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European Commission imposes fines on investment banks for taking part in a European Governments Bonds trading cartel

On 20 May 2021 the European Commission fined three banks a total of c. €371 million for participating in a cartel involving the exchange of commercially sensitive information between a total of seven banks.

BACKGROUND AND DECISION

On 20 May 2021 the European Commission announced that it had fined investment banks Nomura, UBS and UniCredit a total of c. €371 million for their participation in a cartel involving a total of seven banks. The other banks in breach of EU antitrust rules, but not fined, were Bank of America, Natixis, RBS (now NatWest) and WestLB (now Portigon). The conduct involved the exchange of commercially sensitive information between the banks in relation to the primary and secondary markets for European Government Bonds (EGBs).

This decision comes less than a month after the Commission announced on 28 April 2021 that it had fined three banks (Bank of America Merrill Lynch, Credit Suisse, and Crédit Agricole) for a breach of antitrust rules involving their participation in a cartel relating to the market for US Supra-sovereign, Sovereign and Agency (SSA) bonds. This decision is covered in more detail in a previous newsletter.

EGBs are a debt security instrument issued by the central government of a Eurozone Member State. The government issuing the EGB will receive funds for a fixed term at a pre-defined interest rate, and the holder of the bond will receive periodic interest payments (the coupon) and will receive the principal amount at maturity. There is a primary and a secondary market for EGBs. In the primary market, a limited number of investment banks can bid in an auction for the EGBs. In the secondary market, those investment banks place and trade the EGBs obtained from the auction with investors who may hold the EGB as an investment, or may further trade the EGB. Investors in the secondary market include, for example, other investment banks, hedge funds or pension funds.

THE INFRINGEMENT

The Commission's investigation found that traders at each of the banks working on the EGB desks were in regular contact with each other, primarily through the use of multilateral chatrooms using Bloomberg terminals, and exchanged commercially sensitive information.

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

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

The Commission found that the information exchanged included the prices and volumes offered in the run up to EGB auctions and updates on the bidding strategy to be employed at auctions. The parties also gave each other updates on the trading parameters on the secondary market, including the price shown to customers and the market in general.

The Commission concluded that this exchange of information between the seven banks was a violation of the European antitrust rules which prohibit anti-competitive business practices such as collusion on prices (Article 101 TFEU and Article 53 of the EEA Agreement).

THE FINES

The Commission set the fines in line with their 2006 Guidelines on fines. In setting the level of the fines, the Commission took into account, in particular, the sales value in the EEA achieved by the cartel participants for the products in question, the serious nature of the infringement, including that the cartel related to a Euro-based financial product on the primary and secondary market, its geographic scope and the respective duration of participation.

The Commission imposed the fines as follows:

- Nomura: €129,573,000;
- UBS: €172,378,000. UBS received a 45 per cent reduction in the level of their fine as a result of their cooperation with the investigation under the leniency programme;
- UniCredit: €69,442,000;
- RBS (now NatWest): €0 due to receiving full immunity from fines for revealing the cartel under the leniency programme, and thereby managed to avoid a fine of c. €260 million;
- WestLB (now Portigon): €0 as the business did not generate any net turnover in the last business year and fines are capped at 10 per cent of total turnover;
- Bank of America and Natixis: These banks were not fined because they had left the cartel more than five years before the Commission started its investigation in July 2015, so they were excluded from a fine under the limitations period. Natixis also cooperated with the Commission under the leniency programme.

CONCLUSION

The Commission noted in its press release that this decision, alongside previous cases, demonstrated their determination to address anti-competitive behaviour in all business sectors, including the finance sector. Margrethe Vestager, the Executive Vice-President of the Commission and in charge of competition, said that this decision sent a "*clear message the Commission will not tolerate any kind of collusive behaviour*". The Executive Vice-President was particularly critical of the banks' "*unacceptable*" behaviour in light of the background that the behaviour occurred in "*the middle of the financial crisis, when many financial institutions had to be rescued by public funding*".

OTHER DEVELOPMENTS

ANTITRUST

EUROPEAN COMMISSION PUBLISHES FINDINGS OF ITS EVALUATION OF THE MOTOR VEHICLE BLOCK EXEMPTION REGULATION

On 28 May 2021 the European Commission published the Evaluation Report and Staff Working Document summarising the findings of its evaluation of the Motor Vehicle Block Exemption Regulation (MVBER). The Commission launched an evaluation of the regime applicable to the automotive sector - including in particular the MVBER and its supplementary Guidelines - in December 2018 in light of the MVBER expiring on 31 May 2023.

The MVBER regime applies to vertical agreements relating to each of the: (i) distribution of new vehicles; (ii) sale or resale of spare parts; and (iii) provision of repair and maintenance services. Provided that certain conditions are met, the regime exempts certain vertical agreements from falling foul of Article 101(1) TFEU - which prohibits agreements between undertakings that restrict competition within the internal market.

The evaluation found that the MVBER was a useful tool for businesses in the automotive sector, making it easier to assess whether agreements comply with EU competition law. However, it also found that the sector is under pressure to adapt in line with the green and digital transformation. In particular, in relation to the market for motor vehicle repairs, the Staff Working Document and Evaluation Report state that independent repairers will only be able to continue exerting competitive pressure if they have access to key inputs such as technical information and data (amongst others). The Commission also identified: (i) a more concentrated market for the distribution of light commercial vehicles, trucks and buses relative to passenger cars; and (ii) limitations on consumer choice in the spare parts market. Consequently, the Evaluation Report concludes that some provisions of the current regime may need to be updated, as well as specific policy objectives.

The Commission will reflect on its findings in the coming year and move to the policy-making stage of the review, in order to decide whether the current regime should be renewed, revised or permitted to lapse.

CHINA TO SHOW "ZERO TOLERANCE" TO ANTITRUST INFRINGEMENTS IN COMMODITIES TRADING

Commodities trading is set to be the latest area to come under close scrutiny from Chinese regulators, including competition law officials from the State Administration for Market Regulation (SAMR), who have warned there will be "*zero tolerance*" of cartels and other illegal conduct in the sector.

This warning was given in a meeting held on 23 May 2021 between five Chinese regulatory authorities (the SAMR, the National Development and Reform Commission (NDRC), the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), the Ministry of Industry and Information Technology and the China Securities Regulatory Commission) and the leading commodities trading companies and trade bodies in China, according to a press release on the NDRC's website. A number of Chinese state-owned enterprises (SOEs) are active in this sector and therefore the presence of SASAC makes it unequivocal that these SOEs are expected to comply with the Anti-Monopoly Law and other Chinese laws.

During the meeting, Chinese officials said they will show "*zero tolerance*" to anti-competitive agreements, collusion on market prices, dissemination of false information and other illegal conduct. They said their next steps will be to closely monitor commodity price movements and strengthen supervision of commodity futures and spot markets, as well as increase the number of inspections and thoroughly investigate anti-competitive agreements reached and implemented by commodities traders.

Officials also said certain commodity prices had increased significantly since the beginning of this year, which they attribute to factors including excessive speculative activities.

Companies which trade commodities in China should be particularly cautious as they are now under Chinese regulators' radar and are likely to face increased competition and regulatory scrutiny.

GENERAL COMPETITION

CMA AND INFORMATION COMMISSIONER'S OFFICE PUBLISH JOINT STATEMENT ON COMPETITION LAW AND DATA PROTECTION LAW

On 19 May 2021 the UK Competition and Markets Authority (CMA) and Information Commissioner's Office (ICO), published a joint statement setting out their shared views on the relationship between competition and data protection in the digital economy. The joint statement is intended to represent a significant step forward in the collaboration between the two regulators given the increasingly close relationship between the aims of competition and data protection law.

The joint statement highlights that strong synergies exist between the aims of competition law and data protection and focusses on the shared view that the organisations' overlapping objectives are strongly aligned and complementary. To support this conclusion, the joint statement identifies that: (i) more competitive markets will deliver the outcomes consumers consider valuable, such as enhanced privacy and greater control over their personal data; (ii) the relationship between competition and data protection is mutually reinforcing; and (iii) the creation of a level playing field in relation to data access is fundamental for enabling effective competition to thrive.

The joint statement also highlights that both regulators consider that any (potential) tensions between competition law and data protection can be addressed through a careful consideration of the issues on a case-by-case basis with close cooperation between one another.

The joint statement makes clear that the CMA and ICO intend to work collaboratively going forward, including through the work of the Digital Regulation Cooperation Forum – a body set up by a number of regulators with the goal of supporting a coordinated and coherent ongoing approach to digital regulation. By extension, the commitment to work together was reinforced by the publication of an updated Memorandum of Understanding signed by the CMA and ICO, setting out how the regulators will collaborate in the future, for example through information sharing and the potential for joint projects.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650