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French Competition Law Newsletter

Highlights

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The French Competition Authority fines Google €220 million for favoring its own advertising technologies

On June 7, 2021, the French Competition Authority ("**FCA**") imposed a fine of €220 million on Google Inc. (now Google LLC), Alphabet Inc., and all Alphabet Inc.'s subsidiaries (together, "**Google**"), for allegedly abusing its dominant position in the market for advertising servers for website and mobile application publishers.[1] This follows from 2019 complaints by press groups News Corp Inc., Le Figaro, and Rossel La Voix.[2] Google decided to settle the case and to offer commitments to improve the functioning of the relevant markets.

The relevant markets

The FCA identified the market for advertising servers for website and mobile applications publishers and the market for supply-side advertising platforms.

Publishers use ad server technologies to market the advertising space on their websites or mobile applications. Ad server technologies allow for ads to be displayed on publishers' websites and/or mobile applications. They also enable publishers to manage the sale of their advertising space, either by transacting directly with advertisers or through auctions held on multiple platforms *via* an automated mechanism.

Publishers also use platforms for the programmatic sale of advertising space ("supply-side platforms" or "**SSPs**"). SSPs are marketplaces where advertisers meet publishers – SSPs solicit a price offer from

[1] Decision, para. 431.

[2] Le Figaro group withdrew its complaint on November 6, 2020.

advertisers for a given advertising space, conduct an auction between the various prices offered by advertisers, and share the winning bid with the advertising server.

Publishers generally use a single ad server to interact with all the auction platforms. In contrast, they tend to simultaneously offer the same advertising space on several auction platforms, so as to optimize their income.

Google offers two advertising technologies: the DoubleClick for Publishers ad server ("**DFP**") and the SSP DoubleClick AdExchange ("**AdX**"), which Google has been marketing under the Google Ad Manager brand since June 2018.

Favoring practices

The FCA concluded that Google abused its dominant position on the advertising server market by implementing two practices aimed at ensuring that DFP and AdX favored each other.

First, the FCA alleged that DFP favored AdX against third-party SSPs. In particular, although Google had already put an end to this practice, the FCA noted that DFP used to inform AdX of the price offered by competing platforms to AdX (whereas other SSPs did not see their rivals' bids), which then, according to the FCA, used this information to overbid competing SSPs.[3]

Second, the FCA alleged that Google had imposed contractual restrictions on interoperability between third-party ad servers and AdX. As a result, the FCA found that AdX was only partially interoperable with DFP's rivals and did not allow them to organize a competition between AdX and its competitors.[4]

Effects on competition

The FCA concluded that these practices had anticompetitive effects in the relevant markets, as in its view Google was able to reduce the attractiveness of rival ad servers and SSPs for publishers. Moreover, the FCA found that the practices allowed AdX to maintain high prices.

The FCA also took into account the fact that these practices took place in emerging markets with strong growth and, as such, it considered that they may therefore have affected competitors' ability to develop. The FCA found that several of Google's rivals had experienced significant difficulties in France during the relevant period, while Google was able to significantly increase its market share and revenues.[5]

Settlement procedure and commitments

Google decided to settle the case and therefore did not dispute the facts. Google also proposed commitments to improve Google Ad Manager services' interoperability with third-party ad server and sales platform solutions. The commitments will be binding in France for three years, following the FCA's decision.

Specifically, Google committed to offering interoperability with its DFP server to third-party SSPs[6] by:

— allowing third-party SSPs fair access to information on the auction process;

— preserving third-party SSPs' full contractual freedom so that they can negotiate special conditions with publishers or put buyers in competition with one another;

— ensuring that AdX no longer uses its rivals' price in order to optimize its bids in a way that third-party SSPs cannot replicate;

— offering guarantees of technical stability, both for third-party SSPs and for publishers.

Google also committed to allowing publishers using third-party ad servers to access AdX on-demand in "real-time".[7]

[3] Decision, para. 236. Google ceased this conduct ahead of the FCA's decision.

[4] Decision, para. 238.

[5] Decision, para. 457.

[6] Commitments, paras. 2.3-2.19.

[7] Commitments, paras. 3.3-3.13.

Facebook offers commitments to address competition concerns in the online advertising secto

On June 3, 2021, the French Competition Authority (the "**FCA**") launched a public consultation to assess the adequacy of the commitments (the "**Commitments**") offered by Facebook Inc., Facebook Ireland Ltd, and Facebook France (together, "**Facebook**") as part of the FCA's investigation into allegedly abusive online advertising practices by Facebook.

Background

Facebook provides advertising services (i) by directly marketing advertising inventories on its Facebook and Instagram social networks and its Messenger messaging service, and (ii) by selling inventories of third-party publishers who use its intermediation service (Facebook Audience Network). Facebook's Marketing Partners program (the "**FMP**") also enables over 100 advertising technology providers to offer advertisers additional services to improve their online ad campaigns. FMP status is only granted to companies that meet certain requirements in terms of volumes and categories of advertising investment, and may be withdrawn should the member not comply with certain performance criteria.[8]

On September 10, 2019, French online advertising services provider (and former FMP member) Criteo filed a complaint with the FCA, accusing Facebook of (i) denigrating it from 2017 onwards, (ii) unduly retracting its FMP status in July 2018, and (iii) unduly withdrawing its access to certain Application Programming Interfaces ("**APIs**"),[9] which are used for bidding, product recommendations, and ad campaign performance measurement.[10] The FCA subsequently acceded to Facebook's request for the case to follow a commitment procedure.[11]

The FCA's concerns

On June 3, 2021, the FCA published a preliminary assessment of Facebook's alleged practices.[12] It found that they were liable to restrict access to advertising inventories and ad campaign data due to "*conditions that are not transparent or objective*," and which could also be deemed denigrating and discriminatory. In particular, the FCA found that the definition and the application of the investment commitments FMP members undertake lacked "*transparency, stability, objectivity*," and were discriminatory. For instance, the FCA expressed concerns about the opacity of the FMP status withdrawal procedure. In addition, the FCA noted that Facebook's conditions for withdrawing certain APIs could limit the ability of FMP members to offer value-added services through their own advertising technologies. Besides, the FCA feared that external providers involved in the selection process of FMP members may also be active in the online advertising sector and, as such, FMP members' competitors.[13] The FCA therefore deemed that Facebook's practices could fall afoul of Articles 102 TFEU and L. 420-2 of the French Commercial Code.

Facebook's commitments

In order to address the FCA's concerns, Facebook offered the Commitments, which relate to (i) the FMP program, (ii) Facebook's commercial

[8] FCA, Market Test, June 3, 2021, p. 1.

[9] Application Programming Interfaces allow for programs or software to connect and interact with one another with a view to exchange data.

[10] FCA, Market Test, June 3, 2021, p. 1.

[11] Article L. 464-2 of the French Commercial Code governs the FCA's acceptance of commitments offered by companies to address its competition concerns in relation to prohibited practices referred to under Articles L. 420-1, L. 420-2, and L. 420-5 of the same code.

[12] FCA, Market Test, June 3, 2021, p. 2.

[13] Facebook also involves these external providers to determine whether FMP members comply with the FMP performance criteria and to conduct FMP compliance and due diligence assessments.

communication, and (iii) the development of a "*recommendation functionality*" to FMP members that have the FMP badge.[14]

FMP program commitments. Facebook undertook three-year commitments "*to ensure the objectivity, clarity, and non-discriminatory application of the FMP performance criteria*." Under the proposal, any modification of these criteria would be preceded by a two-month notice and be notified to the FCA and FMP members.[15] Facebook also offered to conduct FMP compliance and due diligence assessments, which aim to assess the integrity of FMP applicants or members, "*in an objective, clear, and non-discriminatory manner.*"[16] In addition, Facebook proposed a clear framework for withdrawing the FMP status or FMP badge in the event of non-compliance with the FMP performance criteria.[17] Lastly, Facebook committed to obtaining in-writing and binding confirmation from external providers that they would comply with the FMP program commitments and implement appropriate compliance procedures to avoid conflicts of interest.[18]

Commercial communication commitment. Facebook suggested that its relevant sales teams be provided with competition compliance trainings for the next three years.[19]

The "recommendation functionality" commitment. Facebook offered to develop and implement for two years a "*recommendation functionality*" for FMP members who have a FMP badge. The "*recommendation functionality*" would be an API allowing for certain eligible FMP members to interact with Facebook's systems for the duration of the commitment, provided that they apply thereto, keep their FMP badge throughout and fulfil Facebook's criteria for accessing the functionality (such as using the recommendation functionality for a certain period of time and adding value when using it).[20]

Alongside the publication of its preliminary assessment of Facebook's practices, the FCA launched its public consultation on Facebook's commitments. While interested parties were able to submit comments until July 5, 2021, the FCA has begun market-testing the Commitments in order to determine whether they adequately address its competition concerns. Should the FCA deem them suitable, it will make them binding and close its investigation.

[14] The FMP badge is an accreditation granted to FMP members that meet FMP performance criteria. It enables badge holders to use a particular logo in their marketing materials and to be listed on Facebook's partner directory.

[15] Commitments, paras. 10–18. The FMP program will include an indicative list of objective reasons that Facebook will consider when conducting FMP compliance and due diligence assessments. In particular, Facebook will inform any FMP member that has failed such an assessment of the reasons of its failure. Facebook also agreed not to discriminate against any FMP applicant or member when deciding whether or not to grant the FMP status or badge on the basis of the outcome of an FMP compliance and due diligence assessment. Finally, Facebook offered to allow unsuccessful FMP applicants to request a review of the compliance and due diligence assessment.

[16] Commitments, paras. 19–24.

[17] Commitments, paras. 25–33.

[18] Commitments, para. 34.

[19] Commitments, paras. 35–36.

[20] Commitments, paras. 37–49.

The French Competition Authority updates its Notice on fines

On June 11, 2021, the French Competition Authority ("**FCA**") published a draft to update its Notice on fines.[21] The draft is subject to a public consultation which was held between June 11 and 25, 2021. According to the FCA, the update was prompted by the entry into force of ordinance No.2021-649 of May 26, 2021, which implements Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 ("**ECN+ Directive**"), whose aim is to strengthen and harmonize competition enforcement by national authorities.[22] The FCA also said that the revision also aimed to reflect the FCA's decision-making practice and to bring it closer to the European Commission's. In practice, the Draft Notice would likely increase to a significant extent the level of fines imposed by the FCA.

Like under the current system, fines imposed by the FCA would be based on the value of affected sales during the last full year of infringement, to which a multiplier would be applied to reflect the gravity and the duration of the infringement. The basic amount would then be adapted based on relevant aggravating or mitigating circumstances, or "individual factors". However, the following changes would be implemented.

First, the Draft Notice clarifies that the FCA may use, as a basis for its calculation of the fine, the sales value of the goods or services to which the competition infringement "directly or indirectly" relates, thus allowing indirectly related turnover to be taken into account.[23]

Second, the Draft Notice proposes to revise the criteria that the FCA may rely on to assess the conduct's gravity to notably include its impact on the environment, innovation, or captive buyers.[24]

Third, the Draft Notice proposes to change the method to reflect the duration of the infringement. Under the 2011 Notice, a duration multiplier is applied where the first full year of infringement accounts for 1 and the following years account for 0.5 each. The Draft Notice provides that the value of sales shall be multiplied by the number of years of participation to the infringement.

Fourth, the Draft Notice[25] no longer contains any reference to the notion of 'damage to the economy' as a criteria for the calculation of the fines. The notion of 'damage to the economy' had already been removed from Article L. 464-2 of the Commercial Code by ordinance No.2021-649.

Fifth, the Draft Notice proposes to enable the FCA to increase the fine of an amount between 15% and 25% of the relevant turnover, for deterrence purposes in certain situations (including, but not only, horizontal price-fixing, market-sharing, and output-limitation practices).[26]

Sixth, the Draft Notice brings about several changes concerning fines imposed to trade associations. In line with the provisions of the ECN+ Directive, trade associations, which previously benefited from a €3 million sanction ceiling, may be subject to fines of up to 10% of the association's turnover or of its members'

[21] The Notice on fines lays out the methodology used by the FCA to set fines imposed on companies for competition law infringements prohibited under Articles L. 420-1, L. 420-2 and L. 420-5 of the French Commercial Code, and Articles 101 and 102 of the Treaty on the functioning of the European Union. The current version of the Notice entered into force on 2011.

[22] Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, December 11, 2018, OJ L 11.

[23] Draft Notice, para. 22. European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210, article 13.

[24] Draft Notice, para. 29.

[25] FCA, Draft Notice relating to the methodology for setting financial sanctions, June 2021, available at: https://www.autoritedelaconcurrence.fr/sites/default/files/Projet%20de%20communique%CC%81%20sanction%20-%20juin%202021.pdf.

[26] Draft Notice, para. 32.

total turnover, where the anticompetitive practice "*relates to the activity of its members.*"[27] The Draft Notice also institutes a new regime in case of a trade association' insolvency: (i) either the infringement relates to the association's activities and the association may demonstrate its financial difficulties in the same way as any other company,[28] or (ii) the infringement relates to its members' activities, in which case the FCA may require the association to ask its members to contribute to the payment of the fine.[29]

Finally, the Draft Notice would allow the FCA to depart from its methodology on fines "*after a thorough review of the overall circumstances of the case,*"[30] as it deems "*neither possible nor desirable* [...] *to devise a mechanical scale making it possible to predict their precise amount in advance*".[31]

The FCA has not yet set a date for the final adoption of its Notice on fines, but it is expected to "*take place as soon as possible*".[32]

The French *Cour de cassation* confirms the Paris Court of Appeals' ruling on SNCF's predatory pricing practices

On June 9, 2021, the French *Cour de cassation* ("***Cour de cassation***") put an end to a legal saga involving the French legacy train operator SNCF's anticompetitive practices in the railway freight sector.[33] The *Cour de cassation* confirmed the Paris Court of Appeals' December 20, 2018 ruling[34] that had found that the SNCF had breached Articles L. 420-2 of the French Commercial Code and 102 TFEU by applying a predatory pricing strategy to prevent rivals from entering into key contracts in the market for transport of full-train-load.

Background

On December 18, 2012, following a four-year investigation, the French Competition Authority ("**FCA**") fined SNCF €60.9 million for abusing its dominant position on the market for railway freight by hindering and delaying the entry of new players.[35] In essence, SNCF (i) was using sensitive information on its rivals that it had obtained as the manager of railway network access (public service), which gave it a competitive advantage, and (ii) prevented rivals from accessing indispensable rail infrastructure (*e.g.*, by artificially overbooking train paths and wagons).

The FCA also ordered the SNCF to take all necessary steps to avoid below-costs pricing in relation to transport services by full-train-load. On November 6, 2014, following the SNCF's appeal against the FCA Decision, the Paris Court of Appeals partially annulled the FCA Decision, finding that the FCA had not established the existence of predatory pricing and that, as a result, the FCA Decision was moot in that respect.[36]

On November 22, 2016, however, the *Cour de cassation* annulled the Paris Court of Appeals' decision, ruling that it should have either

[27] Draft Notice, para. 4.

[28] Draft Notice, para. 61.

[29] Draft Notice, para. 62.

[30] Draft Notice, para. 6.

[31] Draft Notice, para. 13.

[32] *See* FCA's press release of June 11, 2021, available here: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-opens-public-consultation-revision-its-notice-fines.

[33] French *Cour de cassation*, Commercial Chamber, decision of June 9, 2021, no. 496 F-D.

[34] Paris Court of Appeals, decision of December 20, 2018, no. 17/01304.

[35] FCA Decision no. 12-D-25 of December 18, 2012, regarding practices implemented in the railway freight sector (the "**FCA Decision**").

[36] Paris Court of Appeals, decision of November 6, 2014, no. 2013/01128.

examined the lawfulness of the SNCF's pricing practices itself or referred the case back to the FCA for further investigation.[37] In its second ruling, on December 20, 2018, the Paris Court of Appeals found that the SNCF had indeed engaged in predatory pricing.

The Cour de cassation's ruling

On June 9, 2021, the *Cour de cassation* confirmed the Paris Court of Appeals' findings, concluding that the SNCF had implemented an "eviction plan" against rivals for key contracts that would have enabled them to enter the market for transport of full-train-load. The *Cour de cassation* thereby confirmed the FCA's 2012 finding that the SNCF had priced below mid- to long-term marginal costs as part of its predatory strategy.

The SNCF argued both before the Paris Court of Appeals and the *Cour de cassation* that, in order to assess predation, the FCA should have compared the SNCF's prices to its most efficient competitors and not to its own costs. The SNCF's own costs were indeed much higher than those of its competitors because of the special costs it incurred as a legacy incumbent.

However, the *Cour de cassation*, relying on *Deutsche Telekom* and *TeliaSonera*,[38] pointed out that predatory pricing should be assessed by reference to the company's own costs, and that competitors' prices are examined only in a limited number of situations.[39] According to the *Cour de cassation*, the Paris Court of Appeals correctly examined the market for the transport of full-train-load *in concreto* and rightly found that the SNCF's position as a legacy incumbent subject to specific legal constraints does not justify taking into account its competitors' costs as opposed to its own costs. In doing so, the *Cour de cassation* clarifies that the legal test for predatory pricing does not differ when the dominant undertaking is a national incumbent.

[37] French *Cour de cassation,* Commercial Chamber, decision of November 22, 2016, no. 1006 FS-D.

[38] *Deutsche Telekom v. Commission* (Case C-280/08) EU:C:2010:603:, *TeliaSonera* (Case 52/09) EU:C:2011:83.

[39] The Paris Court of Appeals and the French *Cour de cassation* rely on the situations provided in *TeliaSonera*, at para. 45: "*That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it.*"

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