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Fine reduction for HSBC as European Commission re-adopts EURIBOR decisions

On 28 June 2021 the European Commission adopted two decisions against three major banks in respect of a cartel in Euro interest rate derivatives. This latest development follows the partial annulment by the European General Court (GC) in November 2019 of the Commission's 2016 decision to fine HSBC for its involvement in the cartel. The Commission has described these latest decisions as "*in line with [its] policy of pursuing an effective and deterrent enforcement against cartels*".

BACKGROUND: THE EIRD CARTEL

The origin of this case predates the 2008 financial crash. Initially, seven banks were suspected by the Commission of operating a cartel in the EEA between September 2005 and May 2008, with the aim of manipulating interest rate derivatives linked to the Euribor benchmark rate.

Interest rate derivatives are financial products including forward rate agreements, interest rate swaps or interest rate options, and are used by companies to manage the risk of interest rate fluctuations or to generate a return based on speculation. These products derive their value from the level of a benchmark interest rate, such as Euribor. Euribor is intended to reflect the cost of interbank lending in Euro and is the rate at which Euro interbank term deposits are offered by one prime bank to another prime bank within the euro zone.

In October 2011 the Commission carried out dawn raids based on suspicions that infringements of Article 101 TFEU had occurred.

On 4 December 2013 it announced that four of the banks - Barclays, Deutsche Bank, Société Générale and RBS - had settled with the Commission and were fined a combined total of €1.49 billion (although Barclays was given full immunity in exchange for blowing the whistle on the alleged cartel).

The remaining three, non-settling banks were subjected to a lengthy and detailed investigation. On 7 December 2016 the Commission found that the banks had participated in a cartel in breach of Article 101 TFEU, and imposed fines totalling €485 million.

Following the adoption of this decision, all three banks lodged appeals with the GC challenging the Commission's decision.

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GENERAL COURT'S HSBC DECISION

In its ruling of 24 September 2019 the GC broadly agreed with the Commission that HSBC's involvement in the cartel amounted to an infringement of EU competition law, but considered that the Commission had failed to provide sufficient reasoning as to how it had calculated the fine. It therefore annulled the fine (as reported in more detail in a previous edition of this newsletter).

Both HSBC and the Commission have appealed the GC's decision to the Court of Justice of the European Union (CJEU), and both JPMorgan and Crédit Agricole have been granted permission to join this appeal.

The GC's rulings in relation to the appeals by JPMorgan and Crédit Agricole have been put on hold.

COMMISSION RE-ADOPTS INFRINGEMENT DECISION

On 28 June 2021 the Commission adopted two decisions concerning the cartel. The first decision re-adopted the prohibition decision against HSBC, but imposed a reduced fine of €31.739 million, this time with precise explanations as to the calculation.

The second decision amended the 2016 decision against Crédit Agricole and JPMorgan, in order to correct the "same irregularity" (that is, the lack of reasoning as to the fines imposed).

But with the appeals of JPMorgan and Crédit Agricole still pending before the GC, and HSBC's appeal pending before the CJEU, the findings and fines in these cases are far from settled.

OTHER DEVELOPMENTS

STATE AID

UK GOVERNMENT UNVEILS NEW PROPOSED SUBSIDY CONTROL REGIME

Following an eight week consultation on its proposals issued earlier this year, on 30 June 2021 the UK Government published its response to the consultation and introduced the Subsidy Control Bill to Parliament.

As of 1 January 2021 the UK no longer applies the EU State aid rules (except as provided for in the NI Protocol to the EU-UK Withdrawal Agreement) but the EU-UK Trade and Cooperation Agreement (TCA) contains relatively detailed subsidy control commitments for the parties. To implement these commitments, the UK has now unveiled a Bill setting out its own subsidy control regime to ensure that UK subsidies are given in line with all of the UK's international obligations, including (but not only) the TCA. The Bill is intended to set out the key elements of the new regime with further detail concerning implementation and guidance to follow.

The substantive elements of the new regime include a definition of what constitutes a subsidy and the seven main principles to be used by public authorities as criteria for evaluating possible subsidies. Furthermore, the Bill sets out the different types of (sub)categories of subsidies, including those that will be out of scope and those that are prohibited. In terms of procedural aspects of the new regime, the Bill envisages a continued devolution of responsibility for subsidy control assessments to the grant-giving organisation, who can grant the majority of subsidies on the basis of a self-assessment of compliance with the subsidy control principles. A new "Subsidy Advice Unit" housed within the UK's Competition and Markets Authority will provide independent advice to public authorities and monitor the regime. Additionally, the judicial enforcement of the rules will be through the courts, in particular in the Competition Appeal Tribunal.

For further details on the proposed new subsidy control regime, see our blog post released on 1 July 2021.

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ANTITRUST

EUROPEAN COMMISSION ANNOUNCES FIRST DAWN RAID SINCE BEGINNING OF COVID-19 PANDEMIC

In a press release of 22 June 2021 the European Commission confirmed that it had earlier that day performed unannounced inspections at the German premises of a company active in the manufacture and distribution of clothing garments, thereby carrying out its first dawn raid since the beginning of the Covid-19 pandemic. The Commission reported that the inspections were performed in response to concerns that the company in question may be in breach of Article 101 TFEU, and were undertaken in conjunction with the German competition authority.

Ordinarily the Commission will not publicly announce that it carried out a dawn raid on the day of the raid itself, instead opting to issue a press release confirming its occurrence after the company subject to the raid has made its own public statement. The last time a raid was publicly confirmed by the Commission in this way was in May 2019 when it raided a number of French grocery retailers.

The Commission's 22 June announcement may have been intended to make clear to companies that any hiatus in such raids which the Commission had allowed in light of Covid-19 – it reportedly did not conduct a single raid in 2020 primarily due to governmental restrictions introduced in response to the pandemic – was now over. The Commission's press release did stress though that the inspections were "*conducted in compliance with all coronavirus health and safety protocols to ensure the security of those involved*".

CRIMINAL STANDARD OF PROOF REQUIRED IN HK ANTITRUST CASES LEADING TO FINES

The Hong Kong Court of Appeal has rejected an appeal brought by the Hong Kong Competition Commission (HKCC) and held that the standard of proof in competition proceedings for a pecuniary penalty remains the criminal standard of beyond reasonable doubt, rather than the balance of probabilities as typically used in civil cases.

The HKCC contended that the standard of proof in competition proceedings for a pecuniary penalty should be the civil standard, since the criminal standard potentially frustrates the Competition Ordinance's enforcement. The HKCC emphasised that this issue has great public importance in relation to the development of competition law in Hong Kong.

In *Competition Commission v W. Hing Construction Co Ltd & Ors*, the Court of Appeal endorsed the approach taken by the Competition Tribunal (Tribunal) in *Competition Commission v Nutanix & Ors*. In *Nutanix*, the Tribunal considered itself bound by the Court of Final Appeal's decision in *Koon Wing Yee v Insider Dealing Tribunal*, in which it was held that once proceedings for a pecuniary penalty involve the determination of a criminal charge, the case must be proved beyond reasonable doubt. This would not apply if the standard is modified by legislation but, as the Competition Ordinance does not expressly or implicitly mandate a different standard, the Tribunal considered the criminal standard of proof to apply to competition proceedings.

The Court of Appeal opined there is a reasonably arguable basis for suggesting the Tribunal in *Nutanix* might not have given sufficient consideration to the potential frustration of effective enforcement in deciding if there is implied derogation or abrogation from the criminal standard. However, it said it found assessing the validity of the HKCC's contention difficult because no evidence had been adduced in the trial to support it.

The Court of Appeal said it would be better for the HKCC's argument to be tested in an actual case where the application of the criminal standard of proof would have a real impact and where the Tribunal has dealt with the issue in its evidential assessment, before the point is considered by an appellate court.

For now, though, this means that the onus on the HKCC is to prove its case beyond reasonable doubt. The early Tribunal cases demonstrate that the HKCC has been able to do so in cartel cases, but the challenge will be reaching this standard of

proof in non-cartel cases such as the Second Conduct Rule case of *Competition Commission v. Linde HKO Limited, Tse Chun Wah and Linde GmbH* currently before the Tribunal.

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