

## French Competition Authority Determines That Certain Information Exchanges Are Acceptable

***The decision gives useful guidance on what type of information exchanges are compatible with antitrust rules***

### Key Points:

- The extent and the types of information that can be exchanged between competitors without being considered anticompetitive is a recurring issue, both at the EU level and in France (see for instance FCA case n°05-D-64 of 25 November 2005, Parisian Luxury Hotels).
- In this context, the FCA's short-term car rental case gives useful practical guidance on the types of information that can be exchanged between competitors.

### Summary

On 27 February 2017 the French Competition Authority (FCA) adopted a decision closing its investigation into an information exchange between several major car rental companies and 12 French airports. The FCA found that there was no infringement of the antitrust rules because (i) exchanges of data between airports and car rental companies were not anticompetitive and (ii) the existence of an agreement establishing a "train station surcharge" was not sufficiently proven. This decision is interesting since it is a (rare) dismissal decision adopted by the FCA which is in contrast to the view of both the case team within the FCA and the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), which had considered the practices as anticompetitive.

### Background

The FCA's investigation focussed on exchanges of historical information between 12 French airports and car rental companies. The information exchange system involved transmitting confidential information by car rental companies to airports (pursuant to leases and agreements signed with the managers of the car rental companies). This information enabled airports to calculate the amount of the royalty to be paid by car rental companies and to reallocate parking lots if necessary. The information, which included, *inter alia*, turnover data, the number of contracts, market shares and number of passengers was then passed on by airports to each car rental company on a monthly basis.

Additionally, the FCA investigated an alleged agreement between the three major car rental companies concerning a local surcharge applicable to train station agencies' tariffs.

This decision brings an end to the FCA's investigation (which started in 2008) by dismissing both charges. Of broader importance is the fact that the decision provides an analytical framework that can help companies assess whether information exchanges are anticompetitive.

## Issues of Interest

### **A two-step test to determine whether exchanges of confidential information are anticompetitive**

The FCA pointed out that the terms “exchanges of information” should be understood in this case as covering only information related to past conduct (and not future pricing policies). To determine whether the practices were contrary to competition law, the FCA examined whether the exchanges led to the reduction of strategic uncertainty and restricted the companies’ autonomy in the market. The FCA proceeded with examining both the nature of the market concerned and the nature of the information exchanged:

- *Investigation of the market concerned:* the FCA considered the characteristics of the car rental market (entry barriers, number of competitors, volatility of the market shares). The FCA noted that the market, while oligopolistic, had recently evolved (with, for instance, growing market shares for Sixt and a progressive exit by ADA). However, the FCA considered that it was not required to demonstrate the existence of a stable oligopoly in order to establish the anticompetitive nature of information exchanges.
- *Analysis of the strategic nature of the information exchanged:* the FCA also investigated whether the information received was of such nature that it would allow the companies to adapt their competitive behavior in the market. In particular, the FCA considered the strategic nature of the information, in light of its degree of precision and taking into account the concrete functioning of the market. In that regard, the FCA pointed out that the data were aggregated, *i.e.* did not distinguish between individual and professional clients, even though the two customer groups were considered to constitute distinct markets. Furthermore, the FCA assessed the particularities of the context (high transparency of the market, yield management practices, etc.) and considered that the monthly information exchanged did not enable others to continuously monitor the efficiency of each car rental company’s pricing policy. Access to this data could not, therefore, in this case, reduce the commercial autonomy of the rental companies by revealing their competitors’ commercial strategy. This finding was further supported by the lack of evidence of parallel behavior in the market.

### **Reconciling the car rental decision with existing precedents**

The FCA adopted an effects-based approach (the data were historical data only), whereas in their landmark cases, both the FCA and the European Courts (see for instance ECJ judgment of 19 March 2015, Dole Food Company, C-286/13 P) considered that the exchanges of future price information were anticompetitive by object. Similarly, in a high-profile case (n°05-D-64 of 25 November 2005, Parisian Luxury Hotels) the FCA found exchanges of past information to be anticompetitive, without a detailed assessment of the effects of the exchange. In contrast, the present decision adopts a more sophisticated approach and conducts an in-depth analysis of the impact of data exchanges on competition.

## Conclusion

The decision provides useful guidance on the kind of information that can be legally exchanged between competitors. In particular, “exchanges of information between competitors” may not be deemed anticompetitive if the information exchanged is non-strategic, aggregated data that does not enable competitors to adapt their behavior in the market.

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