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French Competition Law Newsletter

Highlights

— The Paris Court of Appeals divides by three the historic €1.2 billion fine imposed on Apple and its two French wholesalers in 2020

— The Paris Court of Appeals slashes the fines imposed by the French Competition Authority in the compote cartel

— The French Competition Authority imposes a €75 million fine on Altice for non compliance with injunctions issued in 2017

The Paris Court of Appeals divides by three the historic €1.2 billion fine imposed on Apple and its two French wholesalers in 2020

In a ruling dated October 6, 2022, the Paris Court of Appeals partially overturned the French Competition Authority ("FCA")'s decision no. 20-D-04 of March 16, 2020 (the "Decision"), which had imposed a €1.2 billion fine on Apple and its two French wholesalers, Ingram and Tech Data (the "Ruling").

Background

In the Decision, the FCA had found that (i) Apple and its two French wholesalers Ingram and Tech Data participated in a vertical product and customer allocation agreement between December 2005 and March 2013; (ii) Apple engaged in resale price maintenance ("RPM") by preventing its premium retailers ("APRs") from freely setting their resale prices between October 2012 and April 2017; and (iii) Apple had abused the APRs' economic dependence on Apple through delivery delays, supply shortages, discriminatory treatment, and unstable discounting policy between November 2009 and April 2013.[1]

Consequently, the FCA had imposed a €1.1 billion fine on Apple, as well as €63 million and €76 million fines on Ingram and Tech Data, respectively. The global fine was the highest ever imposed by the FCA.

On appeal, the Paris Court of Appeals reduced the duration of the product and customer allocation infringement by half, annulled the Decision in that it found that Apple had engaged in RPM, partially overturned the findings relating to Apple's alleged abuse of economic dependence, and significantly

[1] FCA Decision No. 20-D-04 of March 16, 2020 regarding practices implemented in the Apple products distribution sector.

reduced some of the parameters taken into account by the FCA to calculate the companies' fines. As a result, the total fine amount was slashed to €371 million.

Product and customer allocation

The Paris Court of Appeals found that the Decision identified "*a sufficient number of unambiguous exchanges*" showing that Apple's allocation policy was not a unilateral strategy implemented by Apple, but rather derived from an agreement with its wholesalers.

Further, the Court considered that the practices at stake amounted to customer restrictions within the meaning of Regulation 330/2010 EC on vertical agreements and, as such, to "hardcore" restrictions of competition.[2] It concluded that the practices revealed a sufficient degree of harm to be considered as a by-object restriction.

However, the Court found that the FCA did not sufficiently substantiate the infringement as regards the period between December 2005 and September 2009. Consequently, the infringement's duration was reduced from seven to three years and the corresponding fine was adjusted accordingly.

Resale price maintenance

The Ruling reaffirmed that RPM practices can be established by any means, provided that competition authorities are able to establish (i) an invitation on the supplier's part, and (ii) acquiescence on the distributor's part. As a result, while the so-called "three-prong test" (communication of recommended resale prices, price monitoring, significant compliance rate) is frequently used to demonstrate the existence of RPM, other types of evidence are admissible.[3]

As regards the existence of an invitation on Apple's part, the Court noted that there was no direct evidence of any contractual clause/documentation imposing compliance with Apple's retail prices.

The Court further stated that (i) while Apple had always been very transparent with respect to the retail prices applied in its own distribution channels (i.e., Apple's online store and physical retail stores), this could not in itself amount to an invitation to comply with certain prices, and (ii) most APRs had perceived Apple's retail prices as setting a price cap above which it would be difficult to be competitive.

However, because some APRs still perceived Apple's retail prices as minimum prices, the Court nevertheless analyzed whether the APRs were genuinely able to sell Apple products below Apple's retail price profitably. On balance, the Court found that this was the case, and that Apple's discounting policy did enable the APRs to turn a profit. In addition, many APRs declared that Apple had never prevented them from departing from Apple's own retail prices and that they were able to offer discounts.

As a result, the Court held that even though a number of APRs did align their retail prices with Apple's own retail prices, "*the mere existence of parallel behaviors, which can be explained by the adaptation to the evolutions of the markets and the characteristics of the high-end products at stake, does not make it possible to characterize an agreement on retail prices*". The Ruling consequently annulled the Decision in that it found that Apple engaged in RPM.

Abuse of a state of economic dependence

The Ruling confirmed that authors of abuses of a state of economic dependence prohibited under article L. 420-2, paragraph 2, of the French Commercial Code do not necessarily have to hold a dominant position in a specific market. Indeed, absent a dominant position, this prohibition also applies to undertakings exercising "*relative power*" over their business partners as a result of their strong bargaining power (which can be drawn from their notoriety).

[2] Commission Regulation No. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

[3] In the Ruling's own words, "*evidence of a concurrence of wills may also result from other types of evidence, whether documentary or behavioral, making it possible to establish, on the one hand, the supplier's invitation and, on the other hand, the distributors' acquiescence to the contentious practice*".

The Court upheld the FCA's finding that the APRs were economically dependent on Apple. In particular, the Court noted that there was no economically viable alternative to the APR status for most companies that were granted this status. This is because none of Apple's competitors operate similar brand-specific distribution networks which could have allowed APRs to switch suppliers without significantly altering their business model (as losing APR status would essentially have left them with no other option but to become generalist multi-brand resellers).

The Ruling also confirmed that Apple had abused this situation of economic dependence by delaying deliveries, refusing to supply certain products, and imposing a discriminatory treatment on APRs by favoring other supply channels (in particular, its own Apple stores). However, the Court found that the FCA failed to demonstrate that the frequent changes to Apple's discounting policy had abnormally affected the APRs' activities, and adjusted the fine accordingly.

Lastly, the Court found that the abuse had resulted in a limited but certain damage to the economy as the practice likely affected the competitive structure of the market by reducing both intra-brand and inter-brand competition on the market.

Fine adjustment for significant economic power

The Court found that the adjustment of the fines' basic amounts in relation to the concerned companies' economic power was disproportionate. Consequently, the Court reduced the fine increases imposed by the FCA from 90% down to 50% for Apple, 60% down to 10% for Ingram, and 50% down to 8% for Tech Data.

Since its publication, Apple has announced its intention to appeal the Ruling to the French Supreme Court, seeking a full annulment of the FCA's Decision.

The Paris Court of Appeals slashes the fines imposed by the French Competition Authority in the compote cartel[4]

On October 6, 2022, the Paris Court of Appeals (the "Court") confirmed the decision issued in 2019 by the French Competition Authority ("FCA") in the compote manufacturers' cartel, but reduced the fines imposed by half.

Background

On December 17, 2019, the FCA fined six compote manufacturers for a total of 58.3 million euros for having implemented price-fixing and market-sharing practices for more than three years (from October 2010 until January 2014).[5] The fines were imposed on Materne (13.6 million euros), Andros (14.1 million euros), Conserves France (1.9 million euros), Délis SA (9.5 million euros), Charles Faraud (16.4 million euros), and Valade (2.8 million euros). The whistleblower, Dutch company Coroos, was fully exempted from a fine of nearly 5 million euros because it complied with the conditions set out in the leniency notice.

On March 13, 2020, the manufacturers formed an appeal against the FCA's decision.

The Court of Appeals' ruling on the merits

In its ruling of October 6, 2022, the Court of Appeals confirmed the findings of the FCA's

[4] Paris Court of Appeals, Oct. 6, 2022, N° 20/01494, Materne a.o.

[5] FCA Decision No. 19-D-24 of December 17, 2019, regarding practices in the sector of fruit sold in cups and flasks. *See* also French Competition Law Review of December 2019, "*The FCA fines compote manufacturers for operating a cartel*".

decision as regards the existence of a price-fixing and market-sharing agreement implemented by the compote manufacturers. However, the Court overturned the FCA's decision on the following points.

First, while the Court confirmed that the infringement was implemented until January 10, 2014, at least, it considered that the individual participation of several companies had ended earlier. Specifically, the Court found that the participation of Délis SA ("Délis"), Charles Faraud, Conserves France and Valade should be held to have ended on November 22, 2013, as they did not participate in any subsequent meeting or exchanges following this date. As regards Andros, the Court held that the ending date was July 28, 2013, corresponding to the company's last manifestation of anticompetitive conduct (*i.e.*, email exchanges). In this respect, the Court stated that the mere belief, by participants in a September 3, 2013 meeting, that Andros was still a party to the cartel was not sufficient in itself to conclude that Andros was aware of the anticompetitive measures decided during that meeting, in particular given that the company did not attend the meeting and had not even been invited.

Second, the Court concluded that the amount used as a basis for the fine calculation should correspond to the value of sales achieved by each participant during its last full year of participation in the infringement. This meant that Materne's fine must be calculated based on its 2013 value of sales, while other participants' fines must be calculated based on their 2012 sales. This change in the reference year had an important impact on the amount of the individual fines.

Third, the Court recalled that the value of sales used to calculate the fine should reflect the relative weight of the participant company in the infringement in the sector in question. Therefore, the Court considered that: (i) the sales achieved by Andros solely as an intermediary should not be taken into account and (ii) the value of the sales achieved by Materne could not include the sales made under a partnership agreement with McDonald's France Services to supply McDonald's restaurants.

By contrast, the Court rejected Délis's request to exclude catering revenues from the value of sales on the ground that it had ceased its activities in this sector as from 2012. In fact, according to the Court, these sales were related to the infringement and should be taken into account because Délis continued to achieve sales in the foodservice segment in 2012 and because the sales recorded that year correspond to contracts concluded while Délis was still participating in the infringement. The Court nevertheless granted a 5% reduction to Délis because the sales retained in 2012 corresponded to residual ongoing contracts as Délis indeed withdrew from the sector in 2012.

Fourth, the Court reduced the proportion of the value of sales used to calculate the fine from 16% to 12%, as it considered that the FCA did not sufficiently take into account the very limited extent of the harm caused to the economy. The Court also noted that the gravity of the practices was mitigated given that there had been no organized monitoring, policing, or retaliation mechanisms, and because it had not been shown that the cartel members agreed to a price increase percentage during the 2012-2013 period (although they had done so for the previous years).

Finally, the Court reduced the fine imposed on Charles Faraud from 13,413,091 euros to 8,000,000 euros to take into account its inability to pay.

Overall, the total fine imposed on the compote manufacturers was reduced by approx. 45% (from 58 million euros to 31 million euros).[6]

The Court of Appeals' ruling on procedural grounds

Interestingly, the Court also upheld a procedural plea alleging a breach of the rights of defense and of the principle of adversarial proceedings insofar as neither the FCA's statement of objections nor

[6] At the individual level, the tax reductions range from 30.84% for Materne to 62.22% for Andros.

its report clearly and precisely stated that two of the cartel participants (*i.e.*, Delis and Vergers de Châteaubourg) were deemed to have participated in a June 2011 meeting. The Court held that because of that omission, the FCA could not, in its decision, hold the companies liable without breaching the rights of defense of those companies, which had not been able to present their observations in a useful manner to challenge their participation. However, this procedural breach related to only one multilateral meeting out of ten, as well as multiple other exchanges, which formed part of a single and continuous infringement. Consequently, it could not lead to the annulment of the decision, as this circumstance has no impact on the characterization of the cartel, its duration, and its continuous nature.

Takeaways

While it was previously relatively rare for the Court to substantially revise decisions of the FCA, the Court did not hesitate to partially challenge the FCA's analysis in the present case. Specifically, the Court adopted a meticulous approach to the facts, analyzing precisely for each sanctioned company the duration of its individual participation, the value of sales, and the seriousness of the facts, three of the key elements for setting the amount of the fines.

The decision may be appealed until December 6, 2022.

The French Competition Authority imposes a €75 million fine on Altice for noncompliance with injunctions issued in 2017

On September 29, 2022, the French Competition Authority (the "FCA") imposed a €75 million fine on Altice for non-compliance with commitments to connect buildings to the fiber optic network. These commitments had been made mandatory by a 2017 FCA decision, which had also ordered penalty payments in case of non-compliance. The case thus also marks the first time that the FCA seeks to collect penalty payments for failure to comply with merger commitments.[7]

Background of the case

The Faber contracts. In 2010, SFR and Bouygues Telecom signed a co-investment agreement, known as "the Faber contract", for the deployment of a horizontal fiber optic network (in the streets and up to the bottom of buildings) in 22 French municipalities located in high-density areas, which represented approximately three million homes.[8] Under the terms of the Faber contract, SFR was in charge of the rollout operations including the adduction to the vertical networks (in the various floors of buildings), in exchange for a financial participation on Bouygues Telecom's part. Bouygues Telecom was therefore dependent on SFR's forecasted connectivity plans.

Altice's acquisition of SFR.[9] In 2014, Altice acquired sole control over SFR. Although the transaction was cleared by the FCA, the decision identified several anticompetitive risks. In particular, because a significant part of Fiber to the Home ("FttH") outlets that SFR planned on deploying would become redundant with Altice's cable network after the transaction, the FCA considered that the merger was likely to lead the new entity to slow down the deployment and completion of Bouygues Telecom's FttH network. To prevent the new entity from suspending the completion of these connections in high-density areas, clearance of Altice's acquisition of SFR

[7] Decision 22-D-15 of September 29, 2022 regarding the implementation of the injunctions pronounced in decision 17-D-04 of March 8, 2017.

[8] "FttH" outlets or "Fiber to the Home".

[9] Decision 14-DCC-160 of October 30, 2014 regarding the takeover of SFR by the Altice group.

was made conditional on a number of structural and behavioral commitments requiring Altice to (i) continue the development of the fiber network pursuant to the Faber Contract within a constrained timetable and (ii) guarantee the maintenance of the network.

Non-compliance with the commitments decision.[10] In a 2017 decision, the FCA found that Altice had failed to comply with the aforementioned commitments. Indeed, the deployment of the connections significantly slowed down after the Altice/SFR merger and took a year to resume, which generated a substantial delay in relation to the commitments undertaken and led to the deterioration of the network's maintenance conditions, to the detriment of Bouygues Telecom. Consequently, the FCA fined Altice 40 million euros for non-compliance with its 2014 commitments and issued mandatory injunctions, along with an order for penalty payments in case of delay, pursuant to Article L. 430-8 of the French Commercial Code.[11] In addition, the FCA set a new performance schedule with specific milestones and requested the appointment of a trustee to monitor Altice's compliance with the injunctions.

In July 2018, the FCA opened a formal investigation to evaluate how Altice complied with the aforementioned injunctions. In parallel, in January 2019, Altice requested the withdrawal of all of these injunctions on the grounds of Article L. 430-7 of the French Commercial Code which allows a party to argue that evolutions in the legal or factual circumstances from the original decision may question the appropriateness of corrective measures imposed or agreed at that time. The FCA found that the injunctions subject to penalty payments were no longer justified as Altice had recently come close to the target set by the injunctions and its remaining obligations were residual, but nevertheless maintained those related to the Faber contract.

The settlement procedure and the collection of penalty payments

In its decision of September 29, 2022, the FCA found that Altice had not correctly complied with the injunctions.

During its investigation, the FCA found that Altice had not carried out the minimum number of connections set in the commitments and that, contrary to what Altice had initially alleged, this was not due to any external issue. The FCA further found that Altice had not satisfactorily carried out its commitment to provide network maintenance in a transparent and non-discriminatory way vis-à-vis Bouygues Telecom. In this respect, the FCA recalled that a notifying party that submits commitments in order to obtain merger clearance is under an obligation to comply with such commitments. The same applied to the aforementioned injunctions as they were limited to enjoining Altice to comply with the commitments.

Altice did not challenge the objections raised by the FCA and requested the benefit of the settlement procedure in exchange for a fine reduction. Accordingly, the exact methodology for the determination of the fine is not detailed. Nevertheless, it stems from the decision that the FCA took the following factors into account:

— Although Altice did not comply with the schedule imposed by the 2017 decision to connect buildings to the fiber optic network, the FCA noted that Altice gradually aligned with its initial objective and that the number of connections increased between the end of 2019 and the beginning of 2020, meaning that the number of remaining non-connected buildings was merely residual as of October 2020. Further the amendment to the Faber contract concluded in December 2018 demonstrated Altice's intent to work in close cooperation with Bouygues Telecom in order to integrate, within the Faber contract, mechanisms similar to those provided

[10] Decision 17-D-04 of March 8, 2017, regarding the compliance with the engagement taken in the decision allowing the acquisition of SFR by Altice regarding the agreement concluded with Bouygues Telecom on November 9, 2010.

[11] Article L 430-8 of the French Commercial Code (see IV. 2°). This article was modified by the Law of 6 August 2015 for growth, activity, and equality of economic opportunities (known as the "Macron Law") as to create the penalty payments injunctions. The purpose of these provisions is to give the FCA additional means of enforcement should the agreed-upon remedies of a merger transaction fail to be upheld.

for in the commitments. Consequently, the FCA decided to reduce the rate of the penalty payments imposed in connection with the first two injunctions.

— By contrast, the FCA took the view that Altice's failure to comply with its maintenance obligations was particularly serious as that commitment was key to the reasoning of the 2014 decision authorizing the acquisition of SFR.

In light of the above, the FCA imposed a 75 million euro fine on Altice. The amount corresponds to both the collection of penalty payments and to a fine for non-compliance with the injunctions ordered in the 2017 decision (the breakdown between the two not being specified in the decision due to the settlement between Altice and the FCA).

The decision marks the fourth fine imposed by the FCA on Altice in connection with its acquisition of SFR in 2014.

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