LIDC 2021 – Question A – French Working Group

Q8: Tools and types of regulatory intervention to address market power in digital markets

1. The general competence of the Competition Authority, including in the electronic communications sector

In France, the FCA has general competence to ensure that economic operators comply with competition rules, regardless of the economic sector (i.e. the rules apply to all production, distribution and service activities).[1]

In regulated sectors, the FCA and sectorial regulators have concurrent powers to promote competition for the benefit of businesses and consumers. If the FCA's action is in principle limited to *ex-post* intervention on the market, it increasingly relies on its consultative powers to undertake a "review of the competitive situation" of the relevant market and issues "opinions" that can eventually identify failures, or even companies and practices that are likely to be found anticompetitive.[2][3]

The FCA has recently acquired new tools to better address competition law issues specific to digital markets. A department dedicated to the digital economy was created within the FCA in January 2020, which focuses on new issues linked to the development of digital technology, such as the collection and exploitation of data by online platforms.[4] The head of this new department explained at a conference on 4 March that the competition authorities use IT tools such as *web scraping* or searches on the TOR network to gather information on data or algorithms on the Internet to detect potential infringements of competition law.

There are close links between French electronic communications regulator (the "**ARCEP**") and the FCA. Indeed:

- The ARCEP may refer a case to the FCA when it suspects that one or more operators are infringing competition rules[5] or under specific regulatory circumstances;[6] and
- The FCA is obliged to ask an opinion from the ARCEP on any matter falling within the latter's jurisdiction.[7]

In addition, the ARCEP's contribution on the regulation of "structuring digital platforms" – which is based on the main principles of regulation in the electronic communications sector – shows the significant role played by sectorial regulators for the competitive functioning of markets.

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1 See Article L.410-1 of the French Commercial Code.

2 See Article L.462-4 of the French Commercial Code: the FCA can issue an opinion *ex-officio* on any questions relating to competition.

3 The FCA's conclusions can encourage market players to file complaints before the FCA against companies identified in the opinions. For instance, following the publication of opinion No. 18-A-03 on the online advertising sector, Criteo announced that it had filed a complaint against Facebook for practices relating to the exploitation of user data (available at: https://www.criteo.com/news/press-releases/2019/10/criteo-files-fca-complaint-against-facebook/).

4 Press release of the Competition Authority of 9 January 2020.

5 See Article L.36-10 of the French Postal and Electronic Communications Code.

6 See Article L.37-1 of the French Postal and Electronic Communications Code: the ARCEP consults the FCA when it wishes to impose specific ex-ante obligations on operators that exercise a "significant influence" on the relevant market(s). For example, in decision No. 2017-1568 of 21 December 2017, the ARCEP first consulted the FCA which issued an Opinion No. 17-A-14 of 25 October 2017.

7 See Article R.463-9 of the French Commercial Code: the ARCEP will be granted two months to issue an opinion. For example, in decision No. 20-D-02 of 23 January 2020 relating to practices implemented by Orange in the electronic communications sector, the FCA first consulted the ARCEP which issued an Opinion No. 2019-1385 of 30 September 2019.

2. Sectoral regulators and public authorities can also intervene in the field of digital platforms

Sectoral regulators (e.g. media and telecoms) generally intervene on an *ex-ante basis,* although they may have *ex-post* intervention powers (e.g. through dispute settlement procedures) in sectors where specific regulation (often derived from general competition law) applies.

The following examples illustrate the role of sectoral regulators and public authorities in relation to networks and platforms:

- The ARCEP is responsible for regulating the electronic communications, postal and press distribution sectors. It has broad powers to ensure a high degree of competition in the market (it defines the regulations that apply to all or some of the operators, enacts "soft law" such as guidelines or recommendations, investigates and eventually imposes sanctions in case of violations of sectoral regulations...). Its responsibilities include the protection of net neutrality.
- The DGCCRF (which is, among other things, the investigative arm of the Ministry of Economy and Finance) pursues broader objectives than the strict application of competition law, such as the general interest and consumer protection. For example, following an investigation by the DGCCRF, Apple was fined EUR 25 million for an update of its operating system that "capped" the performance of aging devices. The company also had to display a statement on its website for a month.[8]
- The Minister of Economy and Finance also plays an important role: it acts for the protection of the general interest and has the power to summon a company before the Commercial Court of Paris for cases of unfair commercial practices. For example: the Minister filed a suit against Apple and Google in March 2018 on the grounds that several provisions of their app store template contracts were likely to cause significant harm to both developers and the economy in general.[9]

Since August 2020, the FCA has also benefited from the work of the new Digital Regulation Expertise Unit (PEReN),[10] an administrative unit attached to the Ministry of Economy, whose mission is to support the government departments involved in the regulation of digital platforms, in particular by providing them with technical assistance in data analysis. The FCA was the driving force behind the creation of this new service.

Finally, on 31 January 2019, the DGCCRF and the CNIL ('*Commission Nationale de l'Informatique et des Libertés*' - see below) signed a cooperation protocol whose objective is to strengthen the collaboration of these two entities through the possibility of conducting joint controls and to adapt to the new digital challenges, according to an analysis conducted jointly in the field of consumer law and the General Data Protection Regulation ("**GDPR**").

The work of the FCA, sectoral regulators and public authorities is certainly multi-faceted but it helps to define the boundaries of the regulation of market power of platforms in France.

Q1: <u>Competence of antitrust authorities in the field of personal data protection in the case of social networks and other digital platforms</u>

In France, the FCA does not have any specific competences in the field of personal data protection. The independent administrative authority in charge of enforcing compliance with data protection regulations is the *Commission Nationale Informatique et Libertés* ("**CNIL**").

As a result, the CNIL is at the forefront for data-related issues. However, this has not prevented the FCA from being active and developing a rich decisional practice with regard to the collection, use and sharing of data.

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8 DGCCRF, press release of 7 February 2020. Available at: https://www.economie.gouv.fr/files/files/directions_services/dgccrf/presse/communique/2020/CP-Ralentissement-fonctionnement-iPhone200207.pdf.

9 Ministry of Economy, press release of 14 March 2018, available at: https://www.economie.gouv.fr/files/files/directions_services/dgccrf/presse/communique/2018/cp-google-apple.pdf.

10 Decree No. 2020-1102 of 31 August 2020 creating a service with national competence called "Pôle d'expertise de la régulation numérique" (PEReN).

The CNIL has been very active in recent years in sanctioning unlawful behaviour by Google and Amazon for non-compliance with cookie-related legislation, after finding that the search engine Google Search and the website Amazon.fr were storing cookies on the terminals of users residing in France even before any action was taken by them, without users being properly informed and being able to consent to the deposit of cookies.[11] The CNIL also sanctioned Facebook in April 2017 following Facebook's refusal to provide users of its website with information considered essential for the processing of their personal data, such as the identity of the data controller, the purposes of the processing or information on data transfers outside the European Union.[12]

Although issues *strictly* relating to the protection of personal data do not fall within its jurisdiction, the FCA has looked into the collection and use of data by digital players, as well as into the competition issues raised by algorithms. The FCA published a joint study with the Bundeskartellamt on data and its challenges for competition law enforcement in 2016, in order to better understand the issues raised by the increased collection, processing and commercial use of data in digital markets.[13] The FCA is aware of the critical importance of data for online platforms, particularly in the context of its merger control analysis. In February 2018, the FCA examined for the first time a merger between two online platforms: the Axel Springer group (which owns the real estate portal seloger.com) and the Concept Multimédia company (which owns the real estate portal logic-immo.fr). The FCA then took a close look at the data access issue, and in particular the risk of foreclosure of competitors in relation with the acquirer's possession of significant volumes of data.[14]

It is therefore worth considering the allocation of competences between the CNIL, the FCA and other authorities in the area of data: if the debate seems to focus on personal data, what about other types of data? Can we consider that the CNIL's natural competence is limited to personal data and that “other” types of data could therefore call for specific intervention and/or regulation insofar as they are likely to raise their own competition concerns? Such a debate leads to the question of which data fall into the category of “personal data” and which do not (for example, individual energy consumption, data produced by connected cars).

Competition law and privacy issues must therefore be resolved separately, although it cannot be assumed that there is no link between the two. This was recently pointed out by Thomas Kramler, Head of Unit at DG Comp, and is in line with the desired cooperation between independent administrative authorities in France:

- In this regard, the FCA specified in its opinion No. 18-A-03 that "*varying compliance with rules on personal data protection could strengthen or weaken the positions of stakeholders*",[15] i.e. that data protection rules have an impact on competition, which is likely to be taken into account in the FCA’s analysis.
- The FCA could for example rely on the findings of the CNIL in terms of personal data protection to assess the practices of an operator from the point of view of the competition rules.

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11 CNIL, Deliberation No. SAN-2020-012 of 7 December 2020 concerning the companies GOOGLE LLC and GOOGLE IRELAND LIMITED; CNIL, Deliberation No. SAN-2020-013 of 7 December 2020 concerning the company AMAZON EUROPE CORE.

12 CNIL, Deliberation No. SAN-2017-006 of 27 April 2017.

13 FCA and Bundeskartellamt, *Competition Law and Data*, Joint Study, 10 May 2016.

14 Decision No. 18-DCC-18 of 1 February 2018 on the acquisition of sole control of Concept Multimedia by the Axel Springer group, paras. 470-477.

15 Opinion No. 18-A-03 of 6 March 2018 on data processing in the online advertising sector, page 112.

Q2: Determining "market power" in digital markets

1. The historical absence of specific guidelines to assess the market power of platforms

The market power of platforms is not a new topic in the antitrust sphere. Online businesses, because of their peculiarities, have been the subject of heated academic debates in the past twenty years, including in France.[16]

Unlike the Bundeskartellamt which published a working paper in June 2016 dedicated to the market power of platforms and networks,[17] the FCA has developed its understanding of this issue through decisions and opinions concerning digital players and issued as part of its consultative and litigation prerogatives, as well as in merger control.[18]

For example, in the decision accepting the commitments offered by Booking.com in the online hotel reservation sector, the FCA relied on several factors usually mentioned by the economic litterature. In assessing the market power of the booking platform, it considered: (i) market shares; (ii) the multi-sidesness of the relevant market; (iii) the existence of strong network effects (and the risk of a "snowball effect"); and (iv) the existence of economies of scale.[19]

In its recent interim measures decision in the *Google / Publishers* case, the FCA also took into account the experience effects and Google's superior capacity to generate revenue and invest in comparison with that of most of its competitors.[20]

In fact, over the last twelve months, several French regulators and public authorities published contributions on networks and platforms in which they discuss in particular the notion of "structuring digital platforms".[21] In France, like in the European Union and beyond, the debate has indeed shifted to the notion of "structuring platforms" to capture new expressions of the market power of digital platforms.

Market power becomes a *trigger* for intervention by public authorities instead of a *legal standard* to demonstrate an abuse of dominant position.

2. Market power as a criterion to define a "structuring digital platform"

The FCA and the ARCEP have made proposals relying on several criteria and/or factors to identify the "structuring platforms" and the practices that raise competition concerns and are specific to these players. These proposals are similar to the criteria set out in Article 3 of the draft Regulation proposed by the European Commission on 15 December 2020 on contestable and fair markets in the digital sector (which is part of the "Digital Markets Act"), for the identification of "gatekeepers".

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16 For example, Rochet J. and J. Tirole (2003), "*Platform competition in two-sided markets*"; Rochet J. and J. Tirole (2006), "*Two-Sided Markets: a Progress Report*", Rand Journal of Economics 37(3), pp. 645-667; Wauthy X. (2008), "*Competition and regulation in platform markets: an introduction*", Reflets et perspectives de la vie économique 2008/1 (Tome XLVII), pp. 39-54; Maxwell W. and T. Pénard T, "*Quelle régulation pour les plateformes numériques en Europe* ? ", Annales des Mines - Réalités industrielles 2016/3 (August 2016), p. 42-46.

17 Bundeskartellamt, "The Market Power of Platforms and Networks", June 2016.

18 See, for example, Opinions No. 10-A-29 of 14 December 2020 and No. 18-A-03 of 6 March 2018 on online advertising, the joint study by the Authority and the Bundeskartellamt on data and its implications for the application of competition law published on 10 May 2016, or Decision No. 18-DCC-18 of 1 February 2018 on the acquisition of sole control of Concept Multimédia by the Axel Springer group.

19 Decision No. 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector, paras. 112 and 113.

20 Decision No. 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse, para. 171.

21 See for example the contributions published by the French Senate in October 2019, by the Commission des affaires numériques of the Assemblée Nationale in June 2020 or by the ARCEP in September 2020.

2.1. Contribution of the FCA [22]

The Authority proposes a general definition of "structuring platforms", which may be supplemented by guidelines on the three steps of the definition.

A structuring digital platform could be defined as:

- A company that provides online intermediation services for exchanging, buying or selling goods, content or services, and
- Who holds structuring market power:
    - Because of its size, financial capacity,[23] user community and/or the data it holds,
    - Enabling it to control access to or significantly affect the functioning of the market(s) in which it operates,
- With regard to its competitors, users and/or third party companies that depend on access to the services it offers for their own economic activity.

The FCA introduces the notion of "structuring market power" which refers the strategic nature of the platforms' behaviour on the dominated market and on other markets. This notion goes beyond the criteria usually followed to assess market power (for example, network effects, economies of scale…) by taking into account the role in the access to some markets ("gatekeeper" role) and on the functioning of other markets ("regulator" role). The concepts of "entrenched and durable position" and "core platform service"' set out by the European Commission in the draft Regulation are similar to the criteria set out by the FCA ("structuring market power") to identify structuring platforms.

According to the Report submitted by the *Commission des Affaires Economiques* before the *Assemblée Nationale* on 24 June 2020, the criteria for identifying structuring digital platforms communicated by the FCA are the following: "*access to the data needed to enter and/or grow on the market, the existence of a dominant position in one or more neighbouring markets, vertical integration and activity in neighbouring markets, financial capacity, access to financial resources, the existence of massive network effects, the existence of multi-sided markets, the degree of data portability and interoperability, the ability of the operator to define the market rules itself or its ability to place the regulator in a strong position of information asymmetry*".

The FCA appears to have relied on these criteria in its recent decisions concerning Google and Apple: it considered that some market players depended on the two companies and draws the consequences of the circumstance that they are unavoidable to access the relevant markets or their functioning.

2.2. ARCEP contribution

The ARCEP proposes a general definition of "structuring digital platforms" which is partly based on the criteria used by the Commission to identify operators with significant individual power in the electronic communications sector.[24]

It relies on a body of "primary" and "secondary" evidence to determine if an actor falls within the definition of "structuring digital platforms".

i. <u>Main evidence:</u>
    - The platform is unavoidable, either because it has "bottleneck power", or because of its downstream positioning which entails a form of economic dependency of other actors;

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22 Contribution of the *Autorité de la concurrence* to the debate on competition policy and digital challenges, published on 21 February 2020 .

23 Webinar with Isabelle de Silva, Nicolas Petit and Alexandre de Steel of 11 June 2020: the FCA President mentioned the financial capacity (i.e. the possibility of using the market to raise resources) and the level of profitability of the activity as factors that can distinguish the GAFAs.

24 ARCEP, "Plateformes numériques structurantes – Eléments de réflexion relatifs à leur caractérisation », December 2019.

- The platform has a certain size, defined in terms of the number of unique users of the platforms;
- The platform is integrated to an ecosystem controlled by the group to which it belongs and this ecosystem enables a leverage effect from a sector to another.

ii. Secondary evidence:

- The platform is a key gateway to a range of digital content ("gatekeeper");
- It has access to significant volumes of qualitative data;
- Market shares of the platform;
- Financial value of the company that owns the platform.

The proposed approach is different from a classic dominance assessment, by proposing a "definition essay with an operational scope". The criteria laid down by the ARCEP overlap with those set out by the European Commission in the draft Regulation of 15 December 2020, in particular the "secondary" factors of Article 3, paragraph 6 (for example, the financial value of the company, the number of users, the size, activities and position of the core platform services' providers). The ARCEP had responded to the European Commission's consultation on the Digital Markets Act.[25]

The ARCEP published another document in September 2020 in which it shared its thoughts on "Remedies to issues raised by digital structuring platforms".

Q4 : Can a "market" be defined in competition law for free services?

The question of the definition of a market for free services, like the nature of two-sided markets, is not a new subject in the antitrust sphere, whether at French, European or international level. These subjects, which are inextricably linked, have been the subject of an abundant economic and legal literature.[26]

In the same way that the European Commission now accepts a market for free services, for example among users of search engines, the FCA has since 2010 developed a decisional practice which shows that it is possible to define a market even in the case of the free provision of goods or services:

- As regards the free print media, the FCA considers that "*it is relevant to draw a distinction between free print media with editorial or informative content and free advertising print media*";[27] and
- It also considered in a recent case relating to Google that the market for general search services is likely to constitute a relevant market, in particular because "*the decision to provide a service without direct financial consideration is the result of a choice by undertakings, and that there is nothing to prevent an undertaking from providing a service without receiving payment from Internet users in return*".[28]

Finally, in the audiovisual sector, the Authority seemed to accept in its Opinion No. 19-A-04 a distinction between the free television and pay television markets,[29] in accordance with the practice of the European Commission, which recognises that "*the distribution of pay television and free television constitute distinct product markets*".[30] However, it did not make such a distinction in the context of the decision to authorise the Salto joint venture.[31] To

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25 ARCEP, « Arcep's contribution to the public consultation on the DSA Package and the New Competition Tool – An asymettric ex-ante regulation of structuring digital platforms for open digital infrastructures", September 2020.

26 See for example E. Malavolti and F. Marty, "La gratuité peut-elle avoir des effets anticoncurrentiels", OFCE, January 2013.

27 See for example decision No. 18-DCC-18 of 1 February 2018 relating to the acquisition of sole control of the company Concept Multimedia by the Axel Springer Group, para. 109.

28 Decision No. 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse, paras. 137 and seq.

29 Opinion No. 19-A-04 of 21 February 2019 on a request from the Committee on Cultural Affairs and Education of the French National Assembly (Assemblée Nationale) for an opinion on the audiovisual sector, para. 188.

30 Decision of the European Commission of 18 July 2007, case M.4504 SFR/Télé 2 France, para. 45.

31 Decision No. 19-DCC-157 of 12 August 2019 on the creation of a joint-venture by France Télévisions, TF1 and Métropole Télévision. The decision has been appealed (available at:

date, its decisional practice in the audiovisual sector therefore differs from its decisional practice on online markets, where it considers that the fact that a service is free of charge does not prevent the delimitation of a relevant market within the meaning of competition law.

Q5: Sector enquiries on online advertising by antitrust authorities

The FCA has noted the growth and importance of the online advertising market in recent years and has published two opinions on this subject, in 2010[32] and 2018.[33]

In its 2010 opinion, the FCA carried out a general study of the market at the end of which it concluded that there was a market for online advertising, distinct from the market for offline advertising.[34] In this opinion, the FCA further delineated the online advertising market, distinguishing between "*search*" advertising operating via search engines and "*display"* advertising, *i.e*. ads that appear via blocks, banners and wrappers integrated into the content of a website.[35]

In its 2018 opinion, the FCA focused on the more specific issue of data exploitation in the advertising sector, noting the key value of data for players in this market. It noted the strong overall growth of the online advertising sector, while emphasising that this growth was mainly captured by a few stakeholders such as Google and Facebook. In this respect, the FCA highlighted the significant competitive advantages of these two players over their competitors, namely (i) the management of very large, diversified volumes of data that are frequently updated, and (ii) the presence of these two players on both the publishing and technical intermediation levels.

The FCA therefore concluded that the online advertising market has a fragile competitive equilibrium.[36] It should also be noted that, following the 2018 opinion, several contentious investigations were opened by the FCA in the online advertising sector, several of which are expected to be concluded in 2021.[37]

Q6: Regulators' treatment of data collection: the FCA's approach on the use of general terms and conditions and data collection

1. The absence of a "Facebook case" in France

Unlike in Germany, where the Bundeskartellamt found that Facebook had breached competition rules due to violations of data collection rules (a decision that was subsequently suspended on appeal by the Düsseldorf Court pending a decision on the merits, and itself overturend by the German Federal Court of Justice the 23 June 2020), there is no similar precedent in France regarding digital players.

The Authority clarified in its joint study with the Bundeskartellamt on data and competition (2016) the conditions under which data processing could constitute a competition concern:

- Privacy policies could be considered from a competition standpoint whenever these policies are liable to affect competition, notably when they are implemented by a dominant undertaking for which data serves as a main input of its products or services; and

https://www.autoritedelaconcurrence.fr/en/decision-de-controle-des-concentrations/regarding-creation-joint-venture-france-televisions-tf1-and). The referral decision by the European Commission had adopted the free/pay distinction, see decision of the European Commission of 18 March 2019, case M.9040 France Télévisions/Métropole Télévisions/TF1/JV, para. 27.

32 Opinion No. 10-A-29 of 14 December 2010 on the competitive functioning of online advertising.

33 Opinion No. 18-A-03 of 6 March 2018 on data processing in the online advertising sector.

34 Opinion No. 10-A-29 of 14 December 2010 on the competitive functioning of online advertising, para. 136.

35 Ibid, para.160.

36 Opinion No. 18-A-03 of 6 March 2018 on data processing in the online advertising sector, see summary.

37 Press release of the Competition Authority on the priorities for 2021.

- A close link between the dominance of the company, its data collection processes and competition on the relevant markets could justify the consideration of privacy policies and regulations in competition proceedings.[38]

2. The FCA's rich decisional practice on the use of certain data by dominant operators (excluding digital networks and platforms)

In an Opinion No. 10-A-13,[39] the FCA specified the restrictions of competition that could result from the cross-usage of customer datasets (when the operator is active on several distinct or related markets). In short, the FCA takes into account:

- The conditions under which the data set was constituted;
- The replicability of the dataset by competitors under reasonable conditions;
- The likelihood that the use of the dataset would result in a significant competitive advantage.

Based on this opinion, the FCA adopted several important decisions, in particular in the energy sector. For instance, in an interim measures decision No. 14-MC-02, the FCA ordered GDF Suez to disclose parts of its database relating to consumers with regulated gas tariffs (GDF Suez was the former monopolistic gas supplier). The FCA found that:

- GDF Suez used the database of customers on regulated tariff to offer them deals on gas and electricity;
- The advantages gained through this behaviour cannot be replicated under reasonable conditions, since no database exists that would allow competitors to precisely locate gas consumers and know their consumption level, in order to propose them offers that are better suited to their profile;
- There was a high risk of market pre-emption.

3. The FCA's decisional practice on the terms of use of services offered by platforms and networks

Since 2010, the FCA has on several occasions specified the conditions for the legality of the establishment and application of the terms of use of Google's services in the advertising market, in sanction, interim measures and commitments decisions. It particularly insists on the predictability and non-discriminatory application of the terms of use.

In the Navx case,[40] the FCA considered that the AdWords content policy concerning roadside bypass devices was not implemented in a transparent and objective manner and had led to several differences in treatment between advertisers. As such, the content policy was likely to violate the prohibition of abuses of dominant position and led Google to offer commitments to make the operation of its AdWords service more transparent and predictable for users.

More recently, in the Gibmedia case,[41] the FCA ultimately sanctioned Google for not having complied with the commitments made in 2010. Indeed :

- It considered that the Google Ads operating rules imposed by Google on advertisers were established and applied in non-objective, non-transparent and discriminatory conditions.

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38 Bundeskartellamt and French Competition Authority, Joint Study on Competition Law and Data, 10 May 2016, pp. 23-24.

39 Opinion No. 10-A-13 of 14 June 2010 on the cross-usage of customer datasets.

40 Decision No. 10-MC-01 of 30 June 2010 on the request for interim measures submitted by Navx; Decision No. 10-D-30 of 28 October 2010 on practices implemented in the online advertising sector.

41 Decision No 15-D-13 of 9 September 2015 on the request for interim measures by the company Gibmedia (rejected); Decision No 19-D-26 of 19 December 2019 on practices implemented in the online search advertising sector.

- The opacity and lack of objectivity of these rules would make it very difficult for advertisers to apply them, while Google would have full discretion to change its interpretation of the rules in a way that is difficult to predict, and to decide accordingly whether sites comply with them or not. This would allow Google to apply them in a discriminatory or inconsistent manner.

The FCA imposed the following sanctions:

- A EUR 150 million penalty;
- A series of injunctions to clarify the terms of use of its service;
- The introduction of mandatory annual training for relevant employees; and
- The communication of reports detailing the measures taken by Google and the complaints received from users.

It results from the above that the FCA has extensive powers to require the operators concerned to modify the terms of use of their services.

Finally, in a recent decision No. 21-D-07 of 17 March 2021, a request for interim measures against Apple was filed before the FCA which led it to assess "*the freedom of the dominant undertaking to define access and maintenance rules of the digital platform*". The FCA applies its traditional decisional practice to so-called "structuring" platforms" (it refers to its contribution of 19 February 2020) and thus states that "[t]*he principle of commercial freedom also applies to so-called "structuring" platforms, which have considerable market power in the market in which they are primarily active, but also in neighbouring markets, because of their status as gatekeepers,* ***provided that the rules governing access or maintenance of economic operators to or on these platforms do not have the purpose or effect of restricting competition***".[42]

It specifies that the dominant operator is "*free to define rules providing additional protection for Internet users compared with what is otherwise required by the regulations*" but must not "*direct the economic model of the economic operators listed on its platform, limit their freedom of enterprise, and influence the quality and diversity of the offer open to Internet users*" by means of anticompetitive practices.[43]

Q7: Parity clauses, market power and special liability of dominant firms in the case of digital platforms

The most-favoured-nation clause is the clause whereby the supplier undertakes to pass on automatically to a customer any more favourable conditions that another customer would subsequently obtain.[44] As a result, the customer automatically obtains the most favourable tariffs granted by the supplier to other customers, leading to a kind of non-discrimination obligation for the supplier. Most-favoured-customer clauses are known as "parity clauses" in the hotel sector.

The "competitiveness clause", or "competing offer clause", or "English clause", is the one "*requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it*",[45] or the clause by which a supplier commits towards a customer to match its price to the lowest price charged by any competitor at a given time,[46] which implies that the supplier is informed of the prices charged by its competitors, and hence, in practice, by the buyer.

The English clause can be viewed either under competition law, where it is assessed on the basis of its anticompetitive effects (**1.**), or under "restrictive practices" law, where it is prohibited as such ("*per se*") (**2.**).

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42 Decision No. 21-D-07 of 17 March 2021 on a request for interim measures filed by Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil and Achat Media, and Syndicat des Régies Internet associations in the sector of mobile applications advertising on iOS, para. 136.

43 Decision No. 21-D-07 of 17 March 2021 on a request for interim measures filed by Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil and Achat Media, and Syndicat des Régies Internet associations in the sector of mobile applications advertising on iOS, paras. 137 and 138.

44 Lamy Droit économique,para. 760.

45 European Commission, Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1-46, para. 129.

46 Lamy Droit économique, para. 760.

1. Effects-based analysis from the perspective of competition law

The English clause clearly constitutes a vertical agreement between the supplier and the distributor in that it results from a vertical contract between two parties located at a different level of the production and distribution chain. The European Commission considers that it *"can be expected to have the same effect as a single branding obligation, especially when the buyer has to reveal who makes the better offer*".[47]

It can also be an abuse of dominance when it is imposed unilaterally.

The competitiveness clause may also produce horizontal effects when distributors agree to generalise its use to all their customers. Indeed, if each of the distributors in a market applies this clause, any price reduction implemented by one of them will result in the alignment of competitors on this lowered price, depriving of effect such a reduction for the person who implemented it[48].

Competitiveness clauses can also increase market transparency: the application of the clause can give the customer who benefits from it valuable information on the price level supported by its competitors.

In an opinion of 2003, the *Conseil de la concurrence*, the predecessor of the FCA, gave its opinion on the offer to contract made by a lead insurer to insurers wishing to join a pool. This offer included a "*most favoured insurer clause, under which the most favourable investment conditions obtained by one or more participating co-insurer(s) apply to the whole co-insurance*".[49]

The *Conseil* considered that "*the fact that an insurer accepts the conditions to enter into a contract offered by the lead insurer constitutes an agreement that falls within the scope of Article L. 420-1 of the Commercial Code. By extending to all insurers' offers the conditions obtained by only one of them, the clause substitutes the conditions obtained by a company to the assessment that each company in the grouping makes of its costs, its selling price and, more generally, its offer, when applying to join the grouping. In doing so, the clause implements a practice likely to restrict competition on the market by favouring an artificial increase in prices to the detriment of their free determination by market forces*".[50]

More recently, the FCA ruled on the lawfulness of parity clauses included in the referencing contracts of online hotel booking centres.

The online booking platforms Booking.com, Hotel Reservation Services (HRS) and Expedia had, from 2012 to 2015, imposed clauses granting the automatic benefit to the said platforms of the advantages in terms of rate, number of nights and conditions of the offer (booking conditions, inclusion or not of breakfast, etc.) granted by the hotels to the competing platforms, as well as on all other distribution channels (online and offline), among which the hotel's own distribution channels (website, telephone, email, at the hotel desk, etc.).

As a result, the offer made by the platforms in question was necessarily the most advantageous for the consumer, even if the latter went directly to the hotel.

The FCA found that Booking.com had a market share above 30% in France and was considered to be dominant on the European market.[51] It also found that the parity clauses were likely to stifle competition between online travel agencies *(*OTAs): "*parity clauses break the link that usually exists between the prices charged by an operator (in this case the level of commission required by Booking.com's from the hotel) and the level of demand for its services (in this case the number of bookings made on Booking.com), reducing price competition between*

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47 European Commission, Guidelines on Vertical Restraints, OJ C 130, 19.5.2010, p. 1-46, para. 129.

48 Competition Commission, opinion of 25 June 1981 on the competitive situation in the fertiliser production and marketing sector, BOCCRF 12 Dec. 1981.

49 *Conseil de la concurrence*, Opinion No. 03-A-19 of 17 November 2003 relating to a request from the Fédération française des courtiers d'assurances et de réassurances concerning the conditions for negotiating co-insurance contracts for industrial risks.

50 *Conseil de la concurrence*, Opinion No. 03-A-19 of 17 November 2003 relating to a request from the Fédération française des courtiers d'assurances et de réassurances concerning the conditions for negotiating co-insurance contracts for industrial risks.

51 Decision No. 15-D-06 of 21 April 2015 regarding practices implemented by Booking.com B.V., Booking.com France SAS and Booking.com Customer Service France SAS in the online hotel booking sector, para. 101.

platforms",[52] "*these clauses also entail risks of exclusion of small and new entrant platforms"*; *"the parity clause prevents competitors [...] from attracting internet users by offering lower commissions*".[53]

In order to adress the restrictions of competition identified, the FCA, in coordination with the European Commission and the Italian and Swedish competition authorities, made binding the commitments offered by Booking.com to modify the parity clause on prices and to remove any clause imposing parity obligations in terms of room availability or commercial conditions, not only in relation to competing platforms but also to hotels' direct offline sales channels and part of their online sales channels.

In the same case, after disjoining the practices implemented by HRS and Expedia, the FCA, in a separate decision, rejected the referral on the grounds that other national competition authorities had dealt with the same facts and, secondly, for the other complaints raised, for lack of evidence.[54]

2. The *per se* approach under the "restrictive practices" law

The most-favoured-customer clause may be considered from the point of view of the provisions specifically prohibiting it as such on the one hand (**2.1.)**, or from the point of view of the provisions on significant imbalance in the rights and obligations of the parties on the other hand (**2.2.**).

2.1. The prohibition of most-favoured-customer clauses as such

The French Commercial Code includes provisions specifically prohibiting the most-favoured-customer clause as such, in the following terms: "*Shall be void any clauses or contracts providing for any person engaged in production, distribution or service activities the possibility of benefiting : (b) Automatically from more favourable conditions granted to competing undertakings by the co-contracting party*".[55]

This article therefore prohibits an economic operator from requiring its partner to grant it the same advantages as competitors.

This sanction was introduced by the Law on the modernisation of Economy in 2008[56] in the former Article L.442-6 II. d. of the French Commercial Code, now Article L.442-3, to accompany the abolition of the ban on discrimination introduced by the same law. The most favoured customer clause indeed produces a similar effect by requiring the contracting party to treat its competing customers equally.

This text has also been applied in the online hotel booking sector, first before the *Commission d'examen des pratiques commerciales* ("**CEPC**") in 2013. Several organisations representing hotel sector professionals questioned the CEPC about the validity – with respect to Article L.442-6 II d. of the French Commercial Code mentioned above – of clauses by which the hotel undertakes to provide the hotel booking website with rates that are equal to or more advantageous than the rates and conditions available from the hotel (directly or via its website or its call centres), and also with any competitor of the central reservation site (parity of rates and conditions), and that the rooms available for reservation on the website concerned are at least as favourable as those provided to any competitor, this commitment sometimes including the hotel itself (parity of availability).

The CEPC considered that the conditions referred to in this provision of the French Commercial Code may be related to price or not, so that all parity clauses, whether they relate to tariffs, availability or other conditions, are null and void as soon as they provide for an automatic alignment with the more favourable conditions granted to competitors.[57]

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52 Paragraph 115 of the decision.
53 Paragraph 123 of the decision.
54 Decision No. 19-D-23 of 10 December 2019 regarding practices implemented in the online hotel booking sector.
55 Article L. 442-3 of the Commercial Code.
56 Law No. 2008-776 of 4 August 2008 on the modernisation of Economy.
57 Commission d'examen des pratques commerciales (CEPC), Opinion No. 13-10 on the commercial relations of hoteliers with the companies operating the main hotel booking sites.

Secondly, in 2016, the Paris Commercial Court applied this provision to the parity clauses applied by Booking.com, at the initiative of the Minister of Economy.[58]

After recalling that the FCA's decision of 21 April 2015 making the commitments proposed by Booking.com binding did not entail a finding of an anticompetitive practice or acknowledgment by Booking.com of the unlawfulness of its practices, that the legal basis of the action is not the same, that the purpose of the Minister's action is to have past clauses sanctioned, declared void and the imposition of a civil fine, the court considered that the challenged clauses, insofar as they allow Booking.com to ensure that it automatically obtains more favourable conditions than those applied through other distribution channels and to Booking.com's competitors, infringe the provisions of Article L.442-6 II d of the French Commercial Code. It ordered Booking.com to put an end to these practices and declared the clauses null and void.[59]

The Paris Court of Appeal also ruled on the conditions of application of the former Article L.442-6 II d of the French Commercial Code in the online hotel booking sector, on the initiative of the Minister of Economy.[60]

The action was brought against Expedia, Hotels.com and other online travel agencies operating hotel search engines. The investigation carried out by the DGCCRF revealed that the contracts included price and non-price parity clauses, whereby the hotel not only undertook to grant to the customer the most favourable rates and other conditions otherwise granted (directly or indirectly) by the hotel, but also to grant him rates and conditions at least 25% or 20 euros lower than the lowest rate.[61]

The Minister requested the nullity of these clauses.

The court found that the companies benefited not only from the lowest rate charged by the partner hotel on its own website or in the context of direct sales of its nights, but also from any additional benefits, such as upgrades, free breakfast, more flexible cancellation conditions, loyalty benefits.

The court considered that the clause exceeded the scope of Article L.442-6 II d in that it extended to the most favourable conditions granted by the hotelier itself, which is not covered by Article L.442-6 II d, which only covers the conditions granted to competing companies. The clause is therefore contrary to Article L.442-6 II d, but only insofar as it aims to align it with the best conditions granted to third party competitors.[62]

2.2. Prohibition of most-favoured-customer clauses creating a significant imbalance in the rights and obligations of the parties

The imbalance in the rights and obligations of the parties also makes it possible to sanction the most favoured client clauses.

Under Article L. 442-6 I 2°, now L.442-1 of the French Commercial Code: *"I. – Any producer, trader, or service provider shall be held liable and obliged to remedy the damage caused in the course of business negociation, the conclusion or the execution of a contract for the following actions: /.../ 2) To submit or attempt to submit a trading partner to obligations creating a significant imbalance in the rights and obligations of the parties"*.

In the context of the nullity action brought by the Minister of the Economy before the Paris Commercial Court, which gave rise to the above-mentioned judgment in 2016, the court assessed the lawfulness of the parity clauses applied by Booking.com with regard to the prohibition of significant imbalance in the rights and obligations of the parties.[63]

The clauses in Booking.com's general terms and conditions of service enabled it to ensure that the hotel owner automatically obtained the more favourable terms and conditions granted by Booking.com, not only to other distribution channels and competitors of Booking.com, which contravene the provisions of the former Article L442-6 II of the French Commercial Code, but also to those implemented by the hotel itself, which the Minister

58 Paris Commercial Court, 29 November 2016, RG n°2014027403.
59 Paris Commercial Court, 29 November 2016, RG n°2014027403.
60 Paris Court of Appeal, 21 June 2017, RG n°15/18784.
61 Paris Court of Appeal, 21 June 2017, RG n°15/18784.
62 Paris Court of Appeal, 21 June 2017, RG n°15/18784.
63 Paris Commercial Court, 29 November 2016, RG n°2014027403.

deems constituting a violation of Article L.442-6 I 2 of the French Commercial Code – now Article L.442-1 of the French Commercial Code – which deals with significant imbalance in the rights and obligations of the parties.

The court considered that the parity clauses are likely to fall within the scope of Article L442-6 I 2 of the French Commercial Code, as the significant imbalance is characterised by a lack of negotiation insofar as the price parity and availability clauses are systematically included in the same terms in all the contracts signed between Booking.com and the hoteliers, at the cost of excessive contractual concessions. In addition, the burden was on Booking.com to prove that other clauses in the contract compensated for the significant imbalance which resulted from the practice, which it did not do in this case.

Despite the fact that the FCA accepted the parity clause applied by Booking.com as part of its commitments, the court found that the effects of the clause *"show that the obligations of the parties are significantly imbalanced and that the clause, taking into account the general balance of the contract, is contrary to Article L. 442-6 I 2 of the French Commercial Code"*.

The court ordered Booking.com to put an end to the practices in question and declared the clauses null and void.

In 2017, the Paris Commercial Court was again called upon to rule on parity clauses, this time on the initiative of a hotel restaurant against the central booking system Relais & Châteaux.

The contract included a price parity clause *"whereby the member undertakes to advertise on the chain's website the best available rate for an equivalent length of stay, even if obtained through a direct booking"*. The hotel restaurant requested that the clause be declared null and void under Article L. 442-6-2 of the French Commercial Code *"on the grounds that it has no counterpart and creates a discretionary power that is a source of significant imbalance between the parties"*. Noting the absence of consideration, the court declared the clause void.[64]

In the abovementioned judgment of 17 June 2017, the Paris Court of Appeal was also called upon to rule on the lawfulness of parity clauses in the light of the provisions of the French Commercial Code on significant imbalance in the rights and obligations of the parties.[65]

It considered that the rate parity and availability clauses contained in the contracts between hoteliers and companies of the Expedia group characterised a significant imbalance in the rights and obligations of the parties. It fined the companies of the group EUR one million and ordered them to put an end to the practice of mentioning the clauses in their contracts signed with the platform's member hotels.

However, this judgment was overturned on this point by the Commercial Chamber of the French Supreme Court (*Cour de Cassation*) in 2020.[66] According to the Commercial Chamber, *"In order to hold that the so-called 'last available room' clause, correlated with the price, non-price and promotional parity clause, leads to a significant imbalance between the rights and obligations of the parties, the judgment held that this clause obliges the hotelier who has rooms still available to sell them through the companies of the Expedia group. By ruling as such, in spite of the fact that the clauses relating to the last available room only imposed on hoteliers to allow the reservation of this room through the channel of the companies of the Expedia group under the conditions provided for other channels, the Court of Appeal, which disregarded the will expressed by the parties in the disputed clauses, violated the aforementioned text.*[67]

2.3. Sectoral ban *per se* :

In 2015, the "Macron law"[68] introduced the prohibition of any parity clause, restricted or extended, in the Tourism Code (Subsection 2: Relations between hoteliers and online booking platforms).

This text imposes the use of the agency contractual model and prohibits clauses limiting the hotelier's pricing freedom in the following terms: *"the hotelier retains the freedom to grant the client any discount or pricing advantage of any kind, any clause to the contrary being deemed unwritten"*.[69] The text is of international public

64 Paris Commercial Court, 28 March 2017, No. 2015000203.
65 Paris Court of Appeal, 21 June 2017, n°15/18784.
66 French Supreme Court, Commercial Chamber, 8 July 2020, n°17-31.536.
67 French Supreme Court, Commercial Chamber, 8 July 2020, n°17-31.536.
68 Law No. 2015-990 of 6 August 2015 for growth, activity and equal economic opportunities.
69 Article L. 311-5-1 of the Tourism Code.

order nature*: "This subsection applies regardless of the place of establishment of the online reservation platform, provided that the rental is made to a hotel established in France"*[70]. It is also immediately applicable, including to current contracts: *"Contracts between hoteliers and online reservation platforms concluded before the publication of Law No. 2015-990 of 6 August 2015 for growth, activity and equal economic opportunity cease to have effect as soon as the same law comes into force".*[71]

The fact that a legal representative of the online reservation platform operates without a contract concluded in accordance with the requirements of Article L.311-5-1 is punishable by a fine of 30,000 euros, which may be increased to 150,000 euros if it is a legal person.

On 9 February 2017, the FCA published an assessment of the commitments made by Booking.com.[72] It found that more hoteliers were differentiating their rates across online hotel booking platforms. This price differentiation was an initial development in the sector, but there were no other external signs of increased competition between online travel agencies (market share, quality of the offer, changes in commission rates).

On 20 June 2018, an information report submitted on behalf of the Senate's *Commission des affaires économiques* by the "tourism" working group has highlighted, through hearings and written contributions from hoteliers, the generally satisfactory nature of the normative developments in terms of parity clauses linking hoteliers to hotel booking platforms. Indeed, it is recorded that *"The hotel unions emphasise the difference between Europe and France in the share of direct bookings in the total hotel booking market in order to consider that the ban on the price parity clause has had a beneficial effect (62.8% compared with 55.1%). (...) According to the data provided (...) by the national group of independents, after the adoption of the ban on the price parity clause, almost 59% of hotels offered lower rates directly than through Booking.com, compared to 31% before".*[73] According to the report, the FCA's action and the Macron Law have *"encouraged hoteliers to better control their commercial policy", "probably contributed to a relative stabilisation of the rate of intermediation fees"* and *"enabled hoteliers and platforms to improve their relationship*".[74]

Q9: Comparison portals, the role of competition authorities in consumer protection and other intervention tools

1. Competition law and the role of the FCA regarding comparison portals

The FCA is seeking to address new issues related to the development of digital platforms and online comparison portals that offer intermediation services.

The FCA controls and sanctions infringements from the traditional angle of competition law: cartels by assessing the effects of an agreement, or abuses of a dominant position via exploitation and exclusionary abuses ("gatekeeping" role),[75] or the control of concentrations of all economic players by evaluating the effects of a merger or acquisition.

The FCA has however demonstrated its ability to deal with new behaviours by using innovative reasoning or by applying well-established solutions to new services, such as online advertising services (Google/Gibmedia decision[76]).

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70 Article L. 311-5-4 of the Tourism Code.

71 Article L. 311-5-4 of the Tourism Code.

72 https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/9-fevrier-2017-plateformes-de-reservation-hoteliere.

73 Information report on behalf of the *Comité des affaires économiques* by the "Tourism" working group, on tourist accommodation and digital technology, by Viviane ARTIGALAS and Patricia MORHET-RICHAUD, Senators.

74 Information report on behalf of the *Comité des affaires économiques* by the "Tourism" working group, on tourist accommodation and digital technology, by Viviane ARTIGALAS and Patricia MORHET-RICHAUD, Senators.

75 Decision No. 21-D-04 of 24 February 2021 regarding practices implemented in the publishing and sales of professional software sector.

76 Decision No. 19-D-26 of 19 December 2019 regarding practices implemented in the sector of online search advertising sector; press release available at: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-hands-down-eu150m-fine-abuse-dominant-position.

However, no specific competence has been attributed to the FCA outside its traditional scope of action with regard to comparison portals.

The FCA has nevertheless had the opportunity to mention price comparison websites in its Opinion No. 12-A-20 of 18 September 2012 on the competitive operation of e-commerce. In this opinion, the FCA indicated that by allowing better price comparison, price comparison sites can reinforce the competitive pressure exerted by e-commerce. The FCA then identifies the characteristics of price comparison sites, the way they operate, the competitive risks they present and discusses a move towards self-regulation of these comparison sites as well as avenues for improvement. The competitive risks were qualified by the FCA as being limited. Finally, the FCA emphasised that the concerns raised by these sites were more related to consumer law than to competition law.

2. Consumer law as a tool for understanding the practices of comparison portals

The French Consumer Code provides a definition of online platform operators,[77] which has made it possible to introduce a general information obligation for these operators that varies according to the nature of the activity of the platform concerned.

This article covers, inter alia, "*any online platform operator whose activity consists of providing information enabling the comparison of prices and characteristics of goods and services offered by professionals, the information provided to consumers concerning the elements of this comparison and what is advertising within the meaning of Article 20 of Law No. 2004-575 of 21 June 2004 on confidence in the digital economy*".

The regulatory part of the French Consumer Code specifies the nature of the activity online goods and services comparison and stipulates that "*the provision of online information allowing the comparison of prices and characteristics of goods and services is understood to mean the activity of sites comparing goods and services and allowing, where appropriate, access to the sites for the sale of these goods or the provision of these services*".[78]

This also applies to online marketplaces which offer, as their main activity, the comparison of goods or services, whether sold by themselves or by third parties, and to any person who uses the terms "comparator" or "comparison" for his or her commercial activity by electronic means.

Comparison portals are therefore subject to a certain number of obligations (compulsory information on the site relating to the ranking criteria, the existence of contractual or capital links between the comparison site and the professionals listed, the existence of remuneration of the site by the professionals listed, etc.).[79]

Failure to comply with these obligations may result in an administrative fine of up to 75,000 euros for a natural person and 375,000 euros for a legal person.[80]

The DGCCRF is competent to sanction these practices. Nevertheless, it is worth emphasising the particularity of this authority, which also has powers in the area of competition and which may, if it finds anticompetitive practices during its investigations, refer the investigation file to the FCA.

3. Civil law and the role of the courts

In civil matters, actions may be brought against these comparison portals before the ordinary courts, on the grounds of unfair competition, disparagement or restrictive practices and discriminatory practices.

On the basis of restrictive practices, the Minister of Economy and Finance, as the guarantor of economic public order, or any interested party, may summon the offender before the courts, which will impose a penalty. Amazon was fined EUR 4 million in September 2019 by the Paris Commercial Court for unbalanced contractual clauses[81].

The French Civil Code, which defines the standard-form contract enables through its article 1240 to be protected against abuses and to invoke unfair competition and parasitism in the event of the use of another's reputation or

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77 See Article L. 111-7 of the Consumer Code.
78 See Article D. 111-10 of the Consumer Code.
79 See Articles D. 111-11 to D.111-13 of the Consumer Code.
80 See Article L.131-4 of the Consumer Code.
81 Paris Commercial Court, 2 September 2019, n°2017050625.

the disorganisation of the company itself in its structures or working methods by hacking into the Internet website of the targeted company or the disclosure of the know-how of the competing company, the misappropriation of a competitor's customer or supplier lists, electronic couponing allowing the systematic solicitation of competitors' customers is tantamount to misappropriation of customers.

Q10: Abuse and treatment of non-dominant business practices

1. The concept of abuse of economic dependency

Abuse of economic dependency is a specific offence under French law which allows the FCA to sanction abuses without having to demonstrate a dominant position, pursuant to Article L.420-2§2 of the French Commercial Code.[82] Unlike abuse of a dominant position which examines the position of an actor on the market, abuse of economic dependence focuses solely on the bilateral relationship between a company in a strong position and its commercial partner.[83]

To do so, three cumulative conditions must be met: **(i)** the existence of a situation of economic dependency, **(ii)** an abusive exploitation of this situation, and **(iii)** an actual or potential effect on the functioning of the structure of competition on the market. The most difficult condition to satisfy is often the demonstration of economic dependency and in particular the impossibility for the dependent undertaking to find a technically and commercially equivalent solution.

This offence, which was initially introduced to protect suppliers agaisnt large retailers, was very rarely applied until recently because of the strict conditions required by the case law. The abuse of economic dependency is however nowadays the subject of renewed interest against the GAFAs for which market definition and dominance are not easy to establish.

In its study "*Competition and e-commerce*" published in May 2020, the FCA indeed stated that the abuse of economic dependenct may be particularly relevant to assess unfair trading conditions in the field of online platforms and marketplaces.[84]

For example, the FCA recently used the concept of abuse of economic dependency in two sanction decisions against Apple and Google.

- On 16 March 2020, the FCA fined Apple and its two main wholesalers, Tech Data and Ingram Micro, EUR 1.24 billion - of which EUR 1.1 billion for Apple.[85] It considered *inter alia* that Apple had abused the economic dependency of its premium resellers, imposing on Apple a fine of EUR 218 million for this practice alone. These premium resellers, dedicated exclusively to Apple products and with no possibility of leaving the Apple universe, had been subjected to supply delays, discriminatory treatment and non-transparent remuneration conditions in relation to the Apple Stores and the Apple website.

- On 9 April 2020, the FCA once again applied the concept of abuse of economic dependency in its interim measures decision against Google in the context of the entry into force of the law of 24 July 2019 on the neighbouring rights of press publishers.[86] Faced with the obligation to pay press publishers for excerpts of articles, photographs, infographics and videos, Google unilaterally decided that it would no longer display this content within its various services (Google Search, Google News and Discover), unless the publishers gave it permission to do so free of charge.

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82 Which prohibits *"where it is liable to affect the functioning or structure of competition, the abuse by an undertaking or group of undertakings of the state of economic dependence of a customer or supplier on it"*.

83 T. Tombal, "Economic Dependence and Data Access", *International Review of Intellectual Property and Competition Law*, 51(1), 2020, p. 75.

84 FCA, Study "Concurrence et commerce en ligne", May 2020, paragraph 150

85 Decision No. 20-D-04 of 16 March 2020 regarding practices implemented in the Apple products distribution sector.

86 Decision No. 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse.

The FCA found that Google's practices were likely to constitute an abuse of a dominant position on the general search services market by imposing unfair trading conditions on publishers and news agencies, and an abuse of economic dependency since search engines account for between 26% and 90% of the traffic redirected to the pages of publishers and news agencies who have no choice but to comply with Google's display policy without financial compensation.

- Finally, the FCA very recently examined a complaint of abuse of economic dependency in the professional software sector in a decision of 24 February 2021 in which it considered that the situation of economic dependency on a supplier was not supported by sufficient evidence by the distributor.[87]

2. Restrictive competition practices

Restrictive practices are also a specific feature of French competition law, allowing certain contractual clauses or abusive behaviour of economic actors vis-à-vis their partners to be sanctioned, regardless of their effect on the market. Here again, the demonstration of a dominant position is not necessary.

The provisions of the French Commercial Code qualify as unlawful practices the fact of (i) obtaining an advantage without consideration or one that is clearly disproportionate to the consideration,[88] (ii) subjecting the other party to obligations that create a significant imbalance between the parties,[89] (iii) applying penalties that are disproportionate with regard to the non-performance of contractual commitments[90] or (iii) abruptly terminating established commercial relations.[91]

Several recent cases illustrate the strict application of these provisions. After Booking[92] and Expedia,[93] it was Amazon on 2 September 2019 which was fined EUR 4 million by the Paris Commercial Court for significant imbalance in its relations with third-party sellers on its platform.[94]

The Court held that several clauses presented a manifest imbalance, in particular the one allowing Amazon to impose a modification to the contract unilaterally and without any prior notice, or the one allowing Amazon to suspend or terminate the contract with immediate effect at its own discretion by simple notification.

Finally, it should be noted that French consumer law also contains certain provisions which make it possible to penalise unfair terms (and in particular significant imbalance) in the context of commercial relations between professionals and consumers.[95]

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87 Decision No. 21-D-04 of 24 February 2021 regarding practices implemented in the publishing and sales of professional software sector.
88 Article L.442-1, I, 1° of the Commercial Code.
89 Article L.442-1, I, 2° of the Commercial Code.
90 Article L.442-1, I, 2° of the Commercial Code.
91 Article L.442-1, II of the Commercial Code.
92 Paris Commercial Court, 29 November 2016, n°2014027403.
93 Paris Commercial Court, 21 June 2017, n°15/18784.
94 Paris Commercial Court, 2 September 2019, n°2017050625.
95 Article L.212-1 of the Consumer Code.