

Financial services : An overview of EU and national case law

Anticompetitive practices, Cartel, Financial services, State aid (notion), Foreword, Prohibition (mergers), Sector inquiry, Anticompetitive object / effect, Market inquiry

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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Introduction

Nearly a decade since the financial crisis first hit the European Union, financial services remain in the spotlight. Around 30% of the European banking sector has been subject to State aid control and more than 60 banks have been restructured: many of them still constrained by restructuring plans agreed with the European Commission. Behaviour within investment banks has also been under scrutiny over the period, with a number of banks subject to substantial fines for anticompetitive conduct. More generally, there has been a drive to examine how competition is working in the sector (as shown by various wholesale and retail market reviews undertaken in the UK) and to stimulate change through legislative measures such as MiFID II, MiFIR, PSD II and the Interchange Fee Regulation. Taken together, the range of activity and intervention has ensured that competition law is high on the agenda of bank executives across Europe.

Cartels

The European Commission's 2013 cartel decisions in relation to the rates applicable to trading in interest rate derivatives continue to resonate and have no doubt stimulated even greater emphasis on compliance and monitoring within banks. Subsequent developments include the following:

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- In August 2014 the Commission found that RBS and JP Morgan participated in a cartel aimed at influencing the Swiss Franc Libor benchmark between March 2008 and July 2009 [1]. RBS was granted immunity and JP Morgan received a reduced fine of EUR 61.6 million as part of a settlement with the Commission. The Commission also settled an investigation into the bid-ask spreads of Swiss Franc interest rate derivatives under which RBS, UBS, JP Morgan and Credit Suisse were fined a total of EUR 32.4 million [2].
 - In 2014, Société Générale appealed the 2013 settlement decision on Euro interest rate derivative cartels, arguing that the Commission had miscalculated the value of sales which led to an inappropriately high level of fines [3]. The Commission subsequently issued a decision lowering the level of fines from EUR 445.9 million to EUR 227.7 million on the basis of revised data which Société Générale provided to it and the bank therefore dropped the appeal [4].
 - In February 2015, the Commission fined ICAP EUR 14.9 million for facilitating six cartels relating to Yen interest rate derivatives by disseminating misleading information and using its contacts at panel banks to influence LIBOR submissions, in addition to acting as a communication channel between traders to enable anti-competitive practices [5]. This followed the 2013 settlement between five banks and broker RP Martin relating to the Yen interest rate derivative cartels which the Commission alleges ICAP facilitated [6].

In 2016, the Italian Competition Authority also fined two trade associations and several local cooperative banks for fixing mortgage interest rates [7].

Outside of cartel enforcement, the Commission recently reprioritised its efforts and resources in its investigation of credit default swaps, closing its long-running proceedings against 13 investment banks and focussing only on proposed commitments by ISDA and Markit [8]. The commitments aim to address the Commission's concern that the emergence of an effective market for exchange traded credit derivatives may have been blocked or delayed by the refusal of ISDA and Markit to license to exchange trading platforms certain data and indices used by the industry for the pricing of credit default swaps [9].

Mergers

The most significant recent merger decision in the sector concerned the proposed combination of Deutsche Börse and NYSE Euronext. In March 2015, the General Court upheld the Commission's decision to prohibit the transaction finding that over-the-counter derivatives were not in the same market as exchange-traded derivatives, and hence that the merger would have led to a near-monopoly [10]. The court also agreed with the Commission's approach towards assessing efficiencies and the ultimate conclusion that

proposed remedies would have been insufficient to remedy the competition concerns identified. The European Commission's approach to the merger that is now proposed between Deutsche Börse and the London Stock Exchange will be closely watched.

In retail banking, the Commission approved in 2015 the acquisition of the UK's TSB by Spanish bank Sabadell – a transaction arising from the divestment obligations imposed on the UK Lloyds Banking Group under its 2009 restructuring plan [11]. In contrast, Santander has recently withdrawn from talks to purchase Williams & Glyn, the UK banking operations owned by the Royal Bank of Scotland which it committed to divest following the receipt of State aid in 2008. Notably both banks had struggled to complete divestment of these operations within the time frame initially required under their restructuring plans.

Visa Inc's acquisition of Visa Europe was cleared in 2015. After some adjustment of its terms, the Commission concluded that the acquisition did not raise competition concerns. It also noted that the companies' activities did not overlap due to their 2007 demerger agreement which prevented them from operating in the same territories [12]. The Commission also approved the acquisition of Equens by Worldline in the area of payment processing, subject to divestment and behavioural commitments [13].

Market studies

There have been a number of recent reviews of competition in the European financial services sector. Notably, in 2015, the European Commission issued a Green Paper on retail financial services which found that a "majority of Member States' retail banking and insurance markets are highly concentrated and display signs of not being fully competitive" [14] and consulted on different measures to increase the cross-border supply of retail financial services.

Consideration of prevailing conditions in the banking sector have also been conducted at the Member State level. In the UK, the Competition and Markets Authority (CMA) recently concluded its detailed market investigation of competition in the supply of retail banking services to personal current account customers and to small and medium sized enterprises. The CMA's remedies include requiring banks to prompt customers to reconsider their banking arrangements at certain times, publish service quality information on their websites, set limits on their unarranged overdraft charges and facilitate the adoption of digital solutions to assist consumers in comparing providers [15]. Separately, the UK Financial Conduct Authority (FCA) gained concurrent competition powers in April 2015 and has launched a number of market studies at both the wholesale and retail levels [16]. These include an ongoing market study in the asset management sector and a broader examination of investment and corporate banking (where the FCA is looking at cross-subsidies in the universal banking model between corporate and investment banking as well as syndication and reciprocity). In the Netherlands, the Authority for Consumers and Markets has also published studies of the Dutch retail banking sector and the Dutch SME loan market [17].

New regulation has also been introduced at the EU level which touches upon competition in financial markets. For example, MiFID II empowers the European Securities and Markets Authority, in cooperation with the European Banking Authority (EBA) to develop cross-selling guidelines, aimed at preventing tying and packaging of products [18]. MiFIR also requires non-discriminatory access to benchmarks, central counterparty clearing houses and trading venues in order to improve competition [19]. The revised Payment Services Directive (PSD II) also refers to the need "to stimulate competition" and empowers the EBA to draft regulatory technical standards to "secure and maintain fair competition" [20].

Payment systems

Payment systems continue to be the subject of competition review. In *Cartes Bancaires* the ECJ considered the fee structure of the Cartes Bancaires four-party payment system and provided useful clarification of the applicable test for establishing a restriction of competition by object [21]. The ECJ found that the concept should be considered restrictively, including in the context of complex financial arrangements.

In *MasterCard*, the ECJ upheld the Commission's finding that MasterCard's rules relating to the default interchange fees applicable to intra-EEA transactions on MasterCard branded consumer credit and debit cards had the effect of restricting competition in the acquiring market by acting as a form of price floor on merchant acquirer pricing [22]. Controversially, the ECJ held that, despite operating as an independent listed company, MasterCard's actions in determining the default interchange fee amounted to a decision of an association of undertakings for the purposes of Article 101(1). The ECJ did not accept that the default interchange fee arrangements were objectively necessary or that MasterCard had satisfied the exemption conditions under Article 101(3). The ECJ decision has been cited in a number of subsequent claims for damages in national courts against Visa and MasterCard by retailers including WM Morrisons, Arcadia, Deutsche Bahn, John Lewis and Dixons Carphone Warehouse [23]. MasterCard is appealing a recent decision of the UK Competition Appeal Tribunal awarding Sainsbury's £68.6 million in damages. In contrast, the Italian Council of State recently found that MasterCard's domestic interchange fee arrangements did not constitute a restriction of competition by object and annulled the Italian Competition Authority's finding of a breach of competition [24].

At the legislative level, the Interchange Fee Regulation came into force in 2015, capping default interchange fees under four-party payment schemes within the EEA at 0.3% of the transaction value for credit cards and 0.2% of for debit cards. The regulation also required the separation of payment card schemes and processing entities within the EEA.

The Commission has ongoing investigations against MasterCard and Visa Inc in relation to default inter-regional interchange fees and, in MasterCard's case, its rules on cross-border acquiring [25].

The Commission has also opened an investigation into Visa's rules on Dynamic Currency Conversion under which allow cardholders making payments in a foreign currency may elect at the point of sale to have the cost converted into their home currency [26]. The Commission has also reportedly launched a preliminary antitrust investigation into possible collusion in the money remittance market [27]. At the national level, the Italian Competition Authority opened an investigation into the Italian banks' association concerning an inter-bank agreement in relation to the Sepa Compliant Electronic Database Alignment [28].

State aid

State aid to the financial sector has retained a prominent role. Between 2007 and 2014, the Commission took over 100 decisions relating to the restructuring of approximately 30% of the EU's financial sector [29]. The Commission issued a series of communications setting out its interpretation of State aid provisions to the financial sector and became the de facto authority for the restructuring of banks. More recently the Bank Recovery and Resolution Directive (BRRD), along with the Single Resolution Mechanism and Single Resolution Fund have altered the process for granting aid to banks in the EU [30]. On 1 January 2016 many of the provisions of the BRRD came into effect and the Single Resolution Mechanism assumed resolution powers. Despite the BRRD making substantial changes to the procedures for supporting banks, where resolution funds or other public financial support is used to assist financial institutions, they must be assessed for their compliance with State aid provisions and a restructuring plan will be required [31]. Similarly, when applying the resolution tools and exercising the resolution powers, Member States must ensure that they comply with the Union State aid framework, where applicable [32]. Aid granted by the Single Resolution Fund in accordance with the Single Resolution Mechanism would also be subject to State aid clearance [33].

There have also been a number of judgments by the European courts elaborating on the application of the Commission's guidelines regarding State aid to banks. In *Kotnik* the ECJ held that the Banking Communication imposed a limit on the exercise of the Commission's discretion such that if a Member State notifies the Commission of proposed State aid that complies with those guidelines, the Commission must, as a general rule, authorise that aid. However, the Commission may authorise aid which does not meet the criteria contained in these guidelines in exceptional circumstances [34]. Similarly, in *BPP* the ECJ held that the previous Banking Communication imposed a limit on the Commission's discretion and that because no restructuring plan was submitted, as required by the Banking Communication, the aid granted to the bank was inappropriate and had to be recovered [35].

The State aid rules have also been a focus in Italy where the government has been exploring ways of supporting the domestic banks suffering from widespread non-performing loans, which impede their ability to lend to the real economy. Further to amendments introduced in 2013, the Banking Communication now requires stricter "burden sharing" as a condition for State aid clearance, including the exhaustion of "all

capital generating measures including the conversion of junior debt". This requirement for a bail-in by bondholders, many of which are Italian retail investors, has led the Italian government to promote a scheme whereby stronger banks, asset managers and insurers put private capital into a fund to be used to support weaker banks. The final approach taken by the Italian government is unclear, however the role of State aid guidelines will remain pivotal [36].

Shortly before Margrethe Vestager was formally appointed as the current Competition Commissioner she stated that "we have to come back to the usual application of State aid control in the banking sector... as soon as the market conditions permit" [37]. At the time of writing it has been nearly 8 years since the bailout of Northern Rock in 2008 and what constitutes the "usual" application of State aid remains unclear.

In summary, competition law is likely to remain at the forefront in the financial sector. From cartels to State aid, mergers to market studies, the close scrutiny shown by European competition authorities to the financial sector looks set to continue.

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[1] AT.39924 - Swiss Franc Interest Rate Derivatives, Commission decision of 21 October 2014.

[2] Ibid.

[3] Case T-98/14, Société Générale v Commission, 2014/C 142/47

[4] European Commission Press Release, amende modifiée pour Société Générale pour sa participation dans le cartel des produits dérivés de taux d'intérêts en euros, 6 April 2016

[5] Communication from the Commission published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case AT.39745 — CDS Information Market — ISDA

[6] European Commission Press Release, Commission fines banks € 1.49 billion for participating in cartels in the interest rate derivatives industry, 4 December 2013. See [European Competition Network Brief, The EU Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry \(Barclays, Deutsche Bank, RBS and Société Générale\), 4 décembre 2013, e-Competitions Bulletin December 2013, Art. N° 62161](#)

[7] See [Michele Giannino, The Italian Competition Authority fines two trade associations and several local cooperative banks for fixing mortgage interest rates \(Mortgage interest rates agreement\), 24 February 2016, e-Competitions Bulletin February 2016, Art. N° 78809](#)

[8] European Commission Press Release, Commission closes proceedings against 13 investment banks in credit default swaps case, 4 December 2015

[9] European Commission Press Release, Commission seeks feedback on commitments by ISDA and Markit on credit default swaps, 28 April 2016

[10] See **Pablo González De Zárate Catón**, The EU General Court upholds a Commission Decision to prohibit a merger of two stock exchanges of financial derivatives (Deutsche Börse / NYSE Euronext), 9 March 2015, e-Competitions Bulletin March 2015, Art. N° 74237

[11] Case M.7597, Sabadell/TSB, Commission Decision of 18 May 2015

[12] Case M.7786, Visa Inc./Visa Europe, Commission Decision of 3 June 2016

[13] See **Porter Elliott**, The EU Commission conditionally approves a merger subject to divestment commitments and behavioural conditions in the payment services and terminals sector (Equens / Worldline), 20 April 2016, e-Competitions Bulletin April 2016, Art. N° 79443

[14] European Commission, Green Paper on retail financial services, 10 December 2015, paragraph 2.1

[15] Competition and Markets Authority, Retail banking market investigation – final report, 9 August 2016

[16] See **Peter Scott, Martin Coleman**, The UK Financial Conduct Authority publishes its final guidance and policy statement in relation to its approach to enforcement of competition law, 15 July 2015, e-Competitions Bulletin July 2015, Art. N° 74511 and **Ilan Sherr**, The Financial Conduct Authority of United Kingdom is empowered to promote effective competition in the interest of consumers in the markets for regulated financial services, 1 April 2015, e-Competitions Bulletin April 2015, Art. N° 73067

[17] Netherlands Authority for Consumers and Markets, Competition in Dutch SME loan market, 28 August 2015, Netherlands Authority for Consumers and Markets, Barriers to entry into the Dutch retail banking sector, 12 June 2014

[18] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p.349)

[19] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, Articles 35 – 37.

[20] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, Recital 56, Article 98(2)(c).

[21] Case C-67/13P, *Groupement des cartes bancaires v European Commission*, 11 September 2014. See Daniel Schwarz, "Immoveable objects – The evolution of object restrictions after the *Cartes Bancaires* case", *Competition Law Insight*, 19 January 2016 ; See **Matthew O'Regan**, [The EU Court of Justice provides further clarity on when an agreement has the object of restricting competition \(*Groupement des cartes bancaires*\)](#), 11 September 2014, *e-Competitions Bulletin* September 2014, Art. N° 69491 ; **Pablo Ibáñez Colomo, Alfonso Lamadrid De Pablo**, [The European Court of justice interprets restriction of competition by object \(*Groupement des Cartes Bancaires*\)](#), 11 September 2014, *e-Competitions Bulletin* September 2014, Art. N° 73606 [fr] ; **Bertold Bar-Bouyssière**, [The European Court of Justice rules on restrictions by object in a case regarding payment card rules \(*Groupement des cartes bancaires*\)](#), 11 September 2014, *e-Competitions Bulletin* September 2014, Art. N° 70593

[22] Case C-382/12 P, *MasterCard Inc and Others v European Commission*. See **Giovanni Scoccini**, [The EU Court of Justice confirms the prohibition of MasterCard's multilateral interchange fees \(*MasterCard and Others*\)](#), 11 September 2014, *e-Competitions Bulletin* September 2014, Art. N° 70049; **Hans Vedder**, [The EU Court of Justice clarifies the object-effect dichotomy and deals with two-sided markets \(*Cartes Bancaires - MasterCard*\)](#), 11 September 2014, *e-Competitions Bulletin* September 2014, Art. N° 69013; **Irene Fraile**, [The European Court of Justice dismisses the final appeal in a case regarding inter-bank card fees \(*MasterCard*\)](#), 11 September 2014, *e-Competitions Bulletin* September 2014, Art. N° 68929

[23] Regarding implications for counterfactual analysis, see **Tom Coates**, [The UK High Court allows a plaintiff to amend its claim and introduce pleas on the counterfactual which were not originally included in the complaint to the European Commission \(*Deutsche Bahn / MasterCard*\)](#), 11 décembre 2015, *e-Competitions Bulletin* December 2015, Art. N° 80136. For implications on time limitation in competition cases, see **Peter Broadhurst**, [The English Court of Appeal confirms that standard six years limitation period in tort or breach of statutory duty cases applies to competition cases \(*Arcadia / Visa*\)](#), 5 August 2015, *e-Competitions Bulletin* August 2015, Art. N° 77138 [fr] and **Peter Broadhurst**, [The English Court of Appeal confirms that standard six years limitation period in tort or breach of statutory duty cases applies to competition cases \(*Arcadia / Visa*\)](#), 5 August 2015, *e-Competitions Bulletin* August 2015, Art. N° 77138 [fr]

[24] Judgment of the Italian Council of State of February 24, 2016 No. 744 regarding MasterCard's Italian domestic MIF.

[25] European Commission Press Release, Commission sends Statement of Objections to MasterCard on cross-border rules and inter-regional interchange fees, 9 July 2015. See also **James Ashe-Taylor**, [The UK Competition and Market Authority decides to close its investigations following approval of European interchange fees regulation \(*MasterCard, Visa*\)](#), 6 May 2015, *e-Competitions Bulletin* May 2015, Art. N° 73542

[26] M-lex, Visa faces EU antitrust probe into currency conversions, 26 July 2016

[27] See **Richard Pike, Yulia Tosheva**, [The EU Commission opens a preliminary investigation in relation to possible collusion in the money transfer market \(*Western Union*\)](#), 23 February 2016, *e-Competitions Bulletin* February 2016, Art. N° 80236 and **ony**

Woodgate, Ajit Kainth. The EU Commission opens a preliminary antitrust investigation in relation to possible collusion in the money transfer market (Western Union), 1 March 2016, e-Competitions Bulletin March 2016, Art. N° 78516

[28] See **Daniele D'Alvia.** The Italian Competition Authority opens an investigation for a possible anticompetitive agreement in relation to the SEDA multilateral inter-bank agreement (Associazione Bancaria Italiana), 21 January 2016, e-Competitions Bulletin January 2016, Art. N° 78898

[29] European Commission, State aid to European banks: returning to viability, Competition State aid brief, February 2015

[30] For further details on BRRD, see Clifford Chance Briefing note "UK implementation of the EU Bank Recovery and Resolution Directive: What you need to know", 7 January 2015 https://www.cliffordchance.com/briefings/2015/01/uk_implementationoftheeubankrecoveryan.html ↗

[31] Bank Recovery and Resolution Directive, Recitals 47, 55, 69, Article 32(4)

[32] Ibid. Articles 34(3), 39, 41, 42, 62 and 56.

[33] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, Article 19

[34] Case C-526/14, Tadej Kotnik and Others v Državni zbor Republike Slovenije, para 43

[35] See **Phedon Nicolaides.** The EU Court of Justice and General Court explain how to determine whether state guarantees constitute State aid and, if yes, how much aid is involved (Banco Privado Português), 19 March 2015, e-Competitions Bulletin March 2015, Art. N° 72683 and **Emma Linklater.** The European Court of Justice reminds that a new State guarantee must be notified, and when it is not, its beneficiaries do not have remedies under EU Law (OTP Bank Nyrt / Magyar Állam), 19 March 2015, e-Competitions Bulletin March 2015, Art. N° 72684

[36] For another example of vigorous monitoring of State aid by the Commission, see **Phedon Nicolaides.** The European Commission closes an investigation regarding a State aid scheme and proves that it will pursue ex post monitoring vigorously (Enterprise Capital Funds), 9 March 2015, e-Competitions Bulletin March 2015, Art. N° 74125

[37] Margrethe Vestager, Answers to the European Parliament Questionnaire, https://ec.europa.eu/commission/sites/cwt/files/commissioner_ep_hearings/vestager-reply_en.pdf ↗