



Meta's commitment issues, a focus in the online

advertisement industry

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***Resume:** On June 16th, 2022, the French Competition Authority accepted the remedies offered by Meta regarding exclusionary conducts the undertaking had had in the online Display advertisement sector. The Authority had expressed competition concerns in its preliminary analysis, following the proceedings opened by Criteo SA, competing with Meta in this market segment. The commitments comprise three sets of behavioral remedies and their monitoring by an independent agent.*

The French Competition Authority (hereafter “FCA”) accepted on June 16th, 2022, a set of behavioural commitments offered by a social network (Facebook Inc, Facebook Ireland Limited and Facebook France, hereafter “Meta”), thus making them legally binding, and closed the proceedings opened by Criteo SA (hereafter “Criteo”), regarding practices implemented in the online advertisement sector.

Most of Meta’s income comes from the sales of its advertisement inventory (Facebook, Instagram, Messenger) to sponsors, as well as from the trade of the inventory with third-party editors, using the Meta Audience Network (hereafter “MAN”). Meta offers a bidding system to purchase

inventories and tools allowing to monitor campaigns and targeting. From 2012 to 2016, Meta allowed to third-party advertisement exchange platforms -among which Criteo- to partake in the auctions. From 2016 to 2018, provided the latter with application programming interfaces (hereafter “API”), for them to use their technology to better the bidding process and campaigns’ tracking. However, Meta deprived them of these APIs in 2018.

On September 10th, 2019, Criteo went before the FCA for an alleged abuse of dominant position by Meta on social media, leading to exclusionary conducts in the linked segment of intermediation services and advertisement on social media. The

investigation led by the Authority revealed “*competition concerns*”, which can be addressed by the commitment procedure, in which the undertaking put under scrutiny suggests remedies to the consequences of its conduct. The endorsement of these oaths makes them legally binding for the enterprise and closes the case. This is why Meta filed a commitment offer on June 1st, 2021, which it last amended on February 11th, 2022, for the FCA to assess the efficiency.

Criteo, which provides advertisement services to advertisers, as well as to websites and applications editors, does not have its own advertising inventory. It creates its added value by offering a custom *retargeting*, by determining the fair price for a given audience and message, but also by optimizing the consumer conversion, even on social networks. Thus, it argued the conditions because of which it has been deprived of the access to the API, lacked fairness, transparency, predictability, and stability; it additionally claimed Meta’s commercial teams were disparaging Criteo, avoiding the firm from accessing the new program (“*Facebook Marketing Partner*”).

The FCA then acknowledged several *concerns* during its preliminary analysis. Meta answered with a set of commitments, comprised of three axes: giving access to a *Meta Business Partner* program to businesses

active in online advertising, a compliance training package for the commercial team, along with the development of a free “*Recommendation functionality*” API, allowing eligible third-party enterprises to operate in the way that suits them best. The social network also vowed to delegate the monitoring of the commitments to an independent agent.

To understand why the FCA approved Meta’s commitments for the first time in an antitrust proceeding¹, further investigation shall be made in the sector analysis and the exclusionary practices (I), and on the reasons why the commitments were considered satisfactory to drop competition concerns (II).

I. Sector analysis and the exclusionary practices

A. Online advertisement industry and undertakings involved

The FCA ought to delimitate the relevant market to assess the dominance of an undertaking, in a definite sector. The articles 102 TFEU and L.420-2 of the French Commercial Code, which prevent the abuse of a dominant position, rely on the relevant market to assess the capability for this

¹ Alain Ronzano, L’actu-concurrence, Concurrences N° 4-2022, « *Engagements: L’Autorité de la concurrence accepte et rend obligatoires les engagements proposés par un réseau social visant à assurer aux intermédiaires qu’ils pourront*

fournir aux annonceurs des services à valeur ajoutée sur leur réseau social à partir de leurs propres technologies publicitaires (Meta) »

undertaking to trump efficient competition, by having a leeway facilitating unilateral behaviour. The Authority thus must evaluate competitive constraints to delimit the frontiers of the market. Both objective (supply and demand substitutability, potential competition²) and subjective (conditions of competition³, supply and demand structure)⁴ characteristics of the market segment are to be investigated to circumscribe the relevant product market. The relevant geographic market comprises the territory in which competitors evolve in homogeneous standards.

Categorising relevant markets in the digital economy is no easy task, given the specificity of its competition dynamics. The latter are characterised by platforms and multifaceted market segments, making it mandatory for the agencies to consider segments' connectedness⁵. The FCA consequently scrutinised the segments of social networks and online advertising. The preliminary analysis identified the relevant market of online advertising unrelated to inquiries (Display), without ruling on the existence of a relevant market of online

Display advertising on social media, in France⁶.

To assess Meta's position on these markets, the FCA first emphasized the monthly users of all social networks in France and worldwide, the average daily time spent by users, and the evolutions of these figures. It concluded Facebook was an "essential" platform, making it highly susceptible for Meta to benefit from a significant market power⁷. Further analysis revealed Meta's dominant position included the French market of advertising unrelated to inquiries, both limited and unlimited to social media.

The Meta Business Partners (hereafter "MBPs") program allowed a hundred of advertising-related companies to offer their services. Some, among which Criteo, are directly competing with Meta by offering a shopping platform for advertisement campaigns on social media (vertically integrated) and in the Open Display (where editors and third-party companies compete in real time to offer their advertising spots in auctions or directly). In practice, whether Criteo could fully use the technologies it developed relied on the access conditions to the Meta's Marketing API and the ULB - OLR (User Level Bidding and

² W. J. Baumol, J. C. Panzar, R. D. Willig, "Contestable Markets and the Theory of Industry Structure", 1982; W. J. Baumol, "Contestable Markets: An Uprising in the Theory of Industry Structure", American Economic Review, vol. 72, n° 1, 1982

³ December 9th, 1997, C 372/5, Commission notice on the definition of relevant market for the purposes of Community competition law (97/ C 372/03), paragraph 20

⁴ Decision n°22-D-12, June 16th, 2022, paragraphs 187-190

⁵ Decision n°18-DCC-18, February 1st, 2018, on the acquisition of sole control by the Axel Springer group of Concept Multimédia, paragraph 23

⁶ Decision n°22-D-12, June 16th, 2022, paragraph 240

⁷ *Ibid.*, paragraph 252

Order Level Reporting) APIs. When the social network cut off Criteo's access to these APIs in 2018, it lowered the quality of the services Criteo could offer on all the advertising inventories it had access to.

B. Analysis of the exclusionary practices

In European competition law, there is a global consensus towards admitting that the reprehension of a dominant position is subject to the abuse of the latter⁸. The dominant undertaking bears a special responsibility, “*not to allow its conduct to impair genuine undistorted competition on the common market*”⁹, nor to hinder effective competition by having unilateral behaviour, to an appreciable extent¹⁰. Not only can the appreciable extent be ascertained in the direct prejudice to consumers, but also on the competitive structure of the market¹¹. In addition, it is sufficient to prove that these anticompetitive effects are potential¹². The potentiality can be evaluated both on the

markets in which the company is dominant, and on market segments sufficiently related¹³.

Meta's gradual vertical integration led it from a position of seller of advertising inventories and of provider of services to third-party companies, to the possibility of offering its own services to advertisers¹⁴. On the verge of launching its new offer of *retargeting*, Meta downgraded the quality it offered to third-party enterprises. The social network jeopardised the conditions of access to the advertising inventories in conditions that were neither objective, nor transparent¹⁵. In addition, the commercial team also committed denigration and treated MBPs unevenly. Such behaviour might well lead to the reinforcement of Meta's dominant position on the online advertisement market, unrelated to inquiries, in which it competes with Criteo. Criteo's withdrawal from the MBP program happened during the probatory period, on a short notice and on opaque conditions. The requirements imposed on MBPs by Meta were subject to

⁸ CJUE, *United Brands v. Commission*, paragraph 113; CJEC, February 13th, 1979, C-85/76, *Hoffmann-La Roche v. Commission*, paragraph 70

⁹ CJUE, C-322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission*, paragraph 57

¹⁰ Judgement of the Paris Court of Appel, April 7th, 2022, *Google v. Gibmedia*, after the Decision n°19-D-26 of December 19th, 2019, relative to practices committed in the online advertising sector, related to inquiries

¹¹ CJEC, *Hoffmann-La Roche v. Commission*, paragraph 125; *Irish Sugar plc. v. Commission*, January 14th, 1999, T-228/97, paragraph 232

¹² TUE, December 17th, 2003, *British Airways*, C-332/81, paragraph 293; TUE, September 3rd, 2003,

Michelin II, T-203/01, paragraph 239; TUE, September 9th, 2019, *Tomra*, T-155/06, paragraph 289

¹³ CJUE, March 6th, 1974, *Istituto Chemioterapico Italiano*, C-6/73, paragraph 22 ; October 3rd, 1985, *Belgium center for market studies*, C-311/84, paragraph 26

¹⁴ Frédéric Marty, *Concurrences*, June 16th, 2022, *Engagements : L'Autorité de la concurrence rend obligatoires, par voie de décision, les engagements volontaires proposés par une plateforme dominante du secteur des réseaux sociaux visant à répondre à ses préoccupations de concurrence dans le marché de la publicité en ligne (Meta)*

¹⁵ Decision n°22-D-12, June 16th, 2022, paragraphs 131-178, summarised in paragraph 280

substantially opaque, and unforeseeable changes. As a result, the partner is not able to understand, based on the reports communicated by Meta, what changes it ought to make to retain its status¹⁶. Meta's libel on Criteo drove several clients of the latter to leave and refused to grant again Criteo with the MBP status, with concerns of "credibility" of its commercial team¹⁷. Not only did this exclusionary conduct culminated in the degradation of the competition between Meta and Criteo, but also between MBPs themselves¹⁸.

II. Meta's remedies to end competition concerns

A. Implementing the commitment procedure

Article L.464-2 of the French Commercial Code, provides that the FCA can accept undertakings' commitments to end competition concerns which might constitute prohibited practices, including those referred to in Article L.420-2 of this very Code. The Authority has the burden to assess the relevance, the trustworthiness, the

verifiability, and the proportionality of the commitments to put an end to the concerns¹⁹. There is no right to the agreement procedure, but rather a discretionary will of the FCA²⁰. Moreover, the procedure does not apply to violations which violate public order and bound the Authority to impose financial penalties²¹.

The procedure is straightforward: the undertaking receives the competition concerns by the FCA and has a minimum period of a month to formalise commitments. Afterwards, both parties are subpoenaed to the session, which is consensual. The FCA defends the economic public order and can subsequently validate commitments that may not convince the plaintiff²².

Three types of commitments can be suggested: structural, behavioural, and quasi-structural. Seldom are structural commitments to be advocated, as competition concerns are mostly related to conducts rather than competitive structure. However, quasi-structural commitments have been endorsed by the FCA (e.g., licensing commitments and to provide access)²³. Such commitment procedures have

¹⁶ Decision n°22-D-12, June 16th, 2022, paragraphs 298

¹⁷ Ibid., paragraph 300

¹⁸ Ibid., paragraphs 310-313

¹⁹ Judgement of the Paris Court of Appeal, December 19th, 2013, *Cogent Communications*, n°2012/19484, pages 9 and 10, validated by the Court of Cassation on May 12th, 2015, n°14-10.792

²⁰ Judgement of the Paris Court of Appeal, April 21, 2022, *Société Sony Interactive Entertainment France S.A.*, n°RG 20/16953, paragraph 26

²¹ Louis Vogel, *Traité de droit économique, droit de la concurrence, droit français*, 2020, paragraph 485 ; FCA, n°09-D-32, October 26th, 2009 and n°11-D-01, January 18th, 2011

²² Decision of the FCA, n°06-D-24, July 24th, 2006

²³ Marie Cartapanis, *Engagements (pratiques anticoncurrentielles)*, Dictionnaire de droit de la concurrence, Concurrences, Art. N° 12301, February 1st, 2023

been implemented in France regarding discriminatory conducts, in the telecommunications sector. A historic undertaking committed to provide third-party operators with the services it had a virtual monopoly on, and on price conditions corresponding to the related costs supported by the incumbent operator²⁴. Several commitments were also accepted regarding market closures and denial of access: several pharmaceutical laboratories undertook to soften the quota system for the supply of wholesalers²⁵, a leading firm has pledged to give access to a computerised system allowing to view sales figures of newspapers by competitors²⁶, and another vowed to amend an agreement procedure to make it more objective and transparent²⁷.

B. Meta's remedies: description and effect analysis

In the present case, the preliminary analysis stressed the lack of transparency and objectivity. Hence Meta's commitment to restrict MBP AdTech's eligibility conditions to quantitative data only; the platform minimised the entry conditions to allow more enterprises to benefit from the advantages of the status²⁸. Additionally, Meta further eased the process for the companies wrongly

excluded from its former API. The social network no longer has discretion in the choice of its partners²⁹. The criteria related to the MBP program are to be applied evenly, and Meta committed to perform its compliance evaluations in a clear, objective, and non-discriminatory manner. All users of the program are granted a six-month probatory period, should they fail the compliance evaluation, which avoids sudden terminations of business relations. The predictability of the criteria is further reinforced with a three-month notice prior to any amendment, sent to all partners and displayed in the MBP AdTech website. Article 4.2.2. of the commitments communication also prevents Meta from modifying the performance criteria more than once every **twelve** months. Article 4.2.3. subordinates any amendment to the approval of the conformity agent, apart from modifications that would facilitate having access to the status and modifications required by law.

To tackle the disparagement concern, Meta is engaged in an awareness campaign to inform its commercial teams of the legal consequences of their exchanges with advertisers. Any failure of an employee to the test would result in the withdrawal of his or her access to the computer systems³⁰.

²⁴ Decision of the FCA, n°08-D-21, October 7th, 2008

²⁵ Decision of the FCA, n°07-D-22, July 5th, 2007

²⁶ Decision of the FCA, n°12-D-20, December 22nd, 2012

²⁷ Decision of the FCA, n°18-D-04, January 23rd, 2018

²⁸ Decision n°22-D-12, June 16th, 2022, paragraph 414

²⁹ *Ibid.*, paragraph 418

³⁰ *Ibid.*, paragraph 435

Following the termination of its ULB API and its exclusionary consequences, Meta vowed in the paragraph 6.1.1. of the commitments to develop the Recommendation Functionality. This API has a broader audience than the former API and is accessible by non-discriminatory and reasonable criteria. Guidelines guarantee that the social network can't access to technologies developed by their competitors (6.3.4) and protect the confidentiality of their commercial strategy.

These commitments were submitted for five years, apart from the recommendation functionality API, which was offered for 3 years. Their geographic scope covers all AdTech service providers that partook in an advertising campaign targeted towards Meta users located in France, in the past 180 days.

Monitoring behavioural-based remedies requires a thorough analysis of the undertaking's actions, and in the context in which they take place³¹. An impartial agent is untrusted with the supervision of the commitments, to prevent the FCA from over-leveraging resources to do it itself³². This

agent is to submit trimestral reports to the FCA.

Conclusively, the Authority considered the remedies were extensive, trustworthy, and confirmable, so accordingly accepted them and put an end to the procedure.

The commitment procedure thus appears like an efficient instrument to halt competition concerns promptly and effectively. Beyond these advantages, specialists noted this procedure avoids the limitations of the litigation proceedings, especially regarding exclusionary conducts, with uncertainties in the judicial review³³.

The Digital Markets Acts³⁴, which came into force on May 2nd, 2023, incorporates obligations regarding sideloading restrictions and eviction conducts. Indeed, gatekeepers are to allow the use of third-party apps in their operating systems and disclose daily insights on advertising campaigns. Limitations are made regarding the cross-use of data by a gatekeeper, between its essential service and linked ventures. These provisions are likely to

³¹ Decision of the FCA, n°12-D-15, July 9th, 2012, related to commitments in the decision authorizing the acquisition of *Socopa Viandes* by the *Bigard Group*, paragraph 31; *Behavioural remedies* study, Jérôme Vidal, 2019, page 148.

³² Decision of the FCA, n°13-D-15, related to practices implemented in the ocean fret sector in Northern Europe and in the French West Indies, paragraph 175

³³ Frédéric Marty, *Concurrences*, June 16th, 2022, *Engagements : L'Autorité de la concurrence rend obligatoires,*

par voie de décision, les engagements volontaires proposés par une plateforme dominante du secteur des réseaux sociaux visant à répondre à ses préoccupations de concurrence dans le marché de la publicité en ligne (Meta)

³⁴ Regulation 2022/1925 of the European parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842, September 14th, 2022

allow more fairness in the interactions between gatekeepers and third-party undertakings in the online advertising market, unrelated to inquiries.

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