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ANTITRUST NEWS IN FRANCE

JULY 2025

In the first half of 2025, two important cases shed light on the interactions between the protection of fundamental rights and the prohibition on abuses of dominance:

- in a first case, the French Competition Authority ("**FCA**") assessed whether Apple had abused its dominance in seeking to protect users' privacy (**1**);
- in another case, the French Court of Cassation assessed whether the FCA could have infringed a dominant undertaking's freedom of speech in finding it had abused its dominance in disparaging a rival (**2**).

1. THE FCA ASSESSED A FEATURE TO PROTECT PRIVACY UNDER ARTICLE 102 TFEU, BASED ON AN OPINION FROM THE FRENCH DATA PROTECTION AGENCY (31 MARCH 2025)

The FCA found that Apple imposed unfair trading conditions on app publishers in seeking to protect users' privacy. Apple's App Tracking Transparency framework ("**ATT**") requires app publishers to ask iPhone and iPad users' permission before transferring their personal data to third parties (e.*g. data brokers,* advertising networks, *etc.)*. This permission applies on top of the obligation to obtain user consent under the General Data Protection Regulation and the *ePrivacy* Directive.

According to the FCA, ATT excessively complicated user experience within iOS and has made it more difficult to access users' personal data. Thus, Apple allegedly reduced the advertising revenue of app publishers. Furthermore, the FCA criticised Apple for not imposing an equivalent permission on its own collection of personal data, even though Apple does not transfer any personal data to third parties. As a result, the FCA considered that Apple imposed discriminatory, non-objective and non-transparent conditions for the access to users' data for advertising purposes. It thus imposed unfair trading conditions to app publishers.

The decision appears to be contradictory. This is because the FCA did not identify the anti-competitive effects in relation to the relevant counterfactual scenario. To identify anticompetitive effects, the FCA compared the situation before the introduction of the ATT with that after its introduction. However, according to its own analysis, the abuse of dominance did not result from the existence of the ATT but from the way it was implemented. In other words, the FCA should have retained a counterfactual scenario consisting in the implementation of a different ATT[1].

A decision illustrating the interplay between regulatory authorities. During its investigation, the FCA took into account two opinions issued by the French Data Protection Agency. That agency's first opinion supported the roll-out of the ATT and contributed to the FCA dismissing a request for interim measures (according to the FCA, there was no *prima facie* infringement). However, the Data Protection Agency's second opinion, obtained during the investigation on the merits, criticised the implementation of the ATT. The FCA referred to the findings of this second opinion several times in its infringement decision.

This argues in favour of regular exchanges with other regulatory authorities when they have to interact with the FCA during its investigation (*e.g.* in the energy, telecoms sectors, *etc.*).

[1] We acted as co-counsel to Apple in this case.

2. THE FRENCH COURT OF CASSATION ASSESSED THE EXISTENCE OF AN ABUSE OF DOMINANCE IN LIGHT OF THE FUNDAMENTAL RIGHT TO FREEDOM OF SPEECH (25 JUNE 2025)

The FCA sanctioned Novartis, Roche and Genentech for disparaging practices. The FCA accused the three laboratories of restricting prescriptions for Avastin, a competitor to Lucentis (a treatment marketed by Novartis) for the treatment of AMD[2]. According to the FCA, these laboratories had disparaged Avastin. Essentially, they had exaggerated the risks associated with its use for the treatment of AMD *vis-à-vis* healthcare professionals, health authorities, patients and the general public. The FCA fined these three companies on the basis of their collective dominant position in the market for the treatment of AMD. To establish this collective dominant position, the FCA took into account that contractual and structural links entailed that Novartis, Roche and Genentech all had the same incentives to promote the sales of Lucentis over the sales of Avastin[3].

The Paris Court of Appeal overturned the FCA's decision on the grounds of the protection of freedom of speech. The Paris Court of Appeal pointed out that the European Convention on Human Rights (the "**ECHR**") granted a high level of protection to freedom of speech when health issues are discussed. Furthermore, freedom of speech may only be restricted when necessary within the meaning of Article 10(2) of the ECHR, in short when there is sufficient legal basis in national law to safeguard democracy, public safety, national security *etc.*. Accordingly, the Paris Court of Appeal interpreted strictly the criteria to find that disparaging comments amount to an abuse of dominance.

In particular, the Court of Appeal held that the disclosure of information likely to discredit a product amounted to abusive disparagement unless it related to a matter of public interest, was based on sufficient factual evidence and showed moderation. It ruled that these criteria were met in the case at stake, so that Novartis, Roche and Genentech had not abused their collective dominance.

The French Court of Cassation overturned the ruling of the Paris Court of Appeal with regard to the standard of proof for assessing disparagement. The Court of Cassation reiterated that an abuse of dominance consists in conduct that deviated from competition on the merits and had an actual or potential restrictive effect on competition. It held that only the criteria set out in Article 102 TFEU are relevant for assessing whether a statement or communication by an undertaking in a dominant position can amount to an abuse. The Court of Appeal had relied on the criteria for disparagement applicable in matters of unfair competition and not on the criteria resulting from Article 102 TFEU. Accordingly, the Court of Appeal had failed to rely on the proper grounds to establish that the statements made by the three laboratories did not amount to an abuse of dominance.

The Court of Cassation clarified the burden of proof when a company relied on the freedom of speech during competition law proceedings. The Court of Cassation ruled that if a company relied on freedom of speech during the FCA's investigation, the FCA must comply with the requirements of Article 10(2) of the ECHR when imposing a fine, *i.e.*, to show that its decision is necessary to achieve one of the interests protected by this provision. The FCA will therefore be required to state reasons as to why this is the case.

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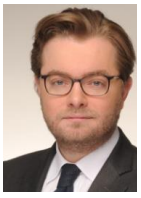

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2 Age-related macular degeneration.

3 The FCA took into account (*i*) licence agreements between Genentech and Novartis for the marketing of Lucentis and between Genentech and Roche for the marketing of Avastin; and (*ii)* Roche's controlling stake in Genentech and Novartis' non-controlling stake in Roche.