

ORANGE CARD FOR FRANCE TELECOM

Triple play offers, including internet, television and telephone, are more and more popular in France. At the end of 2008, thirty percent of the 40,2 million subscribers to a landline used a *triple play* connection.

Competition is thus very harsh, and providers try to find solutions to increase their market shares. One of them is to offer an exclusive television program to prompt clients to subscribe to a *triple play* offer.

But how far can these offers go to attract clients? Is it possible to subordinate an exclusive channel access to a complete *triple play* subscription?

FRANCE TELECOM, and its subsidiary ORANGE SPORTS, tried to do so when they decided to offer access to the “ORANGE FOOT” channel exclusively to the FRANCE TELECOM ADSL subscribers.

This followed FRANCE TELECOM’s purchase of exclusive broadcasting rights offered by the Football League 1 for the 2008 to 2012 season.

FRANCE TELECOM thus offered the subscription to the League 1 TV channel exclusively to its ADSL subscribers, and this offer met a large success.

Unhappy to lose potential clients, the providers FREE and NEUF CEGETEL initiated proceedings against FRANCE TELECOM before the Commercial Court of Paris on the grounds of unfair competition because of the package sale offered by FRANCE TELECOM.

Indeed, package sales, defined as making “*the sale of a product subject to the*

purchase of a minimum quantity or to the accompanying purchase of another product or another service as well as making the provision of a service subject to the provision of another service or to the purchase of a product”, is prohibited by article L. 122-1 of the French Consumer Code in order to protect the contracting freedom of consumers.

FRANCE TELECOM alleged that the interactive services existing in the ORANGE FOOT offer were not severable from the subscription to a FRANCE TELECOM high speed internet access.

The Commercial Court of Paris, in a judgement of February 23, 2009, rejected this argument and ruled that the ORANGE FOOT Channel on the one part and internet access on the other part are two different and not complementary products, which can be commercialized separately.

Therefore, the Court held that the subordination of the channel access to a subscription to a FRANCE TELECOM internet access constitutes a prohibited package sale.

To put an end to this behaviour, the Court forbade FRANCE TELECOM, with a 50.000 euros per day penalty in case of non respect of its decision, to carry on this kind of marketing and ordered the operator to publish an excerpt of the judgement on its website for a duration of two months.

The Court also ruled that the package sale constituted unfair competition to the detriment of other providers, and appointed a surveyor to determine the amount of damages to be paid to FREE and NEUF CEGETEL.

FRANCE TELECOM appealed the decision, and tried unsuccessfully to have the execution of this decision suspended until the Court of Appeal renders its decision. Thus FRANCE TELECOM had to cease the marketing of the ORANGE FOOT channel to its new ADSL subscribers.

Consequently, only the former subscribers to ORANGE FOOT can watch the League 1 matches – at least until the decision of the Court of Appeal is rendered.

If the Court of Appeal upholds the judgement of the Commercial court, FRANCE TELECOM will be faced with a strategic choice: either market the programs of ORANGE FOOT without requiring any internet access or permit the access to the channel via other providers.

French courts are thus giving a second card to the incumbent, a few weeks only after the decision of the Court or Appeal which put an end to its exclusivity for the marketing of the iPhone on the French territory.

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Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.

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