



HERBERT SMITH FREEHILLS COMPETITION LAW MOOT 2021

Problem Question

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**RURITANIA IS A FICTIONAL MEMBER STATE OF THE EUROPEAN UNION
AND THE OFFICIAL LANGUAGE OF RURITANIA IS ENGLISH**

**REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION UNDER
ARTICLE 267 TFEU FROM THE RURITANIAN HIGH COURT IN THE CASE OF:**

Sierra Ltd v Alfa Inc.

Introduction

1. The following paragraphs set out the factual and legal background to the questions referred to below, together with a summary of the parties' submissions to the Ruritanian High Court.
2. The case raises a number of issues relating to the interpretation of Article 102 of the Treaty on the Functioning of the European Union ('TFEU'). These issues form the subject matter of the reference.

Background

Alfa Inc.

3. Alfa Inc. ('Alfa') is the parent of a group of companies active on a global scale, including in the European Union, in the production of a number of mobile devices, including smartphones and tablets. Although competing smartphones exist, Alfa's smartphones account for roughly 70 per cent of all those sold in the EU.
4. Alfa also engages in app distribution through its Alfa App Store which is integrated into Alfa's own operating system (the operating system is not licensed for use by third parties). Alfa

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App Store hosts millions of apps and is the only App Store that can be installed on Alfa's operating system. Alfa smartphone users are only able to download and install third party apps via the Alfa App Store and are prohibited from side loading them in other ways, for example, via direct download through the web browser.

5. In 2018 Alfa launched a music streaming service through its AlfaMusic App. Since then the AlfaMusic App has been pre-installed with the Alfa smartphone operating system. The AlfaMusic App cannot be uninstalled and updates itself automatically. Despite being pre-installed, AlfaMusic features prominently in the Alfa App Store when users browse or search for music apps. When users first open the AlfaMusic App, they are automatically offered a free trial for three months. After this, customers can sign up for AlfaMusic at a cost of 10 euros per month. AlfaMusic also features prominently in other Alfa communications with its customers, including email updates and confirmations about other Alfa products and services.

6. Alfa does not provide a media streaming app or a retail shopping app.

7. All of Alfa's apps collect user data which Alfa combines and then uses to improve its products.

Sierra Ltd

8. Sierra Ltd ('Sierra') is a Ruritania company which provides both media streaming services and music streaming services. Although these services are available to consumers in a variety of ways, it has an app for each service which were, until 1 October 2020, available in the Alfa App Store. Like Alfa, Sierra offers free trials for both services. At the end of the free trial period, however, consumers have a choice of remaining on a more limited free service, which is supported through advertising targeted at users, or subscribing to each service individually ad-free for 10 euros per month. Based on subscribers to music streaming services overall, in September 2020 Sierra had a market share of approximately 60 percent in the EU (including in Ruritania). Of this 60 percent, four out of five users remain on the free, advertising-supported, service.

9. Sierra also provides retail shopping services which were also available via an app on the Alfa App Store until 1 October 2020.

10. Sierra collects users' data from all three of its apps. It combines these data with other data collected from third party websites and uses the data to fund its more limited free services by



providing targeted advertising on behalf of advertisers to users of the music and media streaming apps.

Alfa App Store Fees

11. Alfa does not charge app developers for the downloading by Alfa smartphone users of any app available on the Alfa App Store.

12. Moreover, Alfa does not charge app developers for any purchases made via retail shopping apps downloaded by Alfa smartphone users through the Alfa App Store.

13. By contrast, Alfa charges app developers a fee of 30 per cent of any transaction or subscription price charged for music or media streaming services purchased through apps downloaded via the Alfa App Store, although no fee is charged when subscribers purchase these services elsewhere (for example, via a web browser on a computer or a different App Store) and access them through apps downloaded via the Alfa App Store (although app developers are not allowed to encourage customers to subscribe for these services elsewhere (an anti-circumvention rule applies)). This 30 per cent fee is considerably higher than the charges made by other App Stores on other mobile operating systems. This 30 per cent fee is not paid by AlfaMusic (in fact AlfaMusic pays no fee at all).

Changes to Alfa's developer agreement

14. In June 2020, Alfa updated the terms of its developer agreement to prohibit service providers from collecting data from users via apps downloaded from the Alfa App Store and from sharing such data with third parties for the purposes of targeted advertising. Alfa justifies this change of policy by citing concerns about the privacy of its smartphone customers and the need to ensure compliance with the EU's General Data Protection Regulation ('GDPR') rules.

15. Following this change Sierra continued to collect data via its apps (including those downloaded from the Alfa App Store) and to share such data with third parties for the purposes of targeted advertising. Sierra believes that it is not reasonable for it to have to comply with this new condition in Alfa's developer agreement. Firstly, Sierra takes the privacy of its customers, and compliance with the GDPR, extremely seriously: Sierra only collects data from multiple sources with the consent of users and shares the collected data only with third parties with equally strong privacy policies as its own. Secondly, compliance with Alfa's updated developer agreement would effectively prevent Sierra from providing its free music and media services



to customers, which are funded by the provision of targeted advertising based on this data.

16. On 1 September 2020, Alfa wrote to Sierra demanding that Sierra stop collecting user data via its apps and sharing such data with third parties for the purposes of targeted advertising in line with the updated terms of its developer agreement. Alfa warned Sierra that in the event of its failure to comply with the request within one month, Sierra's apps would be removed from the Alfa App Store. Sierra refused to comply with Alfa's request. Sierra wrote back to Alfa stating that this condition was unreasonable and ignored the high privacy standards adhered to by Sierra and by the third parties with access to the data it collected. In particular, Sierra states that it never collects information from users of its services without their consent and it always ensures that any third parties with which it shares such data have equally strong privacy policies as its own.

17. In the light of Sierra's non-compliance with the condition of the developer agreement, Alfa wrote to Sierra on 1 October 2020 stating that it will no longer allow Sierra's apps to be distributed via its Alfa App Store. Since then, Sierra's apps are not available on the Alfa App Store. Alfa phone users who have already downloaded the apps can continue to use them but updates, including security updates, are not available, and new subscriptions using the apps are not possible. Since 1 October Sierra has experienced a steady decline in new subscriptions to its music and media streaming services. The number of purchases made via its retail shopping app have also fallen.

The current proceedings

18. On 5 November 2020, Sierra brought proceedings before the Ruritarian High Court alleging that Alfa's conduct infringes Article 102 TFEU and seeking an order that the infringements be brought to an end, and notably that Alfa be required to restore Sierra's apps to the Alfa App Store and that Alfa reduce the fees it charges Sierra when users subscribe to Sierra's music and media services through its apps that have been downloaded via the Alfa App Store. Sierra also seeks compensation for the damage suffered as a result of Alfa's anti-competitive conduct.

19. In relation to the substance, Sierra argues *inter alia* that Alfa's conduct breaches Article 102 TFEU on the grounds that:

- Alfa's conduct in refusing to distribute Sierra apps via its Alfa App Store amounts to an illegal refusal to deal;



- Alfa's past conduct in relation to the charging of a fee of 30 per cent of any transaction or subscription price charged for music streaming services purchased via music streaming apps that Alfa smartphone users have downloaded through the Alfa App Store constitutes illegal self-preferencing, insofar as the same fee does not apply to music streaming services purchased via Alfa's own AlfaMusic app and in the light of the pre-installing, and other favourable treatment, of AlfaMusic by Alfa;
- Alfa's past conduct in relation to the charging of a fee of 30 per cent of any transaction or subscription price charged for media and music streaming services purchased via media and music streaming apps that Alfa smartphone users have downloaded through the Alfa App Store are, contrary to Article 102(a), unfairly high and excessive, considering the fees charged by other App Store operators and that there is no charge for in-app purchases made via certain apps, such as retail shopping apps. By differentiating between different types of apps, Alfa's fees are also discriminatory contrary to Article 102(c) TFEU.

20. In relation to damages to be awarded, Sierra claims damages for loss of profit arising from reduced sales since 1 October 2020 and, prior to that, reduced margin and sales of its music and media streaming services as a result of the excessive and discriminatory fees charged.

21. In its defence, Alfa denies that it committed an infringement of Article 102 TFEU and argues *inter alia* that:

- It does not hold a dominant position in the App Store market or in any other relevant market;
- Even if dominant:
 - Alfa has no obligation to distribute all apps via its Alfa App Store and certainly has no obligation to distribute apps on behalf of companies that do not comply with its app developer agreement;
 - Self-preferencing has not been recognized as, and does not constitute, an abuse of a dominant position within the meaning of Article 102 TFEU. In any event, there is no evidence of actual or likely anticompetitive effects in the music streaming services market or elsewhere;
 - Alfa's Alfa App Store fees are not unfair, excessive or discriminatory.
- Even if an abuse of dominance were to be established, the Ruritania Court could not impose



a duty to deal or specific pricing requirements on Alfa as this would unduly constrain its economic freedom.

Questions Referred

22. Faced with such fundamental differences in interpretations and readings of the law, the Ruritanian High Court has decided to stay proceedings before it and refer the following questions relating to the interpretation of Article 102 TFEU to the Court of Justice of the European Union:

- 1) When considering a mobile platform, where a firm makes smartphones, produces a smartphone operating system, operates a mobile app store and engages in app development, how is dominance to be determined? In particular, is it necessary to identify dominance indirectly through the identification of a separate market, market shares and other relevant factors, or can dominance be determined directly, for example, through direct evidence of the firm exercising control over prices or engaging in exclusionary behaviour?
- 2) Assuming dominance, what factors should be taken into account in determining whether the following conduct of an App Store owner is capable of constituting an abuse of a dominant position:
 - a. A decision to cease distributing the apps of a customer (app developer) that the owner of the App Store alleges does not comply with the conditions of its app developer agreement. In particular, in what circumstances could such conduct constitute an unlawful refusal to deal, and what relevance, if any, should be attributed to data protection and privacy considerations?
 - b. The levying of fees on rival music streaming service providers that are not applied to the App Store owner's own music streaming service. In particular, in what circumstances could such conduct, especially if combined with other measures that treat the App Store owner's own music streaming service more favourably, constitute a form of unlawful self-preferencing, margin squeeze or other unlawful leveraging? In assessing these issues what relevance, if any, should be attributed to the fact that a rival holds a strong position in the music streaming services market?



- c. The levying of a fee on media and music streaming service providers of 30 per cent of any transaction or subscription price charged for media and music streaming services purchased via apps downloaded through the App Store. In particular, in what circumstance could such conduct constitute a form of excessive pricing contrary to Article 102?
 - d. The levying of fees on some, but not all, app developers. In particular, in what circumstances could such conduct constitute a form of discriminatory pricing contrary to Article 102?
- 3) Where any such conduct is found to be capable of constituting an abuse, does the need to ensure the effective application of Article 102 TFEU permit or oblige (even if such powers are not otherwise provided for under national law) the national court to take measures to require the dominant firm to distribute apps via its App Store and to alter its fees and even impose a given fee level?
- 4) What significance, if any, should be attached to the fact that damages in this case are being sought by a rival, which has been the market leader in the music streaming services market at issue?
23. The request for a preliminary ruling arrived at the Court of Justice on 24 November 2020. In accordance with Article 23 of the Statute of the Court of Justice, the Registrar has notified the claimant and defendant and has invited them to submit written observations to the Court. The deadline for submission is on 9 April 2021. Oral hearings are provisionally scheduled for 18-19 June 2021.