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Financial services and competition law: An overview of EU and national case law

FINANCIAL SERVICES, FOREWORD

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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A. Introduction [*1*]

For the first time, EU and national competition authorities over the last few years have expanded their scrutiny to the financial sector as a whole (banks, financial markets, insurance). All areas of financial services appear to be on their radar, as exemplified by investigations looking into syndicated loans, credit cards, benchmarks (such as LIBOR), commission rates in asset management and coinsurance. As this article will explain, all kinds of agreements and practices have been investigated and penalised by competition authorities in Europe over the past few years. Competition authorities have certainly not shied away from assessing sophisticated types of financial operation or scheme. They have also examined the market conduct of investment banks (with cases involving rate and index manipulation and suspicions of possible collusions on sovereign bonds negotiations) as well as issues surrounding access to the Financial Technologies ("FinTech") market. Competition authorities have also been concerned by banks' and payment systems' attempts to obstruct access to these markets by new players on the market.

The activity of the European Commission and national competition authorities reflects an increased focus on ensuring compliance with EU competition law rules in the banking and insurance sectors as well in the financial markets. These are sectors that represent up 30% of total service market revenue in developed economies according to the OECD and are the lifeblood of the real economy, providing businesses and individuals with access to credit and financial products. Given this, the more competitive these sectors are, the better the performance of the economy should be.

If the banking and financial sector is no longer *terra incognita* for competition law enforcement, competition authorities have remained cautious, especially when it comes to imposing substantial fines (except for hardcore cartels). They seem to recognise the decisive role played by banking and financial operators in the economy and therefore the importance of maintaining the financial sector's stability. Whilst often concluding that sophisticated

and quite opaque financial schemes and tools under investigation or market survey are anticompetitive, competition authorities in Europe have sought to balance the aim of ensuring compliance of the sector with competition law with the need for a robust and sustainable financial system in Europe.

As regards State aid and the financial sector, the European Commission's main area of activity in recent times has concerned bank restructuration. In this respect, major changes to the legal framework have been implemented since 2015 with the adoption of the Bank Recovery and Resolution Directive (BRRD) and, for the significant banks in the Eurozone, of the Single Resolution Mechanism and their interaction with State aid rules.

B. Cartels

The desire to eliminate anti-competitive behaviour in the banking and financial markets is well illustrated by the recent significant fine imposed by the Commission on several banks for colluding on **foreign exchange (forex) trading strategies**. Indeed, in May 2019, the Commission fined Barclays, RBS, Citigroup, JPMorgan and MUFG a total amount of €1.07 billion after it was shown that the banks had taken part in two cartels regarding foreign exchange spot trading [*2*]. The cartels concerned the eleven most used and negotiated currencies worldwide: Euro, British pound, Japanese yen, Swiss franc, US, Canadian, Australian and New Zealand dollars and Danish, Swedish and Norwegian crowns. The Commission found that forex traders were exchanging sensitive information and trading plans, sometimes also coordinating their strategies on online forums. Although it took part in the cartel, UBS did not have to pay a fine (which would have amounted for €285 million), as it was the bank that revealed the existence of the cartels. This decision is in the continuity of the Commission's 2013 cartel decisions in relation to the rates applicable to trading in interest rate derivatives (where the Commission imposed a fine of €669.7 million). [*3*]

Such a decision follows a number of similar cartel investigations concerning **benchmark manipulation**, such as the Yen interest rate derivatives, Euro Interest Rate Derivatives, Swiss Franc Interest Rate Derivatives and CHF Libor, with decisions in 2013-2016 resulting in very heavy fines for banks [*4*].

In addition the European Commission issued a statement of objections in January 2019, addressed to eight banks regarding an alleged European government bonds cartel [*5*] organised between 2007 and 2012. The procedure is ongoing.

The UK competition authorities have also been examining in detail the asset management market. On 21 May 2019, the FCA found that three asset management firms had breached UK competition law. The firms disclosed and benefited from the disclosure of confidential information of one another concerning bidding intentions in a book-building process. This sharing of information can lead to lower prices of the shares and sometimes, to a failed book-building [*6*]. Interestingly, the FCA also released a report in February 2019 on the disclosure of costs by asset managers where it found that consumers are not given a fair and clear account of how much they pay when investing in financial products. The FCA recommends that asset managers review their cost disclosures to ensure fairness [*7*]. This review followed the publication of the asset management market study in 2015 where it was found that too often, price competition was weak [*8*].

The European Commission is also currently investigating whether certain banks have been deliberately excluding **third party payment providers**, such as some FinTech companies. The Commission and national competition authorities raided the offices of the Dutch and Polish banking associations in late 2017, concerned that banks may collectively have decided to block access to their customer accounts to these third party payment providers, despite customers providing their consent. Operators would hence be foreclosed from the market and potentially

innovative products would be unable to reach customers. The Payment Services Directive II has offered a legislative solution as banks are now legally obliged to provide non-discriminatory access to all payment initiation providers and account information service providers who have been given customer consent and to provide the technical interface to allow this access. A decision from the Commission is still pending.

C. Anticompetitive forms of cooperation

In the financial sector, there are a number of forms of cooperation between competitors which can actually be viewed as pro-competitive and consequently have been recognised as being compliant with competition law. By working together, operators have created efficiencies which improve the services offered to customers, both in qualitative and quantitative terms. Nonetheless, to remain lawful under competition law and respect the conditions of Article 101(3), these forms of cooperation have to make sure that any restriction of competition is limited to what is strictly necessary for the cooperation to work. In order to understand how that proportionality and necessity test is applied, it is useful to look at the cases that have been going on recently.

The multiple **Visa and Mastercard** investigations are a good illustration of this point within the European Union.

The European Commission has never criticised the existence of the objectives of the cooperation within the Visa and Mastercard card associations. Instead, what has concerned the Commission has been certain of the conditions that the card issuers have imposed on merchants. The main focus has been on multilateral interchange fees ("MIFs"). MIFs are fees paid by the merchant and the consumer when purchasing a good or service with a payment card; those fees cannot be influenced by retailers or consumers and are reflected in the prices of the goods and services. Even though the Commission has recognised that it is legitimate for Visa and Mastercard to charge fees and that those fees should be harmonised, it has found that the fees were too high in certain instances, devoid of any objective justification.

Visa and Mastercard have been forced, therefore, to lower their MIFs over the past few years. The Commission also adopted a regulation in 2015 [***9***] capping fees for payments within the EU (i.e. where the merchant is located in the EU and the card is issued in the EU).

The European Commission has recently turned its attention to interregional MIFs. Having invited interested parties to comment on the commitments offered by MasterCard and Visa, which involve reducing the current level of interregional interchange fees by at least 40% and capping the level of fees [***10***], the Commission adopted a decision making those commitments binding upon MasterCard and Visa in April 2019 [***11***]. The Commission is the first competition authority to intervene on interregional fees. This decision also followed a decision from January 2019 whereby the European Commission fined MasterCard EUR 570 million for limiting retailers' access to cross-border payment services.

It is notable that the investigations regarding MIFs have also spurred on damages claims around the World. In the USA Visa, Master and a number of US banks agreed in 2018 to pay US$6.2 billion to settle a long-running antitrust suit brought by merchants over the fees they pay when they accept card payments. In the UK [***12***], claims by merchants have led to conflicting judgments as regards the existence or nature of a competition law infringement. For instance, the Competition Appeal Tribunal found that MasterCard had committed restrictions of competition in the UK in accordance with the Commission decisions. However, in January 2017, a judge at the UK Commercial Court concluded against that judgment. The High Court proceeded to a new counterfactual analysis which led to the conclusion that the MIFs were objectively necessary for the operation of MasterCard cards and there was no breach of Article 101(1) TFEU. However, in November 2017, another judge at the Commercial Court concluded that

Visa's interchange fees were not restrictive of competition in the first place. He added that, should have found that there was a violation of Article 101(1) TFEU, he would have found that the companies did not qualify for exemption. In July 2018, the Court of Appeal ruled on all of these judgments and concluded that the MIFs did infringe Article 101(1) TFEU and that they were not objectively justified under Article 101(3). That judgment has been appealed before the Supreme Court where the case is still pending. The judgment will impact the quantum of damages payable to victims of the potentially anticompetitive MIFs.

A number of competition authorities have recently looked at **syndicated loans**. The fact that banks come together to offer a loan can be perfectly legitimate: in particular when the banks would not have granted a loan individually and so a syndicated loan is actually pro-competitive as it increases the offer on the market.

Several national competition authorities nonetheless have found that competition problems can arise. In the United Kingdom, the competition authority fined two banks in 2012 for disclosure of information relating to the pricing of loan products to professional service firms. The UK Loan Market Authority published a notice on the application of competition law to syndicated loan arrangements in 2014 and the Financial Conduct Authority sent a warning letter to several banks in 2016 on the same topic. In 2017, the Turkish competition authority fined three banks for anticompetitive exchange of information in the context of loan syndication, whilst in February 2018 the Spanish competition authority fined Caixabank, Banco Santander, Banco Sabadell, BBVA a total of EUR 91 million for colluding on prices of derivatives to cover interest rate associated with syndicated loans [*13*].

In April 2019, the European Commission also published a study regarding antitrust aspects in the syndicated loans market [*14*]. The study did not find any competition problems that would require further investigation but highlighted that there could be competition issues in the process of forming syndicates, which might lead to information exchange facilitating market sharing. The study recommends measures to reduce the risks of competition law infringement.

D. State aid

As regards State aid enforcement and financial services, the Commission has continued to examine the compatibility of certain bank resolution plans with State aid rules. The major legal development in this area has been the advent of bank resolution rules (the BRRD) implemented as a reaction to the financial crisis and their articulation with State aid rules. Member State have used different tools when faced by a bank in difficulty. For instance, Italy relied upon State aid rules to mitigate the negative effects that could have arisen from the market exit of Banco Popolare di Vicenza and Veneto Banca (approved by the Commission in June 2017) and also to recapitalise Monte dei Paschi di Siena (approved in July 2017). In November 2015, however, Italy put four regional banks into liquidation in accordance with the BRRD to ensure the orderly exit of the banks whilst also creating a resolution fund to ensure financial stability under EU State aid rules, which was approved by the Commission. In 2017, the provisions of the Single Resolution Mechanism were used by the Single Resolution Board to authorise the transfer of the assets and liabilities of the Spanish bank, Banco Popular, which was on the brink of collapse, to Banco Santander without endangering the deposits of the former's customers or requiring the grant of any State aid by Spain.

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[2] See ***Richard Burton***, *The EU Commission imposes fines totalling over € 1 billion on banks for their involvement in two separate cartels on the spot foreign exchange markets (Barclays / RBS / Citigroup / JPMorgan / MUFG Bank), 16 May 2019, e-Competitions Bulletin May 2019, Art. N° 90767* ; ***European Commission***, *The EU Commission fines five banks for participating in foreign exchange spot trading cartel (Barclays / RBS / Citigroup / JPMorgan / MUFG), 16 May 2019, e-Competitions Bulletin May 2019, Art. N° 90617.*

[3] See ***European Competition Network Brief***, *The EU Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry (Barclays /Deutsche Bank / RBS / Société Générale), 4 December 2013, e-Competitions Bulletin December 2013, Art. N° 62161.*

[4] See ***James Ashe-Taylor, Ana Rojo Prada***, *The European Commission imposes fines of nearly 94 millions euros of four major banks for collusive behaviours (RBS, JPMorgan, UBS, Credit Suisse), 21 October 2014, e-Competitions Bulletin October 2014, Art. N° 69840* ; ***James Ashe-Taylor***, *The EU Commission fines a broker for facilitating Yen Libor cartels by serving as communication channel and disseminating misleading information about expected rates (ICAP), 4 February 2015, e-Competitions Bulletin February 2015, Art. N° 71685* ; ***European Commission***, *The EU Commission fines three banks for cartel on the euro interest rate derivatives market (Crédit Agricole / HSBC / JPMorgan Chase), 7 December 2016, e-Competitions Bulletin December 2016, Art. N° 82433.*

[5] European Commission. (2019, January 31). Antitrust: Commission sends Statement of Objections in European government bonds cartel.[Press Release] Retrieved from *http://europa.eu/rapid/press-release_IP-19-804_en.htm* ↗.

[6] Financial Conduct Authority. (2019, 22 May). *Anti-competitive conduct in the asset management sector: FCA Decisions under the Competition Act 1998.* [Press Release] Retrieved from: *https://www.fca.org.uk/publications/notices-and-decisions/anti-competitive-conduct-asset-management-sector-fca-decisions-under-competition-act-1998* ↗ .

[7] Financial Conduct Authority. (2019, 28 February). *Review on disclosure of costs by asset managers.* [Press Release] Retrieved from : *https://www.fca.org.uk/print/publications/multi-firm-reviews/review-disclosure-costs-asset-managers* ↗.

[8] Financial Conduct Authority (2015, 18 November) *Asset management market study.*

[9] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, *OJ L 123, 19.5.2015, p. 1–15.*

[10] See ***European Commission***, *The EU Commission invites interested parties to comment on the commitments offered by two credit card companies to address competition concerns relating to inter-regional interchange fees for card payment transactions (Mastercard II / Visa), 5 December 2018, e-Competitions Bulletin December 2018, Art. N° 88980.*

[11] See ***European Commission***, *The EU Commission accepts remedies proposed by two financial services companies to cut interregional interchange fees (Mastercard / Visa), 29 April 2019, e-Competitions Bulletin April 2019, Art. N° 90383.*

[12] See **Ilan Sherr**, *The UK High Court concludes that multilateral interchange fees were not restrictive of competition and can be exempted under article 101(3) (MasterCard), 30 January 2017, e-Competitions Bulletin Financial services, Art. N° 83575.*

[13] See **Clara García Fernández, Miguel Troncoso Ferrer, Sara Moya Izquierdo**, *The Spanish Competition Authority fines four banks for colluding to offer interest rate derivatives at conditions different to those agreed with the clients (Banco Santander / Banco Sabadell / BBVA / Caixabank), 13 February 2018, e-Competitions Bulletin February 2018, Art. N° 86418.*

[14] See **Nathdwarawala Shachi, Satyen Dhana, Peter Broadhurst**, *The EU Commission publishes final study on antitrust aspects in loan syndication markets, 8 April 2019, e-Competitions Bulletin April 2019, Art. N° 90224* ; **Michael Masling, Florian Hinderer**, *The EU commission publishes its final study on antitrust aspects in EU loan syndication markets, 8 April 2019, e-Competitions Bulletin April 2019, Art. N° 90190.*