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General Court annuls €33.6m HSBC Euribor cartel fine

On Tuesday 24 September the European General Court (GC) annulled a €33.6m fine that the European Commission had imposed on HSBC in December 2016 for participating in a cartel in the market for Euro Interest Rate Derivatives (EIRDs) linked to the Euro Interbank Offered Rate (Euribor). While the GC largely upheld the Commission's decision, it nonetheless annulled the fine imposed on HSBC on the basis that the Commission had given "insufficient reasoning" as to how it had calculated the fine.

Background

The investigation into a possible cartel in the EIRD sector was originally opened after the Barclays banking group applied to the Commission for immunity in respect of the cartel in June 2011. Following Barclays' notification, the Commission carried out inspections of various premises, including those of HSBC.

In December 2016 the Commission fined HSBC, JPMorgan and Crédit Agricole a total of €485m, after the banks declined to participate in the settlement procedure.[1] The banks were accused of, among other things, exchanging information (including their banks' trading positions and intentions regarding future Euribor submissions) and exploring possibilities to align their banks' future Euribor submissions. In respect of HSBC specifically, the Commission found that HSBC had participated in a single and continuous infringement between 12 February 2007 and 27 March 2007, and imposed a fine of €33.6m.

In calculating the fines, the Commission determined as its starting point the value of sales relating to HSBC's infringing behaviour using a proxy (given EIRDs do not generate sales in the typical sense) - namely, all cash flows received under EIRDs, subject to a uniform reduction factor of 98.849 per cent.

For further information on any competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

[1] Barclays, Deutsche Bank, Société Générale and RBS did participate in the settlement procedure and the Commission adopted the settlement decision on 4 December 2013.

HSBC's arguments

In appealing the Commission's decision, HSBC:

- denied that its actions had constituted a restriction of competition by object;
- contested the Commission's finding that it participated in a single and continuous infringement; and
- challenged the fine on the basis that the Commission had not given sufficient reasoning as to how it had calculated the fine and decided on a 98.849 per cent reduction factor.

GC judgment

As to whether HSBC's conduct amounted to a restriction of competition by object, the GC agreed with the Commission that the manipulation of Euribor submissions on 19 March 2007 (whereby, prompted by a Barclays trader, an HSBC trader asked the person responsible for submitting HSBC's rates to issue a low quote with a view to reducing the Euribor rate on that day) was an infringement by its object. However, it disagreed with the Commission's finding that exchanges of information between traders from HSBC and other banks on their trading positions (unrelated to the Euribor manipulation above) were an infringement by object, on the basis that they did not reduce or remove the degree of uncertainty from the market.

The GC also rejected HSBC's arguments regarding the lack of a single and continuous infringement, finding it was "clear from the evidence" that HSBC intended to participate in such an infringement.

Regarding the fine, the GC agreed with HSBC that the Commission had provided insufficient reasoning for its approach to calculating the value of sales. The GC noted that since the Commission decided to determine value of sales taking all cash flows received under EIRDs as a starting point, the reduction factor it applied "play[ed] an essential role". It was therefore "*necessary that [HSBC] be placed in a position to understand how it arrived at a reduction factor set precisely at 98.849 per cent*", and the Commission had not provided a "*sufficient explanation of the reasons*" for doing so. The GC therefore annulled the fine in its entirety.

Reaction to the ruling

Whilst its fine has been annulled, HSBC may still appeal the decision to the European Court of Justice, given that the finding that it had participated in an infringement by object was not overturned by the GC.

Crédit Agricole and **JPMorgan**, fined €114.6m and €337m respectively for their roles in the cartel, have also appealed the Commission's decision. Both were **previously unsuccessful** in requesting interim measures to stop the publication of the Commission's decision pending their appeals of the decision to the GC.

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Merger control

CMA fines PayPal for breaching an initial enforcement order

On 24 September 2019 the Competition and Markets Authority (CMA) announced that it has **fined** PayPal for breach of an initial enforcement order (IEO) relating to its completed acquisition of iZettle. The **IEO**, served on 19 September 2018, required the businesses to be held separate pending the conclusion of the CMA's investigation into the acquisition. The CMA ultimately cleared the merger on 12 June 2019 after a Phase II investigation.

PayPal had successfully negotiated a derogation to the IEO allowing it to conduct international integration activities involving the merging parties' non-UK businesses, including conducting cross-selling pilot campaigns involving its non-UK businesses. However, the CMA found that PayPal, contrary to the derogation, conducted cross-selling pilot campaigns (targeted at French and German customers) that led to its contacting UK potential customers. The CMA's concern was that contacting potential customers with a UK presence risked them forming the view that iZettle had already replaced PayPal's equivalent offering (PayPal Here), which in turn risked a removal of potential customers from PayPal Here in the UK and the provision of a new source of potential customers to iZettle.

The CMA did not consider there to be a reasonable excuse for PayPal's failure to comply with the IEO and so imposed a penalty of £250,000. The fine is the highest to be imposed to date for breach of an IEO, although the CMA noted: "*whilst the penalty may be the highest imposed to date for a single IEO infringement, it is the lowest fine by proportion of profits after tax and is therefore not disproportionate in terms of the level of penalties imposed in previous cases*".

This is the latest in a series of cases in which the CMA has focused on breaches of interim orders. Earlier cases include penalties imposed on **Nicholls's Fuel Oils (July 2019)**, **Vanilla Group (March 2019)**, **Ausurus (December 2018)** and **Electro Rent (June 2018)**. It also follows the publication of the CMA's new **guidance on interim measures** earlier in the year.

Finisar/II-VI conditional clearance by SAMR

On 23 September 2019 China's State Administration for Market Regulation (SAMR) **announced** its conditional clearance of the proposed acquisition by II-VI Incorporated of Finisar Corporation. II-VI, a company incorporated in the U.S. and listed on the NASDAQ, is a global vertically integrated manufacturing company of engineered materials and optoelectronic components. Finisar is also incorporated in the U.S. and is a global supplier of optical communication products. Both parties engage in the manufacture and sale of optical communication components. Pursuant to an agreement signed on 7 November 2018 II-VI agreed to acquire all of the shares of Finisar for approximately US$3.2billion in cash and stock.

SAMR commenced its review on 20 February 2019. SAMR found a combination of horizontal, vertical and neighbouring overlaps. In particular, it identified competition concerns in the market for wavelength

selective switches, where the post-deal combined market share of II-VI and Finisar was 45 per cent to 50 per cent. SAMR considered that the merger would eliminate the close competition between II-VI and Finisar, and would increase the likelihood of coordination between the two companies. SAMR also noted that the market for wavelength selective switches is capital-intensive, involving highly technical products with high barriers to entry for putative competitors, meaning there were unlikely to be new entrants in the near future.

The remedies offered by the parties require II-VI and Finisar to continue to compete in the wavelength selective switches market and keep their operations separate by setting up a Chinese wall. Both companies are also to continue supplying wavelength selective switches to customers on fair and reasonable terms, without applying dissimilar terms to customers without appropriate reasons. There is also no automatic expiry of the conditions; the parties must seek to remove them and may only do so after 3 years from the date of the clearance decision.

The parties initially notified this transaction in December 2018 and the review took less than 9 months in total. It is worth noting both the relevant sector involved (optical communication components) and the fact that the parties involved are US companies. Furthermore, this case demonstrates the continuing willingness of the SAMR to accept behavioural remedies to address its competition concerns.

State aid

You win some, you lose some – European court rules on Starbucks and Fiat tax appeals

On 24 September 2019 the GC handed down judgments in two appeals against European Commission decisions which found that tax rulings by **Luxembourg** and **The Netherlands**, respectively, amounted to incompatible State aid. The issue in both cases related to the tax treatment of intra-group arrangements; financing arrangements in the Fiat case and commercial arrangements in the Starbucks case.

In both appeals, the GC ruled that the Commission was entitled to rely on the "arm's length principle" to assess transfer pricing.[2] In the Fiat case, the GC then concluded that the Commission was right (i) to find that the methodology endorsed by Luxembourg's tax ruling could not have resulted in an arm's length remuneration; and (ii) to conclude therefore that the tax ruling had conferred an advantage on Fiat that was selective. In the Starbucks case, however, the GC found that the Commission had failed to demonstrate that the tax ruling amounted to a selective advantage over other companies and constituted State aid. The different outcomes show that each case depends on its facts, as discussed further in Sara Luder's **blog post**.

Following the judgments, Competition Commissioner Margrethe Vestager **said** that the judgments provide important guidance on the application of the State aid rules in the area of taxation but that each case has its specificities. The Commission will "*study the judgments carefully before deciding on possible next steps*". However, she also noted that the Commission "*will continue to look at aggressive tax planning measures under EU State aid rules to assess if they result in illegal State aid*".

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[2] The principle allows the Commission to verify whether the pricing for intra-group transactions accepted by the Member State's tax ruling corresponds to prices that would have been negotiated under market conditions.

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