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French Competition Law Newsletter

Highlights

— The Paris Court of Appeals annuls for the second time the fines imposed by the French Competition Authority on 11 banks in 2010 decision

— The French Competition Authority sanctions Mayotte import/export group for obstruction practices

— The French Competition Authority launches a market test to assess Google's proposed commitments in the "related rights" case

The Paris Court of Appeals annuls for the second time the fines imposed by the French Competition Authority on 11 banks in 2010 decision

In a ruling dated December 2, 2021, the Paris Court of Appeals overturned a 2010 decision in which the French Competition Authority (the "**FCA**") had fined 11 major French banks for colluding on check handling fees, possibly bringing the 11-year saga to an end. The ruling confirms that the concept of by-object restriction should be interpreted restrictively, in line with a judgment issued by the French *Cour de cassation* in the same case in 2020.

Background

On September 20, 2010, the FCA imposed a 385 million euro fine on 11 French banks for agreeing to fix interbank fees for processing checks.[1] This mechanism, which required the check beneficiary's bank to pay a fixed fee to the issuer's bank in order to offset the losses associated with the digitalization of the check-processing system, was deemed to amount to a restriction of competition by object.

In 2012, on appeal by the banks, the Paris Court of Appeals (the "**Court of Appeals**") annulled the FCA Decision for failure to demonstrate that the introduction of interbank fees had an anticompetitive object.[2] However, this ruling was quashed by the *Cour de cassation*, which found that the judges had not properly examined all of

[1] FCA Decision No. 10-D-28 of September 20, 2010, relating to prices and associated conditions applied by banks and financial institutions for processing checks submitted for encashment purposes (the "**FCA Decision**").

[2] Paris Court of Appeals ruling of February 23, 2012 (No. 2010/20555).

the parties' pleas, and the case was remanded back to the Court of Appeals.[3]

On December 21, 2017, in its second appeal ruling, the Court of Appeals upheld the FCA Decision. The Court of Appeals found that the fixed interbank fee in fact amounted to a by-object restriction because it did not correspond to any actual service, therefore artificially increasing the costs of check processing and thus the price of the services provided to final customers. The Court of Appeals further considered that the fee restricted the banks' ability to determine their own pricing policies.[4]

This second ruling was challenged by the banks before the *Cour de cassation*, which found that the banks' conduct had been improperly qualified as a by-object infringement. In line with consistent EU case law,[5] the *Cour de cassation* held that in the absence of past experience, the Court of Appeals could not assume that the costs associated with check-processing fees would necessarily be passed on to final customers or that fixing these fees would crystallize the market structure.[6] As a result, the case was remanded once again to the Court of Appeals.

Absence of "by-object" restriction

In its ruling of December 2, 2021, the Court of Appeals followed the *Cour de cassation*'s reasoning and accordingly found that the banks' conduct did not qualify as by-object infringement because it did not reveal, in itself, a sufficient degree of harm to competition. In particular, the Court of Appeals held that the FCA should not have relied on a general assumption that costs are passed on to customers to presume that the interbank fee would be passed on to the banks' customers.

The Court of Appeals subsequently examined the legal and economic context of the impugned agreement and found that it did not require the banks to pass on the fees, nor did it prevent the banks from bilaterally negotiating different terms and conditions for check processing with their customers. In addition, the Court noted that the agreement's objectives, which were to (i) maintain a financial equilibrium between the various banks (as the check-processing system was likely to have a greater impact on issuers' banks, *i.e.*, on banks providing mostly retail banking services), and (ii) ensure that the digitalization of the check-processing system would not favor the use of checks over more efficient means of payment, such as credit cards or interbank payment orders, could not be considered illegitimate. Consequently, the Court held that the interbank agreement's inherent harmfulness was not easily detectable in light of past experience and case law, especially since no such agreement had ever been examined by European or national competition authorities.

No restriction by effect

Regarding the potential effects of the agreement on competition, the Court of Appeals considered that the FCA's counterfactual analysis was flawed due to the fact that the FCA compared the existing situation to a situation where the banks (i) would not have agreed on fixing interbank fees and (ii) where the acceleration of check processing, which caused the treasury imbalance that the agreement was intended to fix, would nevertheless have occurred. According to the Court of Appeals, the FCA should have used a scenario where neither event took place given that the interbank fee was necessary to allow the acceleration of check processing. The FCA should thus have factored in the gains and losses associated with the checkprocessing acceleration in its effects analysis.

The Court of Appeals noted that there was no evidence that the interbank fee and acceleration of check processing translated into a price increase for the various categories of check issuers and therefore concluded that the FCA had not established that the interbank fee had significantly reduced competition on the market.

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3 *Cour de cassation* judgment of April 14, 2015 (No. 12-15.971).

4 Paris Court of Appeals ruling of December 21, 2017 (No. 15/17638).

5 *See* the Court of Justice's judgments of September 11, 2014, *Groupement des cartes bancaires v European Commission* (Case C-67/13 P) and of November 26, 2015, *SIA "Maxima Latvija" v Konkurences padome* (Case C-345/14).

6 *Cour de cassation* judgment of January 29, 2020 (No. 18-10.967 and 18-11.001).

Clarifications regarding the Court of Appeal's jurisdiction

The case also raised the question of whether the Court of Appeals can rule on the effects of alleged anticompetitive practices in cases where the FCA has found a by-object infringement and consequently has not conducted an effects analysis in its decision.

In this respect, the Court of Appeals recalled that pursuant to articles L.464-8 of the French Commercial Code and articles 561 and 562 of the French Code of Civil Procedure, it is entitled, when ruling on appeals from FCA decisions, to reach a new decision on the existence of the objections notified by the FCA. This means that the Court's own reasoning may replace the grounds of the FCA's decisions, provided that the parties' right to adversarial proceedings is complied with. In the present case, given that by-object and by-effect agreements are not autonomous infringements, but rather alternative categories of the same infringement, the Court of Appeals had jurisdiction to rule on the effects of the banks' conduct regardless of the fact that the FCA had not tackled the issue in its decision.

It remains to be seen whether the FCA will, yet again, challenge the Court of Appeals' annulment decision.

The French Competition Authority sanctions Mayotte import/export group for obstruction practices[7]

On December 9, 2021, the French Competition Authority (the "**FCA**") imposed a €100,000 fine on Mayotte Channel Gateway ("**MCG**"), the manager and operator of the Longoni port in Mayotte, together with its parent company, Société Nel Import Export, for refusal to comply with an FCA request for information.

Background

In 2018, the FCA opened an investigation into alleged practices implemented in the maritime transport sector in Mayotte. In this context, dawn raids were carried out in November 2019 on the premises of MCG and its former subsidiary, port-handling company Manuport. Subsequently, in December 2020, the FCA Investigation Services sent a request for information to the president of MCG, specifying that the deadline to respond was set on January 25, 2021.

Despite receiving three reminders from the case handlers, two of which explicitly outlined the penalties incurred in case of failure to reply, as well as two extensions of the deadline that increased the total time limit within which to respond to ten weeks, MCG did not respond to the request for information, leading to the issuance of an obstruction report in June 2021. At the time of the oral hearing which followed the obstruction, *i.e.*, in October 2021, MCG still had not provided any element of response.

The FCA's analysis

Articles L. 450-1 and L. 450-3 paragraph 4 of the French Commercial Code entitle the FCA Investigation Services to collect any information, document, or evidence necessary for the purposes of an ongoing investigation. Further, consistent EU and French case law states that any company under investigation by a competition authority must respond to requests for information actively, diligently, and in good faith.[8]

[7] FCA Decision No. 21-D-28 of December 9, 2021, relating to the application of Article L. 464-2 of the French Commercial Code with respect to Mayotte Channel Gateway SAS's obstruction to an FCA investigation.

[8] *See* Court of Justice's judgment of October 18, 1989, *Orkem v. Commission* (Case 374-87). *See* also FCA Decision No. 17-D-27 of December 21, 2017, relating to obstruction practices implemented by Brenntag.

Both Article 23(1) of Council Regulation (EC) No. 1/2003 of December 16, 2002 and Article L. 464-2, paragraph V, of the French Commercial Code provide that obstructing an investigation may give rise to fines. These provisions also specify that obstruction may be characterized by any behavior that hinders or delays the progress of an antitrust investigation. In other words, obstruction is not limited to the intentional misleading of investigators but also extends to negligence or passive behavior that is likely to compromise the effectiveness of an investigation.[9] Refusal to provide information or documents under request within the required time limit, as well as the failure to rectify an incorrect or incomplete reply, may therefore amount to obstruction. In this respect, in the recent *Akka* case, the French Constitutional Council confirmed that "any hindrance to the conduct of investigation or inquiry measures, that is attributable to the company [under investigation], whether intentional or resulting from negligence, amounts to obstruction."[10]

In the present case, the FCA's *Collège* found that by deliberately and repeatedly failing to respond to the request for information sent by the investigation services in December 2020, MCG had obstructed the ongoing investigation. The FCA further held that MCG's parent company, Société Nel Import Export, should be held liable for its subsidiary's behavior. The two companies were therefore imposed a €100,000 fine, jointly and severally.

Over the past three years, the FCA has been increasingly relying on the French Commercial Code's provision on obstruction to ensure the effectiveness of its investigative and fact-finding powers. It is now clear that the duty for investigated companies to actively and loyally cooperate with an investigation entails an obligation to respond to information requests in a timely manner. This is the FCA's fifth obstruction sanction decision in four years.[11]

The French Competition Authority launches a market test to assess Google's proposed commitments in the "related rights" case

In a press release dated December 15, 2021, the French Competition Authority (the "**FCA**") announced the opening of a public consultation on Google's proposed commitments in the "related rights" case. These commitments seek to address the preliminary competition concerns expressed by the FCA Investigation Services, who are still pursuing the proceedings on the merits following an interim measures decision issued in April 2020.

Background

EU Directive No. 2019/790[12] aims at recognizing the financial contribution of publishers in producing press publications through the creation of a right to authorize or prohibit the reproduction of "protected content" (such as text extracts, images, and videos) by platforms, aggregators, and search engines. In anticipation of the entry into force of the French Law transposing the directive,[13] Google offered to the publishers to

[9] *See* judgment of the Court of First Instance of November 9, 1994, *Scottish Football Association v. Commission* (Case T-46/929). *See* also FCA Decisions No. 17-D-27 of December 21, 2017, relating to obstruction practices implemented by Brenntag, and No. 19-D-09 of May 22, 2019, relating to obstruction practices implemented by the Akka group.

[10] French Constitutional Council Decision No. 2021-892 QPC of March 26, 2021, *Société Akka technologies et autres (courtesy translation)*.

[11] *See* FCA Decision No. 19-D-09 of May 22, 2019, and No. 17-D-27 of December 21, 2017, referenced above. *See* also FCA Decisions No. 21-D-16 of July 9, 2021, relating to obstruction practices implemented by Nixon, and No. 21-D-10 of May 3, 2021, relating to obstruction practices implemented by Fleury Michon.

[12] Directive (EU) 2019/790 of the European Parliament and of the Council of April 17, 2019, on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[13] Law No. 2019-775 of July 24, 2019, creating a related right for the benefit of news agencies and press publishers (the "**Law of July 24, 2019**").

either stop displaying protected content in its search engine, or authorize the reproduction of such content free of charge.

In November 2019, trade associations representing press publishers as well as *Agence France-Presse* referred the case to the FCA, leading to the imposition of interim measures in April 2020.[14] In parallel, the FCA continued its investigation into the merits of the case. In this context, the FCA expressed its concern that Google may have relied on its likely dominant position in the market for generalist search services to impose unfair and discriminatory trading conditions on publishers and news agencies in the context of its implementation of Law of July 24, 2019 transposing the directive.

Google's proposed commitments

In response to the FCA's competition concerns, Google has offered to implement the following six commitments:

— Negotiate the remuneration of press publishers and news agencies for any reproduction of protected content in good faith, in a transparent and non-discriminatory manner;

— Communicate to press publishers and news agencies the information necessary for a transparent assessment of the proposed remuneration;

— Continue to display the concerned contents within its search engine services while negotiations are ongoing;

— Submit a proposal for remuneration within three months of the start of negotiations. Should no agreement be found regarding the amount of remuneration by the end of the negotiation period, the negotiating parties will have the option to refer the matter to an arbitration tribunal, whose fees will be paid by Google;

— Guarantee that the conduct of negotiations does not affect the indexing, classification, or presentation of protected contents within Google's services; and

— Ensure that the negotiations do not impact other economic relationships that might exist between Google and the press publishers and news agencies.

The proposed remedies would apply for a period of five years, and an independent trustee would oversee their implementation. The FCA is currently carrying out a market test to determine whether these commitments effectively address its competition concerns. Interested parties, publishers, and news agencies must submit their comments by January 31, 2022.

[14] FCA Decision No. 20-MC-01 of April 9, 2020, relating to requests for interim measures by the *Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale* and others, and *Agence France-Presse*. Decision No. 20-MC-01 was mostly confirmed by the Paris Court of Appeals in a ruling dated October 8, 2020 (*Société Google e.a.*, No. 20/08071).

CONTACTS

Antoine Winckler
+32 2 287 2018
awinckler@cgsh.com

François-Charles Laprévote
+32 2 287 2184
fclaprevote@cgsh.com

Frédéric de Bure
+33 1 40 74 68 00
fdebure@cgsh.com

Séverine Schrameck
+33 1 40 74 68 00
sschrameck@cgsh.com

Sophie Troussard-Fauré
+33 1 40 74 68 54
stroussard@cgsh.com

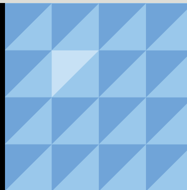
Maud Lesaffre
+32 2 287 2025
mlesaffre@cgsh.com

Gabrielle Rostand
+33 1 40 74 68 32
grostand@cgsh.com

Clarisse Ouakrat
+33 1 40 74 69 93
couakrat@cgsh.com

Ségolène Allègre
+32 2 287 2171
sallegre@cgsh.com

Manon Oiknine
+33 1 40 74 68 13
moiknine@cgsh.com



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