9th November 2004 : Internet music downloads - The Conseil dismisses VirginMega's complaint against Apple, due to insufficient evidence in view of the case elements available

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> Version française

On 28th June 2004, the *Conseil de la concurrence* received a complaint from the company VirginMega regarding practices by the company Apple Computer France, along with a request for interim measures. The *Conseil* considered that in view of the case elements available, there was insufficient evidence of the existence of practices infringing competition law.

Consequently, it dismissed both the referral and the associated request for interim measures.

VirginMega's complaint

VirginMega, a subsidiary of the Lagardère group, offers a platform enabling customers to download music via the Internet.

Consumers who download songs from the VirginMega platform are unable to transfer them directly to the *iPod* digital walkmans manufactured and marketed by Apple. This is due to the incompatibility between the digital rights management systems (DRMs) used by the VirginMega platform and *iPod* walkmans.

VirginMega uses a Microsoft DRM, whereas the *iPod* is only compatible with the DRM owned by Apple, which is called *FairPlay*. VirginMega asked Apple for a

licence enabling it to integrate *FairPlay* into its platform in exchange for royalty payments, but its request was refused.

VirginMega considers that access to the *FairPlay* DRM is vital to its activity as an on-line music operator, that *FairPlay* is an essential resource and that refusal to allow access to it by a dominant operator in the adjacent market for digital hard disk walkmans constitutes an abusive practice.

The *Conseil* observes that access to the Fairplay DRM is not essential for the development of legal on-line music download platforms

Whilst it acknowledges the disadvantages for consumers caused by incompatibility between software and hardware, the *Conseil* can only conclude that situations of this kind are very common in the information technology sector, where technological advances follow one another at a rapid rate. The fact that a market adjusts to innovations in this way does not necessarily indicate that competition laws have been broken.

The *Conseil* reminds that according to case law, abuse of a dominant position based on denial of access to an essential resource requires access to the resource in question to be indispensable. In the case in point, the indispensable nature of access to Apple's DRM does not appear to have been established. There are three reasons for this:

- downloaded music is only transferred to a walkman in a minority of cases; most downloaded music is listened to, stored and managed on the computer (notably with the creation of personal compilations which are then burned onto CDs). This type of use is currently far more widespread than the practice of transferring music to a digital walkman.
- a simple, inexpensive and extremely common workaround solution exists in the event of incompatibility between DRMs: burning to CDs.
- many digital walkmans have recently appeared in France, with and without hard disks, secured with the Microsoft DRM and compatible with the VirginMega platform.

The risk that competitors may be eliminated is extremely low, given the highly dynamic market

The market for downloading music on-line is buoyant. The iTunes Music Store site has only been operating in Europe since 16th June 2004. Competition in this market is extremely dynamic, in France and other European countries, as well as in the United States.

There is already intense competition between the six players present in the French market, notably in terms of prices, with very small margins (a few Euro cents per song). Two major operators are now entering the market (Sony Connect and Fnacmusic) and there are a number of potential competitors.

There is no proof of a causal link between the possible dominant position of Apple in the market for hard disk walkmans, and the state of competition in the market for music downloads

The *Conseil* emphasises that a number of models of walkman are appearing on the French market, with or without hard disks, which include the Microsoft DRM and are compatible with the VirginMega platform.

In addition, hard disk walkmans do not account for the majority of digital walkman sales. They are, and will remain for some time to come, dominated by "flash-based" walkmans which can also include the Microsoft DRM (several secured models are already available in France).

Referral on the merits and request for interim measures dismissed

For these reasons, the *Conseil* considered that in view of the case elements available, it could not usefully pursue an investigation intended to demonstrate the existence of an abusive denial of access to an essential resource.
However, it does note that a dismissal due to insufficient evidence does not preclude companies in the sector from taking their case to the *Conseil*, if they acquire new elements from a subsequent observation of the market in question.