17 th December 2008 : Conseil de la concurrence decision on the Orange / Apple exclusive rights agreement for iPhone sales

Published on January 16, 2009

The iPhone may not be reserved for Orange subscribers

> *Version française*

In September 2008, the *Conseil de la concurrence* received a complaint from Bouygues Télécom, accompanied by an application for interim measures, concerning practices by Orange and Apple for iPhone sales in France. The complainant took issue with the partnership negotiated between Apple and Orange, which made Orange the exclusive network operator and wholesaler of the iPhone in France.

Orange's exclusive deal for the iPhone is likely to further stifle competition in a sector that already suffers from competition deficit

The *Conseil de la concurrence*, along with the ARCEP and the EU Commission, have on a number of occasions already deplored the lack of competition in the mobile telephony market, which is largely due to the small number of operators present, the preponderance of offers entailing long-term commitments, the existence of loyalty programs and weak growth among virtual operators (MVNOs).

However, at a time when the development of mobile Internet and the launch of unlimited data transfer offers by operators could potentially open up the market, Orange's exclusive deal for the iPhone is likely to constitute a further, targeted step in the opposite direction, effectively stifling competition in this specific market segment. In its decision, the *Conseil* observed that the exclusive rights

granted by Apple to France's leading mobile operator extend over a very long period (five years, although Apple is entitled to terminate the agreement after three), and also apply not only to iPhone models already on sale, but also those which may be marketed during the term of the deal. In addition, the agreement is locked down by restrictions on the sale of "unmarked" iPhones.

The *Conseil* does not take the view that SFR's recent announcement, that it has signed partnership agreements with the manufacturers Blackberry and HTC, is any reason to downgrade the significance of the market impact of Orange's exclusive deal. This reaction would merely serve to confirm the risk of cumulative effects associated with the type of partnership concerned.

Exclusive deals of this kind further increase the costs to consumers of changing mobile operators

In spite of the measures taken to improve portability, it is still difficult for consumers to switch between mobile operators, since many have signed up for contracts lasting 12 or over 24 months, and are encouraged to remain with their current operator through specific loyalty programs. If operators gain exclusive long-term rights to some very popular models, this would add yet another obstacle to switching operators. In the case of terminals like the iPhone, consumer captivity is made worse by interoperability issues, which mean it is difficult to migrate data to other models of telephone.

In the opinion of the *Conseil*, such a development would have the effect of further reducing competition on prices or the quality of networks, infrastructures and customer services, with operators focusing their differentiation efforts on the terminals they are able to offer. This type of competition would favour those networks with larger subscriber bases, which would then be selected by manufacturers to market their most attractive models.

Interim measures to enable other operators to market the iPhone

At this stage of the investigation, the *Conseil* takes the view that the exclusive rights granted to Orange, in the conditions in which they were negotiated, may be prohibited by EC and national competition rules, and are likely to do serious

and immediate damage to competition in the mobile telephony market and to consumers. Consequently, the *Conseil* has decided to grant interim measures, whilst awaiting its full decision on the merits of the case. The injunction handed down states that iPhone products must no longer be exclusively marketed by Orange, but may be marketed by any other operator wishing to create an offer with this terminal.

These emergency measures call into question not only the exclusive rights obtained by Orange as a network operator, but also those obtained by the company in its capacity as a wholesaler for distributing the iPhone, as well as the terms of Apple's standard distribution contract, requiring all would-be iPhone distributors to distribute the product solely in association with Orange's services. The measures are effective immediately upon notification of the decision.

> For more details of decision 08-MC-01 dated 17th December 2008



> See decision of the Paris Court of Appeal (4th February 2009)

> See decision of the Cour de cassation (Supreme Court of appeals) - 16th February 2010