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French Competition Law Newsletter

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The French Competition Authority dismisses interim measures request against Apple

On March 17, 2021, the French Competition Authority (hereinafter, the "**FCA**")[1] rejected the request for interim measures of various players in the online advertising industry concerning the introduction by Apple Inc. ("**Apple**") of the App Tracking Transparency ("**ATT**") feature as part of the upcoming changes in its iOS 14 operating system.

Background

On June 22, 2020, Apple announced that it would implement the ATT feature as part of its policy to enhance customer privacy. The ATT feature displays a pop-up window requesting iPhone users' explicit consent (the "**ATT solicitation**") that online advertisers track their activity on websites or mobile applications for ad targeting purposes.

On October 23, 2020, several associations representing mobile marketing agencies, advertising agencies, and other players in the sector filed a complaint to the FCA. They argued that, while Apple has a monopoly on the market for the distribution of iOS applications, it abused its dominant position by imposing on application developers unfair trading conditions which were not necessary and proportionate to protect

[1] FCA Decision no. 21-D-07 of March 17, 2021, regarding a request for urgent interim measures presented by Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil et Achat Media, and Syndicat des Régies Internet, associations in the sector of mobile applications advertising on iOS.

the personal data of iOS users. The claimants also argued that Apple's practice constituted unlawful tying and bundling[2] by imposing an undue obligation on application developers to provide additional services that are unrelated to the distribution of applications on iOS devices.[3] The complainants requested interim measures to order Apple to suspend the ATT solicitation.

The FCA's assessment

The FCA dismissed the request for interim measures and found that Apple's practice was unlikely to be anticompetitive, subject to an investigation on the merits.[4]

On unfair trading conditions, the FCA found that the introduction of the ATT solicitation was part of Apple's data protection policy and constituted, in principle, a legitimate exercise of Apple's commercial policy.[5]

In addition, the FCA pointed out that it was not established that Apple's ATT solicitation was unnecessary and disproportionate to protect the personal data of iOS product users, and that it was therefore unlikely to constitute unfair trading conditions. In particular, application developers have the possibility of personalising the ATT solicitation to explain the reasons why they require personal data and convince users to accept their tracking devices for advertising purposes.[6]

On tying and bundling, the FCA explained that the ATT solicitation did not constitute an obligation for developers to provide an additional service.[7] The ATT solicitation rather amounted to a service ancillary to the distribution of applications in the App Store and which would also address customers' concerns on personal data protection.[8]

Consequently, the FCA rejected the request for interim measures. The FCA nevertheless decided to investigate the case on the merits to ensure that, by imposing the ATT solicitation on players wishing to use the tracking of user activity on third-party sites, Apple is not applying a more stringent treatment than it would apply to itself in the form of self-preferencing.[9]

The French Competition Authority dismisses interim measures against French electricity supplier EDF

On February 18, 2021, the FCA announced that it had denied interim measures requested by Plüm Energie, a competing electricity supplier, to prevent Électricité de France ("**EDF**") from allegedly abusing its dominant position in the French market for the supply of electricity. However, the FCA decided to continue the investigation on the merits.[10]

[2] Article 102(d) TFEU provides that "*making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts*" may constitute an abuse of a dominant position.

[3] FCA Decision no. 21-D-07 of March 17, 2021, para. 90.

[4] In order to issue interim measures, the FCA must find that the company's conduct (i) likely infringes competition rules and (ii) causes serious and immediate harm to the general economy, the relevant sector, consumers, or the complainant's interests.

[5] FCA Decision no. 21-D-07 of March 17, 2021, para. 147.

[6] FCA Decision no. 21-D-07 of March 17, 2021, para. 152.

[7] The FCA noted the four cumulative conditions to be met for a conduct to fall within the scope of Article 102(d) TFEU: (i) the undertaking is dominant in the market where it offers the product or service; (ii) the additional obligation is not related to the subject matter of the contract; (iii) the additional obligation does not give the other party the choice of obtaining the other product or service without accepting the additional obligation; and (iv) the additional obligation is likely to restrict competition (FCA Decision no. 21-D-07 of March 17, 2021, point 166).

[8] FCA Decision no. 21-D-07 of March 17, 2021, point 170.

[9] *Ibid.*, paras 162-163.

[10] FCA Decision no. 21-D-03 of February 18, 2021, regarding a request for interim measures by Plüm Energie in the sector of the supply of electricity in France (the "**Decision**").

Background

In September 2020, Plüm Energie filed a complaint with the FCA against EDF for abuse of a dominant position. According to Plüm Energie, EDF was charging prices lower than the costs it incurred when bidding for tenders issued by local and regional authorities, which allegedly constituted predatory pricing.[11]

Additionally, Plüm Energie sought interim measures from the FCA. Those measures aimed to (i) have EDF cover its costs in its responses to calls for tenders, (ii) appoint an independent trustee to conduct *ex ante* compliance assessments of EDF's offers, and (iii) require EDF to submit a monthly report to the FCA and the French Energy Regulatory Commission ("*Commission de régulation de l'énergie*") showing that its commercial and pricing policy complies with competition rules.[12]

The FCA's decision

In order to issue interim measures, the FCA must find that the company's conduct (i) likely infringes competition rules and (ii) causes serious and immediate harm to the general economy, the relevant sector, consumers, or the complainant's interests.[13]

In the Decision, the FCA found that EDF was dominant on the French market for the retail supply of electricity to non-residential customers, as it supplies 60 to 70% of the electricity on this market.[14] EDF further enjoys significant competitive advantages as the incumbent operator (*i.e.*, brand image, geographic presence, and reputation).[15]

The FCA then recalled that the price policy of a dominant undertaking must be assessed on the basis of several criteria, including the prices it charges and the costs it incurs. The FCA explained that, at this stage, it could not exclude that EDF did not cover its costs with respect to several activities. The FCA thus indicated that it would continue its investigation on the merits.[16]

However, the FCA found that the alleged practices did not cause serious and immediate harm to the economy or the complainant's interests.

With regard to the damage to Plüm Energie, the FCA found that there was no evidence that the complainant's losses resulted from the prices offered by EDF. In particular, based on bidding data, the FCA found that Plüm Energie had not been EDF's runner-up in certain calls for tenders won by EDF and thus was not even in a position to win had EDF not submitted a bid.[17] The FCA also found that Plüm Energie had already won major tenders against EDF and maintained a stable success rate.

With regard to the damage to the economy, the FCA concluded that Plüm Energie had failed to adduce sufficient evidence showing that small competitors would be foreclosed from the market in the short term due to EDF's conduct. Nor did it prove that larger competitors, such as ENGIE and Total Direct Énergie, would also be driven out of the market, especially as they benefit from a significant critical mass enabling them match EDF's low prices.[18]

The FCA therefore dismissed Plüm Energie's request for interim measures and decided to continue its investigation on the merits.

[11] FCA Decision, paras. 27–28.

[12] FCA Decision, para. 29.

[13] *See* Article L. 464-1 of the French Commercial Code.

[14] FCA Decision, paras. 46, 55, 62.

[15] FCA Decision, paras. 64–66.

[16] FCA Decision, paras. 80–83.

[17] FCA Decision, paras. 89 and 91.

[18] FCA Decision, paras. 97–99.

The French Competition Authority fines leading manufacturers of industrial sandwiches €24 million for entering into an anticompetitive agreement

On March 24, 2021, the FCA sanctioned[19] three manufacturers of industrial sandwiches sold under private labels, La Toque Angevine ("**LTA**"), Daunat, and Roland Monterrat, for fixing prices and market allocation in France.

The three companies participated in tenders to supply large food retailers and gas stations with industrial sandwiches under private labels. Between 2010 and 2016, they agreed not to engage in price competition.[20] In practice, the companies' directors (or sometimes an employee) and a business manager would exchange price information through regular calls, meetings, and emails, and then adjust their prices accordingly when submitting a tender offer. To avoid suspicion, they used code names to refer to their rivals, appointed a lead manager to better organize their meetings, and maintained trackers to monitor their offers.[21] The companies also exchanged their negotiation status with large food retailers regarding price evolutions for ongoing contracts.[22]

The FCA also noted that LTA, Daunat, and Roland Monterrat accounted for almost 90% of the French market, which allowed them to increase their prices without fear of retaliation from their competitors.[23]

The FCA granted full immunity to Roland Monterrat as it was the first company to file for leniency. LTA and Daunat both requested leniency as well, in second and third position, and respectively received a 35% and a 30% fine reduction, due to the added value of their disclosures. LTA and Daunat both submitted applications within a couple of hours of one another, but that small time difference was sufficient to determine which company would benefit from the greatest fine reduction.[24] Daunat also benefitted from the "leniency plus" policy, which the FCA applied for the first time in 2018,[25] and thus received an additional €5 million fine reduction, because it provided additional evidence, such as a detailed account of the meetings. The FCA eventually imposed a fine of €24,574,000 on Daunat and LTA.[26]

[19] FCA Decision no. 21-D-09 of March 24, 2021 (the "**Decision**"), para. 364. The FCA imposed a fine of €15.6 million on La Toque Angevine and €9 million on Daunat. The fines amount to a total of €24.6 million.

[20] Decision, para. 44.

[21] Decision, paras. 47-53 and 240.

[22] Decision, para. 99.

[23] Decision, paras. 246 and 263.

[24] Decision, paras. 340-341.

[25] FCA, Decision no. 18-D-24 of December 5, 2018 on practices implemented in the household appliances sector.

[26] LTA was fined €15,574,000 and Daunat was fined €9 million. *See* Decision, para. 364.

The French *Conseil d'Etat* recognizes right of employee representatives to appeal against a French Competition Authority's merger clearance decision

On March 9, 2021, the French *Conseil d'Etat* ruled that the employee representative body of the target company could appeal the FCA's decision to clear the transaction. However, the *Conseil d'Etat* dismissed the appeal on the merits.[27]

Background

On July 24, 2019, the FCA conditionally cleared the acquisition of Mondadori Magazines France ("**Mondadori**") by Reworld Media.[28] Both companies are active in print magazine publication, editorial website operation, and the sale of advertising space. The FCA raised competition concerns in the market for general interest car magazines as it found that the merged entity would own three of the four specialist magazines. To mitigate the FCA's concerns, Reworld Media undertook to sell one of its magazines to ensure competition and pluralism post-transaction.

The *Conseil d'Etat* decision

Mondadori's social and economic committee lodged an appeal against the FCA's decision before the *Conseil d'Etat*. Mondadori argued that the FCA (i) had violated defense rights because the parties' competitors could not submit observations on the proposed transaction and (ii) had violated French labor law by clearing the transaction although Mondadori had failed to inform and consult its social and economic committee.

The *Conseil d'Etat* ruled that the target's social and economic committee's appeal was admissible. In light of the social and economic committee's role in the expression of employees and the effects of the clearance decision, the social and economic committee had standing to request the annulment of the FCA's clearance decision.[29]

However, the *Conseil d'Etat* dismissed the appeal on the merits. As regards the violation of defense rights' claim, the *Conseil d'Etat* noted that the FCA had published the merger notification on its website and that the FCA had conducted several market tests enabling competitors to voice their opinion.[30] The *Conseil d'Etat* concluded that the claim was factually unfounded and the FCA had not violated defense rights. As regards the violation of French labor law, the *Conseil d'Etat* recognized that Mondadori was under the obligation to inform and consult the social and economic committee. However, it concluded that the FCA had not erred in disregarding this obligation because Mondadori, as the target company, is not a notifying party.[31] The *Conseil d'Etat* also noted that French labor law does not impose on the FCA to verify that employee representative bodies have been consulted.[32]

[27] French *Conseil d'Etat* ruling of March 9, 2021, no. 433214.

[28] FCA Decision no. 19-DCC-141 of July 24, 2019 (the "**FCA's decision**").

[29] French *Conseil d'Etat* ruling of March 9, 2021, no. 433214, para. 3.

[30] *Ibid.*, para. 4.

[31] *Ibid.*, para. 7.

[32] *Ibid.*, para. 8.

The French Competition Authority fines Vinci group for bid rigging in a public tender for building maintenance in the city of Lille

On March 4, 2021, the FCA fined Santerne Nord Tertiaire ("**Santerne**"), a Vinci group subsidiary, a total of €435,000 for bid rigging in a public tender for building maintenance in the city of Lille.[33]

In 2017, the French Directorate General for Competition, Policy, Consumer Affairs, and Fraud Control (the "**DGCCRF**") carried out an investigation in the building maintenance sector in Lille. The DGCCRF found that building management company Neu had exchanged confidential information with two other bidders, STTN Energie and Santerne, prior to submitting their bids in 2013 and 2014. While Neu and STTN Energie settled with the DGCCRF and were fined €19,400 and €14,850 respectively, Santerne refused to enter into a settlement with the DGCCRF. The DGCCRF thus referred Santerne's case to the FCA.[34]

In its decision, the FCA found that the information exchange on price and technical plans had helped prepare Santerne's bid.[35] The FCA considered that, while an undertaking may ask other undertakings for expert opinions, the exchange of information on pricing and technical aspects between bidders to a tender is anticompetitive since bids are no longer prepared independently.[36] The FCA concluded that the submission of two apparently independent bids had necessarily misled the tendering authority as to the intensity of competition between bidders.[37]

As a result, the FCA fined Santerne, as well as its parent companies Vinci Energies France and Vinci. While Santerne's parent companies argued that Santerne was acting independently, and thus that its parent companies should not be fined, the FCA found that there was insufficient evidence to rebut the presumption that Santerne's parent companies exercised decisive influence over it, particularly in light of the fact that Santerne made several references to its parent companies in its tender bids.[38]

[33] FCA Decision no. 21-D-05 of March 4, 2021 on practices concerning the technical management of buildings in Lille ("**FCA Decision**").

[34] Article L. 464-9 of the French Commercial Code provides that the DGCCRF can (i) order undertakings to put an end to anticompetitive practices and (ii) propose a settlement no higher than €150,000 and 5% of the undertaking's turnover in France. If the undertaking refuses to settle, the DGCCRF will bring the case to the FCA.

[35] FCA Decision, para. 65.

[36] FCA Decision, para. 68.

[37] FCA Decision, para. 86.

[38] FCA Decision, paras 106, 112.

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