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Main Developments in Competition Law and Policy 2020: France

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Digital antitrust

Introduction

The accelerated digitalisation of the economy has brought about fundamental structural changes: the emergence of world-class platforms, which benefit from network effects and access to considerable financial resources, the rapid shift from physical distribution to online sales, the appearance of new products and services based on technological innovation, algorithms, artificial intelligence or blockchain, etc.

All these phenomena are radically changing the rules of the competitive game in all markets and create new challenges for the French Competition Authority: How can the latter deal with the competitive issues posed by global players forging new business models based on the collection and use of personal data or the creation of worldwide user communities? How can the authority detect infringements committed by means of algorithms, which are more easily concealed than traditional cartels?

It is certain that competition authorities can hardly remain inactive in the face of this structural upheaval. In order to examine a potentially restrictive competing phenomenon, it is crucial to fully and thoroughly unravel the dynamics of the market, its drivers and its stakes.

The French scenario

To develop investigatory tools using algorithms, big data and artificial intelligence (“AI”), the French competition authority (“FCA”) created a digital economy unit in January 2020. This specialised service, reporting directly to the General Rapporteur, is responsible for developing in-depth expertise on all digital issues and participating in investigations on anti-competitive practices involving AI’s aspects. For example, it can assist the investigation services when they are confronted with infringements relating to problems of referencing, classification bias or collusion practices using algorithms. The team is also responsible for developing new digital investigation tools, based in particular on algorithmic technologies to facilitate the work of investigation services. The department is composed of a variety of profiles such as engineers, lawyers, economists and data science specialists.

The creation of this unit is the first step towards a much more capable and responsive competition

authority in the face of the competitive distortions taking place in digital markets. However, it seems that this is still not enough. Once it comes to grasp the market and the restrictions it has brought about, the FCA has to design the most suitable remedies to correct the anticompetitive effects on the market", and it has to do so in a timely manner. This issue is perfectly illustrated in the FCA's decisional practice on several digital matters from last year. Two examples of such decisions (i.e. regarding Google and Apple cases) are discussed below.

1.Google: urgent interim measures

On 9 April 2020, the French Competition Authority ("FCA") ordered Google to negotiate with publishers and news agencies the remuneration due to them under the French law on copyright and related rights for their protected content.

Background

In November 2019, several unions representing press publishers as well as Agence France-Presse (AFP) referred to the authority the practices undertaken by Google on the occasion of the entry into force of the French law of 24 July 2019 on copyright and related rights.

The French law of 24 July 2019 (the "law") transposes the directive on copyright and related rights of 17 April 2019. It entitles publishers and news agencies to authorise or prohibit the reproduction of their publications on digital platforms. This applies in particular to excerpts from articles, photos, videos, etc. that are displayed by digital platforms within their services (Google Search, Google News and Discover for example).

The purpose of the law was to establish fair bargaining conditions between digital platforms on the one hand, and publishers and news agencies on the other. More specifically, it seeks to redefine the distribution of value-added in favour of press publishers vis-à-vis the platforms through the attribution of a related right that must give rise to remuneration according to precise criteria. In exceptional cases, the law also provides for the granting of free licences for certain content.

Google took advantage of this legal provision by deciding that it would no longer display excerpts from articles, photographs, computer graphics and videos within its various services (Google Search, Google News and Discover) unless the publishers gave it permission to do so free of charge.

As a result, the vast majority of newspaper publishers have granted Google licences for the use of their protected content, without any possible negotiation and without receiving any remuneration from Google. Indeed, for publishers and news agencies, search engines are a vital source of revenue. According to the data provided by the plaintiffs, depending on the site, search engines account for between 26% and 90% of the traffic redirected to their pages. It should be noted that in the French search services market, Google's market share is around 90% at the end of 2019. In other words, publishers and press agencies are clearly dependent on it.

This traffic is all the more vital in the covid context. Publishers and news agencies cannot afford to lose any part of their digital readership due to their economic difficulties. In these

circumstances, in parallel with the referral on the merits of the case, the plaintiffs sought interim measures to enjoin Google to enter into good faith negotiations for compensation for the recovery of their content.

The FCA Decision

In order to assess the plaintiffs' demand for interim measures, the authority examined whether the practices notified by the plaintiffs are likely to be qualified as an abuse of a dominant position.

The abuse of dominance

After having established Google's dominant position on the French Market for general services, the authority first considered that Google is likely to have imposed unfair transaction conditions on publishers and agencies.

Second, through its practice, the FCA considers that Google has circumvented the purpose and scope of the law, which was intended to redefine the distribution of added value in favour of newspaper publishers. Indeed, Google used a marginal possibility left by the law by deciding that, in general, no remuneration would be paid for the display of any protected content whatsoever.

The third practice that is likely to have been conducted by Google relates to discrimination. By imposing a principle of zero remuneration on all publishers without examining their individual situations and the corresponding protected content in the light of the precise criteria laid down by the Related Rights Act, Google is likely to have treated economic players in different situations in an identical manner, without any objective justification, and, consequently, to have implemented a discriminatory practice.

The necessity of implementing interim measures

The FCA considered that Google's practices caused serious and immediate damage to the plaintiffs, while the economic situation of the latter is fragile. Indeed, in a context of major crisis in the press sector, Google's practice deprived publishers and news agencies of a resource considered by the regulator to be vital for the continuity of their activities, and this at a crucial moment in the French law's coming into force.

As a result, the Authority issued injunctions. In concrete terms, Google will have to negotiate in good faith with publishers and news agencies that request it, and according to transparent, objective and non-discriminatory criteria, the remuneration due to them for their protected content. Google will have to conduct the negotiations within 3 months of the request to open negotiations from a press publisher and the injunction requires that the negotiations actually result in a remuneration proposal from Google.

Conclusion

These interim measures do not predetermine the decision that will be taken on the merits of the case by the FCA. Moreover, the latter may still be reviewed by the upper judicial bodies and lead

to a preliminary ruling request handed to the CJUE on the interpretation of the Directive. However, it seems clear that Google's practice is not taken lightly by the French jurisdiction. Indeed, Google, which had appealed against the decision, had all its pleas rejected by the Court of Appeal of Paris, which handed down its decision on 8 October. This decision definitively confirms the interim measures ordered by the FCA until a decision on the merits of the case is made.

2. Abuse of economic dependence and anticompetitive agreements: Apple fined EUR 1.1 billion by the French Competition Authority

In a decision dated 16 March 2020, the FCA fined Apple €1.1 billion for several anticompetitive practices regarding the distribution of its products in France. Apple's wholesalers Tech Data and Ingram Micro were fined €76.1 million and €62.9 million respectively.

This decision is a milestone in the decision-making practice of the French Competition Authority as it involves the highest financial penalty ever imposed by the FCA, but more importantly, as it provides a rare and significant example of an abuse of economic dependence, a specific infringement under French legislation which allows the FCA to fine an economic operator for abusive practices without the need for a dominant position to be established.

The FCA Decision

Following a complaint from one of Apple's independent resellers in 2012, the FCA conducted an investigation that revealed the existence of three types of anticompetitive practices committed by Apple within its distribution network, comprising an upstream and a downstream market. On the upstream Apple sells its products to its wholesalers, the global leaders in the wholesale market of electronic products: Tech Data and Ingram Micro. On the downstream market, the distribution of Apple's products is carried out by large retailers and small independent resellers, including the Premium resellers which are specialized in the distribution of Apple's products.

Allocation of products and clients

The first set of practices highlighted by the FCA concerns Apple's strategy consisting of providing its wholesalers with precise instructions on the quantities of products to be supplied to each independent reseller. The implementation of Apple's directives by Tech Data and Ingram Micro resulted in the elimination of all competition on the wholesale market, while preventing those two companies from freely choosing their commercial strategy.

Resale price maintenance

The FCA also highlighted the tech company's conduct consisting of compelling its Premium resellers to apply the same prices as those charged in Apple Stores. To this end, Apple circulated recommended retail prices to its Premium resellers, strictly supervised their promotional operations and set up a price monitoring system entailing for them a risk of being sanctioned.

Abuse of economic dependence

A specific feature of French competition law, the abuse of economic dependence triggered in the past the condemnation of economic operators on three occasions only, along with the imposition of small financial penalties. The Apple case is therefore not only the first decision that relates to an abuse of economic dependence adopted by the FCA in a long time, but it is also the largest fine imposed in this respect.

French competition law prohibits any abuse of economic dependence likely to affect the functioning or the structure of competition on a given market.

The infringement presupposes the demonstration of economic dependence, a requirement which has so far been strictly interpreted by the FCA and the French jurisdictions.

The assessment involves notably the analysis of the circumstances that led to the situation of economic dependence, the possibility for the dependent undertaking to propose similar products, the market share of the supplier and the proportion of the dependent undertaking's turnover achieved with the supplier.

By adopting a rather flexible interpretation of those criteria in the present case, the FCA took into account the very particular situation of Apple as a tech giant in order to establish the existence of economic dependence. In particular, it highlighted that the resellers were required to distribute almost exclusively Apple's products, that the distribution contracts prohibited them up to six months after their expiry from opening stores in Europe with the purpose of selling competing products as well as the absence of any viable possibility to propose distinct products due to the strong attachment of customers to the Apple brand.

In the course of its investigation and after taking a decision on the existence of economic dependence, the FCA identified two specific sets of abusive behaviours.

First, Apple deliberately delayed the supply of some of its key products and engaged in discriminatory practices against resellers, preventing them from properly delivering sales orders to customers. Second, Apple's abusive behaviour consisted of maintaining uncertainty regarding business conditions through the implementation of an unpredictable and discretionary rebate scheme.

According to the decision, this uncertainty was unduly restricting the independent resellers' commercial freedom and was likely to force them out of the market.

Conclusion

At a time when tech giants are frequently at the centre of debates, this decision, by imposing a record €1.1 billion fine on Apple is a powerful signal sent by the FCA.

Taking into account Apple's *extraordinary dimension*, in the words of FCA's president Isabelle de Silva, the French competition watchdog revealed its policy goals in a fast-evolving world by reintroducing the abuse of economic dependence as a valuable tool to preserve the functioning of digital markets in France.

It remains to be seen whether the FCA will take advantage of this infringement and tailor it to the

specific features of the digital economy. In the meantime, Apple has appealed the decision and Paris Court of Appeal will now have to decide whether French jurisdictions are ready to follow the path opened by the FCA.

3. French pharma sector fined for rare collective abuse of a dominant position

On 9 September 2020, the FCA fined three pharmaceutical companies Novartis, Roche and its subsidiary Genentech €444 million for abusing their collective dominance on the market for age-related macular degeneration ("AMD"), which is the main cause of vision troubles for people over 50 years old. The FCA found that the abusive practices were designed to sustain the sales of Lucentis for AMD treatment to the detriment of Lucentis's competitive medicinal product Avastin that is 30 times cheaper.

A finding of collective dominance is not a frequent one in the French (and EU market in general). It may be based on a range of connecting factors and depends on an economic assessment, in particular of the structure of the market in question and the way in which undertakings interact on that market. The simpler and more stable the economic environment, the easier it is for undertakings to reach a common understanding and to coordinate their behaviour by observing and reacting to each other's behaviour.

Background

In 2007, the Genentech laboratory launched a new drug for AMD treatment known as Lucentis. It was licensed to Novartis for distribution outside of the US and was granted EU market authorisation ("MA") in 2007. In parallel, Genentech also developed an anti-cancer drug known as Avastin. It was licenced to its parent company Roche for distribution outside the US and granted MA in 2005 for therapeutic indications in oncology only.

Physicians noticed that Avastin had also curating effects on AMD for patients suffering both from cancer and AMD. As Avastin was about 30 times cheaper than Lucentis, doctors started to administer it "off label". Progressively and although Roche never obtained MA for use of Avastin for other than ontological purposes, this drug started to be used as an AMD treatment only.

The FCA decision

Due to numerous scandals arising from the Mediator healthcare in France, the regulators started to look closer into the conduct of the pharma companies and the safety of the AMD treatment. The FCA then considered that Genentech, Novartis and Roche tried to preserve Lucentis' position and price, by impeding Avastin's off-label use for the treatment of AMD.

Market definition

The FCA analysed the cross-holdings links and controlling interests of Roche in Genentech and non-controlling interests of Novartis in Roche and assessed the contractual links that existed

between the companies, in particular, the license agreements between Genentech and Novartis, for Lucentis, and between Genentech and Roche, for Avastin. Contrary to the Italian Competition Authority which fined the companies under Article 101(1) TFEU, the FCA relied on 102 TFEU to assess the conduct of pharma and Article L. 420-2 of the French Commercial Code.

Although the MA indications for both drugs are different, the European Court of Justice specified in 2018 that Avastin could be considered to be part of the same market as Lucentis. It confirmed that the agreement between Roche and Novartis groups to increase the use of Lucentis could constitute a restriction of competition by object.

The FCA found that the three pharma companies together held a dominant collective position on the market for the treatment of AMD. Taking into account the cross-holding links, the FCA considered that Genentech, Roche and Novartis constituted a single entity through the licencing agreement. It then considered that the single entity had a dominant position on the market for the treatment of AMD where the combined market shares exceeded 90% until Bayer's entry in 2013.

The alleged abuses of collective dominant position

According to the FCA, these close connections prompted the three operators to adopt a policy of joint action on the market, aimed at maintaining the distinction between the two drugs and delaying the development of Avastin compared to Lucentis, whose marketing was highly profitable for the three laboratories.

First, the Authority held that Novartis has implemented, between 2008 and 2013 a communication campaign intended to disparage the use of Avastin in ophthalmology with specialist doctors, patient associations and the general public, to preserve Lucentis' prescription and position. The FCA held that pharmaceutical companies have a duty to communicate objective and comprehensive information to doctors, public authorities and the public in general. The Agency then condemned Novartis for disseminating selective and biased data in comparing Avastin and Lucentis thereby indulging in the risk related to the use of Avastin for AMD treatment.

According to the FCA, these practices reduced the "off label" use of Avastin in ophthalmology, which in turn unduly preserved Novartis' quasi-monopoly position on the market and helped sustain Lucentis' high price. As a side effect, the prices of AMD's treatment of its direct competitor Bayer increased.

For this infringement, Novartis was fined €253.9 million.

Second, the FTA found that the three pharma companies held misleading statements concerning the risks of using Avastin for the treatment of AMD before the French public authorities. This abusive conduct allegedly aimed at delaying the public authorities initiatives to promote the use of Avastin for AMD treatment.

Although Genentech did not directly intervene in Novartis's and Roche's interactions with the French authorities, the FCA considered that it had helped the two other companies coordinate their message to ensure coherent and consistent marketing.

Novartis was condemned to pay €131.2 million fine for this abuse, while Roche and Genentech were fined €59.7 million.

The FCA has increased the amount of the fine imposed to the three companies as it considered that the practices of denigration of a drug towards prescribers and users and influencing public authorities in the pharmaceutical sector are particularly serious.

Conclusion

Interesting developments are yet to come as Novartis and Roche announced that they would lodge an appeal before the Paris Court of Appeal. The main point of the dispute will probably focus on the critical question of standard of proof and the FCA's jurisdiction to interpret medical studies and scientific data. The FCA relied mainly on one of the parties' (Novartis) behaviour to demonstrate a collective abusive practice.

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