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French Competition Law Newsletter

Highlights

— The French Competition Authority sent a statement of objections to Apple for practices related to advertising on iOS mobile applications

— The French Competition Authority issues its Opinion on competition in the cloud sector

— The French Competition Authority orders interim measures against Meta regarding practices implemented in the online ad verification sector

The French Competition Authority unconditionally approves the creation of an airport catering joint venture between Aéroports de Paris and British caterer Select Service Partner following an in-depth investigation

On August 8, 2023, following an in-depth investigation ("**Phase 2**"), the French Competition Authority ("**FCA**") unconditionally approved the creation of a full-function joint venture between Aéroports de Paris ("**ADP**") and the British caterer Select Service Partner ("**SSP**", together "**the Parties**") for the operation of catering services at Paris-Orly and Paris Roissy-Charles de Gaulle airports.[1]

Background

ADP is the state-owned operator of the three main Paris airports, where it operates various airport infrastructures, including retail shops and restaurants. In particular, ADP is active in the provision of food catering services at Orly airport through its subsidiary Extime Food & Beverages Paris ("**Extime**"). SSP is a multinational group active in concession food services and typically operates in airports, train stations, shopping malls, museums, and other similar venues. In France, SSP is present in several airports (Marseille, Nice, Nantes, Bordeaux, Lyon, Paris Roissy-Charles de Gaulle, and Orly), train stations (Gare de Lyon and Gare Montparnasse), and motorway service areas, as well as in the Paris underground.

On October 28, 2022, following a tender won by SSP, the Parties notified the FCA of their intent to

[1] FCA Decision No. 23-DCC-165 of August 3, 2023, on the creation of a full-function joint venture between Select Service Partner and Aéroports de Paris.

transform Extime into a full-function joint venture which would operate almost all catering outlets at Charles de Gaulle and Orly airports.

On January 9, 2023, the FCA raised potential competition concerns with the proposed transaction and opened a Phase 2 investigation.[2]

Identification of a separate downstream market for commercial airport catering

For the first time and similarly to the Commission, the FCA differentiated between:

— The upstream market for the granting of concessions, where the FCA identified a separate market for the concession of catering specific to the transport sector and left open a potential distinction for the concession of catering services provided in airports.

— The downstream market for the concession of catering market. Because passengers cannot access external food sources once they pass airport security checkpoints, the FCA considered that catering activities are not subject to competitive pressure from outside the airport and identified each ADP-managed airport as a distinct geographic market. Yet, the investigation found no need for further market segmentation, such as by terminal or zone, because operators set uniform pricing policies across all their catering facilities within an airport.

Absence of horizontal effects on the downstream catering markets

Initially, the FCA was concerned that the joint venture could ultimately have a virtual monopoly in Paris airports, presenting the risk of price increases and a decline in the quality and diversity of catering offerings.

However, the investigation revealed that, independently of the transaction, ADP had already entrusted Extime with the management of its catering spaces. Indeed, Extime had already started to operate spaces that were previously run by other operators when their leases ended. The FCA also considered that ADP has the legal capacity, the technical means, and the experience required to entrust this activity to a single operator over which it will exercise control, as well as a plausible incentive to do so.

On the basis of the counterfactual scenario, the FCA thus considered that even without the joint venture, ADP, through Extime, would likely control most of the catering outlets by 2032. The FCA concluded that the transaction would not shift the market from an oligopoly to a monopoly since, either way, a single operator would oversee the two airports' catering outlets. The FCA, therefore, dismissed concerns about adverse horizontal effects on the downstream airport catering market.

Absence of vertical effects on the upstream concession catering market

When it opened the Phase 2 investigation, the FCA raised two concerns.

Firstly, the FCA feared that, as a result of the transaction, Extime would, in the long term, manage almost all the food service areas in the two largest French airports. The FCA was concerned that this leadership position would potentially give SSP a significant competitive advantage in the national market for the concession of food services in airports, enabling SSP to systematically prevail in calls for tender issued by ADP or other French airports. In its final decision, the FCA concluded that although the merged entity would have a substantial market share on the airport catering market, a substantial demand besides ADP-managed airports for SSP's competitors will remain. Additionally, SSP would not have a significant competitive advantage, given that ADP's calls for tenders allow all market operators to bid without giving a major competitive advantage to the outgoing operator.

[2] FCA Decision No. 23-DEX-01 of January 9, 2023, on the creation of a full-function joint venture between Select Service Partner and Aéroports de Paris. For further details, see the French Competition Law Newsletter, January 2023, available at: www.clearygottlieb.com/-/media/files/french-competition-reports/french-competition-newsletter-jan-2023.pdf.

Secondly, the FCA analyzed whether the transaction could limit access to concession catering services for other French airports. Yet, concerns about SSP limiting its services exclusively to other French airports were set aside, as SPP's incentives to expand into other airports would not be altered by the transaction. In addition, other airports can collaborate with other operators whose competitive abilities are unlikely to be affected by the transaction. The investigation also confirmed that the transaction would not distort the competitive parameters of contracts between concession caterers and catering chains, so that Extime would not hold an undue advantage in its relations with these chains.

Conclusion

In light of the above findings, the FCA approved the merger without commitment.

The French Competition Authority sent a statement of objections to Apple for practices related to advertising on iOS mobile applications

On July 27, 2023, the *Rapporteur Général* confirmed the notification to Apple of a statement of objections ("**SO**") concerning potential anticompetitive practices in the sector for the distribution of mobile applications, likely to have consequences on several related markets for advertising and consumer services.[3]

Background

In June 2020, Apple announced that as of September 2020, it would launch a new privacy feature called "App Tracking Transparency" ("**ATT**"). This feature requires mobile applications offered on Apple's operating system, iOS, to get users' permission before using Apple's unique Identifier for Advertisers ("**IFA**") to track users' data across applications or websites owned by third-party companies.

Given the significant impact on advertisers and application publishers, on October 23, 2020, several associations of actors in the online advertising sector (*e.g.*, media, internet networks, advertising agencies, technical intermediaries, publishers, and mobile marketing agencies) launched a complaint against Apple's new feature to the FCA. They claimed that by implementing the ATT feature, Apple was abusing its dominant position by imposing unfair trading conditions on third-party advertising services that would not apply to its own services. They argued that with ATT, Apple requires third-party applications to obtain users' consent for certain advertising services while Apple's own services are not subject to such requirement for advertising purposes. In addition, the associations requested interim measures to prevent Apple from implementing ATT until the adoption of a decision on the merits of the case.

Apple argued that the requirements of its ATT do not apply to its own services because they are irrelevant insofar as Apple does not track individual users across its own services for advertising purposes based on unique user identifiers such as the IFA. Apple explained that it relies only on limited proprietary datapoints that cover cohorts of no less than 5,000 users.

In a decision of March 17, 2021, the FCA rejected the request for interim measures and indicated that it would pursue its investigation to rule on the merits of the case because its preliminary investigation did not conclude that Apple's practice contravened Art. 102 TFEU.[4]

[3] FCA Press Release, "Advertising on iOS mobile applications: the General Rapporteur confirms having notified the Apple group of an objection", July 27, 2023, available at: www.autoritedelaconcurrence.fr/en/article/advertising-ios-mobile-applications-general-rapporteur-confirms-having-notified-apple-group.

[4] FCA Decision No 21-D-07 of March 17, 2021, regarding a request for interim measures submitted by the associations Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil et Achat Media, and Syndicat des Régies Internet in the sector of advertising on mobile apps on iOS.

Proceedings on the merits of the case: the SO

On July 27, 2023, the *Rapporteur Général* confirmed that it had sent an SO to Apple because it suspected the company of abusing its dominant position by imposing discriminatory, non-objective, and non-transparent conditions for the collection of user data for advertising purposes.

Interestingly, the German Federal Cartel Office ("**FCO**") also opened an investigation into Apple's introduction of the ATT in June 2022. The FCO is investigating whether Apple is favoring its own services and/or impeding other companies through this new privacy feature by imposing requirements on third parties for advertising purposes that do not apply to its own services.[5] Furthermore, in December 2021, the Office of Competition and Consumer Protection ("**UOKiK**") in Poland opened a similar investigation.[6]

These investigations further highlight the growing link between privacy considerations and competition law. In 2019, the FCO found that Facebook (now Meta) had abused its dominant position in the way it collected, merged, and utilized user data not only from its own services but also from third-party services. The use of user data by tech giants for advertising purposes was also at the core of the commitments that Google offered to the European Commission in the *Google/Fitbit* case[7] and to the UK Competition and Markets Authority ("**CMA**") in the *Google Privacy Sandbox* case.[8]

The French Competition Authority conditionally approves the acquisition of Sirestco Group by Areas Group in the provision of highway catering services

On July 25, 2023, the French Competition Authority approved, subject to remedies, the acquisition by the Areas Group ("**Areas**") of sole control of its French competitor, Sirestco Group ("**Sirestco**", together, "**the Parties**") in the sector for the provision of highway catering services.[9]

Background

Areas and Sirestco are both active in the concession catering sector in highway service stations. In France, they operate in multiple restaurants and shops in more than a hundred highway service stations under a broad range of brands (*e.g.*, "L'Arche Cafétéria" and "A Table" for Areas and "Léo Bistrot" for Sirestco), as well as with brand licenses and franchises (*e.g.*, "Paul", "Starbucks", and "Subway" for Areas; "La Mie Câline", "Steak N'Shake", and "Carrefour Express" for Sirestco).

The Parties' activities overlap in the upstream market for the allocation of highway catering concessions, and the downstream markets for the provision of highway catering services to end-consumers (segmented between markets for the provision of catering services *stricto sensu*, for the provision of light refreshments, and for the sale of food products in shops and vending machines). They also overlap in the market for the retail of highway tobacco and as purchasers in the upstream market for the sourcing of food products.

On May 15, 2023, Areas notified the FCA of its intent to acquire sole control of Sirestco.

[5] FCO press release, "Bundeskartellamt reviews Apple's tracking rules for third-party apps", June 14, 2022, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html.

[6] UOKiK press release, "Apple - the President of UOKiK initiates an investigation", December 13, 2021, available at https://uokik.gov.pl/news.php?news_id=18092.

[7] *Google/Fitbit* (Case M.9660) OJ C(2020) 9105, Commission decision of December 17, 2020.

[8] Case 50972, CMA Decision to accept commitments offered by Google in relation to its Privacy Sandbox Proposals.

[9] FCA Decision 23-DCC-151 of July 25, 2023 on the acquisition of sole control of the Sirestco Group by the Areas Group.

Potential risks to competition

Following its assessment, the FCA considered that the transaction raised anticompetitive concerns in some markets for the provision of highway catering services to end-consumers. As highways are one-way roads and because drivers typically make stops in service station along their route, the FCA assessed the impact of the transaction on competition for each highway separately, in both directions of traffic. It identified the following concerns:

— On the A5 highway, the Parties' combined share would exceed 50% in both directions of traffic on the downstream market for the provision of catering services *stricto sensu*, as well as on the market for the provision of light refreshments.

— On the A19 highway, the combined entity would also command more than half of the market for the sale of food product in both directions of traffic, while having a monopoly on the market for the retail of highway tobacco.

Therefore, the FCA was concerned that the transaction would result in higher prices and lower quality of services provided to end-consumers on these two highways, especially given the lack of credible alternative suppliers post-transaction.

Remedies offered by Areas

To address the FCA's concerns, Areas committed to (i) divest the sub-concession contract for the catering and food retail activities of the Troyes-Fresnoy service station's shop on the A5 highway and (ii) transfer the lease management contract for the operation of the "Casino Everyday" shop, as well as entering into a third-party operating contract for catering services at the Loiret service station on the A19 highway. The remedy package would entirely alleviate the FCA's concerns on these highways as the Troyes-Fresnoy and Loiret service stations are accessible from both directions of traffic.

An independent monitoring trustee approved by the FCA oversee the implementation of these remedies, and the FCA will have to approve the buyers.

The French Competition Authority issues its Opinion on competition in the cloud sector

On June 29, 2023, the French Competition Authority published its Opinion on competition in the cloud sector following a sector inquiry.[10] The Opinion examines various practices currently implemented or likely to be deployed in this sector which have the potential to restrict competition. The Opinion provides a blueprint for future investigations, setting out the theories of harm that the FCA may put forward in the context of abuse of dominance, abuse of economic dependency, anticompetitive agreements or merger control cases.

Background

In its 2023-2024 Roadmap, the FCA announced that "[t]*he digital economy in all its forms continues to be one of the Autorité's priorities for action*" and, in particular, that it will continue to apply competition law to "*operators and practices not covered by the DMA*".[11] The FCA targeted the cloud as one of its key enforcement priorities. The Opinion will likely be the basis for future enforcement in the cloud sector, just as the 2010 opinion on online advertising[12] was the basis for the FCA's numerous

[10] FCA Opinion No. 23-A-08 of June 29, 2023 (hereinafter "Opinion"). Available in French here. Summary in English here.

[11] FCA, "*The Autorité publishes its roadmap for 2023-2024*", available at: https://www.autoritedelaconcurrence.fr/en/article/autorite-publishes-its-roadmap-2023-2024.

[12] FCA Opinion No. 10-A-29 of December 14, 2010, available at: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/14-december-2010-sector-inquiry-online-advertising.

investigations in this sector.[13] As one of the first authorities to issue an opinion on competition in the cloud sector, the FCA is likely to influence the position of the European Commission ("**EC**") and other national competition authorities in ongoing and future cases.

Cloud sector characteristics

The FCA asserts that "*companies generally use only one cloud service provider per workload*", that is "single-homing".[14] The FCA asserts that multi-homing requires complex technical interoperability between several cloud service providers ("**CSPs**").[15] The FCA is concerned that lock-in effects within cloud ecosystems will become stronger "*as the number of companies that have migrated to a cloud ecosystem increases*", in particular towards so-called 'hyperscalers' CSPs, such as Amazon, Microsoft, and Google, which the FCA asserts captured 80% of the growth in public cloud infrastructure in France in 2021.[16]

Market definition

The Opinion indicates that three categories of cloud services are generally distinguished: (i) Infrastructure as a Service ("IaaS"); (ii) Platform as a Service ("PaaS"); and (iii) Software as a Service ("SaaS").[17] The Opinion further indicates that the FCA will analyse market definitions at the level of the workload, looking at the different solutions—including cloud-based and non-cloud based ones—from which a customer can choose to meet a particular need. The Opinion indicates that a segmentation based on the SecNumCloud certification (also called "cloud de confiance" in France) could also be taken into account.[18] However, the Opinion considers that a segmentation based on customers' activity sector is not relevant at this stage.[19]

Furthermore, the Opinion defines three closely related software markets the FCA believes competition authorities should watch closely, particularly with respect to their links with the cloud, which are the markets for (i) data centre colocation services; (ii) on-premise software; and (iii) intermediation in consulting and integration of cloud solutions.[20]

Practices identified by the FCA

The Opinion raises a general concern over the risk of market imbalances—a risk that, according to the FCA, is inherent to markets where unavoidable players operate. It further identifies a series of competitive concerns specific to the cloud sector, focusing in particular on the public cloud.

Pricing practices. The FCA analyzed two pricing practices specific to the cloud sector: (i) cloud credits and (ii) egress fees. The FCA considers that "*in depth surveillance*" of cloud credits and egress fees is warranted, especially given that both practices tend to be put in place simultaneously by hyperscalers.[21]

[13] FCA Decision No. 19-D-26 of December 19, 2019, imposing a fine of €150 million along with injunctions on Google for abuse of dominant position in the search advertising market. FCA Decision No. 21-D-11 of June 7, 2021, imposing a €220 million fine along with injunctions for abuse of dominant position in the market for ad servers for publishers of websites and mobile apps. FCA Decision No. 21-D-07 of March 17, 2021 regarding a request for interim measures by several association on practices implemented by Apple on the sector for advertising on iOS mobile apps. Decision No. 22-D-12 of June 16, 2022, adopting Meta's proposed commitments to put an end to the FCA's concerns in non-search-related online advertising. Decision No. 23-MC-01 of May 4, 2023, imposing interim measures on Meta regarding practices implemented in the online ad verification sector.

[14] Opinion, paras. 71–73.

[15] *Ibid.*, para. 73.

[16] Opinion, para. 302.

[17] IaaS and PaaS solutions tend to be used by IT business customers to build their own internal systems on a 'pay-as-you go' model, while SaaS offerings tend to be used by software end-customers on a license model (see Opinion, page 3).

[18] Opinion, para. 355.

[19] Opinion, para. 363.

[20] Opinion, paras. 367–385.

[21] Opinion, para. 463.

Cloud credits are offered in the form of free trials or support programs to accompany the migration of companies to the cloud. Most CSPs offer free trials, *i.e.*, credits to be spent on cloud services for a certain duration upon signing up for the service. These can range from dozens to thousands of euros, generally last no more than three months, and can be frequent or recurring. In contrast, support programs are mainly offered by larger CSPs for users with high innovation potential, such as start-ups, cover much larger amounts (hundreds of thousands of euros, for example) and can last for several years. The FCA calls for special attention to be given to support programs targeted at specific customers with large purchase potential, such as startups, as smaller CSPs would not necessarily be able to replicate such support programs and would end up losing these potential customers. The Opinion considers that these support programs can have strong lock-in effects on customers and significant exclusionary effects on competitors.[22] In addition, the Opinion expresses doubts as to the CSPs' ability to offer such support programs profitably, suggesting that CSPs would offer support programs to attract customers who would then be locked into the CSP's ecosystem.[23]

Furthermore, CSPs charge egress fees, *i.e.*, network fees billed when a customer seeks to transfer data out of the cloud, for instance to another CSP. The Opinion notes, first, that there appears to be a discrepancy between these fees and the actual costs borne by CSPs for the data transfer.[24] Second, when selecting a CSP, customers cannot anticipate the volume of data that will be generated and stored on the cloud, and therefore cannot anticipate the amount of the egress fee that they will have to pay in the future if and when they want to switch to another CSP. This uncertainty can lock in customers, making it harder for users to switch away from their primary provider or to adopt multiple providers in a multi-cloud environment.

First time migration. The Opinion notes that migration from on-premise to cloud-based services is an intricate one that comes with substantial expenses. When selecting a CSP, customers often turn to their existing IT service providers. The FCA's sector inquiry has brought to light disincentives for customers to opt for alternative service providers. These disincentives include restrictive contractual clauses, tied sales, pricing benefits favoring the service provider's own products, and technical limitations. In instances where a dominant operator adopts such measures, they could be deemed abusive practices. The EC is currently investigating several complaints related to practices of this nature.[25]

Migration between CSPs. According to the FCA, migration between CSPs can be impeded by both technical barriers and contractual practices. Technological hurdles may arise due the specific architecture and solutions used. The extensive range of products and services involved lead to substantial migration expenses. Beyond the technical challenges, incumbents can erect additional technical and commercial barriers to increase migration costs. This could spurn a dominant CSP intentionally utilizing a proprietary data format to obstruct data portability to an alternative CSP or may impose commercial conditions that bind customers to its ecosystem.

Barriers to entry. The Opinion also notes that new entrants face an uphill struggle when trying to enter or expand into the markets due to technical barriers to interoperability arising between their services and those developed by hyperscalers. While these challenges impact all competitors, they particularly affect the smaller ones.

The FCA is particularly concerned by the fact that hyperscalers are potentially dominant in several related markets. First, dominant undertakings that are active in both software publishing and cloud

[22] Opinion, paras. 409–411.

[23] Opinion, p.138

[24] Opinion, para. 451.

[25] The Opinion notes that four complaints have been lodged against Microsoft with the EC: (i) a complaint by OVHcloud in the summer of 2021 (*see* here), which other players, such as Aruba and The Danish Cloud Community, have joined; (ii) a complaint by Nextcloud in 2021; (iii) a complaint by Cloud Infrastructure Services Providers in Europe ("CISPE") for unfair software licensing practices (*see* here); and (iv) a complaint by Slack filed in July 2020 (*see* here) on an alleged tying of Teams with its other cloud software products Word, Excel, PowerPoint and Outlook (link).

services may have the ability and incentive to increase the price of software licenses granted to competing CSPs. Second, dominant undertakings may engage in self-preferencing and favor their own services through discount systems, non-tariff benefits, and cross-subsidies across the broad range of services they offer. Third, dominant undertakings benefit from privileged access to customers' data, which can constitute a decisive competitive advantage and risks tilting the market towards hyperscalers. Competitors may struggle to offer attractive cloud credits and incentivize customers to switch away from hyperscalers due to high egress fees.

The Opinion also analyzes the emerging role of online marketplaces for cloud services.[26] The FCA is concerned by several restrictive practices which are or could be put in place by such marketplaces, namely (i) contractual clauses preventing third party providers from communicating or promoting offers on the marketplace; (ii) the marketplace's ability to position and display its own products more favorably than those of third parties; (iii) tariff parity clauses, whereby the third party must ensure price parity between the price offered on the marketplace and that offered on other distribution channels; and (iv) potentially excessive commission rates charged by marketplaces.

The FCA's Toolkit to Remedy Competitive Concerns

The Opinion explores potential remedial actions drawn from competition law instruments but also regulatory intervention.

In the field of abuse of dominance, the Opinion provides an overview of the FCA and EC's decisional practice on self-preferencing, tying, and interoperability, suggesting that the FCA may use those theories of harm in future enforcement.[27]

In the field of anticompetitive agreements, the Opinion indicates that the FCA will stay vigilant on groupings, associations, technological partnerships, and joint-structures between CSPs.[28] In the context of merger control, the Opinion calls for close scrutiny of concentrations involving major CSPs. It also explores the use of the French legal concept of "abuse of economic dependency," which prohibits the abusive exploitation of an undertaking's state of "economic dependency" on another undertaking. While the Opinion does not state how such a provision would be applied to the markets at stake, it notes that the FCA has already used the concept against Apple in 2020.[29]

Furthermore, the Opinion considers market failures that could potentially warrant regulatory intervention. It notes that although technical options exist to facilitate supplier switching or multi-cloud usage, like standard services or open-source solutions, market players have not adopted common technical standards yet. Incumbent operators, particularly hyperscalers, may not have a strong incentive to develop high-performance or cost-effective solutions if it risks altering their market position. The Opinion concludes that regulatory intervention may be warranted—whether via the DMA, the Data Act,[30] or the French draft law to secure and regulate the digital space[31]—to remedy such market failures.

[26] Opinion, para. 545. Online marketplaces for cloud services sell cloud products and services from various providers.

[27] GC, judgement of November 10, 2021, T-612/17, *Google Shopping*, currently under appeal; FCA Decision No 14-D-09 of September 4, 2014, *Nespresso*; Court of first instance, judgement of September 17, 2007, T-201/04, *Microsoft*.

[28] *E.g.*, "trusted cloud offers" or the Microsoft Azure – Oracle Cloud technology partnership.

[29] Opinion, p.11. FCA Decision No 20-D-04, March 4, 2020, *Apple*.

[30] Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), February 23, 2022, COM/2022/68 final.

[31] Draft law to secure and regulate the digital space.

The *Cour de cassation* upholds a restrictive interpretation of the notion of "by object" infringements and puts an end to long-running proceedings

In a ruling dated June 28, 2023, the *Cour de cassation*[32] upheld the Paris Court of Appeals' judgment which had reversed the 2010 decision of the French Competition Authority fining 11 banks for an anticompetitive pricing agreement in relation to check processing. The *Cour de cassation* ruled that the FCA had improperly qualified the agreement as a "by object" infringement when no sufficient degree of harmfulness to competition was proven. This ruling puts an end to a 13-year old judicial saga.

Background

In 2010, the French Competition Authority fined 11 banks[33] for having set unjustified interbank fees and artificially raised check processing charges between 2002 and 2017.[34] The FCA found that the banks had colluded on the creation of a computerized check processing system at the time of the switch to the Euro, which included the creation of an Exchange Check-Image Fee ("**ECIF**") and eight fees for related services (the "**Fees**"). As the banks themselves acknowledged, the ECIF was not a remuneration that remitting banks paid to drawee banks in consideration for a service rendered, but rather a transfer of income from one bank to another to share the financial consequences of the acceleration in check exchange made possible by the system's dematerialization. The ECIF increased the costs of the remitting banks, which the FCA assumed was likely to increase final prices and reduce the supply of check remittances. Furthermore, the FCA found that the creation of the ECIF and the Fees aimed to restrict each bank's freedom to independently determine its pricing policy, thereby hindering price competition in the check market. The FCA therefore classified the multilateral agreement that led to the establishment of the ECIF and the Fees as an infringement "by object."

The banks attempted to convince the FCA that the ECIF and the Fees could qualify for an exemption as they contributed to overall efficiency gains associated with the new computerized system. Although the FCA recognized that the Fees could be considered as compensation for services newly provided by banks and as a means to offset cost transfers resulting from the dematerialization of the check exchange system, it noted that the banks failed to demonstrate that the ECIF specifically contributed to the overall efficiency gains achieved through dematerialization.

The parties appealed, and a long judicial saga ensued around the notion of infringement "by object." According to the European Court of Justice ("**ECJ**") case law, infringements of competition "by object" are restrictions that reveal "*a sufficient degree of harm to competition that it may be found that there is no need to examine their effects*."[35] To determine whether an agreement reveals a sufficient degree of harm, antitrust enforcers and judges must analyze the content of its provisions, its objectives, and the economic and legal context of which it forms a part.[36] This notion must be interpreted restrictively.[37] The saga in this case concerned the

[32] *Cour de cassation*, judgment of June 28, 2023, No. 21-26.015.

[33] BNP Paris, Banque de France, Confédération Nationale du Crédit Mutuel, Crédit Industriel et Commercial (CIC), Crédit Agricole, Le Crédit Lyonnais (LCL), Crédit du Nord, HSBC France, Banque Postale, Société Générale, and Groupe BPCE.

[34] FCA Decision No. 10-D-28 of September 20, 2010.

[35] ECJ, judgment of September 11, 2014, C-67/13 P, *Groupement des cartes bancaires*, para. 58.

[36] ECJ, judgment of September 11, 2014, C-67/13 P, *Groupement des cartes bancaires*, para. 53.

[37] ECJ, judgment of September 11, 2014, C-67/13 P, *Groupement des cartes bancaires*, para. 58.

standard of proof to demonstrate that a restriction revealed a "*sufficient degree of harm*."

In 2012, the Paris Court of Appeals annulled the FCA decision on the grounds that the FCA had not proven to the requisite standard of proof that the agreement had an anticompetitive object.[38] Three years later, the *Cour de cassation* quashed the Paris Court of Appeals' ruling on procedural grounds,[39] and the case was remanded to the Paris Court of Appeals.[40]

The Paris Court of Appeals handed down a new judgment in 2017,[41] this time upholding the FCA's decision. The Court found that the establishment of the ECIF and the Fees were infringements "by object" because they restricted each bank's pricing autonomy and were necessarily passed on to consumers. However, the *Cour de cassation* quashed it once again in 2020, stating that the Paris Court of Appeals had applied the notion of "restriction of competition by object" too broadly.[42] In particular, the *Cour de cassation* held that in the absence of "*sufficiently reliable and robust experience*" showing that the contested fees are necessarily passed on to final prices, it was not appropriate to classify agreements like the one in question as inherently harmful to competition.

The case was remanded to the Paris Court of Appeals once more. In 2021, applying the legal standard defined by the *Cour de cassation*, the Paris Court of Appeals held that the agreement creating the ECIF and the Fees did not amount to an anticompetitive agreement. Neither "by object," primarily because the agreement did not hinder the banks' ability to freely determine their prices, nor "by effect," because the FCA had failed to demonstrate that the ECIF and the Fees had any tangible impact on the prices of check remittance services or had diminished the supply in the remittance market.[43] The FCA appealed.

The Cour de cassation's ruling

The *Cour de cassation* rejected the FCA's appeal on all its grounds.

First, it dismissed the FCA's argument that there was "*reliable and robust experience*" indicating that the specific fees concerned were by their very nature harmful to competition. The *Cour de cassation* relied on the *Budapest Bank* preliminary ruling in which the ECJ held that "*an interbank agreement which fixes at the same amount the interchange fee payable, where a payment transaction by card takes place, to the banks issuing such cards offered by card payment services companies operating on the national market concerned*" cannot be classified as a restriction "by object," unless that agreement, "*in light of its wording, its objective and its context*" can be regarded as posing a sufficient degree of harm to competition to be classified as such.[44] The *Cour de cassation* also reiterated that the FCA's argument according to which the ECIF and the Fees were necessarily passed onto consumers was based on a mere presumption. Therefore, the *Cour de cassation* held that the Paris Court of Appeals sufficiently demonstrated that the agreement was not an infringement "by object."

Second, the *Cour de cassation* held that, contrary to the FCA's argument, the Paris Court of Appeals did consider the potential effects of the ECIF and the Fees in order to reject the classification of infringement "by effect." However, the Court rightly concluded that the FCA did not successfully demonstrate that the fees had been passed on to consumers. Therefore, the FCA failed to prove that the ECIF and the Fees had had the effect of preventing, restricting, or distorting competition between banks. Thus, the agreement that led to the establishment of the ECIF and the Fees was neither an infringement "by object" nor an infringement "by effect."

[38] Paris Court of Appeals, judgment of February 23, 2012, No. 2010/20555.

[39] The *Cour de cassation* held that the Paris Court of Appeals' refusal to address the arguments raised by two consumer protection association in support of the FCA violated their right to be heard and as such their right to a fair trial, which justified the complete annulment of the Court's judgment.

[40] *Cour de cassation*, judgment of April 14, 2015, No. 12-15.971.

[41] Paris Court of Appeals, judgment of December 21, 2017, No. 2015/17638.

[42] *Cour de cassation,* judgment of January 29, 2020, No. 18-10.967 and No. 18-11.001.

[43] Paris Court of Appeals, judgment of December 2, 2021, No. 20/4626.

[44] ECJ, judgment of April 2, 2020, C-228/78, *Budapest Bank.*

The Paris Court of Appeals upholds the FCA's sandwich cartel decision

On June 15, 2023, the Paris Court of Appeals confirmed[45] the French Competition Authority's (decision fining La Toque Angevine ("**LTA**") about 16 million euros for colluding with two other leading manufacturers of industrial sandwiches.[46]

Background

On March 24, 2021, the FCA sanctioned three manufacturers of industrial sandwiches sold under private label, LTA, Snacking Services (Daunat), and Roland Monterrat, for price fixing and market allocation between 2010 and 2016 (the "**FCA Decision**").[47] The FCA granted full immunity to Roland Monterrat which was the first company to file for leniency. LTA and Daunat both requested leniency as well, in second and third position, and respectively received a 35% and a 30% fine reduction due to the added value of their disclosures.

LTA appealed, asking the Paris Court of Appeals (the "**Court**") to reduce the fine to nine million euros. LTA claimed that the *Rapporteur Général* wrongly rejected its application for a settlement. It also challenged the determination of the fine claiming that the FCA: (i) retained the wrong value of sales; (ii) did not properly appreciate the gravity of the practice and damage to the economy; (iii) should have set the leniency rate at a higher level given evidence shared by LTA; and (iv) breached the principle of equality by imposing on LTA—but not the two other parties—a 10% fine increase for belonging to a group. The Court rejected all the pleas.

The Court confirmed the fine imposed on LTA

LTA claimed that the *Rapporteur Général* wrongly refused LTA's offer to enter into settlement. The *Rapporteur Général* had refused LTA's offer on the grounds that a settlement procedure would not grant any procedural gain for the investigation services. LTA claimed that the *Rapporteur Général* cannot arbitrarily and without motivation refuse to settle with a party due to the principles of transparency and predictability. LTA also claimed that the *Rapporteur Général*'s refusal breached the principle of equality because in other cases, parties benefitting from leniency were offered a settlement procedure.

The Court rejected LTA's claims entirely. It reminded that the *Rapporteur Général* has full discretion to offer a settlement procedure (*i.e.*, companies are not entitled to obtain a settlement, even when they benefit from the leniency procedure) under the FCA's Procedural notice on settlement[48] and Article L.464-2, III of the French Commercial Code. The Court went on to explain that, in this case, all the parties had been granted conditional leniency, such that the parties were not allowed to challenge the conduct anymore and had committed to put an end to the conduct. In those circumstances, the *Rapporteur Général* could lawfully consider that a settlement procedure would not bring any additional procedural gains. Second, the fact that certain companies in distinct proceedings benefited from both leniency and settlement procedures cannot constitute a breach of the principles of equality. This principle applies between companies involved in the same proceedings, not by reference to companies involved in distinct proceedings. Finally, the

[45] Paris Court of Appeals, judgment of June 15, 2023, No. 21/08411.

[46] FCA Decision 21-D-09 of March 24, 2021, regarding practices implemented in the sector for the manufacturing and marketing of retailers' own-brand label sandwiches.

[47] *See* our March 2021 French Competition Law Newsletter.

[48] FCA, Procedural notice of December 21, 2018, regarding the settlement procedure.

Court held that LTA was in a position to appreciate the nature and level of the fine in light of the legal criteria set out in the French Commercial Code and the FCA's leniency notice, such that the *Rapporteur Général*'s refusal to settle did not create legal uncertainty.[49]

The Court also rejected all the pleas put forward by LTA on the determination of the fine. In particular:

— ***Value of sales.*** The Court reminded that according to well-established case law,[50] the relevant sales for the calculation of the fine are those realized in the market affected by the conduct (here, the sales generated by industrial sandwiches under private labels sold to mass-market food retailers), not those affected by the conduct (here, the sales generated by the cartelized tenders).

— ***Gravity.*** The Court held that the absence of retaliatory measures cannot mitigate the gravity of the conduct, while the fact that the practices were relatively sophisticated and had been kept secret did contribute to the gravity of the conduct.[51]

— ***Fine increase for belonging to a group.*** The Court upheld the 10% fine increase, the maximum legal amount, which it held was not disproportionate in light of the group's resources and the gravity of the practices and damage caused to the economy by the cartel. Furthermore, the Court found that the FCA applied a higher percentage to LTA, whose group has greater financial resources than Daunat.

— ***Leniency rate.*** The Court upheld the leniency rate because, in particular, the evidence brought by LTA did not establish the infringement or extend its scope or duration, but simply supported the existence of the infringement.

Takeaways

The Court's judgment confirms that the FCA holds a wide margin of discretion when deciding whether to offer a settlement procedure and that a leniency applicant is not entitled to a settlement—quite to the contrary, settlement is likely to bring limited procedural gains once one leniency application, and even more so for several leniency applications, has been accepted. Furthermore, the Court's judgment confirms that chances of success on appeal are more limited after a leniency application, as the scope of the appeal is generally limited to claims on the procedure and the calculation of the fine.

The French Competition Authority orders interim measures against Meta regarding practices implemented in the online ad verification sector

In a ruling dated May 4, 2023[52], the French Competition Authority ordered interim measures against Meta following a complaint by Adloox, in light of suspicions that Meta was abusing its dominant position on the market for online advertising by imposing unfair conditions for accessing its ecosystem, thereby causing serious and immediate harm to both Adloox and other independent ad verification service providers. These interim measures are imposed pending a decision on the merits of the case.

[49] Paris Court of Appeals, judgment of June 15, 2023, paras. 71-84.

[50] CJUE, judgment of April 23, 2015, C-227/14 P, *LG Display et LG Display Taiwan / Commission*, paras. 53 *et seq.*

[51] Paris Court of Appeals, judgment of June 15, 2023, paras. 147 and 149-153.

[52] FCA, May 4, 2023, decision n°23-MC-01 regarding a request for interim measures from Adloox (the "**Decision**").

Background

Meta, which is the parent company of Facebook and Instagram, notably provides advertising services among many other activities. In particular, Meta offers ad verification services intended to measure the effectiveness and to control the appropriate deployment of ads campaigns. This type of services may be offered by integrated advertising platforms (such as Meta) for their own advertising inventories, or by independent players like Adloox, the latter needing access to the integrated platforms' ecosystems to cover the related inventories.

Meta has developed two partnerships aimed at granting such access, by processing and providing data to third party ad verification players enabling them to offer ad verification services on Meta's advertising inventories. The "viewability" partnership allows partners to ensure that an ad has actually been seen by internet users, and the "brand safety" partnership allows them to control the appropriate deployment of ads campaigns and guarantee that the advertisement is not displayed in an environment that could harm the interests and values of the brand. Access to these partnerships is subject to a prior "invitation" by Meta.

On October 9, 2022, Adloox, a French provider of ad verification services, filed a complaint with the FCA stating that Meta was abusing its dominant position in the market for display advertising in France. Adloox first claimed that Meta was abusing its dominant position by discriminatorily denying it access to the "viewability" and "brand safety" partnerships. Adloox also claimed that Meta was abusing its dominant position by refusing to give direct access to the data required for providing advertising verification services to third party service providers (indeed, Meta is only providing third party providers with data it collected and processed itself beforehand).

In January 2023, Meta provided the FCA with a proposal of new "eligibility criteria" for the "viewability" and "brand safety" partnerships to address potential competitive concerns raised by the existing criteria.

The FCA's preliminary ruling on the alleged abuse of dominant position

The FCA preliminarily ruled that Meta might have abused its dominant position on the market for online advertising on social media as well on the broader market for online advertising not related to searches in France by applying unfair and discriminatory conditions to access its advertising ecosystem.

In particular, the FCA preliminarily found that Meta had likely not defined transparent, objective, non-discriminatory, and proportionate criteria for accessing and maintaining the viewability and brand safety partnerships, in breach of its "*duty*" as a dominant market player. With respect to the new eligibility criteria proposed by Meta in January 2023, the FCA considered that these were not satisfactory as Meta did not intend to make them public and eligibility to the partnerships was still subject to a prior "invitation" by Meta. In addition, the FCA also found that Adloox's denial of access to these partnerships was susceptible to be discriminatory, given that Adloox' situation is equivalent to that of certain of its competitors who have been invited and promoted as Meta partners.

The interim measures

In light of the above, the FCA imposed interim measures on Meta on the basis of Article L.464-1 of the French Commercial Code, according to which the FCA might impose interim measures where "*the conduct causes serious and immediate harm to the general economy, to that of the sector concerned, to the interests of consumers or, as the case may be, to the complainant company*", provided that such interim measures remain strictly limited to what is necessary to deal with the urgency pending a decision on the merits.

The FCA found that Meta's alleged practices are causing serious and immediate harm to the interests of Adloox because the latter is deprived of a major source of growth, which could result in the loss of its current clients or even in it being evicted from the ad verification sector. The FCA found that Adloox is already facing "financial

difficulties" because it has no access to the Meta ecosystem, unlike some of its competitors. In addition, the FCA found that these practices also cause serious and immediate harm to the independent ad verification sector in general, given Meta's strong position in the market for online advertising on social media, such practices leading to foreclosures on the market for the benefit of market participants who already have access to the Meta ecosystem.

The FCA therefore ordered Meta to publicly define new objective, transparent, non-discriminatory and proportionate criteria for accessing its viewability and brand safety partnerships within two months. In addition, provided that Adloox meets these new access criteria, the FCA ordered that Meta allows Adloox to access its ecosystem in an accelerated manner.

Takeaways

The FCA's ruling shows, once again, the strong focus of national competition authorities ("**NCA**") on big tech players. More specifically, the online advertising sector is under strict scrutiny by the NCAs. For an example, since 2018, the FCA has conducted several investigations in connection with this sector against companies such as Google, Apple, and Meta.

A decision on the merits will be issued within the coming months. Meta chose not to challenge the interim measure decision before the Paris Court of Appeals.

The French Competition Authority provides its opinion on certain provisions of a French draft law aimed at securing and regulating the digital space

On April 20, 2023, the French Competition Authority issued an opinion on three articles of an incoming French law aimed at securing and regulating the digital space (the "**French draft legislation**"), pending the coming into force of EU-wide rules (the "**European Data Act**").[53]

In short, the French draft legislation provides measures to ensure that cloud computing markets are as contestable as possible, notably through the regulation of certain potentially harmful commercial practices, such as the risk of lock-in due to the costs of setting up cloud architecture and difficulties in migrating between rival providers.

In particular, the provisions concerned aim at:

— preventing cloud computing service providers from granting cloud credits with a duration exceeding one year or subject to an exclusivity condition (article 7, II of the French draft legislation) and from charging fees for the transfer of data to the customer's own infrastructure or to another provider's infrastructure (article 7, III);[54] and

— compelling cloud computing service providers to ensure their services' interoperability with the customers' services or with those provided by other providers and to ensure portability of digital assets towards the customers' services or towards those provided by other providers, notably through the free provision of necessary interfaces (article 8, II).

[53] FCA opinion No. 23-A-05 of April 20, 2023 on the French draft legislation to secure and regulate the digital space (Articles 7 to 9). For detailed information on the future European Data Act, which was formally issued on February 23, 2022 but is still at the stage of a proposal, *see:* https://www.eu-data-act.com/ or, in general terms, the European Commission's press release of February 23, 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1113. The French draft legislation aimed at making more secure and regulating the digital sector is available at: https://www.senat.fr/leg/pjl22-593.html.

[54] Fees relating to a change of provider are authorized until the date of entry into force of the European Data Act, provided that they are limited to the actual costs directly linked to this change and that they are communicated transparently to users.

In its opinion, the FCA agrees with such measures and provides the following five recommendations:

Recommendation no. 1: ensure consistency with the future European Data Act

Considering the European regulatory context in which the French draft legislation is being introduced, the FCA considers that insufficient alignment of the national regulation with the future European framework may cause temporary distortions and sunk adaptation costs for stakeholders operating on the French market. The FCA thus calls for the best possible alignment of the French draft legislation (which by virtue of the principle of the primacy of European Union law should be transitional) with the future European Data Act.

Recommendation no. 2: clarify the definitions of "*cloud computing services*" and "*cloud computing assets*" (or "*cloud credits*")

To better align with the European Data Act, the FCA in particular recommends clarifying the definition of:

— "*cloud computing services*" (or "*data processing services*" under the European Data Act), which are currently defined as digital services that provide access to a modular and variable set of IT resources that can be shared. To clarify the rules applicable, the FCA recommends completing this definition with the same distinction as the one envisaged at EU-level between Infrastructure as a Service ("IaaS"), Platform as a Service ("PaaS") and Software as a Service ("SaaS") as these categories of services correspond to different levels of shared responsibility between the cloud service provider and the customer company;[55] and

— "*cloud computing assets*" or "*cloud credits*," which are currently defined as units of a virtual currency handed out by cloud suppliers to allow users to perform certain tasks involving cloud services. The draft French legislation limits cloud credits to monetary forms, although these can also come in non-monetary forms, such as, in particular, (i) free trial offers aimed at attracting new clients during the first months of a subscription to cloud computing services or (ii) business support programs which are subject to higher fees in exchange for longer-term (*i.e.*, years') access. The FCA recommends clarifying the definition and scope of cloud credits by making a clear distinction among cloud credits between monetary/non-monetary and free trial/support programs and identifying the undertakings concerned by each form of cloud credits.

Recommendation no. 3: clarify the conditions for the duration and renewal of cloud credits

Relatedly, the FCA considers that the business support program form of cloud credits could raise competitive concerns due to its higher cost and longer duration. Such credits could, if handed out by dominant companies (in particular, the "hyperscalers" defined below), in addition to tying customers within a single cloud environment, have potentially anticompetitive effects on the smallest suppliers who could not profitably replicate such terms. In the FCA's opinion, setting clearer terms and conditions to ensure equitable competition between the different cloud service providers is key and should be done after consultation with clients and suppliers.

[55] In short, IaaS is the least outsourced model, in which the supplier provides the user with IT infrastructure, such as servers or storage. PaaS is an intermediate model. It provides an environment where customers can benefit from software and tools to develop their applications without having to create or maintain the infrastructure or platform usually associated with the process. SaaS is the most outsourced model. It gives users direct access to applications, managed entirely by the supplier, from any connected device.

Recommendation no. 4: ensure a gradual removal of "*egress fees*"

The FCA notes that the cloud market in France appears to be consolidated around a group of so-called "*hyperscalers*" (*e.g.*, AmazonWeb Services, Google Cloud and Microsoft Azure). Hyperscalers are cloud service providers whose policy is to charge clients depending on their utilization of the outgoing bandwidth and to charge fees for the transfer of data to a destination outside of the provider's cloud environment and infrastructure (namely, "*egress fees*" or "*data transfer fees*").[56] The FCA fears that egress fees are potentially disconnected from the costs directly incurred by hyperscalers regarding data transfers. Also, since those fees are proportionate to the volume of data transferred, it may be difficult for customers to anticipate how much they will spend, as this will depend on future needs. According to the FCA, this uncertainty may lead to customer lock-in by making it more difficult to migrate cloud services to another provider, or to use several providers at once.

The FCA therefore agrees that egress fees should be removed, notably to ensure the possibility of multi-homing cloud services (*i.e.*, using several providers at once), but considers that this should be done gradually. The FCA cites as reference the European Data Act, which provides for a transition period of three years to phase-out egress fees (rather than an outright ban).[57]

Recommendation no. 5: ensure that measures relating to interoperability of cloud services and data portability are aligned with the future European Data Act

The French draft legislation fails to provide a definition of key cloud sector concepts such as "*interoperability of services*" or "*data portability.*" The FCA thus recommends clarifying these terms and ensuring their consistency with the European Data Act, in particular to allow customers to easily use third-party cloud computing services.

Furthermore, the French draft legislation sets forth an obligation for cloud providers to ensure interoperability between services that cover "the same type of service." The FCA, however, considers this obligation as being too broad since it does not specify which service is targeted by the obligation (*i.e.*, IaaS, PaaS or SaaS). In any case, the FCA, together with the French Electronic Communications, Postal and Print media distribution Regulatory Authority (the "ARCEP"), shall ensure that obligations of interoperability and portability respond to harmonized standards set by the framework enshrined in the future European Data Act.

In parallel, the FCA's cloud sector inquiry

On June 29, 2023, the FCA published a 200-page report detailing the results of the *ex officio* market study of the cloud industry it had been conducting since January 2022.[58] In short, the FCA considers that enforcement action may be necessary against the hyperscalers to address concerns that customers are being locked into their rapidly-growing cloud ecosystems. The FCA's detailed report will be presented in a separate article.

[56] *Cloud sector's use of exit fees concerns French antitrust watchdog*, N. Hirst, MLex, May 11, 2023.

[57] After the transition period, failure to comply with this ban on egress fees could then, subject to the draft European Data Act being adopted in its current form, result in a fine of up to €1 million (or even €2 million in the event of a repeat offense by the cloud service provider).

[58] *See* "The Autorité de la concurrence issues its market study on competition in the cloud sector", FCA, June 29, 2023.

The French *Conseil d'Etat* clarifies the start date of the limitation period applicable to a public entity claiming damages for anticompetitive practices and whose management bodies took part in such practices

On May 9, 2023, the *Conseil d'Etat* clarified how the start date of the limitation period applicable to a public entity claiming damages for anticompetitive practices should be determined in a case where the management bodies of that public entity took part in such practices, confirming that the follow-on actions brought by the *Île-de-France* region following an illegal market sharing agreement was not time-barred. [59] The *Conseil d'Etat* held that in the event that the damage suffered by the public entity resulted from practices in which its governing bodies participated, the limitation period could only run from the date on which new governing bodies, not involved in the anticompetitive practices, had acquired sufficient certainty as to the extent of these practices.

Background

The *Île-de-France* region launched a high school construction and renovation program and entered into 241 public contracts between 1988 and 1997, including 101 contracts with construction companies, at a total cost of 23.3 billion francs (more than 3.5 billion euros).

On May 9, 2007, the *Conseil de la Concurrence* imposed financial penalties on 14 companies in the construction sector that had participated in a general and continuous agreement to share 88 public contracts for a total of ten billion French francs between 1989 and 1996.[60] In parallel, criminal proceedings were brought against a number of individuals.[61]

On March 28, 2017, the *Île-de-France* region brought a follow-on damage claim before the Paris Administrative Court after the *Tribunal des Conflits* ruled that administrative courts had jurisdiction.[62] The region sought compensation for the material loss it had suffered because the illegal agreement prevented it from obtaining fair market prices.

The Paris Administrative Court dismissed this claim on July 29, 2019, considering that the region had already sufficient knowledge of the extent of the practices to which it had been exposed in 1996, as evidenced by materials in which members of the regional Council informed the *Procureur de la République* (Public Prosecutor) of irregularities likely to be subject to criminal law, and therefore that its action was time-barred because the ten-year limitation period had elapsed in 2006.[63]

However, on appeal, the Paris Administrative Court of Appeals found that the evidence available to the region in 1996 was merely sufficient to raise suspicions of favoritism, but not to provide certainty as to extent of the anticompetitive practices perpetrated against it by the construction contract holders. The Paris Administrative Court of Appeals held that it was only on the date of the

[59] *Conseil d'Etat,* May 9, 2023, No. 451710 and No. 451817, available at: https://www.conseil etat.fr/fr/arianeweb/CE/decision/2023-05-09/451710 and https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2023-05-09/451817.

[60] *Conseil de la concurrence* Decision No. 07-D-15 of May 9, 2007 on practices implemented in the public markets relative to *Île-de-France* secondary schools. This decision was confirmed on appeal (except with regard to the liability of one company, Campenon Bernard), *see* Paris Court of Appeals, July 3, 2008, No. 2007/10671. The appeal to the Supreme Court was subsequently dismissed, *see* Supreme Court, October 13, 2009, No. 08-18.224.

[61] Several employees of construction companies as well as a number of elected officials (including the president of the *Île-de-France* regional Council) and members of the region's personnel were found guilty by the Criminal Tribunal of engaging in an anticompetitive agreement to award these contracts. *See* Criminal Court of Paris, October 26, 2005, No. P9631169017. This judgment was upheld by the Paris Court of Appeals, February 27, 2007, No. 06/00406.

[62] *Tribunal des conflits*, November 16, 2015, No. C4035.

[63] *See*, for example, Paris Administrative Court, July 29, 2019, No. 1705349 and 1711026.

Conseil de la Concurrence's decision of May 9, 2007 that the region knew with sufficient certainty the extent of the anticompetitive practices perpetrated against it by its contractors. As a result, the Paris Administrative Court of Appeals considered that the region's action was not time-barred when it lodged its claim with the Paris Administrative Court on March 28, 2017, especially as the action brought by the region before the Judicial Court of Paris in February 2010 had interrupted the limitation period until the *Tribunal des conflits*' decision of November 16, 2015.[64]

The construction companies and the *Île-de-France* region appealed this decision before the *Conseil d'Etat*.

The French *Conseil d'Etat*'s ruling

The *Conseil d'Etat* confirmed the analysis of the Administrative Court of Appeals regarding the limitation period for the region's action. It clarified that when the governing bodies of a public entity have participated in the anticompetitive practices of which it has been the victim, and this involvement has made it impossible for the public entity in question to assert its rights to compensation, the limitation period can only begin when its new governing bodies, which are not involved in the practices, have acquired sufficient knowledge of the extent of these anticompetitive practices. In this case, the extent of the practices was not known by the new governing bodies before the *Conseil de la concurrence*'s decision of May 2007, the ten-year limitation period for the region's civil liability action had not expired when it brought the case before the Judicial Court of Paris in 2010.

As regards liability, the *Conseil d'Etat* confirmed that the breaches of the public entities involved justified to absolve the companies of one-third of their liability towards the region.

Therefore, the appeals were dismissed.

[64] Paris Administrative Court of Appeals, February 19, 2021, No. 19PA03200 and No. 19PA03201.

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