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French Competition Law Newsletter

Highlights

— The French Competition Authority ("FCA") fines the four historical meal voucher issuers for exchanging commercially sensitive information and locking their market

— The *Cour de Cassation* Issues Two Judgments Relating to the Business Secret Protection in the FCA's proceedings

— The French *Cour de Cassation* annuls the Paris Court of Appeal's judgment in the interbank fees case for the second time

The French Competition Authority ("FCA") fines the four historical meal voucher issuers for exchanging commercially sensitive information and locking their market

On December 17, 2019, the FCA issued fines of nearly 415 million euros to the four historical issuers of meal vouchers in France – namely Edenred France, Natixis Intertitres, Sodexo Pass France, and Up – as well as the Centrale de Règlement des Titres ("**CRT**") for exchanging confidential commercial information and implementing market locking practices.

Background

The FCA opened an investigation in October 2015 after Octoplus, a service provider offering meal vouchers *via* a mobile application, and several professional trade unions filed complaints for a number of anticompetitive practices.

The meal voucher market is highly concentrated, with four historical issuers holding combined market shares of almost 100%. These four operators are the only members of the CRT, an association that ensures, on their behalf, the processing and reimbursement of materialized (paper-based) meal vouchers with affiliated merchants.

The meal voucher market is a two-sided market. Meal voucher issuers are active on both sides. On the "issuance" side, they sell meal vouchers to companies who then distribute the vouchers to their employees. On the "acceptance" side, *via* the CRT, they process the meal vouchers used with their affiliated merchants and reimburse them. The affiliated merchants pay a commission to the issuers in exchange for these services. Competition only takes place on the issuance side, where issuers compete to win companies. Conversely, no competition really takes place on the acceptance side, because merchants tend

to accept as many meal vouchers as possible regardless of the identity of the issuer.

Although the FCA ultimately dismissed Octoplus and the professional trade unions' complaints for lack of evidence, it found during its investigation that the four historical issuers and the CRT had implemented several other anticompetitive practices under Article 101(1) TFEU and Article L. 420-1 of the French Commercial Code.

The FCA's decision

In its decision, the FCA fines the four issuers and the CRT for (i) exchanging confidential commercial information and (ii) implementing market locking practices.

First, the FCA found that the four issuers had, *via* the CRT, exchanged confidential commercial information relating to their strategic position on the acceptance side (*e.g.*, market shares and volumes of meal vouchers processed) on a monthly basis. No information was exchanged regarding the issuance side, where competition really takes place (in particular, with regard to prices charged to clients). The FCA nevertheless found that the information exchanges affected competition. This is because both sides of the market were perfectly symmetrical, such that any variation of the issuers' market shares on the acceptance side fairly reflected a similar variation of the issuers' strategic position on the issuance side. Similarly, the volume of meal vouchers processed on the acceptance side reflected the volume of meal vouchers issued on the issuance side. Therefore, the FCA found that the information exchanges allowed the issuers to detect any change in the pricing strategy of the competing issuers on the issuance side, and dissuaded them from adopting any aggressive pricing behavior.

Second, the FCA found that the four issuers had entered into two agreements with the aim to lock the meal voucher market.

The FCA found that the four historical issuers and the CRT had implemented non-objective and non-transparent CRT membership conditions. Membership to the CRT allows important economies of scale, simplifies management for merchants, and provides members with a single point of access to all merchants. Therefore, the FCA found that the non-objective and non-transparent CRT membership conditions restrained competitors' access to the meal vouchers market.

In addition, the FCA found that the four historical issuers agreed not to unilaterally launch dematerialized meal vouchers (either in the form of a card or mobile application). This agreement was found anticompetitive because it reduced the issuers' commercial autonomy and impeded innovation in the market at the expense of businesses and employees.

Interestingly, the FCA concluded that the CRT had partially participated in the practices because (i) the head of the CRT was necessarily aware of the content of the membership conditions and (ii) the CRT had clearly expressed its willingness to control the entry of new competitors in the market in various presentations.

The FCA fined the four issuers and the CRT a total fine of 415 million euros. In setting the fines, the FCA took into account the repeated occurrence of the practices as an aggravating circumstance. The FCA, indeed, had fined Sodexo Pass France, Up, Edenred France, and the CRT for anticompetitive horizontal agreements concerning the same market in 2001.[1] As a consequence, the FCA increased these three issuers' fine by 20% for the exchange of information and by 30% for the market locking practices.

Takeaways

The decision applies the FCA's well-established case law on information exchanges in the context of multi-sided platforms. The decision shows that exchanges of information carried out on one

[1] See decision No 01-D-41 of July 17, 2001.

side of a market can have anticompetitive effects on another side of the market if both sides are deemed sufficiently interdependent. Separately, on February 26, 2020, the FCA announced that it had carried out dawn-raids on the premises of various meal voucher issuers suspected of anticompetitive practices. These could be related to elements uncovered during the investigations resulting in suspicions of other potentially anticompetitive practices, or similar practices that occurred during a different time period. Further legal developments in this sector are therefore expected in the future, and the FCA may impose new fines on the historical meal voucher issuers. In the context of a market undergoing digital transition, the developing FCA case law in this sector will potentially have a long-term impact on the current competitive landscape by substantially reducing barriers to entry.

The *Cour de Cassation* Issues Two Judgments Relating to the Business Secret Protection in the FCA's proceedings

On January 29, 2020, the *Cour de Cassation* issued two judgments relating to decisions from the FCA's *Rapporteur Général* to waive the protection of business secrets granted to a party in proceedings before the FCA. In the first judgment, the *Cour de Cassation* held that the *Rapporteur Général* must provide concrete reasons in order to waive the protection of business secrets granted to a party in proceedings involving other parties. Conversely, in the second judgment, the proceedings did not involve any other parties, and the *Cour de Cassation* upheld the *Rapporteur Général*'s decision to waive the protection of business secrets initially granted to a party. The *Cour de Cassation* considered that the *Rapporteur Général*'s decision would not risk exposing that party's business secrets to any third parties.

First judgment

In the first case,[2] one of the defendants made confidentiality claims over certain documents containing business secrets that had first been accepted by the FCA's *Rapporteur Général*. However, the *Rapporteur Général* subsequently decided to declassify these documents "*for the purposes of the debate before the FCA*" and communicated these in their full version (including the previously protected business secrets) to the other parties to the case, including the plaintiff. The defendant appealed this decision before the First President of the Paris Court of Appeal, who has jurisdiction over such claims. The First President of the Paris Court of Appeal upheld the *Rapporteur Général*'s decision, considering that the FCA had to submit the full version of the documents to the other parties in order to obtain the parties' comments and assess the materiality of the facts. The company appealed in cassation.

The *Cour de Cassation* quashed the judgment of the First President of the Paris Court of Appeal. It considered that the *Rapporteur Général* had failed to explain why all parties to the proceedings—including the plaintiff—needed access to the full version of the documents. The *Cour de cassation*'s judgment considered that, in proceedings involving several parties, the *Rapporteur Général* could not provide a general reason for waiving the protection of business secrets granted to a party. Rather, he must provide concrete and specific reasons justifying that the other parties to whom the documents are disclosed require access to versions of the documents that include business secrets.

[2] *Cour de Cassation*, Commercial Chamber, Judgment No. 18-11.725 of January 29, 2020.

Second judgment

In the second judgement,[3] the proceedings before the FCA concerned a company's failure to comply with commitments, and therefore did not involve any third parties. The *Rapporteur Général* had issued a decision accepting the company's confidentiality claims over certain documents, but subsequently decided to declassify these documents "*for the purposes of the debate before the FCA*". The company appealed. The First President of the Paris Court of Appeal upheld the decision on the grounds that the company did not suffer any harm, as no third parties would gain access to its business secrets. The company appealed in cassation.

The *Cour de Cassation* upheld the judgment, confirming that the company had failed to justify why the *Rapporteur Général*'s decision violated its business secret protection right, since no third party was involved in the proceedings. Therefore, unlike in the first judgment, it seems—although it is not explicitly stated—that the *Rapporteur Général* did not have to provide concrete reasons in this case, as there was no risk that the party's business secrets would be disclosed to third parties.

Takeaways

While the first judgment provides a helpful clarification by requiring the *Rapporteur Général* to state reasons for his decisions to waive the protection of business secrets that he initially granted, the second judgment is far more questionable.

The second judgment assumes that when there is only one company involved in the FCA's proceedings, there is no risk that the *Rapporteur Général*'s decision to waive business secrets protection would violate, "*at this stage of the proceedings*", the company's right to protect its business secrets.

However, this line of reasoning ignores the fact that information declassified during the investigation might also be considered non-confidential at a later stage, in particular in the final decision published by the FCA. Unlike for merger control proceedings, the French Commercial Code currently does not provide for a business protection mechanism at the stage of the publication of a decision relating to anticompetitive practices or compliance with commitments or injunctions. It is the duty of the FCA College to decide whether or not certain information should be redacted in the published version of such decisions. It is unclear whether the *Rapporteur Général*'s decisions to uphold or waive the protection of business secrets during the investigation binds the FCA's College when it comes to the publication of the final decision. For the time being, it seems that the FCA considers that the *Rapporteur Général*'s decisions do not bind the FCA's College. Recently, the FCA initiated a practice whereby it asks parties to provide any confidential claims on an advanced copy of the decision, and then freely decides whether to redact any excerpts from the public version of the decision without informing the parties whether their claims were accepted in the first place. As such, the parties cannot effectively protect their business secrets at the stage of the publication of the decision. In contrast, before the European Commission, the parties hold lengthy discussions with the case team on a non-confidential version of the decision before it is published.

Moreover, the second judgment ignores the impact that the *Rapporteur Général*'s decision to waive business secrets protection may potentially have on subsequent proceedings before French courts, in particular in the context of appeal proceedings against the FCA's decision or private enforcement actions.

[3] *Cour de Cassation*, Commercial Chamber, Judgment No. 18-11.726 of January 29, 2020.

The French *Cour de Cassation* annuls the Paris Court of Appeal's judgment in the interbank fees case for the second time

On January 29, 2020, the *Cour de Cassation* annulled the judgment of the Paris Court of Appeal in the interbank fees case for interpreting the concept of restriction by object too broadly. The *Cour de Cassation* noted that only coordination practices that harm competition to a sufficient degree may be qualified as restrictions by object. Absent a clearly established anticompetitive object, likely anticompetitive effects must be proven to establish an infringement of Articles 101(1) TFEU and L. 420-1 of the French Commercial Code.

In September 2010, the FCA had fined 11 French banks €384.9 million for raising unjustified interbank fees during the transition towards a digital check-processing system. The FCA considered that the conduct had an anticompetitive object and, as such, did not examine the likely effects of the conduct.[4] After a first appeal, the Paris Court of Appeals overturned the FCA decision, considering that it had not demonstrated the alleged anticompetitive object of the conduct. In cassation, the *Cour de cassation* remanded the case to the Paris Court of Appeal for *de novo* judgment, considering that the Paris Court of Appeal had not examined pleas raised by two parties.

On December 21, 2017, the Paris Court of Appeal issued a second judgement on the case, this time confirming the FCA decision. The Court found that the exchange check-image fee ("CEIC") – a fixed fee per check paid by the "remittent bank" (the bank of the beneficiary of the check) to the "drawee bank" (the bank of the issuer of the check) – amounted to a uniform cost input for remittent banks which did not correspond to any rendered service and, therefore, artificially increased remittent banks' costs. It further found that the fee restricted banks' freedom to define their pricing policy. Moreover, the Court considered that the fee would necessarily influence banking service prices overall, because it would be passed on to final customers through the cross subsidies system that financed the check service, but also because costs are generally passed on to final prices. The Court concluded that the CEIC qualified as a restriction by object, and did not assess the likely effects of the agreement on the market. The banks appealed in cassation.

On January 29, 2020, the *Cour de Cassation* annulled the judgment. It held that, in the absence of past experience establishing that the practices at stake were harmful, the Paris Court of Appeal could not presume – without proving it – that the fee would necessarily be passed on to final customers. The *Cour de Cassation* held in particular that the Paris Court of Appeals had failed to demonstrate that the fee would be passed on to final customers through the cross subsidies system. By qualifying the conduct as a restriction by object without clearly establishing its anticompetitive object, the Paris Court of Appeal infringed the so-called principle of restrictive interpretation of the concept of restriction by object, in violation of Articles 101(1) TFEU and L. 420-1 of the French Commercial Code.

The ruling of the *Cour de Cassation* is in line with consistent EU case-law in *Groupement des Cartes Bancaires v European Commission*[5] and *SIA „Maxima Latvija" v Konkurences padome*.[6] In these cases, the European Court of Justice held that "*the concept of restriction of competition 'by object', [...] must be interpreted restrictively and can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects*".[7]

[4] Decision n° 10-D-28 of September 20, 2010 (the "FCA Decision").

[5] ECJ judgment of September 11, 2014, *Groupement des cartes bancaires (CB) v European Commission*, case C-67/13 P.

[6] ECJ judgment of November 26, 2015, *SIA „Maxima Latvija" v Konkurences padome*, case C-345/14.

[7] *SIA „Maxima Latvija" v Konkurences padome*, para.18.

The FCA issues a study on behavioral remedies

In January 2020, the FCA published its study on behavioral remedies in merger control and anticompetitive practices.[8] The study takes stock of the FCA's decisional practice on behavioral remedies and provides material for broader discussion amongst competition law practitioners and academics.

Background

Behavioral remedies aim to address competition concerns by modifying a company's commercial behavior, often for a limited period of time, for instance through commitments to license key technology, provide access to infrastructure or key assets, or put in place firewall provisions. In contrast, structural remedies (*e.g.,* divestiture of a business activity, termination of contractual ties) are one-off remedies that aim to immediately restore the competitive structure of the market.[9]

According to the study, competition authorities have traditionally been reluctant to accept behavioral remedies for three main reasons:

— **Duration.** Structural remedies are instantly implemented where behavioral remedies are implemented over several years.

— **Temporary nature.** Structural remedies are by nature irreversible and permanently restore competition on the market. In contrast, behavioral remedies are temporary. While their duration generally varies between 3 and 11 years, they are typically offered for 5-10 years in merger control and 5 years in anticompetitive proceedings.[10]

— **Complex monitoring.** Structural remedies require monitoring for a short time period, for instance, the few months required to divest a business. In contrast, behavioral remedies require rigorous and continuous monitoring throughout their entire duration.

The FCA has generally been more eager to accept behavioral commitments than other competition authorities. The study confirms that the FCA considers that behavioral remedies can sometimes be a more flexible and proportionate tool than structural remedies to address competitive concerns, especially in fast-moving markets.

Key features of behavioral remedies in FCA decisional practice

The study indicates that the FCA assesses proposed behavioral remedies in light of three main criteria:

Suitability and proportionality. Remedies must be sufficient to resolve the competition issues identified, *i.e.* to maintain competition on the market (in merger control cases) or put an end to a competition concern (in anticompetitive practices cases). They should not go beyond what is strictly necessary to resolve the competition issues. The duration of the remedies must also be proportionate to the competitive concern they address.

— **Verifiability.** Remedies must be verifiable, *i.e.* the FCA must be able to easily check (i) prior to their approval, whether the party is capable of enforcing them, and (ii) after the proposed remedies have been approved, whether the party is actually implementing them. Third parties may inform the FCA of any risk in this respect, particularly in response to a remedy presentation notice sent by the FCA to concerned parties in anticompetitive proceedings or to a remedy market test launched by the FCA in merger control proceedings.

[8] Available both online since January 17, 2020 and in paperback format starting February 18, 2020.

[9] Remedies can also be "hybrid" when they are both behavioral and structural in nature, typically when they aim to address different competition concerns (*e.g.*, horizontal and vertical effects in merger cases).

[10] No indefinite behavioral remedies have been accepted by the FCA to date.

— **FCA's ability to easily monitor and review the remedies.** The FCA must be able to monitor the remedies easily and adapt them over time if market conditions change. The FCA is therefore unlikely to accept behavioral commitments that would require complex or burdensome monitoring over time.

The study concludes that in any commitment litigation the FCA aims at finding a balance (i) between restoring or maintaining overall competition on the market and (ii) protecting the individual party's freedom to determine its own business policy. As a result, the FCA typically allows parties to shape tailored commitments addressing the particular anticompetitive concerns raised in the case at stake. The FCA also limits third-party challenges to those who have standing to bring proceedings.

Takeaway

Parties offering behavioral remedies generally need more time to convince the FCA that such remedies are more suitable and/or effective than clear-cut structural remedies. They should therefore submit their proposals sufficiently in advance of the relevant deadlines.

The FCA Publishes an Antitrust Practical Guide for SMEs

In February 2020, the FCA published a practical guide on the application of antitrust rules to small and medium-sized enterprises. The FCA published this guide with the knowledge that SMEs often lack the resources to be fully aware of and comply with antitrust rules.

The guide outlines the anticompetitive practices that are most likely to concern SMEs (namely cartels, tenders offer rules, exchanges of information, resale price maintenance, restrictions on online sales, and general abuses of dominance). It also presents the procedures applicable when SMEs are in breach of antitrust rules (*i.e.*, leniency and settlement proceedings) or victims of anticompetitive practices (*i.e.*, complaints and follow-on actions for damages).

The guide is a further step towards enforcement of antitrust laws at all levels of the economy. It also reflects the FCA's objective of increasingly relying on private actors to report breaches and enforce antitrust rules.

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