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# Competition between “open and closed ecosystems” *France*

Olivier Fréget

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- Technology and the dissemination of Internet Protocol based technologies (IP-technologies) in the telecom industries have created new way of assembling, bundling and distributing services
- These new ways of bundling products has paved the way of a new type of economic integration/cooperation of enterprises scheme, along of the classical vertical and horizontal integration
- the “*ecosystem*”
  - An ecosystem, strictly speaking, is a group of interconnected elements, originally referring to a group of interconnected elements, formed by the interaction of a community of organisms with their environment
  - A technological ecosystem could be defined as « *a number of firms – competitors and complementors – that work together to create a new market and produce goods and services of value to customers*”  
(*Hazlett 2011, cited by Open and closed ecosystems FCA-CMA joint report*)

From a technological standpoint, each ecosystem could present a difference in terms of “openness” or “closeness”,

From this standpoint,

- an **“open ecosystem”** is **“equipped with an interface that is accessible to component makers or system developers other than the system owner itself and thus can work with a relatively wide variety of other components available on the market”**
- a **“closed ecosystem”**, **“is a a system in which “each component can work only with selected other components (...) which “will allow a significantly larger number of component variations to be used by consumers and lead to competition between these”**

*FCA-CMA Joint Report 2014*

From a competition standpoint, this may reflect the nature of the technological bundling

- a closed ecosystem usually involves an important degrees of “pure bundling” between the components of the system

Since 2005, the French Competition Authority has developed an important literature on this matter through

- opinions, in some cases, joint with other competition authorities such as the UK Competition and Merger Authority,
  - a new one, with respect to data in collaboration the [Bundeskartellamt](#) has been just published on May 10, 2016
- decisions essentially behavioral ones and less frequently, some derived from merger decisions

- In chronological order, the main documents analyzed are
  1. Decision 04-D-54 of 9th November 2004, relative to practices by the company Apple Computer, Inc. in the sectors for Internet music downloads and digital walkmans  
see for a summary in English 2004 Activity Report p. 43 <http://www.utoritedelaconurrence.fr/doc/rapport2004anglais.pdf> or the English version of the Press release [http://www.utoritedelaconurrence.fr/user/standard.php?id\\_rub=134&id\\_article=356](http://www.utoritedelaconurrence.fr/user/standard.php?id_rub=134&id_article=356)
  2. Opinion 09-A-56 of 18 December 2009, relative to the Minister for Culture and Communication's request for an opinion regarding digital books  
[http://www.utoritedelaconurrence.fr/user/standard.php?id\\_rub=368&id\\_article=1334](http://www.utoritedelaconurrence.fr/user/standard.php?id_rub=368&id_article=1334)
  3. Opinion on TV content access exclusivity offers by Internet service providers\*  
([http://www.utoritedelaconurrence.fr/user/standard.php?id\\_rub=316&id\\_article=1228](http://www.utoritedelaconurrence.fr/user/standard.php?id_rub=316&id_article=1228))
  4. Decision on the Orange / Apple exclusive rights agreement for iPhone sales of 17th December 2008 and its commitment decision in 2010\*  
[http://www.utoritedelaconurrence.fr/user/standard.php?id\\_rub=368&id\\_article=1335](http://www.utoritedelaconurrence.fr/user/standard.php?id_rub=368&id_article=1335)
  5. Decision no. 12-D-18 of 20 September 2012 on practices concerning reciprocal interconnection services in the area of internet connectivity.  
[http://www.utoritedelaconurrence.fr/doc/12d18\\_en.pdf](http://www.utoritedelaconurrence.fr/doc/12d18_en.pdf)
  6. Decision no. 14-D-09 of 4 September 2014, Single-portion Espresso Coffee Machines  
[http://www.utoritedelaconurrence.fr/user/standard.php?id\\_rub=592&id\\_article=2418](http://www.utoritedelaconurrence.fr/user/standard.php?id_rub=592&id_article=2418)
  7. Joint report ADLC and CMA on The economics of Open and closed ecosystems, Décembre 2014  
([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/387718/The\\_economics\\_of\\_open\\_and\\_closed\\_systems.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387718/The_economics_of_open_and_closed_systems.pdf))

For a summary of the analysis of the FCA, one may also consult « DIGITAL ECONOMY -- Note by the French Delegation » - October 2011  
[http://www.utoritedelaconurrence.fr/doc/eco\\_numerique\\_ocde\\_oct11\\_uk.pdf](http://www.utoritedelaconurrence.fr/doc/eco_numerique_ocde_oct11_uk.pdf)

\* The author of the presentation has been involved in these decisions and/or opinions, representing either complainants or third parties heard by the FCA

- The word of “ecosystem” seems having appeared for the first time in the Opinion 09-A-42 (par 101) describing the bundling between Orange media services and Orange ADSL services as a “*closed ecosystem*”
- From 2005 to 2010, the competition between Vivendi and Orange on the French pay TV markets after the merger between Canal + and TPS in 2004 have shaped the initial thinking of the FCA
- As in many other countries, this is only in a second step that the development of digital **platforms** from 2004 has given rise to a more broader analysis of **all types of ecosystems** in the context of multi-sided markets which has been the object a joint opinion between the FCA and the CMA

- **This historical distinction also corresponds to two types of ecosystems**
  - “pure” vertically integrated ecosystems combining an exclusive access to a media content through a distribution service, which may be built on exclusivity agreements
  - “more” horizontally integrated ecosystem through a platform

*“The platforms can be defined as functional and coherent sets of software more often than not combining an operating system, an app store (with the option for third-party developers of developing their own applications), an access to content and a payment system. These platforms perform a function of intermediation, networking users with either content or advertising providers, in the context of a two- or multi-sided market. Several models of digital platforms coexist, though what they have in common is putting web users in contact with content publishers or services”*

(OCDE French note on Digital Economy 2011)

# The Opinion 09-A-42 on exclusive relationships between telcos and distribution of media contents

- Opinion on TV content access exclusivity offers by Internet service providers have been requested by the French Ministry of economy in the context of the commercial war between Vivendi and Orange on the distribution of football matches
- Orange bought from the French *Ligue de Football* the exclusive right to broadcast the Saturday night football matches when Canal + obtained all the other rights on the same event
- Orange decided to reserve the access to the Saturday night matches only to its ADSL subscribers
- As Canal + was forbidden to withdraw to Orange the right to distribute Canal + Channel, Orange subscribers were the only subscribers having the possibility to view the whole set of football matches of Ligue 1
- Every other internet access providers voice against this solution, notably Free and SFR, as this may lead their customers to migrate from their ADSL offers to the Orange's ones

# The Opinion 09-A-42 on exclusive relationships between telcos and distribution of media contents

- It was the first time that appears a debate between open ecosystem and closed ecosystem
- The situation created by Orange was viewed as creating a *closed ecosystem* by the virtue of a double exclusivity mechanism :
  - a distribution exclusivity as the matchs were broadcasted only through ADSL services
  - an access exclusivity as to access to the said content, the subscriber was forced to subscribe to an Orange triple play offer which means cancelling its own Internet access with an other Internet Access Provider as a copper line could bot have simultaneously two ADSL offers
- Vivendi was fiercely against such a situation as it has been obliged in the context of the merger between canal + and TPS to create an “open ecosystem”, letting any Internet Access Provider accessing its TV channels
  - In 2004, Canal + and TPS merged. Canal + justified this merger as a preemptive defense against the development of ADSL internet access provider which have just launched their first TV offers
  - The merger approval decision from the French Ministry on Economy imposed on Vivendi-Canal + 53 behavioral commitments : among them, some of them had for explicit purpose to impeded Canal + to favor Vivendi fixed and mobile telecom operator SFR by forbidding any pure and mixed bundling between Canal + TV channel and SFR’s offers

- **The position of the FCA in its opinion was balanced**
  - Obligated to recognize that Orange solution was partially in line with the business models it wishes to favor when it has adopted the Canal + / TPS merger decision
    - A “mixed business model” where IAP may climb the value chain by becoming media distributors reinforcing the competition against Canal + Premium TV channels
  - Concerned by the fact that Orange strategy restricted consumer choice by obliging it either to migrate its ADSL offer from third party IAP to Orange or to renounce to watch all the *Ligue 1* football matches
  - The generalization of such a model would evolve into silo-like competition where consumer will arbitrate not based on quality/price part of each component but rather a logic “on all or nothing” between vertically integrated groups of companies, from the publishing of TV channels to its distribution through platform

# Decision on the Orange / Apple exclusive rights agreement for iPhone sales of 17th December 2008 and its commitment decision in 2010\*

- The same concerns appear in the context of the exclusive distribution agreement between Apple and Orange in 2008. It stated that if all mobile operators execute exclusive distribution agreement this may create a silo like competition
  - Considering that
    - « *In the case of terminals like the iPhone, consumer captivity is made worse by interoperability issues, which mean it is difficult to migrate data to other models of telephone.* » and
    - « *such a development would have the effect of further reducing competition on prices or the quality of networks, infrastructures and customer services, with operators focusing their differentiation efforts on the terminals they are able to offer. This type of competition would favour those networks with larger subscriber bases, which would then be selected by manufacturers to market their most attractive models.* »
- **The interim measure decision has been squashed down by the *Cour de Cassation* in February 2010. The Court was not convinced at all by the economic reasoning developed and the possibility that the development of similar agreements between the other telcos with other most notable manufacturers - such as Blackberry - could not compensate the detrimental effect of the exclusive agreement.**

- **These two cases show :**
  - The lack of appetite from the Competition authority about competition between « closed ecosystem » which is described a silo like competition
  - especially when implemented by dominant competition on either of the market included in a ecosystem
- **This position has evolved a little bit since, as shown by the last report of the FCA-CMA**

# The FCA-CMA report on closed / open ecosystems

- The reports states that
  - « Although openness can have these positive effects on competition, that is not to say that closure of an ecosystem is automatically bad for competition. Closure of an ecosystem can also generate positive effects on competition » ( § 3.8) **notably because**
  - « the profitability of locked-in consumers can engender fierce competition ‘for the market’ between systems and (...) “can make them decrease the price of the primary product (often the hardware component, which is a durable good) until the profits generated on other components markets are fully dissipated through lower prices and/or better quality of the primary product ».
  - «This competition can be particularly fierce in the presence of significant network effects and switching costs: indeed, in that context, the related markets are prone to a situation of ‘tipping’, with one competitor winning over most of the market<sup>30</sup> and firms ‘struggle for dominance’. »

# The FCA-CMA report on closed / open Ecosystems

- **But the rapport counterbalances this opinion by saying that the closure of the system may arise for anticompetitive reasons with a long list of circumstances**
  - the protection of the host markets (i.e. its core business) by the system owner
  - where a system owner who holds a monopoly on one or several sides of the market may manage to foreclose the other sides by closing the sides on which it holds a monopoly
  - when the components of the system can be used alone, without the host platform
  - competition on the component market may prevent or limit the exercise of market power by the system owner
  - control over component markets may also allow the platform host to price-discriminate.

# The importance of single homing and multi-homing

- **Basically, the benefit of competition between open or closed ecosystems depends widely from the switching costs between systems such as**
  - The price of the device for accessing to the ecosystem and, if any, the period of renewal
  - The migration costs of its data and the contractual possibility it has to do it (conditions of sales), which may include the cost of its apps
  - The learning costs, which are all the more neglected
- **and finally the *actual possibility* for the customer to « single home » or « multi-home »**
  - The multi-homing situation describes the possibility for the user to use several systems at the same time and then not to be locked-in: the possibility to test other systems

# The importance of single homing and multi-homing

- In some cases, the single homing is due to financial and technical constraints
  - This is the case notably for telecom and energy markets where the consumer cannot have simultaneously, at the same time, two subscriptions with a provider of telecom and/or energy
  - The consumer is thus « single-homed » by construction and cannot be informed of the fact that he is deprived some innovative services when entering into a subscription
  - It means than the internet access provider handles a « bottleneck »
    - if it refuses letting access to its customer base, at reasonable conditions, it may extract a rent to the customer and exclude as efficient producer of components or complementary services to the possibility for accessing to the customers

# Are this economic analysis being applied consistently ?

- **The Nespresso decision**
  - A quite stringent decision : Nespresso has been obliged to commit itself to keep its system fully interoperable to third parties providers of coffee capsules
    - Even if the price of the coffee machine is quite low and the possibility for the customer to have several machines or to switch from one machine to another
    - by decreasing the price of the Nespresso system, the decision may indeed reinforce the dominant position of Nespresso and discourage innovation in competing systems
- **The Cogent decision**
  - a quite lenient decision : Orange has been authorized to bill independent transit providers used by content provider a price for accessing Orange fixed customers
    - i.e. a variable remuneration per megabit when the incremental cost for Orange is negligible and representing anyhow a one-shot spending
    - no information measures toward the customers for informing them that Orange billing practices may limit their internet access to some content providers