of the Apple group. More importantly though, the FCA sent the message that its stance on vertical agreements, and abuses of economic dependence, is as strong as the one it takes on cartels and abuses of dominance. While usually, companies have one month from the date of the decision to appeal it, in this instance the time-limits have been suspended due to the health emergency period that takes place in France since March 12, 2020. As a result, Apple, Tech Data and/or Ingram Micro may still appeal the decision within one month from the end of the health emergency period, which is planned for July 2020.

Apple's distribution system

In France, Apple had two authorised wholesalers, Tech Data and Ingram Micro. At the downstream level, Apple's distribution system was open, with the reservation of some APRs' and retailers' supply to the wholesalers, and some other APRs and retailers' supply made concurrently by Apple and the wholesalers. Apple reserved for itself the supplying of its own distribution channel, through both the Apple Retail Stores and the Apple Online Store.

Indirect information exchange between the wholesalers via Apple

The first objection in the FCA' Statement of Objections [*1*] was directed at Apple and its wholesalers for having engaged, between 2007 and 2013, in a regular exchange of commercial information on the wholesale distribution of Apple products (other than the Iphone) in France. The FCA was concerned about the possibility of a "hub and spoke" cartel between the two wholesalers, which indirectly exchanged information on their past commercial performance, and occasionally their current commercial and financial policies, through Apple. The FCA noted that, although the information exchange was initially requested by Apple, the wholesalers played an active role in it. This is because, not only they could not ignore that the information provided to Apple would subsequently be retransmitted to their competitor, but they also accepted to receive it, and even requested it when not provided by Apple.

However, given that the information exchange was limited to Apple's products and not the other manufacturers', the FCA considered that there was remaining inter-brand competition on the market. In addition, in the FCA's view, the information exchanged was not of a strategic nature. Interestingly, this was due to the fact that the wholesalers were not in a position to compete on their commercial policy, as they were merely following Apple's recommendations in this regard. Accordingly, the FCA concluded that the information exchange could not be characterized as a concerted practice within the meaning of articles 101 TFEU and L. 420-1 of the French commercial code.

Product and customer allocation system

The second objection concerned a product and customer allocation system used by Apple and its wholesalers from 2005 to 2013. The FCA found that, based on a system of mandatory information reporting by both its wholesalers and the APRs, Apple set up a system for allocating products to its wholesalers and, indirectly, to the APRs which were customers of the wholesalers. The FCA considered this system, which "prevented distributors from competing with each other, thereby sterilizing the wholesale market for Apple products", [*2*] as having an anticompetitive object. Furthermore, it qualified as a hardcore restriction of clientele under the EU vertical block exemption regulation ("VBER"). [*3*]

The FCA then examined whether the practice could benefit from an exemption. It concluded by the negative, given that the conditions for both a block exemption under the VBER and an individual exemption under article 101(3) TFUE or its French equivalent were not met. Accordingly, the FCA fined Apple, Tech Data and Ingram Micro €662,48 million, €76,1 million and €62,9 million respectively for this infringement.

Resale price maintenance

The third objection concerned resale price maintenance at the retail level between Apple and its APRs from 2012 to 2017. The FCA found that while formally, the prices communicated by Apple were presented as recommended, they were perceived as mandatory by the APRs. In addition, their application was monitored by Apple, with reprisals if they were not followed. Furthermore, Apple was able to control the APRs' discounts due to strong restrictions in their contractual stipulations to implement promotions and their very low margin. As a result, the APRs aligned their

prices on those of the Apple Retail Stores and the Apple Online Store. Resale price maintenance, as customer allocation, is considered as having an anticompetitive object under French and EU competition laws, and the FCA considered that the practice could not benefit from the VBER block exemption. In addition, insofar as Apple did not express a request in this sense, the FCA did not examine whether the practice could benefit from an individual exemption. While the FCA established the intention of the APRs to participate in the price coordination, it only imposed a fine on Apple for this infringement, of €221,18 million.

Abuse of a state of economic dependence

The fourth objection was related to the concept of abuse of a state of economic dependence, prohibited under Article L. 420-2.2 of the French Commercial Code. [*4*] The FCA considered that the APRs were in a situation of economic dependence in relation to Apple, due to the reputation of the Apple's products, Apple' status as a market leader, the importance of its share in the APRs' turnover and the absence of alternative technical and economic solutions for the APRs. The FCA then found that, from 2009 to 2013, Apple had abused this state of economic dependence by implementing a set of practices depriving the APRs of their commercial freedom, in particular through supplies difficulties due to the customer and product allocation system between Apple and its wholesalers. In doing so, Apple placed the APRs at a disadvantage compared with its own internal distribution network and restricted intra-brand competition. Accordingly, the FCA fined Apple €218,29 million for this infringement.

Conclusion

Beyond the record fines imposed by the FCA, the Apple case is worth noting for two reasons. The first one is the length of the investigation, which lasted for 8 years. This contrasts with the Google decision of April 2020, [*5*] where the FCA imposed interim measures on Google five months after receiving a complaint. In the Apple case, eBizcuss also lodged a request for interim measures in addition to its request for a case on the merits. However, eBizcuss withdrew its request for interim measures three months later. Given the speed of change in the Big Tech and the digital economy markets, it is likely that more requests for interim measures will be made in the future, alongside requests for cases on the merits. The second reason to note this case is the finding by the FCA, at the request of the plaintiff, of an abuse of economic dependence. Conceived initially to repress abuses of purchasing power in mass retail distribution, this infringement seldom gives rise to sanctions by the FCA. It requires three cumulative conditions to be met:

- a state of economic dependence of one company on another, which must be demonstrated objectively, in particular, by the absence for the reseller of alternative sources of supply for equivalent products,

- an abuse of this state, which is usually demonstrated by reference to the definition of abuses under the prohibition of abuse of dominance, and

- an actual or potential effect on the functioning or structure of competition.

In its decision, the FCA noted that "Apple has greater market power than is reflected in its market shares because of the differentiation of its products and its key role in innovation". [*6*] Despite this market power, the conditions for a finding of dominance as regards Apple on the relevant market could possibly not have been met. By contrast, the abuse of economic dependence prohibition allows the FCA to tackle the behaviour of any company which imposes unfair conditions to its small trading partners, irrespective of its position on the market.

[1] The FCA sent the Statement of Objections to the Parties in October 2018.

[2] Statement from Isabelle da Silva, President of the FCA, quoted in the case press release of March 16, 2020.

[3] Regulation (EC) 2790/99 of the Commission of 22 December 1999, succeeded by regulation 330/2010 of the Commission of 20 April 2010.

[4] This prohibition has no equivalent under EU competition law, but several EU Member States (Austria, Belgium, Cyprus, Germany, Hungary, Italy and Portugal) have similar prohibitions.

[5] *https://www.concurrences.com/en/bulletin/news-issues/june-2020-en/the-french-competition-authority-imposes-interim-measures-on-a-dominant-big#nb1*

[6] Paragraph 51 of the FCA Decision.