

June 2022

French Competition Law Newsletter

Highlights

- The French Competition Authority accepts commitments from Meta, ending its investigation into the tech giant's online advertising practices
- The Paris Court of Appeals reduces the fine imposed on exclusive champagne importer in overseas territory on account of strong inter-brand competition

The French Competition Authority accepts commitments from Meta, ending its investigation into the tech giant's online advertising practices

On June 16, 2022, the French Competition Authority accepted binding commitments from Meta to introduce new policies enhancing advertising service providers' access to its online advertising technologies.

Background

Over the past years, online advertising has been the largest and fastest growing market of the advertising sector, generating more than €7 billion in revenue in France in 2021. Online advertising revenues are the main source of income for social networks such as Meta's platforms Facebook and Instagram, which auction ad spaces to advertisers.

In September 2019, Criteo, a French online advertising service provider, filed a complaint against Meta with the FCA. Criteo offers intermediation services for online advertising

through which it enhances ad placements on various online platforms, including Meta's social networks. In particular, Criteo offers retargeting services, which allow advertisers to specifically target users who have previously visited their websites.

Criteo complained that, in 2018, as Meta was developing its own retargeting service, Meta stopped providing some intermediaries (among those Criteo) its application programming interfaces ("APIs"), which allowed users to improve bidding strategies and campaign performance tracking on Meta's advertising inventories. At the same time, Criteo's status as Meta Business Partner¹ ("MBP") was removed by Meta. This status granted Criteo access to better services (*e.g.*, access to technical support and training, easier access to APIs) which improved its reputation among advertisers.

¹ The status was formally that of "Facebook Marketing Partner".

Online search and non-search advertising are distinct relevant markets

Search ads are sponsored links listed in the result pages of a search engine query, while non-search (or “**display**”) ads are videos or graphic snippets displayed on a webpage.

According to the FCA, search and display advertising constitute separate relevant markets within the sector of online advertising. The market test indeed revealed that most companies active in online advertising markets considered that search and display ads have distinct purposes and follow distinct marketing strategies.

The FCA also investigated whether display advertising on social networks should be considered a separate relevant market within display advertising, but eventually left the question open. The FCA noted strong differences between display advertising within and outside social networks. In particular, the way the supply-side is structured largely differs: while the sale of non-search ads on social networks is characterized by a high degree of vertical integration, the sale of display ads outside social networks usually involves a large number of independent intermediary service providers.

Meta’s market power on the non-search advertising market

The FCA estimated Meta’s market share to be around 50% for the sale of non-search ad spaces, and 90% on the social network segment of the market.

According to the FCA, the existence of Meta’s strong market power is substantiated (i) by the fact that its advertising revenues’ growth rate has been much higher than that of the overall market, (ii) by its particularly high profitability (more than 30%), and (iii) by the steady growth of its average revenue per user. The market test also revealed that stakeholders consider the finesse and relevance of Meta’s user data to be unparalleled.

Meta’s behavior is likely to distort competition

The FCA’s preliminary assessment showed that the practices revealed by Criteo in its complaint could strengthen Meta’s market position by reducing the ability of intermediaries to provide services with added value to advertisers. In addition, Meta’s practices are liable to place some MBPs at a disadvantage relative to other MBPs.

Indeed, according to the FCA, the lack of stability, transparency and objectivity for access to MBP status creates an unpredictable and unsafe competitive environment for MBPs as Meta was not able to demonstrate that its MBP status criteria were based on objective performance metrics (such as spending, number of ad spaces bought, *etc.*). This unfair treatment is possibly compounded by the disparaging of some MBPs by Meta’s commercial teams.

In addition, the withdrawal of the API prevents Criteo from making optimal use of its predictive bidding and product recommendation technologies, thereby barring it from competing with Meta on equal footing.

Meta’s commitments

In order to alleviate the FCA’s concerns, and after “substantial improvements,” Meta committed, first, to granting access to MBP status based on objective, transparent and non-discriminatory criteria for a period of five years.

Second, Meta committed to providing adequate yearly antitrust compliance trainings to the sales team working with advertisers for a period of five years. This training will focus in particular on communications with customers and include a knowledge test.

Third, Meta committed to providing access to a new recommendation function for online advertising service providers, allowing eligible companies to send individualized requests for product recommendations on Meta’s social networks and to send individualized bid adjustments. Access to

this new API will be based on objective, transparent and non-discriminatory criteria and provided by Meta free of charge for a period of three years.

Meta's commitments will be monitored by an independent trustee with adequate legal, statistical and IT qualifications.

This is the first time a competition authority has accepted commitments from Meta, which remains under two separate antitrust investigations by the European Commission in the online advertising sector for a possible anticompetitive agreement with Google and for its use of advertising data.

The Paris Court of Appeals reduces the fine imposed on exclusive champagne importer in overseas territory on account of strong inter-brand competition

On June 9, 2022 the Paris Court of Appeals partially reversed an FCA prohibition decision following an appeal by wine importer Distillerie Dillon SAS (“**Distillerie Dillon**”) and its parent companies Bardinnet SAS and Compagnie Financière Européenne de Prises de Participation SA (together, the “**Appellants**”). The FCA decision, issued on October 29, 2020, sanctioned the Appellants as well as several wine producers and importers, including Champagne Nicolas Feuillatte (“**CNF**”), for participating in an exclusive importation system for champagne in several overseas French territories.² The Court of Appeals largely upheld the FCA's reasoning and finding of infringement but reduced the amount of the fine imposed on the Appellant on the grounds that the harm caused to the economy was very limited.

Background

In 2010, the Appellants and CNF entered into a contract for the importation of champagne wine in Martinique. The contract contained two exclusivity clauses, whereby Distillerie Dillon committed to distribute champagne in Martinique sourcing its needs exclusively from CNF, and CNF granted Distillerie Dillon the exclusive right to distribute its champagne on the territory.

In March 2013, a law was enacted prohibiting agreements and concerted practices that have the object or effect of granting exclusive importation

rights in French overseas territories, including Martinique (the “**Lurel Law**”). Yet the Appellants and CNF continued to implement their contract well after the entry into force of the Lurel Law. Consequently, the FCA found that the parties had infringed the Lurel Law between Mars 22, 2013 and June 28, 2016, and imposed a total fine of 421,000 euros on the Appellants.³

The Court of Appeals' ruling

Following an appeal by Distillerie Dillon and its parent companies, the Paris Court of Appeals issued its decision on June 9, 2022. It largely upheld the appealed decision but disagreed with the FCA regarding the assessment of the harm caused to the economy, leading to a fine reduction.

The FCA had concluded that the damage to the economy was “*certain but limited*”. It found that retailers needed to be sufficiently large to be able to sell champagne in overseas territories without relying on an import and distribution agreement, and possibilities to circumvent exclusive import agreements are limited. Therefore, the practices restrained the ability of competing importer-wholesalers to develop their activities and prevented retailers from benefiting from the competition between wholesalers.

However, despite acknowledging the absence of intra-brand competition, the Court stressed

² FCA decision 20-D-16 of October 29, 2020, regarding practices implemented in the sector for the sale of champagne in the French Antilles and Guiana.

³ CNF was fined 216,000 euros.

that inter-brand competition is very strong in Martinique as regards the sale of champagne to consumers, and that retailers frequently make promotional offers, making champagne a loss leader product. Therefore, the Court refuted the FCA's conclusion that there were no competitive constraints in the champagne market in Martinique and held that, although certain, the damage to the economy was not merely limited but "*very limited*". Accordingly, the Court partially overturned the FCA's decision and reduced the Appellants' fine from 421,000 euros to 300,000 euros.

CONTACTS



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



Fran ois-Charles Lapr votte
+32 2 287 2184
fclaprevote@cgsh.com



Fr d ric de Bure
+33 1 40 74 68 00
fdebure@cgsh.com



S verine Schrameck
+33 1 40 74 68 00
sschrameck@cgsh.com



Sophie Troussard-Faur 
+33 1 40 74 68 00
troussard@cgsh.com



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



Gabrielle Rostand
+33 1 40 74 68 32
grostand@cgsh.com



Clarisse Ouakrat
+33 1 40 74 69 93
couakrat@cgsh.com



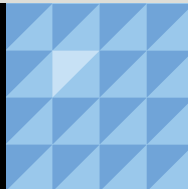
S gol ne Allegre
+32 2 287 2171
sallegre@cgsh.com



Manon Oiknine
+33 1 40 74 68 00
moiknine@cgsh.com

Antitrust Watch

clearyantitrustwatch.com

**Cleary Antitrust Watch Blog**

[Click here](#) to subscribe.

