June 2020

French Competition Law Newsletter

The French Competition Authority publishes a study on the impact of e-commerce on competition policy

Highlights

— The French Competition Authority publishes a study on the impact of e-commerce on competition policy

— The Paris Court of Appeals orders Orange to pay over €180 million in follow-on antitrust damage claim

— The European Commission authorizes an amendment to the French recovery plan

On June 5, 2020, the French Competition Authority ("**FCA**") published a study on the growth of e-commerce and its impact on competition policy. This publication provides an overview of the lasting changes triggered by the development of online sales, the impact of such changes on the analytical framework used by the FCA and the types of anticompetitive conducts that may arise as a result. The study is part of a broader reflection led by the FCA on the challenges raised by antitrust enforcement in the digital sector.[1]

As French consumers increasingly purchase online, the FCA's study seeks to identify the consequences of this growth of e-commerce on market dynamics and business strategies, both from traditional retailers and pure online players' perspective. The study also notes that the development of e-commerce has allowed the emergence of new products or services that cannot be offered through traditional distribution channels, thereby intensifying competition. Finally, the study assesses the impact of these developments on the FCA's possible analysis of market power and of anti-competitive behaviors.

Assessing market power with the growth of online sales

The development of online sales has affected the way in which the FCA defines relevant product and geographic markets, and in particular whether online and offline channels encompass one single market for a given product or service. For the past few years, the FCA has used both quantitative criteria (*e.g.*, would a "*small but significant and non-transitory increase in price*" lead a significant portion of customers to switch from traditional retail shops to online purchases?) and more qualitative criteria (*e.g.*, what is the evolution of market penetration of online sales in the sector?) to answer the question on a case-by-case basis.

[1] *See* FCA's contribution to the debate on competition policy in the digital sector of February 19, 2020.

The study proposes further adaptations. First, the FCA notes that the local specificities of a sector may warrant analyzing the market both at the national and local levels, as distances between brick and mortar stores may still play a role in certain situations. The FCA endorsed such a dual approach in its review of the *Fnac/Darty*[2] and *PicWic/Toys'R'Us*[3] transactions. Second, the FCA explains that the development of online sales may require an adaptation of its traditional market share calculation methodology, for instance by taking into account various volume indicators such as the number of website users or visitors, rather than solely focusing on turnover data. In addition, the study recommends assessing other competitive factors (*e.g.*, the investment capacities of digital platforms), as market shares can be very unstable and evolve rapidly, in particular on multi-sided digital markets.

The study identifies several factors specific to digital markets that can either reinforce or weaken competition:

— On the one hand, the development of online sales may facilitate price and product comparison between different websites and lead consumers to switch more easily between providers or to "multi-home". Moreover, a number of digital markets may be particularly dynamic and unstable, especially during the first years of development and therefore prone to potential market entries. For instance, when analyzing the *SeLoger/Logic-Immo* transaction,[4] the FCA considered the possibility of head-to-head and imminent competition from the GAFAs on traditional market players but dismissed this hypothesis in the short term.

— On the other hand, certain characteristics of online markets may reinforce barriers to entry and increase incumbent operators' market power. They include network effects and the growing significance of data when access to such data is an important competitive parameter. For instance, when reviewing the *Aufeminin/TF1* merger,[5] the FCA analyzed whether TF1 could reinforce the attractiveness of its online advertising spaces by acquiring data collected by Aufeminin – although in this case the FCA ultimately dismissed the risk of anticompetitive effects.

Analyzing anticompetitive conducts likely to reduce online competition

In the past, the FCA reviewed (i) practices implemented by suppliers to limit the competitive pressure exerted by online sales, (ii) regulatory frameworks that may dissuade operators from relying on online sales, and (iii) practices implemented by online players to limit competition between them.

First, the study mentions practices that have been implemented by suppliers to limit competition exerted by online sales. Pricing practices mainly relate to resale price maintenance[6] and price discrimination at the wholesale level between offline and online distribution channels.[7] As regards non-price related practices, the FCA notes that it may investigate suppliers who decide to ban distributors from selling their products online, as this constitutes a hard-core restriction of competition.[8] The FCA may also investigate suppliers that prevent distributors from selling on third-party online platforms or so-called

[2] Decision No. 16-DCC-111 of July 27, 2016 regarding the acquisition of Darty by Fnac.

[3] Decision No. 19-DCC-65 of April 17, 2019 regarding the acquisition of joint control of Luderix International by Jellej Jouets and the Mulliez undivided ownership.

[4] Decision No. 18-DCC-18 of February 1, 2018 regarding the acquisition of sole control of Concept Multimédia by Axel Springer.

[5] Decision No. 18-DCC-63 of April 23, 2018 regarding the acquisition of sole control of Aufeminin by TF1.

[6] *See* for instance Decisions No. 17-D-01 of January 26, 2017 regarding practices implemented in the tableware and kitchen sector; No. 17-D-02 of February 10, 2017 regarding practices implemented in the competitive pétanque balls sector; No. 18-D-26 and 19-D-17 of December 20, 2018 and July 30, 2019 regarding practices implemented in the liquid fertilizers sector for above-ground home farming.

[7] *See* in particular Opinion No.12-A-20 on the competitive functioning of electronic commerce.

[8] *See* for instance Decisions No. 08-D-25 of October 29, 2008 regarding practices implemented in the sector for the distribution of cosmetics and personal hygiene products; No. 12-D-23 of December 12, 2012 regarding practices implemented by Bang & Olufsen in the selective distribution of hi-fi and home cinema equipment sector; No. 19-D-14 of July 1, 2019 regarding practices implemented in the sector for the distribution of high-end bicycles.

"market places"[9] or that restrict the possibility of being referenced on price comparison websites (although the FCA notes that it has not yet come across the latter type of conduct).

Second, the FCA notes that the development of online sales may be hindered by state regulations limiting online sales, thereby reducing consumer choice, competition between undertakings and opportunities for new players to develop. For instance, the FCA notes that it has regularly suggested to adapt the conditions for online distribution of over-the-counter drugs although the regulatory framework still constrains the development of online sales by French pharmacies.[10]

Third, the FCA's analysis focuses on practices implemented by online players to reduce competition amongst themselves or to exclude or prevent the development of competing online platforms. The FCA notes that such strategies are less frequent than those aiming to limit competition between offline and online sales, but may develop over time as companies acquire significant market power. The FCA has already challenged the lawfulness of price parity clauses imposed by Booking.com on hotel operators referenced on its platform.[11] In addition, the FCA emphasizes the need to pay particular attention to exclusionary and foreclosure strategies implemented by incumbent operators or former state monopolists who may leverage their dominant position on the offline market across the online market. The FCA identified such risks in its opinion relating to the online gambling sector, with regard to La Française des Jeux,[12] and in its commitment decisions concerning the horse-race betting company PMU[13] and the rail operator SNCF.[14] Finally, the FCA emphasizes that there is a wide range of other practices that dominant platforms may implement to restrict competition, for example resorting to exclusivity or tying mechanisms, or imposing unfair commercial conditions.

In conclusion, the FCA's publication notes that while the growth of online sales may result in relatively atypical conducts, the current analytical framework and tools at its disposal are sufficiently flexible to allow the FCA to continue to address such conducts. Yet, as it did in its study on competition policy in the digital sector,[15] the FCA suggests reinforcing this framework by (i) developing specific digital analytical skills, (ii) using interim measures more often, (iii) improving competition authorities' capacity to review mergers involving digital platforms and (iv) introducing new rules applicable to "structuring digital platforms".

---

[9] For instance, in 2015, the FCA opened an investigation into Adidas' decision to prevent its online retailers from being referenced on online marketplaces but closed the investigation as Adidas committed during the investigation to authorize retailers to use online marketplaces, provided that they met certain qualitative criteria (See FCA's press release of November 8, 2015 on online selling: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/18-november-2015-online-sales). In 2018, the FCA also considered that a chainsaw manufacturer's decision to prohibit its distributors from being referenced on online marketplaces was lawful because (i) this prohibition guaranteed that the products were sold by approved distributors, thereby limiting the risk of counterfeiting and lack of sufficient advice, (ii) according to the European Commission's E-Commerce Sector Inquiry, online marketplaces were used by only 31% of the retailers, and there was nothing indicating that marketplaces would be more necessary for online resale of outdoor power equipment than for online resale of other products (*See* Decision No. 18-D-23 of October 24, 2018 relating to practices implemented in the outdoor power equipment distribution sector).

[10] Opinions No. 13-A-12 of April 10, 2013 regarding a draft regulation from the French Ministry of Social Affairs and Health on good practices in online drug sales; No. 16-A-09 of April 26, 2016 regarding two draft regulations on online drug sales; No. 19-A-08 of April 4, 2019 regarding the urban distribution of drugs and private chemical pathology sectors.

[11] Decision No. 15-D-06 of April 21, 2015 relating to practices implemented by Booking.com BV, Booking.com SAS and Booking.com Customer Service France SAS in the online booking sector. A complaint was also filed against Expedia and HRS in 2013 regarding similar practices, but the FCA dismissed the complaint (*See* Decision No. 19-D-23 of December 10, 2019 regarding practices implemented in the online hotel booking sector).

[12] Opinion No. 11-A-02 of January 20, 2011 regarding the online gambling sector.

[13] Decision No. 14-D-04 of February 25, 2014 regarding practices implemented in the online betting and horseracing sector.

[14] Decision No. 14-D-11 of October 2, 2014 regarding practices implemented in the train ticket distribution sector.

[15] FCA's contribution to the debate on competition policy in the digital sector of February 19, 2020.

The Paris Court of Appeals orders Orange to pay over €180 million in follow-on antitrust damage claim[16]

On June 17, 2020, the Paris Court of Appeals ("**the Court**") ordered Orange and its subsidiary Orange Caraïbe to pay (jointly and severally) €181.5 million in antitrust damages and €68 million in interest to rival Digicel (formerly Bouygues Telecom Caraïbe) as compensation for the Orange group's anti-competitive behavior across several markets in the French West Indies.[17] The Court's decision overturns a 2017 first instance ruling by the Paris Commercial Court.[18]

Background

In December 2009, the French Competition Authority ("FCA") imposed a €63 million fine on Orange (then France Telecom) and Orange Caraïbe for thwarting competition in the mobile and fixed telephony markets in the West Indies and Guyana between 2000 and 2006.[19] The fine was subsequently reduced to €60 million on appeal.[20]

In its decision, the FCA found that Orange Caraïbe, the then-incumbent operator in the West Indies, had implemented a series of practices that hindered the development of competition in the mobile telephony sector and raised barriers to entry for competitors, including Bouygues Telecom (which later sold its Caribbean business to Digicel). Such practices included: (i) entering into exclusivity agreements with local independent distributors and with the only authorized repair center for handsets in the Caribbean, (ii) implementing a customer loyalty program ("*Changez de mobile*") which strongly deterred consumers from switching to a competing mobile operator at the end of their subscription period, and (iii) engaging in price discrimination between "*on net*" calls (*i.e.*, calls within the Orange network) and "*off net*" calls (*i.e.*, calls to other networks). The FCA also found that France Telecom had unduly favored its subsidiary Orange Caraïbe by (i) implementing a loyalty program ("*Avantage Améris*") allowing professional customers to make free-of-charge landline calls to the Orange Caraïbe network and (ii) engaging in margin squeeze.

The FCA's decision gave rise to two follow-on damage actions, both of which were filed with the Paris Commercial Court by Orange's competitors. One was initiated by Digicel, which claimed damages of €494 million, and the other one by Outremer Telecom, which claimed damages of €75 million.[21] As regards Digicel, the Paris Commercial Court ruled in December 2017 that Orange's anticompetitive practices had caused harm to Digicel, and awarded the latter €180 million in damages plus 10.4% interest per year, for a total of €346 million.

Both Orange and Orange Caraïbe (the "**Appellants**") and Digicel appealed the 2017 ruling.

The Parties' main arguments

The Appellants submitted that despite its practices, Digicel had been able to capture 35% of new customers and that the exclusivity agreements had not had any actual impact on the market. They also disputed the existence of a causal link between the two loyalty programs and the alleged

[16] Paris Court of Appeals ruling of June 17, 2020 (no. 17/23041) *SA Orange, SA Orange Caraïbes c/ SA Digicel Antilles Françaises Guyane*.

[17] The Court awarded €173.4 million in compensation for the lost profit; €7.12 million for extra costs relating to exclusivity agreement and €737 500 for extra costs generated by the exclusivity repair clauses for a total of around €181.5 million.

[18] Paris Commercial Court ruling of December 18, 2017 (no. 2009/016849), *SA Digicel Antilles Françaises Guyane c/ SA Orange Caraïbe, SA Orange*.

[19] FCA Decision No. 09-D-36 of December 9, 2009 relating to practices implemented by Orange Caraïbe and France Telecom in various telecommunication services markets in the overseas territories of Martinique, Guadeloupe and Guyana.

[20] Paris Court of Appeals ruling of September 23, 2010 (no. 2010/0063).

[21] Outremer Telecom was awarded €8 million by the Paris Commercial Court in March 2015. The damage award was reduced to €2.6 million by the Paris Court of Appeals in May 2017.

harm, as these programs had a moderate impact on the market and did not result in any customer foreclosure. According to the Appellants, the damages suffered by Digicel mainly resulted from its own poor business strategy and lack of knowledge of the Caribbean market's specificities.

Conversely, Digicel claimed that it should have been awarded a higher amount of damages. In particular, Digicel argued that Orange's decision to refrain from paying the sums awarded by the Paris Commercial Court, and instead to place these sums in escrow pending the appeal court's ruling, had prevented it from investing in profitable projects relating notably to the implementation of 3G or 4G. As a result, Digicel sought €520 million in compensation, an amount calculated by applying an interest rate based on the Weighted Average Cost of Capital ("**WACC**") to the sums owed by Orange.

The Paris Court of Appeals' assessment

First, the Court confirmed that the two customer loyalty programs implemented by the Appellants amounted to civil torts and had contributed to the reinforcement of Orange's dominant position. In particular, the Court noted that Orange Caraïbe's market shares, which had dropped from 100% to 75% between 2000 and 2002 following Digicel (then Bouygues Telecom)'s entry into the market, had increased back to 83% in late 2003, when the effects of the "*Changez de Mobile*" program began to materialize.

Second, the Court overturned the first instance ruling finding that the exclusivity agreements between Orange and independent distributors had not harmed Digicel. In addition, the Court considered that the Appellants' exclusivity agreement with the sole repairer in the area, Cetelec Caraibes, had damaged Digicel's brand image as it could not offer comparable services to its own customers. Consequently, the Court held that the overcharge suffered by Digicel as a result of the exclusivity agreements amounted to almost €8 million.

Third, the Court took the view that the price discrimination between on-net and off-net calls had reinforced Orange's position to the detriment of Bouygues and other new entrants.

Fourth, the Court dismissed as unsubstantiated the Appellants' argument that Digicel's development issues were the result of its own failures.

Fifth, with respect to the calculation of damages, the Court held that the first instance court was correct in assessing the harm suffered by Digicel based on its overall lack of economic growth. Accordingly, the Court confirmed that the practices at stake had resulted in lost profits amounting to €173,64 million. The Court also decided to apply a capitalized interest rate of 5.3% to both the lost profits and the overcharge from April 1, 2003 to December 31, 2005 and a statutory interest rate from January 1, 2006 to December 31, 2018. Finally, the Court dismissed the application of the WACC method used by the Paris Commercial Court, as it considered that Digicel had failed to demonstrate that it had been forced to restrict its activity or to abandon certain investment projects as a result of the unavailability of the sums. In particular, the Court noted that Digicel had not shown that it had no alternative means to finance its projects (for example through loans from its parent company).

Implications

While the sum awarded to Digicel is far below its initial claim, it nevertheless remains three times higher than the fine imposed by the FCA, and is (at this stage) the highest damage award ordered by a French court in a follow-on case.

Orange indicated that it was "seriously examining" the possibility of appealing the Court of Appeals' ruling before the French Supreme Court.

The European Commission authorizes an amendment to the French recovery plan.

Background

On March 21, 2020, the European Commission (“**EC**”) approved three French state aid schemes to support the French economy during the coronavirus crisis[22] under the State aid Temporary Framework adopted by the Commission two days earlier.[23]

Two of these schemes enable the French public investment bank, Bpifrance Financement S.A., to provide State guarantees on commercial loans and credit lines to non-financial companies with up to 5,000 employees. The third scheme enables the French State to provide guarantees to banks on portfolios of new loans for all types of companies active in France, regardless of their size or their business segment, thereby enabling banks to provide cash liquidity to any company that needs it.[24] The EC authorized these three State aid schemes as it considered that they cover guarantees on loans with a limited maturity and size, while limiting the risk taken by the State to a maximum of 90%.

The purpose of the third measure was, in particular, to provide State guarantees to banks and investment firms on portfolios of new loans for all types of companies (with the exception of credit institutions and civil real estate companies). Companies would be eligible for such guarantees for a period of up to six years under the following conditions: (i) the loans must be contracted between March 16, 2020 and December 31, 2020; (ii) the risk taken by the State should be limited to a maximum of 90% of the loan for SMEs and midcap companies, 80% for large undertakings generating revenues of €5 billion and 70% for large undertakings generating revenues exceeding €5 billion; (iii) the amount of the loan is limited to 25% of the 2019 revenues or double the 2019 wage share for start-ups or innovative companies; and (iv) the State guarantee is remunerated by an annual premium, depending on both the nature of the recipient company and the maturity of the loan.

The Amendment

Following the entry into force of the initial scheme on March 24, more than 500,000 companies filed a request for a State guarantee. On June 2, 2020, the French government notified to the EC an extended version of the third scheme, which was approved by the Commission on June 4.

First, the amendment extends the scope of companies eligible for the aid. Civil real estate companies, in particular companies owning historical monuments open to the public and impacted by the lockdown may now benefit from State guarantees on loans and credit lines.

Second, the amendment provides that State guarantees may back loans granted by equity crowdfunding intermediaries (*intermédiaires en financement participatif*), and not only loans granted by credit institutions and investment firms.

Third, the amendment increases the maximum amount of the guarantee and allows the State to back up to 90% of the loan principal for all companies, regardless of their size, and to reduce or cancel the waiting period.

Fourth, the amendment introduces additional flexibility to determine the maximum amount of the guaranteed loan for companies or professionals active in sectors of seasonal activity, or sectors

[22] The three schemes were approved under Decision n° SA. 56709. The French scheme for securing business financing would mobilize a total of €300 billion in liquidity support for affected companies. Since March, the French Government has received more than 500,000 requests from companies and professionals whose activities were impacted by the pandemic.

[23] EC Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, March 20, 2020, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2020.091.01.0001.01.ENG&toc=OJ:C:2020:091I:TOC.

[24] For completeness, please note that this scheme does not apply to (i) civil real estate companies, (ii) credit institutions, (iii) investment firms, and (iv) undertakings that were already in difficulty on December 31, 2019.

subject to a longer shutdown period for sanitary reasons. For such companies, the maximum amount which may be guaranteed by the State should be calculated on the basis of (i) the revenues generated during the three highest-grossing months of 2019, or if not applicable (ii) the latest financial year, provided that the beneficiary certifies that this amount is inferior to 18 months of its estimated cash requirement if it is an SME, and 12 months for other types of companies.[25]

[25] The amendment specifies that neither the lender nor the Government will perform any counter-expertise with respect to this self-certification.

CONTACTS

Antoine Winckler
+32 2 287 2018
awinckler@cgsh.com

François-Charles Laprévote
+32 2 287 2184
fclaprevote@cgsh.com

Frédéric de Bure
+33 1 40 74 68 00
fdebure@cgsh.com

Séverine Schrameck
+33 1 40 74 68 00
sschrameck@cgsh.com

Sarah Aït Benali
+33 1 40 74 68 00
saitbenali@cgsh.com

Jeanne Lévy-Bruhl
+32 2 287 2226
jlevybruhl@cgsh.com

Maeva Lagoute
+33 1 40 74 68 00
mlagoute@cgsh.com

Sophie Troussard-Fauré
+33 1 40 74 68 00
stroussard@cgsh.com

Maud Lesaffre
+32 2 287 2025
mlesaffre@cgsh.com

© 2020 Cleary Gottlieb Steen & Hamilton LLP
Under the rules of certain jurisdictions, this may constitute Attorney Advertising.