Decision 20-D-04 of March 16, 2020

regarding practices implemented in the Apple products distribution sector

Posted on: June 15, 2020 | Sector(s) :

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Presentation of the decision

Summary

Having received on 12 April 2012 a request for interim measures and a request for a case on the merits from a distributor with APR (Apple Premium Reseller) status, the company eBizcuss.com, the Autorité de la concurrence has fined the Apple group, consisting of a number of companies, hereinafter Apple, for employing three anticompetitive practices within its distribution network for Apple electronic products, excluding the iPhone, in France. The first of these practices was a restriction of customers implemented with its two approved wholesalers; the second was a vertical agreement on the retail prices of its APR retailers; and the third was an abuse of a state of economic dependence at the expense of these retailers.

This decision to impose fines follows dawn raids at the headquarters of Apple and its wholesalers on 26 and 27 June 2013, the litigation for which ended in December 2017.

The Investigation Services used the thousands of documents seized to carry out a detailed analysis of the specialised distribution system set up by Apple in France.

Since the mid-1990s, Apple had chosen to supply part of the French market through two global electronics wholesalers, the companies Ingram Micro and Tech Data. These two wholesalers sell Apple products to “indirect” specialist distributors (or “resellers”), which can buy Apple products only from them, and to “direct” specialist distributors, which can buy either direct from Apple or from the two wholesalers. The direct distributors have the highest turnover for the brand’s products. These resellers are either Non-Authorized Resellers (NARs), Apple Authorised Resellers (AARs) or Apple Premium Resellers (APRs).

Alongside these specialist distributors, Apple supplies its products direct to major distributors, or "retailers" such as Fnac, Darty and Boulanger, and to large supermarkets such as Carrefour and Casino.

In late 2009, Apple decided to set up its own physical retail outlets, known as Apple Retail Stores (ARSs), in the most important catchment areas. They are also specialist resellers and are supplied direct by Apple. Apple also sells its products direct online to end consumers through its website, the Apple Online Store (AOS).

Although a manufacturer is free to organise its distribution system as it chooses, to define different retail channels, to choose wholesalers to supply some retailers and to supply other retailers direct, in doing so it must still comply with the competition law applicable in its sector. Thus, in law on anticompetitive practices, it is prohibited for a manufacturer that heads a network to undermine competition between its wholesalers by pre-allocating customers to them, or to have an agreement with its distributors on retail prices. Furthermore, if the manufacturer keeps its distributors in a situation of economic dependence on itself, it must ensure it does not abuse that dependence. In particular, it must not restrict their commercial freedom beyond tolerable limits, by placing them at a disadvantage in relation to its own internal distribution network.

Restriction of wholesalers' clientele

The Autorité found that, from December 2005 to March 2013, Apple divided its products and customers between its two wholesalers in such a way that the resellers and retailers could no longer make them compete either with each other or with Apple. This was not justified by the need to manage product scarcity, which was the reason given by Apple for these practices. The Autorité considered that these product scarcities and shortages were mostly created by Apple itself. This constitutes an anticompetitive practice by object and it cannot be the subject of a block exemption; the harm it does is explained in the decision. Having examined the particular justifications given, the Autorité also considered that the conditions were not met to be able to grant the wholesalers and Apple an individual exemption.

This agreement, which is contrary to Article 101 of the TFEU and to Article L. 420?1 of the French Code of Commercial Law (Code de commerce), was facilitated by very frequent and detailed exchanges of information between Apple and its wholesalers, which enabled Apple to control and monitor compliance with the allocations it had previously made.

Vertical agreement on retail prices

The Autorité also sanctioned a vertical agreement on prices between Apple and its APR distributors. Apple advertised so-called "recommended" prices on numerous media, especially its website, accessible to end consumers. Moreover, the APRs

interviewed during the investigation acknowledged that they strictly adhered to the prices indicated by Apple, and price collections included in the case file also attest to the fact that the distributors' prices are completely aligned. Although only some said that the prices were fixed, the majority of APRs highlighted their "lack of room for manoeuvre" in setting prices, and the Autorité considered that many pieces of evidence in the case file demonstrated that these so-called "recommended" prices were in fact the prices Apple wanted the distributors to charge and that the distributors knew this, such that there was a joint intention of the parties.

This constitutes an agreement on the basis of both Article 101 of the TFEU and Article L. 420?1 of the French Code of Commercial Law (Code de commerce).

The Autorité considered that this practice, which is by nature serious, had had an impact on Apple's specialist distribution channel, since the prices offered by Apple's internal network and the APRs were the same, and had led to the alignment of retail prices in at least half of the Apple products retail market; the investigation did not cover the other half of the market, covered by the retailers. The Autorité found that the services offered by the two channels concerned were the same in the eyes of consumers, but different from those offered by multi-brand resellers that do not specialise in Apple products and do not have such a good knowledge of the brand's products.

Abuse of a state of economic dependence

The particular situation of the APRs in relation to Apple caused the Autorité to characterise them as being in a situation of economic dependence on Apple.

This situation of economic dependence, rarely observed in the decision-making practice of the Conseil de la concurrence or the Autorité de la concurrence, results from a complex web of numerous contractual clauses and practices.

The Autorité found in particular that the APR Agreement required APRs almost exclusively to sell Apple products and prohibited them, during the agreement term and for six months after the end of the agreement, regardless of the reason for its termination, from opening within the contractual territory, namely the whole of Europe, any shop specialising in the sale of a competing brand.

The lack of an alternative to the distribution of Apple products was highlighted by the APRs' statements: they all stressed that their customers were strongly attached to the Apple brand and that leaving Apple would cause the total loss of value of their business, because of irrecoverable investments and significant costs to refurbish stores and train staff, which would be impossible to recoup in the short term for operators already in a fragile situation.

There was found to have been an abuse of a state of dependence in this case because the Autorité noted that Apple had restricted the commercial freedom of the APR distributors by subjecting them to delays or supply shortages, due to the allocation system it had set up, whereas the network of ARSs and the AOS, owned by Apple, was supplied more regularly. These practices, which placed the APRs at a disadvantage in relation to the Apple Stores, which always received the Apple products promptly, constituted in themselves an abuse of a state of economic dependence by Apple. The Autorité also considered as abusive the practice of keeping the APRs in a state of uncertainty regarding prices of supply and commercial conditions, in view of Apple's discount policy towards them. Because they were dependent on Apple regarding the items and quantities that could be delivered to them and were left uncertain about the commercial conditions, they were not in a position to compete compared to the services to the ARSs.

The Autorité therefore found that the APRs had been deprived of the ability to compete with the ARSs for consumers and that the functioning of intrabrand competition, i.e. the competition that should normally exist between different distributors of a particular brand, had been affected. These practices had led to the weakening and even exclusion of certain APRs, such as eBizcuss.com.

Interbrand competition, i.e. the competition between different electronics brands, could also have been affected by these practices, since Apple's violation of the competition rules within its distribution network could have given it an undue and unfair competitive advantage over the networks set up by competing manufacturers. With the APRs, Apple benefited from a network in which the obligations characteristically placed on the distributors were similar to those placed on franchisees, without itself having to meet the obligations of a franchisor, thus depriving the distributors of the consideration attached to this form of distribution. Thanks to the APRs, Apple also had no need to set up ARSs throughout France, enabling it to focus on setting up ARSs in the most profitable areas.

The three practices penalised by the Autorité enabled Apple to control not only the 40% of retail sales of its products in France through its own network (ARSs and AOS) but also the 10% sold through its APRs, while appearing in theory to run a totally free and open distribution system that did not qualify contractually either as exclusive distribution, or as selective or franchise distribution.

The Autorité imposed fines of €1,241,050,609 for all these practices.

Only full text of the decision prevails

Information about the decision

Origin of the case	eBizcuss.com
Decision	Mixed decision Established practice(s) Non-established practices Sanctions pécuniaires
Company(ies) involved	Apple France SARL Apple Sales International Apple Distribution International Apple Europe Limited Apple Operations Europe Apple Operations International Apple Inc Ingram Micro SAS Ingram Micro Europe BVBA Ingram Micro Inc. Tech Data France SAS Tech Data France Holding Tech Data BV Tech Data Corp

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20-D-04
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