Unsettled times: the General Court's judgment in Icap v Commission

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On 10 November 2017 the European Union's General Court (GC) delivered its judgment in *Icap v Commission*. The judgment makes clear that the pursuit of greater procedural efficiency by the European Commission through its cartel settlement procedure cannot override parties' fundamental rights of defence, particularly in a 'hybrid' settlement context. The judgment also confirms prevailing EU case law on determining the existence of 'by object' infringements under Article 101 of the Treaty on the Functioning of the European Union (TFEU) and emphasises the need for the Commission to present sufficient evidence to establish a party's own involvement in any given infringement.

Background

On 4 December 2013 the Commission reached a settlement with five banks and one broking firm in connection with their participation in one or more bilateral cartels relating to interest rate derivatives denominated in Japanese Yen (the YIRD Cartels).[1]

However, the Commission continued its investigation into the possible involvement of Icap - an interdealer broker and provider of post-trade services - under the Commission's standard (non-settlement) procedure. On 4 February 2015 the Commission subsequently issued an infringement decision concluding that Icap had "facilitated" six infringements as part of the YIRD Cartels and imposed a fine of €14.9 million on Icap.

Icap appealed the Commission's decision in April 2015. On 10 November 2017 the GC partially annulled the Commission's decision.[2] Of particular interest are the GC's views on the Commission's approach to conducting 'hybrid' settlements, the characterisation of particular types of conduct as 'by object' infringements under Article 101 of the TFEU and the evidential burden on the Commission when proving involvement in an infringement.

The Commission's approach to conducting 'hybrid' settlements

Perhaps the most interesting aspect of the GC's decision, at least from the Commission's perspective, is the GC's criticism of the manner in which the Commission conducted its 'hybrid' settlement procedure.

When the Commission adopted its settlement decision for the other six participants in December 2013 (which was not addressed to Icap), the Commission nevertheless referred to Icap's role in facilitating the

[1] Case COMP/AT.39861 – *Yen Interest Rate Derivatives*, Commission decision of 4 December 2013.

[2] Case T-180/15 *Icap plc, Icap Management Services Ltd, and Icap New Zealand Ltd v the European Commission*, judgment of 10 November 2017.

relevant conduct. At that time, however, the Commission's investigative procedure involving Icap was still ongoing, and it would be another 14 months before a formal infringement finding was made against Icap.

Before the GC, Icap argued that the references in the earlier settlement decision to Icap's conduct constituted a breach of the principles of presumption of innocence and good administration. For those reasons, Icap argued that the later decision should be set aside.

The GC agreed that the Commission had infringed the presumption of Icap's innocence when adopting the earlier settlement decision. The GC emphasised in particular that "*the principle of presumption of innocence cannot be distorted by considerations linked to the safeguarding of rapidity and efficiency of the settlement procedure, no matter how laudable those objectives may be*".[3] The Commission must apply its settlement procedure in a way that respects any non-settling party's rights of defence.

Looking ahead, where the Commission does pursue a 'hybrid' procedure, it will need to ensure that any non-settling party's procedural rights are not prejudiced by the adoption of the settlement decision. In practice, this may increase the likelihood of the Commission delaying the adoption of its settlement decision until it is ready to adopt its infringement decision simultaneously. Indeed, the GC noted this option as an example of the "necessary measures" that the Commission may be required to take, and the Commission has previously adopted such an approach in the *Animal Feed Phosphates* case.[4] Otherwise, the Commission would have to find a way to draft the settlement decision in a manner which avoids implicating any (non-settling) parties that continue to be involved in separate investigative proceedings – which may be more difficult to achieve in complex cartel scenarios.

It is also worth noting, however, that while the GC concluded that the Commission had infringed the presumption of Icap's innocence, this did not justify annulment of the infringement decision, since the Commission's findings were properly supported by evidence (save where those findings had been separately annulled by the court). This outcome therefore narrows somewhat the usefulness of the GC's judgment for other future appellants. It suggests that breaches of a non-settling party's procedural rights must be allied to a material flaw in the Commission's substantive assessment if it is to result in the annulment of a decision: if that is the case though, the appellant is likely already to have stronger grounds for a successful challenge.

Information exchange as an exclusionary 'by object' infringement

In its infringement decision, the Commission identified the existence of both conduct aimed at coordinating Japanese Yen LIBOR panel submissions and the anti-competitive exchange of confidential information. The Commission alleged that such conduct was sufficiently harmful to be classified as a 'by object' infringement.

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[3] Case T-180/15 *Icap plc, Icap Management Services Ltd, and Icap New Zealand Ltd v the European Commission*, judgment of 10 November 2017, para. 266.

[4] Case COMP/38.866 – *Animal Feed Phosphates*, Commission decisions of 20 July 2010.

Regarding the alleged coordination, the GC noted that the payment flows between financial institutions in respect of the relevant derivatives were either directly or indirectly linked to the level of Japanese Yen LIBOR. The GC considered that, to the extent that such coordination was intended to influence the extent of the payments between banks, it had an anti-competitive object.

In light of that conclusion, the GC was not obliged to consider whether the alleged anti-competitive exchange of confidential information also constituted a 'by object' infringement in this case.

Notwithstanding, the GC took the opportunity to restate the case law in this area, and went on to suggest that the exchanges of information in which Icap was involved would in any event have amounted to 'by object' infringements. It is, however, worth noting that:

(i) the GC's comments on information exchange are effectively obiter – it had already found against Icap in relation to coordination; and

(ii) it is not clear from the GC's judgment which theory of harm it was relying on. The Commission's infringement decision considered both an exploitative theory of harm (i.e. conduct aimed at setting rates at a different level) and an exclusionary theory of harm (i.e. conduct aimed at conferring a competitive advantage on the participants resulting in the foreclosure of other banks). The GC also referred to "an advantage" (consistent with exclusionary foreclosure) in its judgment, but at the same time emphasised "*the significance of the impact of the level of the* [Japanese Yen] *LIBOR rates on the amount of the payments effected*" under derivatives contracts when determining that exchange of information could have amounted to a 'by object' infringement.[5] The GC did not appear to consider the precise extent of any alleged foreclosure, which the Commission's own guidance states "*is only possible* [in information exchange cases] *if the information concerned is very strategic for competition and covers a significant part of the relevant mar*ket".[6]

Establishing a party's participation in any given infringement

It is well-established that anti-competitive conduct occurring over a period of time can either be characterised as a single, continuous infringement or as a single, repeated infringement. In the case of the former, the Commission can impose a fine in respect of the whole period of the infringement (including periods in respect of which it does not have specific evidence of an infringing party's involvement, provided there is no proof or indication that the infringement was interrupted as regards that party). For the latter, the Commission cannot impose a fine in respect of those periods during which the infringement was interrupted.

In order to establish participation in a single and continuous infringement, the Commission must prove that: (i) the participants' actions formed part of an "overall plan" pursuing a common objective; (ii) a participant intended to contribute to that overall plan by its own conduct; and (iii) that participant was

[5] Case T-180/15 *Icap plc, Icap Management Services Ltd, and Icap New Zealand Ltd v the European Commission*, judgment of 10 November 2017, para. 75.

[6] Commission guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ 2011 C11/01, 14.01.2011), para. 70.

aware of the offending conduct of the other participants, or ought to have been so aware and was prepared to take the risk.[7]

In light of the context in which the relevant conduct took place (in particular, the fact that LIBOR is set daily), the GC held that the Commission needed to produce evidence of positive measures adopted by Icap, if not on a daily basis at least sufficiently recurrent in time to establish that a single infringement was continuing. Otherwise the Commission was limited to finding the existence of a single, repeated infringement. When examining the six infringements identified in the Commission's infringement decision, the GC concluded that for four of those infringements the Commission had failed to produce sufficient evidence of Icap's participation for the entire duration on a single, continuous basis.

Further, the GC noted that in one instance, certain initial exchanges between Icap and one of the other parties allegedly referred to attempts to move a particular LIBOR rate upwards, whereas subsequent evidence cited by the Commission showed alleged attempts to move rates with different maturities and/or to move that rate lower. Interestingly, the GC concluded that the differing maturity and direction of movement of the rate meant that Icap could have reasonably taken the view that the initial conduct had ceased. In the absence of any subsequent information that would have otherwise suggested to Icap that it ought to continue or repeat the earlier conduct, the GC concluded that Icap could not be held as having participated in the relevant infringement after the date on which the instructions changed as regards maturity and direction of movement of the rates.[8]

[7] Case T-180/15 *Icap plc, Icap Management Services Ltd, and Icap New Zealand Ltd v the European Commission*, judgment of 10 November 2017, paras. 205-206.

[8] Case T-180/15 *Icap plc, Icap Management Services Ltd, and Icap New Zealand Ltd v the European Commission*, judgment of 10 November 2017, paras. 229-230.

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