September 2019

French Competition Law Newsletter

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Amazon fined €4 million for restrictive trade practices

On September 2, 2019, the Paris Commercial Court sanctioned Amazon for having imposed unfair conditions on businesses selling on its platform. Amazon received a record fine of €4 million and was ordered to remove or modify the contentious clauses from its contracts and terms of use within six months, failing which it will incur a periodic penalty of €10,000 for each day's delay.

In the last ten years, the French e-commerce sector has experienced very significant growth. While online sales represented approximately €20 billion in 2008, they accounted for more than €37 billion in 2011,[1] and €64 billion in 2015. Over the same period, the development of online intermediation platforms followed a similar trend, with the share of such "marketplaces" in the e-commerce sector increasing by 50% between 2012 and 2015. In France, Amazon is the clear leader among online marketplaces, with a €5 billion turnover and 170,000 independent resellers registered on its platform ("vendors").

In 2015 and 2016, the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control ("DGCCRF") carried out investigations on possible concerns raised by the functioning of online marketplaces from an antitrust standpoint or under French rules on restrictive trade practices (*pratiques restrictives de concurrence*). A key issue is that vendors are usually small and medium businesses which do not have market power, contrary to marketplaces. In July 2017, following the completion of the investigation, the Minister for the Economy, Bruno Le Maire, filed a lawsuit against several European entities of the Amazon Group before the Paris Commercial Court.

According to the Minister, Amazon's contracts with vendors and terms of use contained a number of clauses that created a significant imbalance to the vendors' detriment and, as such, constituted restrictive trade practices in violation of Article L. 442-1, I, 2° (then Article L. 442-6, I, 2°) of the French Commercial Code, in particular:

[1] French Competition Authority, Opinion no. 12-A-20 of September 18, 2012 relating to the functioning of the e-commerce sector, para. 8.

— Clauses enabling Amazon to modify any of the contractual terms or to suspend or terminate the contract on a discretionary basis and without prior notice;

— Clauses enabling Amazon to suspend vendors in the event of non-compliance with performance indicators; and

— Most-favored nation ("MFN") clauses compelling vendors to maintain a "parity" between the products offered on amazon.fr and those offered on other online sales channels.

Amazon's defense

Article L. 442-1, I, 2° (then Article L. 442-6, I, 2°) of the French Commercial Code prohibits companies from "*forcing or trying to force a trade partner to comply with obligations creating a significant imbalance between the parties' rights and obligations*". In its defense, Amazon had argued that these provisions were inapplicable to contracts with vendors located outside of France, which represented the majority of vendors selling on amazon.fr. However, this argument was dismissed at the outset by the Court, which recalled that the legislation at stake amounted to overriding mandatory provisions ("*lois de police*").

On the substance, Amazon submitted that the DGCCRF could not merely rely on the existence of an asymmetry between the parties' bargaining power to prove that it had "forced or tried to force" vendors. Amazon further asserted that the possible imbalances created by the contentious contractual clauses were not significant and ultimately benefitted consumers.

The Paris Commercial Court's assessment

First, the Court recalled that a party's attempt to "*force*" another party into significantly imbalanced contractual obligations may be established on the basis of a body of evidence, *e.g.* the "*must-have*" position or economic power of one of the parties, a lack of room for negotiation, and/or the existence of general and unclear clauses in every contract. In the present case, the Court thus ruled that Amazon's "*forcing or trying to force*" vendors could be established, noting in particular that Amazon is the largest online retailer in the world and in France and faces very limited competition (given that brick & mortar stores cannot be included in the relevant market).

Second, the Court conducted an individual assessment of each of the clauses targeted by the DGCCRF's allegations, examining both the way in which these clauses were drafted and their implementation by Amazon in practice.

Unsurprisingly, the Court ruled that clauses enabling Amazon to modify any of the contract terms or to suspend or terminate the contract, on a discretionary basis and without prior notice, created a significant imbalance between the parties' rights and obligations. In this respect, the Court noted that the fact that vendors were free to terminate their contracts with Amazon without providing reasons was insufficient to compensate for the imbalance, as the consequences of termination for Amazon and vendors were in no way comparable. Following a similar reasoning, provisions granting Amazon the discretionary right to "*forbid or limit access to any Amazon website*", "*delay or suspend a sale*", or "*refuse to put up [a product] for sale*" were deemed illegal, as they essentially allowed Amazon, in its capacity as retailer, to limit the competition it faced from vendors by restricting their sales.

Moreover, the Court took the view that clauses relating to vendors' compliance with performance indicators, while not problematic in themselves, were likely to create a significant imbalance, inasmuch as (i) the evaluation criteria of vendors' performance were imprecise and could be unilaterally amended by Amazon without prior notice, (ii) Amazon's assessment of vendors' performance partly relied on extraneous elements (such as consumers' decision to return a product simply because they changed their mind), and (iii) the consequences of non-compliance (in particular the time period during which an account could be suspended) were arbitrary and not proportionate to vendors' alleged shortcomings.

In line with previous case law, the Court also considered that an MFN clause included in Amazon's contracts with vendors, and compelling the latter to "*maintain a parity*" between products offered on amazon.fr and products offered on other online sales channels, notably by providing "*the same quality of information*" regarding resale prices and shipping rates, unduly benefitted Amazon. The Court noted in particular that the drafting of the MFN clause potentially prevented vendors from charging lower resale prices on marketplaces other than Amazon, and that this constituted sufficient grounds to order Amazon to clarify the clause.

On the whole, the Court ruled that seven out of the eleven clauses targeted by the Minister's lawsuit created a significant imbalance between the rights and obligations of Amazon and vendors. Interestingly, Amazon had already agreed to amend some of the sanctioned clauses earlier this year, following investigations from the German and Austrian competition authorities.

Third, the Court evaluated whether, on the whole, the benefits received by vendors from their contract with Amazon could outweigh the clauses favoring Amazon—and concluded in the negative. Although it acknowledged that vendors were able to benefit from the trust of millions of consumers thanks to Amazon's reputation and brand image, and from a number of tools put in place by Amazon to facilitate the management of sales, prices and stocks, the Court stated that Amazon already received adequate consideration for such benefits through commissions paid by vendors.

In addition, the Court held that some of the contentious clauses, especially those relating to performance indicators, could potentially enable Amazon to "*test*" the success of a new product sold by a vendor, and subsequently favor the sale of its own competing product after having matched the vendor's price. In particular, the Court noted that whether or not a vendor could access Amazon's "*buy box*" (*i.e.* the box on the right side of the Amazon product page allowing consumers to add items for purchase to their shopping cart) is determined by an algorithm relying on vendors' compliance with performance indicators, which themselves are discretionarily set by Amazon, thereby making it possible for Amazon to withdraw access to the buy box and make vendors less attractive.

Sanctions and implications

The Paris Commercial Court imposed a €4 million fine on Amazon. While the final amount is significantly lower that what the Minister for the Economy had requested (€9.5 million), it still constitutes the highest fine ever imposed for restrictive trade practices. In addition, the Court ordered Amazon to remove or modify the illegal clauses within the next six months, failing which it will incur a periodic penalty of €10,000 for each day's delay.

Following the 2016 and 2017 rulings against Booking.com and Expedia on similar grounds, the Paris Commercial Court's judgment against Amazon confirms that digital platforms should expect antitrust scrutiny not only from the French Competition Authority, but also from the French executive branch. In this respect, Cédric O, the current Secretary of State for the Digital Sector, emphasized that the government in place was "*firmly committed to the promotion and the defense of a balanced and transparent digital economy for the benefit of French consumers*".[2]

Amazon is the subject of a number of other antitrust probes, most notably from the Italian competition authority since April 2019, and the European Commission since June 2019. According to publicly available information, both investigations concern Amazon's relations with small vendors.

[2] https://www2.economie.gouv.fr/files/files/directions_services/dgccrf/presse/communique/2019/CP-Sanction-Amazon.pdf (free translation).

The FCA Conditionally Approves the Creation of TV Platform Salto

On August 12, 2019, the FCA approved, subject to remedies, the creation of TV platform Salto by TF1, France Télévisions ("FTV"), and Métropole Télévision ("M6") following a referral by the European Commission. Salto is intended to offer television services, including free-to-air digital terrestrial television ("DTT") channels and related (*e.g.* catch-up TV) services and functionalities, together with subscription video on-demand services. Salto's offering will be distributed directly over the internet (known as "over-the-top" or "OTT").

The FCA identified several competition concerns resulting from the transaction. On the upstream markets for the acquisition of broadcasting rights, the FCA has, for the first time, considered the existence of a single market for the acquisition of both linear (*i.e.* real time viewing) and non-linear (*i.e.* on-demand viewing) broadcasting rights (except for recent films). The FCA analysed to what extent the parent companies were likely to use their strong market position on the markets for the acquisition of linear broadcasting rights in order to favour Salto's access to non-linear broadcasting content. While the risk has been eliminated in relation to American and European content, due to the presence of strong competitors, the FCA found that such a bundling strategy would have been possible in relation to original French-language content. On the intermediate markets for production and supply of television channels, the FCA found that the parent companies would have the ability and incentive to limit or eliminate Salto's competitors access to their channels and related services. In this respect, the FCA noted that the parent companies' channels constituted important input for other distributors, representing more than 70% of the national audience. On the downstream distribution market, the FCA identified a risk of cross-promotion between the parents' popular free-to-air DTT channels and the Salto platform. The FCA was also concerned that the common platform would increase market transparency and facilitate coordination between the parent companies, and between the parent companies and their joint subsidiary.

To address the FCA's concerns, TF1, FTV and M6 offered a long list of remedies, which were adjusted following market tests launched by the FCA. Concerning the upstream markets for the acquisition of broadcasting rights, the parent companies committed to *inter alia* limit the amount of video-on-demand content that Salto can purchase from them and limit the possibilities for joint purchases of linear and non-linear rights. In the intermediary markets for production and supply of television channels, TF1, FTV, and M6 will ensure that Salto will not conclude exclusive distribution agreements for free-to-air channels and related services offered by them or third party operators. In addition, the parent companies committed to offer directly, without Salto as intermediary, the distribution of their free-to-air DTT channels along with their associated services and functionalities to any interested third party distributor, on objective and non-discriminatory terms. The commitments further provide that the remuneration due by Salto to its parent companies will be set by two independent experts. The parent companies have also undertaken to limit the cross-promotion risk in the downstream distribution market and to sell advertising space to Salto on the basis of general terms and conditions of sale. Finally, the parent companies have committed to establish a set of individual and collective guarantees to limit the exchange of information to what is strictly necessary. These include the implementation of rules on incompatibilities between a membership in Salto's governing bodies and certain functions within the parent companies, the signature of confidentiality agreements by parent companies' representatives participating in Salto's governing bodies, the limitation of access to information to what is strictly necessary for the exercise of the supervisory board members' duties, and the presence of the trustee appointed by the FCA during discussions related to Salto's acquisition of rights and distribution activities.

With the exception of commitments to prevent the risk of coordination, which will apply throughout Salto's lifetime, the remedies will apply for a period of five years from the date of the decision, and can be renewed for a maximum period of five years. In the event of significant market changes, the FCA may also re-examine some of the remedies.

The Polynesian Competition Authority fines a company for excessive prices for the first time

On August 22, 2019, the Polynesian Competition Authority (PCA) imposed a fine of 235 million CFP francs (about 2 million euros) on the retail division of the Wane group for having imposed excessively high prices for the refrigeration of its suppliers' beverages.[3] This is the first abuse of dominance decision and, more generally, the first contentious ruling by the PCA since its creation in 2016.

In French Polynesia, beverages are mainly sold in refrigerated displays. Historically, the main suppliers of beverages provided retailers with refrigerators when supplying beverages. However, in the 2010s, the main retailers decided to acquire their own refrigerators. In this context, Wane's retail division decided to charge suppliers of beverages for access to its refrigerators. While some suppliers first refused to pay (leading the Wane group to stop displaying their beverages), they gradually accepted Wane's pricing conditions. However, some of them complained to the PCA.

The PCA found that the retail division of the Wane group, one of the largest retailers in Polynesia, enjoyed a dominant position in the French Polynesian markets for the procurement of several types of beverages (in which it competes with other retail chains, such as "*Carrefour*" and "*Système U*").

The PCA then held that Wane's retail division had abused its dominant position through price discrimination and excessive pricing.

First, the PCA considered that Wane's retail division had engaged in first-line discrimination by applying discriminatory pricing conditions to suppliers of beverages until December 2015 without any objective justification. The PCA indeed found that some of the suppliers (including Bevco, a subsidiary of the Wane group) did not have to pay to have their beverages placed in the retailer's refrigerated displays, while others suffered a competitive disadvantage, as they were charged for this service (and the price actually charged varied among the suppliers concerned). The Authority also considered that it did not have to show an actual quantifiable deterioration of the competitive position of the wronged suppliers to demonstrate the effects of the practice. Although price discrimination by a dominant undertaking is prohibited by Polynesian competition law since its entry into force in February 2015, such conduct only became punishable by the PCA in February 2016. Therefore, the PCA did not fine Wane's retail division for such behaviour.

Second, the PCA considered that prices charged between 2016 and 2018 by Wane's retail division for this refrigeration service were excessive. Referring to ECJ case law, the PCA stated that prices can be considered abusive when they bear no reasonable relation to the economic value of the product supplied, *i.e.* (i) when there is a significant difference between the price actually charged by the dominant undertaking and the price which that undertaking would have obtained had there been effective competition in the market, and (ii) if so, when the actual price is unfair, either in itself or when compared to competing products. In this respect, the PCA considered, in particular, that Wane's charging for the use of its

[3] Decision of the Polynesian Competition Authority of August 22, 2019, No.2019-PAC-01.

refrigerators was not justified, as it did not correspond to any identified service, in light of the specificities of the Polynesian market (in which beverages are mostly sold refrigerated). In any event, the PCA found that prices charged were excessive compared to (i) prices charged by other retail chains, (ii) prices charged in another similar geographic market, namely New Caledonia, (iii) prices charged by Wane's retail division before 2016 and (iv) specific costs associated with the provision of this "service" by Wane's retail division. In this regard, the Authority rejected the dominant undertaking's argument that the prices charged reflected the economic value of the service provided to suppliers. This illustrates, once again, the difficulty in establishing a benchmark to determine whether or not prices can be deemed unfair.

As this was the PCA fine for abuse of dominance, the Authority decided "*to emphasize the educational value of this sanction*" and therefore reduced the amount of the fine by 50%. The retail division of the Wane group, along with its parent company, were ultimately fined 235 million CFP francs (about 2 million euros).

The PCA's decision follows a recent decision of the French Competition Authority (FCA) in *Sanicorse* where the FCA imposed a €199,000 fine on the only infectious medical waste treatment company present in Corsica for having abused its dominant position through excessive price increases.[4] The FCA found that Sanicorse had abruptly, significantly and lastingly increased the price of waste disposal services charged to hospitals and clinics in Corsica between 2011 and 2015 without any objective justification. Both decisions follow the recent renewed interest of European competition authorities for excessive pricing.

The French Competition Authority clears Ineos' acquisition of the OGC Nice football club

On August 21, 2019, the French Competition Authority ("FCA") unconditionally cleared the acquisition of the SASP Olympic Gymnast Club of Nice ("OGC Nice") by Ineos,[5] thereby issuing the first merger decision in Europe relating to a professional football club.

Ineos is a multinational chemicals company based in the United Kingdom that also owns a number of participations in the sports sector, including Swiss football club Lausanne-Sport. OGC Nice is a professional sports company created to manage all of the Nice football club's activities linked to its participation in for-profit sporting events.

In its decision, and in line with a market test in which OGC Nice's ten largest competitors participated, the FCA identified for the first time a specific product market for the transfer of professional football players, in which football clubs compete to recruit the best players. Although the exact geographic scope of the market was left open, the FCA noted that competition between football clubs takes place at least on a European-wide basis.

Given this market definition, the FCA held that Ineos' share in the market for the transfer of professional football players would be extremely limited (below 1%), and unconditionally cleared the transaction—after having granted an exceptional derogation to the standstill obligation so that OGC Nice and Ineos could recruit football players before the FCA's clearance decision.

4 Decision of the French Competition Authority of September 20 2018, No.18-D-17.

5 French Competition Authority, Decision No. 19-DCC-160 of August 21, 2019 regarding the acquisition of the SASP Olympic Gymnastic Club of Nice by Ineos.

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