[FR] Orange Foot’s Offer Constitutes Conditional Sale and Unfair Competition

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Orange (a subsidiary of France Telecom) has just been ordered by the commercial court in Paris to suspend its exclusivity for the broadcasting of certain football matches on its channel Orange Sport.

Last August, having spent EUR 203 million on acquiring the exclusivity of some of the rights for broadcasting premier league football during the period from 2008 to 2012 (including one premium broadcast, the Saturday night match live), Orange launched its channel Orange Foot (renamed Orange Sports in January). The channel’s offer, comprising linear, non-linear and interactive services, is offered as a paying option in Orange’s TV package for EUR 6 per month. This is only accessible by subscribing to the operator’s triple-play offer, comprising land-line telephone, broadband Internet connection and the basic television package. Free and Neuf Cegetel (SFR), Orange’s two main competitors, brought a complaint against it in the commercial court, claiming that the offer it proposed constituted a conditional sale, which is prohibited by Article L. 122-1 of the Consumer Code. The Code prohibits making the sale of a product conditional on the purchase of a specified quantity or the concomitant purchase of another product or service and making the provision of a service conditional on the provision of another service or the purchase of a product. In the present case, the applicants complained that a client who wanted to take up the Orange Foot offer was obliged to take out a subscription to Orange’s broadband Internet. Clients could not therefore have access to Orange Foot if they did not have this subscription, and if they had a subscription with a different IAP, they had to terminate it since one telephone line cannot carry more than one ADSL broadcast.

The Court, initially, will determine whether the two elements that make up the Orange Foot offer may be acquired separately on the market. France Telecom claims that the offer constitutes an inseparable package of conventional television services and non-linear and interactive services requiring broadband Internet access, which therefore cannot be dissociated from an Orange subscription. The Court noted that, in those areas where ADSL was not a possibility, consumers had satellite access to all the television services (including football matches) but not the interactive services. Moreover, the Orange Foot offer was broadcast in these areas by satellite and not exclusively by broadband Internet. The Court concluded that the Orange Foot offer and Orange’s broadband Internet subscription were

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two separate products and did not constitute complementary products within the meaning of Article L. 122-1 of the Consumer Code. Orange Foot's offer, by making subscription to the Orange Foot channel dependent on an Orange Internet subscription, therefore constituted conditional sale. Furthermore, this was declared to constitute unfair competition since it enabled France Telecom to acquire a clientele to the detriment of its competitors. The operator was ordered to stop making subscription to Orange Foot dependent on subscription to Orange's broadband offer, on pain of paying a fine of EUR 50,000 for each day of failing to do so. The Court felt it did not have enough information at its disposal to pronounce on the extent of the prejudice resulting from the unfair competition, and appointed an expert to provide the information necessary for it to be able to do so.

This decision is another hard blow for Orange, which lost a court case a few months ago over the right to be the only mobile operator to distribute the iPhone in France. Moreover, the competition authority received an application last month from both the Government, and Canal+ and SFR, requesting it to deal with the issue of exclusive offers of content (sport and cinema) by the IAPs, and Orange's television channels in particular. The match is not over yet …

Tribunal de commerce de Paris, 23 février 2009, Free et Neuf Cegetel c/ France Télécom et Orange Sports

Commercial Court in Paris, 23 February 2009; Free and Neuf Cegetel v. France Telecom and Orange Sports

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