FRENCH COMPETITION COUNCIL PROVISIONALLY SUSPENDS ORANGE'S EXCLUSIVITY FOR iPHONE

In a decision rendered on December 17, 2008, the French Competition Council (the "Council") provisionally suspended an exclusivity deal between the number one French mobile company, Orange, and Apple for the distribution of iPhones.

Pending a full review of the case on the merits, and just a few days before Christmas, the Council adopted interim measures aimed at allowing Orange's competitors to distribute Apple's product.

The Council held that the exclusivity granted to Orange was capable of restricting competition in the mobile telecommunications market.

The Council based its finding on the following factors.

Apple's position in the market

The Council noted that, although Apple's share of the mobile phone market was limited (even if the market was narrowly defined to include only smart phones), the iPhone was a great commercial success and that Apple could use its strong position as an mp3 player supplier to increase its presence in such market. It also noted that iPhone's special functionalities were not easy for competitors to duplicate.

Scope and duration of the exclusivity

The Council pointed out that the exclusivity period (five years) was very long in view of common industry practice. It also noted that the exclusivity covered existing and future iPhone models. The Council stressed the fact that consumers had limited opportunities to circumvent the exclusivity, as the unlocking of the terminal (to be able to use a service provider other than Orange) was a long and costly process.

Orange's position in the market

The Council observed that Orange had a very strong (about 44 percent) share of the mobile communications market and that an exclusivity for the distribution of iPhones, which have proved to be very attractive to consumers, might allow Orange to increase its share, by gaining additional customers who would subscribe to comparatively expensive contracts covering their web and multimedia needs.

The French mobile market

The Council also found that competition in the French mobile market was weak, with only three network operators and limited competitive pressure from mobile virtual network operators. It also noted that mobile phone penetration was low compared to that in other European countries and that the cost of switching from one service provider to another was significant.

Efficiency gains

The Council rejected Orange's arguments, according to which the exclusivity was necessary to ensure a successful launch of the iPhone in France and was justified by the investment it had made to market Apple's product. The French watchdog found on the contrary that the level of investment made by Orange was limited compared to the number of sales it had achieved since the product was launched.

It also remarked that the degree of risk borne by Orange was relatively low, as Apple is a very well-known brand and the iPhone had been expected by consumers for quite a long time.

Interim measures

Overall, the Council found that the exclusivity was capable of causing irreparable harm to competition, by giving rise to increased rigidity in a market where competition was already limited. The Council therefore demanded the removal of the exclusivity granted to Orange for existing iPhone models and a limit of three months on exclusivity clauses for future models.

Orange has already indicated that it will appeal the Council's interim decision. The company declared that the ruling had serious implications, as it calls into question the dynamics of the market in general and in particular cooperation agreements between mobile phone manufacturers and telecom operators. It also said that the ruling had the effect of putting the French market in a very peculiar situation compared to what prevails in other countries such as the United States, Germany, Spain and the UK.

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