ALLEN & OVERY

# French Competition Authority's record fine overturned on appeal

On 6 October 2022, the Paris Court of Appeal (**CoA**) partially overturned the French Competition Authority (**FCA**)'s record EUR1.2 billion fine on Apple and two of its wholesalers, Ingram Micro and Tech Data, for antitrust infringements involving product and customer allocation, resale price maintenance and the French law concept of abuse of economic dependency. Our alert sets out the details of the CoA's ruling and its implications for the calculation of fines and the structuring of antitrust-compliant distribution networks.

## The infringement finding appealed

In March 2020, the FCA fined all three companies for antitrust infringements in relation to the distribution of Apple products (excluding iPhones) (see our **alert**). In particular, the FCA found that:

- in terms of product and customer allocation, Apple and its wholesalers agreed the exact quantities of the Apple products to be delivered to each downstream distributor;
- in terms of resale price maintenance (**RPM**), Apple implemented an RPM practice under which its resellers lost their ability to freely determine their commercial policy and were effectively prevented from deviating from the retail prices set by Apple; and
- in terms of abuse of economic dependency, Apple abused its position towards its Apple Premium Resellers (**APRs**), entities considered as being economically dependent upon Apple, by restricting their commercial freedom in an abnormal and excessive manner. This included: (i) delays or shortages due to Apple's allocation system, and differences in treatment between Apple's distribution channels; and (ii) uncertainty in the allocation of rebates and discounts by Apple to APRs.

Apple, Ingram Micro and Tech Data all appealed the FCA's decision to the CoA in July 2020.

In its hotly anticipated ruling, the CoA drastically reduced the fines imposed. In particular, it considered that the RPM practices had not been established. The CoA also reduced the duration of the product and customer allocation practice by more than four years.

## Apple and its Apple Premium Resellers did not implement RPM practices

The CoA first noted that, although RPM practices are usually demonstrated on the basis of a combination of three indicia (dissemination of prices, implementation of a system of price policing and distributors' significant application of the prices disseminated), they may also result from other types of evidence, "whether documentary or behavioural, making it possible to establish, on the one hand, the invitation of the manufacturer, and on the other hand, the acquiescence of the distributors".

Applying this two-step test, the CoA considered that the FCA had not sufficiently demonstrated the implementation of any RPM practice. Minimum resale prices were not imposed in Apple's agreements with its APRs and there was no evidence that Apple applied a price monitoring system or retaliatory measures against APRs to ensure they followed its recommended prices.

In coming to this conclusion, the CoA applied the reliable, accurate and consistent body of evidence method ("*faisceau d'indices graves, précis et concordants*"):

- first, the CoA considered that there is no evidence that Apple asked all of its APRs to comply with specified price levels. In fact, the CoA noted that the regular "Apple price lists" sent by Apple to its wholesalers and direct resellers were not *exclusively* addressed to the APRs, nor were they addressed to *all* APRs. The CoA further noted that the APRs mostly considered the price lists to be legitimate "maximum resale prices". The CoA also conducted a detailed analysis as to whether the impact of rebates on the APRs' margins could have transformed the recommended prices into imposed prices but eventually concluded that this was not the case; and

- secondly, the CoA considered that the FCA had failed to demonstrate the APRs' adherence to the alleged RPM practices. The CoA noted that the fact that several APRs actually applied the recommended retail prices was not sufficient as they had clearly indicated to the FCA that they freely chose to do so. In other words, "the mere existence of a parallelism of behaviours, explained by the adaptation to market developments and the characteristics of the high-end products involved, does not characterise an RPM practice".

These findings resulted in a fine reduction of approximatively EUR221 million for Apple.

## Apple and its wholesalers allocated markets, but for a limited duration

The CoA upheld the FCA's findings that Apple's behaviour did not consist of "mere recommendations" to its wholesalers of "delivery priorities" to the end-distributors. On the contrary, evidence showed that Apple intervened in the wholesalers' management of inventories with their consent, thereby amounting to a market allocation agreement between Apple and its wholesalers.

Apple, Tech Data and Ingram Micro also challenged the FCA's characterisation of the agreement as a "by-object" restriction. They argued that the FCA should have instead demonstrated the effects of the alleged practice on the market. The CoA, however, rejected this plea, holding that the practice presented such a sufficient degree of harm to competition that it could be considered as a restriction of competition by object.

The CoA did, however, reduce the duration of the infringement from approximately seven and a half to three and a half years. It is worth noting that the FCA considered, as the starting point of the practice, a December 2005

internal Apple email, but did not rely on any other evidence for the 2005-2008 period. After rejecting the 2005 email as evidence, the CoA analysed whether the evidence gathered for 2008 was sufficient. The CoA concluded that it was not, and fixed the starting point of the practice in November 2009, thereby largely reducing the coefficient applied to take into account the duration of the practice and, *in fine*, the fine.

## Apple's abuse of economic dependency partially confirmed

The CoA considered that the instability of the terms and conditions of the Apple/APR contractual relationships and the resulting lack of visibility of the APRs was purely theoretical, and could therefore not constitute an abuse. In practice: (i) the terms and conditions of the Apple/APR relationship were updated every two years (which is more frequent than most commercial relationships); and (ii) Apple never used its right to unilaterally modify the parties' terms and conditions (subject to a 30-day prior notice period). The CoA therefore considered that the FCA had failed to demonstrate that Apple's behaviour was such as to create a lack of visibility for its APRs regarding the rebates and discounts applied, in particular in the context of the parties' stable relationship.

It is worth noting that the CoA upheld the FCA's reasoning that undertakings have a particular responsibility, towards their counterparties that are economically dependent, not to impose transaction conditions they would not have obtained in other circumstances (ie absent any situation of economic dependency). The reasoning for the characterisation of an abuse of economic dependency is therefore similar to the one of an abuse of dominant position.

## Fines broadly reduced to a third of their original level

Besides the fine reductions following the overturning of the FCA's findings on the alleged RPM practices and on the duration of the market allocation practice, the CoA further reduced the overall fines imposed on Apple and the wholesalers based on: (i) a correction to the value of sales; and (ii) a reduction in the value of sales to guarantee the proportionality of the fine.

| | FCA decision | Court of Appeal decision |
|---|---|---|
| Apple | EUR1.1bn | EUR371.6m |
| Tech Data | EUR76.1m | EUR19.5m |
| Ingram Micro | EUR62.9m | EUR24.9m |

The CoA also significantly reduced the overhead rates applied respectively to Apple (from 90% to 50%), Ingram Micro (from 60% to 10%) and Tech Data (from 50% to 8%) due to the size of their group, considering that the fine imposed would satisfy the objectives of repression and deterrence without being disproportionate.

## Key takeaways and next steps

The CoA's judgment is a hard blow for the FCA as its headline-grabbing fine has been substantially cut. To add to the FCA's woes, on the same day, the CoA issued its ruling on an appeal of a FCA cartel decision in the stewed fruits sector, reducing the initial EUR58 million fine to EUR31 million.

In this case, the CoA analysed in great detail how the FCA calculated the fine imposed in the stewed fruits ruling, including the duration of the infringement, the seriousness of the practice and the values of sales taken into account in the analysis. Interestingly, however, the CoA considered that a 65% overhead rate applied to Lactalis was proportionate (in comparison to a 50% overhead rate for Apple), thereby confirming the CoA's willingness to conduct a case-by-case analysis.

It is clear that the CoA will subject FCA fine calculations to in-depth scrutiny. Going forward, we expect the FCA to ensure it has sufficient elements to justify any (high) level of fine it decides to impose.

Another interesting takeaway from the Apple ruling relates to the demonstration of RPM practices. Specifically, the CoA confirmed that the FCA may set aside the three-limbed test (based on dissemination of prices, implementation of a system of price policing and distributors' significant application of the prices disseminated). The FCA would nonetheless need to demonstrate the supplier's invitation to follow its (recommended) resale prices, and the distributor's agreement to follow those prices.

Overall, despite the curtailing of the FCA's findings and the reduction in fines, the FCA's decision remains as a warning to manufacturers to structure their distribution networks and dealings with independent resellers in a way that complies with antitrust laws, including those relating to abuse of economic dependency. Indeed, Apple has announced that it will appeal the CoA's ruling before France's highest court (*Cour de cassation*) as it maintains that the CoA should have fully annulled the fine.

## Contacts


**Florence Ninane**
Partner
Tel +331 4006 5322
Mob +336 1633 5644
**florence.ninane@allenovery.com**

**Noémie Bomble**
Associate
Tel +331 4006 5360
Mob +336 2928 1847
**noemie.bomble@allenovery.com**