Pázmány Law Working Papers

2016/6.

Botond Horváth – Tihamér Tóth

Antitrust cases in the financial services sector

- an overview of seminal Hungarian and EU cases

Pázmány Péter Katolikus Egyetem
Pázmány Péter Catholic University Budapest
http://www.plwp.eu

Botond Horváth[1] and Tihamér Tóth[2]

Antitrust cases in the financial services sector

- an overview of seminal Hungarian and EU cases

I. Anti-competitive agreements

Article 101 TFEU and Tpvt.[3] 11. § prohibit anti-competitive agreements, concerted practices and decisions of associations of undertakings if they aim or have the effect to restrict, distort or eliminate competition. EU law shall be applied if the action may have an effect on trade between Member States. Our paper gives an overview of the most important decisions adopted by the EU Commission and the Hungarian Competition Authority (Gazdasági Versenyhivatal: GVH) of the past five years in Hungary and the EU.

1. The Mortgage loan information cartel case

1.1. Scope and background of the GVH investigation

The GVH opened its investigation in case Vj-74/2011 on November 23, 2011. The subject matter of the procedure was the alleged cartel among financial institutions in the Hungarian mortgage loan sector. Following several complaints, the case handlers investigated whether the banks involved in mortgage financing coordinated their market strategies concerning final repayment of foreign currency-denominated mortgage loans between September 2011 and January 2012.

The investigation involved the following banks operating in Hungary: OTP Bank Nyrt., Erste Bank Hungary Zrt., MKB Bank Zrt., Raiffeisen Bank Zrt., CIB Bank Zrt., UniCredit Bank Hungary Zrt., Budapest Bank Zrt., Hungarian Branch Office of Citibank Europe Plc., FHB Jelzálogbank Nyrt., K&H Bank Zrt., Magyar Cetelem Bank Zrt., Magyar Takarékszövetkezeti Bank Zrt., and UCB Ingatlanhitel Zrt.

---

[1] PhD candidate PPKE Faculty of Law and head of team at the Hungarian Competition Authority, author of chapter 4, 5 and 6

[2] Assistant professor PPKE Faculty of Law and of counsel at Réczicza Dentons Europe LLP, author of chapter 1,2 and 3 of the paper. The author is indebted to the financial support provided by the Pallas Athéné Domus Animae Foundation to his research.

[3] Hungarian Competition Act

The Parliament adopted an act making it possible for natural persons who had mortgage loans denominated in foreign currency, especially Swiss franc, to repay their debts at a preferential HUF/franc rate. The significant savings achieved by the clients had to be financed by the banks. The Hungarian Banking Association challenged the law before the Constitutional Court, but failed.

1.2. The facts of the case

The aggregate market share of the banks involved in the Hungarian mortgage loan market was approximately 90%. Two meetings were held within the framework of a series of Retail Risk Breakfasts on September 15, 2011 and on October 3, 2011.

At the September Breakfast, the banks came to a common understanding as to the restriction of competition by way of limiting access to new retail mortgage loan products during the period of final repayment. This was evidenced by notes of a Budapest Bank manager, an in-house e-mail prepared by the representative of the market-leading OTP Bank summarizing the discussion at the September Breakfast, and various written and oral statements of certain banks.

During the October Breakfast participants shared sensitive business information, e.g. information relating to the number of clients who indicated their intention to repay their existing mortgage loans in full, and information regarding the business strategies of the participants related to new mortgage loans extended to clients with the purpose of changing their existing loans within the framework of Full Repayment. This was evidenced by the notes of a Budapest Bank manager as well as by written and oral statements of certain banks.
Furthermore, e-mails showed that some of the larger banks also shared sensitive information during high level bilateral negotiations.

1.3. The decision of the Competition Council

The participants of the Retail Risk Breakfasts denied that they had come to a common understanding to restrict competition. The discussions at the September Breakfast were too vague, did not reach the level of an agreement. It was argued that the e-mails found at OTP Bank referring to restrictions were not conclusive evidence. Furthermore, some of the representatives at the meeting had no knowledge of, or influence on the bank’s overall strategy.

Nevertheless, the Competition Council established that the banks, with the exception of Magyar Cetelem Bank Zrt., were engaged in a single, continuous, complex and multilevel cartel by sharing confidential business information with each other and by discussing their business strategies with the aim of limiting the volume of refinancing for the final repayment of foreign currency-denominated mortgage loans between September 15, 2011 and January 30, 2012.

To be included in this complex infringement it was sufficient if a bank participated in one of the three elements of the infringement (the two breakfasts and bilateral collaborations). The Competition Council found that even if no evidence was found to support that the banks in groups b)-c) participated in any bilateral negotiations, they had or could have knowledge of these bilateral negotiations. Also, it was no excuse is a bank did not participate at the second breakfast, since they were invited and did not clearly distance themselves from the meeting.

The GVH also looked into to what extent banks harmonized their business strategies in accordance with the plan agreed on during the September Breakfast, and how intensely they were competing for the clients. Based on the intensity of the companies' participation in the infringement, the GVH allocated the banks into three groups:

a) banks that attended both the September and the October Breakfasts and also shared sensitive information during bilateral negotiations (OTP, Erste, CIB, Budapest Bank, K&H Bank)
b) banks participating at both Breakfasts (UniCredit, MKB, Raiffeisen, Takarékbank, UCB);
c) banks that attended only the September Breakfast (Citibank, FHB).

It was no excuse that some of the banks did not raise interest rates of any of their loan products. One of the new market entrants expressly stated that they want to actively participate in acquiring new clients after their early repayment with other banks.

The Competition Council imposed fines in line with its antitrust fining guidelines totaling HUF 9,5 billion, approximately EUR 30 million. Aggravating factors were the non-termination of the anti-competitive conduct following the launch of the investigation. Banks that had previously infringed competition law received a higher fine. There were also some mitigating factors taken into account. The Competition Council considered the liquidity, capital and capacity constraints, the aim of minimizing losses and the significant financial burden imposed on the banks by the Parliament.

1.4. Comments on the case

Although the investigation of the mortgage cartel case was expressly demanded by leading politicians of the dominating party in Parliament, the case could have been started without this political impetus as well. The case consumed much energy on the side of the GVH, almost the whole domestic banking sector was being involved. The Competition Council's decision, confirmed since then by the first instance review court, confirmed a strict even formalistic approach to information exchange agreements. Even if the parties had no regular meetings and the information did not relate to especially sensitive data, like planned future price increases, an anti-competitive concerted practice could be established. The Council believed that a by-object restriction is present whenever competitors exchange information that can be considered as business secrets.

2. The MasterCard and OTP Bank agreement

2.1. The MasterCard-OTP Bank agreement

The GVH started its investigation under case no. Vj/78/2013 in June 2013 suspecting that a contract between OTP Bank and MasterCard Europe would have vertical foreclosure effects and impede market entry of competitors. The GVH procedure involved the application of Section 11 of the Hungarian Competition Act and Article 101 TFEU.

The Customer Segment Agreement was signed in 2012 for five years. OTP Bank undertook *(i)* to achieve the turnover level determined by MasterCard each year (turnover level clause), and *(ii)* to reach the card proportion within OTP Bank's debit card portfolio determined by MasterCard (card proportion clause). Additionally, OTP Bank also undertook to introduce the PayPass functionality at a pre-defined percentage of Maestro cards. MasterCard undertook to provide OTP Bank with different kinds of support subject to fulfilment of the targets set out in the agreement.

MasterCard operates a worldwide card payment service providing MasterCard, Maestro, and Cirrus cards for its partner banks. It also provides payment processing, authorization, clearing and settlement, as well as advising services. OTP Bank is the largest player of the Hungarian retail banking market.

The market of card payment services functions as a two-sided market. In card payment systems competition occurs on several levels; on the level of the payment organizations on the one hand, and on the level of the card issuers (banks) and the acquirers (merchants, shops) on the other hand. The main goal of a payment organization is to issue as many debit and credit cards as possible on the market and to have these cards accepted by as many acquirers as possible. The issuing banks are interested in providing their customers with better products in terms of price and range of card acceptance.

The Competition Council noted that in this special market both card companies and issuing banks are interested in higher interchange fees, in contrast with shops accepting card payments. Stronger competition between payment card companies persuade more and more banks to issue their cards leads to higher interchange fees, ultimately to higher fees for merchants and/or consumers paying with cards. This is one of the reasons why many states, including Hungary and the EU[4] adopted regulation capping the level of interchange fees.

2.2. The commitment decision of the GVH

In its fairly detailed, 68 pages long order adopted in May 2015 the GVH did not find the turnover level clause to infringe competition law provisions. The card proportion clause, however, was regarded in the preliminary position of the Competition Council as a form of single branding, since it exceeded the 80% foreclosure level applied in the European Commission's practice.

MasterCard argued that the agreement does not include non-compete clauses. Should OTP Bank not meet the numbers set out in the agreement, it would only loose some of the financial support provided by MasterCard. The parties also put forward arguments relating to the individual exemption of the agreement, focusing mainly on the positive effects of the wide-spread use of the PassPay technology.

[4] http://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:32015R0751&from=EN

The preliminary position of the Competition Council established that MasterCard's market share in the Hungarian debit card market is well above the 30% threshold enshrined in the EU and Hungarian vertical block exemption regulations. Interestingly the Competition Council was prepared to establish the dominant position of MasterCard, having regard to the structure of the market, high entry barriers, and lack of bargaining power by banks.

The GVH analyzed the agreement first under the EU vertical block exemption regulation, and also under the vertical guidelines issued by the Commission. The Competition Council held in its preliminary position that although the regulation is not applicable because of the high market share, the restrictive clause is not on the black list of the regulation, since it does not include exclusivity, or post-termination restrictions and lasts for not more than five years.[5]

The next part of the preliminary position evaluated the agreement under the vertical guidelines issued by the EU Commission. The nature of the product and the agreement, the market position of the parties and their competitors, the strength of the buyers, the market entry barriers, the maturity of the market, the levels of trade affected were considered at length.

Quoting point 129. of the guidelines the Council recalled that an agreement constitutes single branding if the buyer is obliged or induced to procure more than 80% of its needs from one supplier. According to points 140-142. of the guidelines, if the supplier is a dominant undertaking, even short term single branding with a relatively smaller tied market share may result in anti-competitive effects.

Interestingly, after analyzing the documents related to the preparation of the agreement, the content of which was not published in the order, the Competition Council held in its preliminary position that the aim of the parties was to foreclose the market, at least the cards issued by OTP Bank, from other card companies like Visa.[6] It is not entirely clear, but it seems that the Council considered the single branding clause as a restriction of competition by object, therefore did not investigate the market effects thereof.

In its preliminary position the Council refused to accept the parties arguments that the agreement's single branding clause could be exempted under Article 101 (3) TFEU. It was emphasized that that the pay-pass technology is spreading around the globe, so this cannot be

[5] Point 265. of the order.
[6] Point 318. of the order.

the consequence of this restrictive agreement alone. Furthermore, OTP Bank's customers are practically unable to choose Visa debit cards.

The GVH took the following considerations into account in favor of accepting the commitments offered by the undertakings:

- the commitments terminated the challenged conduct immediately and with a retroactive effect to 1 January 2014,
- Competitors of MasterCard will have a realistic chance to issue cards through the most important Hungarian bank which may result in more choice and decreasing prices for consumers,

1. the agreement contributed to the proliferation of PayPass technology, and
2. the commitments met the requirement of verifiability.

2.3. Comments on the case

This was not the first time that MasterCard and OTP Bank were targeted by a GVH investigation. In 2009, the competition authority imposed fines on MasterCard, Visa and several Hungarian banks for adopting an anti-competitive agreement relating to the multilateral interchange fee (MIF).[7] In another, ongoing case[8] the GVH is inquiring whether MasterCard abused its dominant position by setting its interchange fees in a way to foreclose the market from its main competitor, Visa.[9]

In theory, the GVH investigation could have also involved the provisions on the prohibition of abuse of dominance. In the above mentioned interchange fee inquiry, started one year before this case, the GVH is investigating basically the same market assuming that MasterCard is the dominant player on the Hungarian debit card markets. The order mentions that MasterCard has such a strong and increasing market share in the Hungarian payment card market which can be strong proof of a dominant position on the debit card market. The order, recalling the content of the preliminary position of the Competition Council expressly declares that MasterCard is dominant on the relevant market.[10] Yet, neither the order starting the investigation, nor the legal

[7] Case no. Vj/18/2008., challenged before court, no judgments adopted yet.
[8] Case no. Vj/46/2012.
[9] Case no. Vj/46/2012.
[10] Point 259. of the order.

part of the order contains references to Article 102 TFEU and Section 21 of the Tpvt., prohibiting the abuse of dominant position. It seems that the preliminary position of the Council went beyond the scope of the procedure in this respect.

It was an unusual approach by the Council to analyze the restrictive clause under the block exemption regulation after it declared that MasterCard has a market share well above 30%, which on its own should have precluded the application of the regulation. The preliminary position referred to in the order is part of the worrying tendency of enlarging the scope of anti-competitive agreements by their object. Even if the parties, or one of the parties might have had subjective aims to preclude one of its competitors, it should not follow automatically that the agreement will be put into the "by object' category instead of analyzing its actual and potential market effects.

The GVH believed that accepting the commitments enabled a more efficient termination of an anti-competitive behaviour, and also that the order may serve as a guideline for other market operators. It could also be argued, however, that the same outcome could have been achieved through the adoption of an infringement decision ordering the termination of the unlawful practice, with or without the imposition of a fine. The length of the procedure was almost two years, so the authority must have collected all the necessary facts and legal arguments to build a strong case against the undertakings. One important difference between an infringement decision and a commitment order is that the latter has no binding force upon civil law courts hearing action for damage cases. Alternatively, the GVH might have had some second-thoughts as to the efficiency arguments of the agreement, taking into account that the pay-pass technology is indeed relatively widely used in Hungary, compared to other European countries, which may have been one of the consequences of the agreement.

3. The EU Court's *Cartes Bancaires* judgment

3.1. The facts of the case

On September 11, 2014 the European Court of Justice delivered an important judgment in the *Cartes Bancaires* case.[11] The Groupement des cartes bancaires ('GCB') was created in 1984 as an economic interest grouping by the main French banks to achieve interoperability of systems for payment and withdrawal by bank cards issued by its members. In 2002, to avoid free riding by banks which issued lots of cards but did not promote cards with merchants, the GCB adopted three pricing measures: (i) a MERFA fee for regulating the acquiring function, payable by the members of the GCB whose CB-card issuing activity exceeded their activity in affiliating new traders to the system, (ii) a reform of the membership fee for new members, fixing the sum and a supplementary membership fee for members whose number of CB cards in stock exceeded a certain threshold, and (iii) a fee per CB card issued, payable by 'dormant' members who were not very active before the date of entry into force of the new pricing measures.

3.2. The proceedings

The Commission concluded in a decision adopted in October 2007 that the pricing measures adopted by the Grouping were contrary to EU competition law because both their object and effect was anti-competitive under Article 101 TFEU.

The Commission argued that pricing measures had an anti-competitive object. First, those measures are not appropriate for encouraging card acquisition and they have the effect of either imposing an additional charge on members or limiting their issuing activities. The anti-competitive object was reflected in the intention of the main members to impede competition of new entrants and to safeguard the main members' revenue, and to limit the price reduction for bank cards.

The Commission also argued that the measures at issue also had the effect of restricting competition. During the period in which they were applicable, between January 2003 and June 2004, they resulted in a reduction in issue plans for CB cards of new entrants and the prevention

[11] Case C-67/13 P *Groupement des cartes bancaires v Commission*, judgment of 11 September 2014, not yet published

of a price reduction for CB cards, both for new entrants and for main members. Giving individual exemption was refused.

The GCB brought an action before the General Court for the annulment of that decision. The General Court dismissed the action in November 2012[12] on the ground that the Commission could properly conclude that the pricing measures as decisions of an association of undertakings restricted competition because of their anti-competitive object. The General Court found that there was no need to examine the effects of the measures on the market.

The GCB brought an appeal before the Court of Justice against the judgment arguing, inter alia, that the General Court had erred in law when it applied the concept of the restriction of competition by object. AG Wahl proposed in his opinion to set aside the judgment of the General Court in its entirety.[13]

3.3. The judgment

The Court confirmed a 'human-rights conform' standard of judicial review. The General Court cannot use the margin of assessment which the Commission enjoys as the master of competition policy by, as a basis for dispensing with an in-depth review of the law and of the facts.[14] The first instance court is criticized for *"simply reproducing on a number of occasions [..] the contents of the decision at issue"*.[15] Although the General Court shall not substitute its own economic assessment for that of the Commission, which is institutionally responsible for making those assessments, it must check whether the evidence is factually accurate, reliable and consistent, and that the evidence contains all the relevant information which must be taken into account in order to assess a complex situation.[16]

The Court of Justice ruled that "the concept of restriction of competition `by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects…". It added as a policy warning that "otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal

[12] *Case T-491/07 CB v Commission*
[13] *Opinion of AG Wahl in Case C-67/13 P, Cartes Bancaires, EU:C:2014:1958., delivered on* March 27, 2014.
[14] *Chalkor* v *Commission*, EU:C:2011:815, paragraph 62.
[15] Paragraph 90.
[16] Paragraphs 45-46.

competition".[17] The Court added that "Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers."[18]

The Court followed its advocate general Wahl who stated that "only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object".[19]

Two-sided markets illustrate that a restriction which at first sight seems to be a by object restriction may need to be considered as a by effect restriction put into a broader context. The ECJ, following the advice of AG Wahl, acknowledged that in two-sided markets the competitive assessment must cover both sides of the market, not only the acquiring part.

The Court considered that the measures at issue had as their object the imposition of a financial contribution on the members of the Grouping which were content to benefit from the acquisition efforts of other members. However, such an object cannot be regarded as being, by its very nature, harmful to the "proper functioning of normal competition", all the more so since combatting free-riding in the GCB system was a legitimate objective.

Since the Court annulled the judgment, the General Court must now reexamine the case.

3.4. Comments on the case

The judgment shows that the Court was prepared to refine its much-debated position on the concept of restriction by object. Over the past view years the EU Commission seems to have focused exclusively on anti-competitive agreements where it was able to avoid the time and energy consuming investigation of effects. The judgment clarifies that the concept of restriction by object is to be interpreted restrictively and that agreements with the potential of restricting competition do not automatically qualify as an object restriction. This is a significant shift from the *T-Mobile* case where the ECJ stated that "[it] must simply be capable in an individual case (…) of resulting in the prevention, restriction or distortion of competition".[20]

[17] Paragraph 58.
[18] Paragraph 51.
[19] Opinion, paragraph 56.
[20] *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 31 and 43.

Before this, the ECJ endorsed a wide interpretation of the notion of restriction by object, see for example the Hungary-related *Allianz* case.[21] From this angle, it is interesting that *Allianz* is cited fairly often in the Court's reasoning. Now it seems to be clear again, that the object box should be construed narrowly, only the obviously bad restrictions should qualify for that. To recall AG Kokott: by object infringements are akin to drunk driving, we know it is bad so we punish those who do it even if they have not caused harm.[22]

[21] EU:C:2013:160

[22] *Opinion of AG Kokott in case C-8/08 T-Mobile, EU:C:2009:110, paragraph 47.*

4. Manipulation of interbank reference rates within the internal market

4.1. Introduction

The integrity of benchmarks in the financial markets is crucial for the pricing of the financial instruments, therefore any conduct manipulating them may cause serious harm to the investors and distort the real economy.

There have been three decisions issued by the European Commission on LIBOR cartels (EIRD Libor, YEN Libor and CHF Libor) so far. It should be noted, however, that each one concerned conducts of very similar characteristics, only the relevant product market was different. Therefore in the followings, after an introduction of the LIBOR system, these similar characteristics will be discussed and then each cartel will be elaborated in each subsection.

4.2. The LIBOR system

The London Interbank Offered Rate (Libor) was considered the most important benchmark for calculating interest rates worldwide. It is used for a wide variety of purposes such as pricing derivatives and loans (e.g. corporate debts, home mortgages, student loans, credit cards, etc.).

Libor, set by the British Banker's Association, was calculated for 15 different maturities (ranging from one day up to 12 months) and in 10 different currencies.[23] Libor rates were set on the basis of the submissions of the selected global banks according to their estimations on what they consider they would be charged if borrowing a certain amount of money for a certain period of time and in a certain currency from other banks. The submissions were then sent to Thomson Reuters who calculated the Libor interest rates by using a trimmed arithmetic mean. The rates were immediately published and made available to the public each business day.

Since the Libor interest rates were estimated, based on non-binding quotes, the numbers were open to manipulation, the system itself opened the door to fraud which led to the manipulation of Libor.

4.3. Investigations related to interbank reference rates

The Libor scandal and the related manipulation scandals were discovered publicly in June 2012 when Barclays, one of the largest bank of the world, settled with the UK Financial Services

[23] American dollar - USD LIBOR, Australian dollar- AUD LIBOR, British pound sterling - GBP LIBOR, Canadian dollar- CAD LIBOR, Danish krone - DKK LIBOR, European euro - EUR LIBOR, Japanese yen - JPY LIBOR, New Zealand dollar - NZD LIBOR, Swedish krona - SEK LIBOR, Swiss franc - CHF LIBOR.

Authority and admitted that in manipulated interbank rates. This case, nonetheless, was not a competition law case.

With regard to competition law proceedings, the European Commission confirmed that it was investigating the alleged cartel in the Euro interest rate derivatives in October 2011. In the meantime it turned out that besides the Commission, several authorities like the DOJ, the Swiss antitrust regulator, Japanese regulator, Canadian Competition Bureau were also investigating a possible competition law infringement related to the submissions for YEN Libor, CHF Libor and EIRD Libor. The European Commission was investigating whether the largest international banks violated European competition law, whether there was any collusion between them in the interest rate derivatives market infringing Article 101 TFEU.

4.4. Description of the infringements

The Commission came to the conclusion in it its decisions that the bank traders of the undertakings concerned discussed on their submissions, occasionally complemented by an exchange of information concerning current and future trading position and intended prices.[24] This conduct can be characterised as a complex infringement of Article 101 TFEU, consisting of various actions classified as agreements or concerted practices within which the competitors knowingly substituted cooperation between them for the risks of competition.[25] These conducts constitute agreements or concerted practices within the meaning of Article 101 TFEU which had as their object the prevention, restriction and/or distortion of competition in the relevant markets.[26]

The Commission also concluded that the conducts constituted a single and continuous infringement since the undertakings concerned engaged in anticompetitive practices which constituted an interrelated string of concurrences united by the common objective of restriction and/or distortion of competition in the relevant markets.[27]

The agreements and concerted practices covered the entire EEA and were related to trade within the EEA and were therefore capable of having an appreciable effect on trade between Member States.

[24] *Case AT.39924 – Swiss Franc Interest Rate Derivatives,* point 24.
[25] Ibid., point 32.
[26] Ibid., point 33.
[27] Ibid., point 36.

Although the illegal conducts were committed by the bankers of the undertakings, according to European competition law, the undertaking is responsible for the conduct of its employees, therefore the responsibility of the undertakings was found on the basis of it.

4.5. Leniency and Settlement

Under the leniency policy of the Commission, the undertakings parties to a cartel may apply for leniency providing meaningful information on the cartel in which they have participated and thus receiving full immunity or a reduction of fines. In the proceedings related to the LIBOR scandal the vast majority of the undertakings applied for leniency.

Pursuant to the Settlement Notice of the Commission, when the parties to a cartel admit to the Commission's objections, they receive a 10% reduction in the fine[28]. The settlement procedure is an incentive to accelerate the proceedings once the Commission has obtained sufficient evidence to find an infringement. It should be noted that when settled cases involve leniency applicants, the reduction of the fine granted to them for settlement is added to their leniency reward. Since the adoption of the first settlement decision in 2010, about half of the decisions of the Commission were concluded following the settlement procedure. There are hybrid cases too when one or several parties to the cartel decide not to settle while others settle. For those parties who opt out of the settlement procedure, the normal procedure is followed. In the proceedings related to the LIBOR scandals, besides leniency, the vast majority of the undertakings also settled the case.

4.6. Total fines of the cartel decisions

The total amount of fines imposed on the undertakings in the three cartels was 1.8 billion EUR. If there were no leniency and settlements, the fines would be around 5 billion EUR.

4.7. Euro LIBOR Case[29]

4.7.1. Facts of the case

The undertakings concerned are Barclays, Deutsche Bank, Société Generale and the Royal Bank of Scotland (RBS), leading providers of banking and integrated financial services. Barclays was the first to apply for leniency. In March 2013 the Commission initiated proceeding

---

[28] The settlement procedure was introduced in Hungary with the amendment of the Hungarian Competition Act in 2014.

[29] *Case AT.39914 – Euro Interest Rate Derivatives*. The public version of the decision has not been published yet.

against RBS, Deutsche Bank, Société Generale, Barclays, JPMorgan, HSBC and Crédit Agricole.

The products concerned by the EIRD cartel are Euro interest rate derivatives linked to the EURIBOR and/or the Euro Over-Night Index Average.

4.7.2. Decision of the Commission

The Commission delivered its settlement decision concerning the EIRD cartel on 4 December 2013 concerning 4 undertakings out of the seven. RBS, Deutsche Bank, Société Generale, Barclays settled the case. According to the decision, the EIRD cartel operated between September 2005 and May 2008. The EIRD cartel aimed at distorting the normal course of pricing components for the Euro interest rate derivatives. The traders of the banks concerned discussed their bank's submissions for the calculation of the EURIBOR and they also shared their trading and pricing strategies. This conduct constituted an infringement of Article 101 TFEU and Article 53 of the EEA Agreement.

Barclays received full immunity (instead of a fine of 690 million EUR), 131 million EUR of fine was imposed on RBS, while 465 million EUR on Deutsche Bank and 445 million EUR on Société Générale.

JPMorgan, HSBC and Crédit Agricole did not settle the case, therefore the investigation continues against them under the standard cartel procedure.

4.8. Yen LIBOR Case[30]

4.8.1. Facts of the case

The undertakings concerned are five international banks, namely UBS, RBS, Deutsche Bank, JPMorgan, Citigroup and the broker RP Martin and ICAP facilitating an infringement. The Yen LIBOR Case is composed of seven distinct bilateral infringements lasting between 1 and 10 months between 2007 and 2010.

The products concerned by the YIRD cartel are Japanese Yen interest rate derivatives linked to the JPY LIBOR.

4.8.2. Decision of the Commission

Pursuant to the settlement decision of the Commission delivered on 4 December 2013, the collusion included discussion between traders of the banks on certain JPY LIBOR submissions

[30] *Case AT.39861 – Yen Interest Rate Derivatives.* The public version of the decision has not been published yet.

and they also shared their trading and future pricing strategies in the period between 2007 and 2010. One infringement concerned certain future submissions for the Euroyen Tokyo interbank offered rate. These conducts constituted infringements of Article 101 TFEU and Article 53 of the EEA Agreement.

UBS received fill immunity (instead of a fine of 2.5 billion EUR), 260 million EUR of fine was imposed on RBS, 259.5 million EUR on Deutsche Bank, approx. 80 million EUR on JPMorgan, 70 million EUR on Citigroup and 247.000 EUR on RP Martin. Citigroup received full immunity (avoiding a fine of around 55 million EUR) for one of the infringements. All the undertakings benefitted from both leniency and settlement.

Unlike the other undertakings concerned, one of the world's largest brokers of interest-rate swaps, ICAP did not settle the case, so the proceeding against this undertaking continued under the non-settlement cartel procedure. The Commission, in its decision issued on 4 February 2015, concluded that ICAP facilitated six of the seven cartels in the YIRD sector through its actions that contributed to the anticompetitive objective of the parties to the cartels. Due to its illegal conduct, the Commission imposed a fine of 14.9 million EUR on UICAP.

4.9. CHF LIBOR Case[31]

4.9.1. Facts of the case

The undertakings concerned were RBS and JPMorgan. In August 2011, RBS applied for a marker under the Leniency Notice and RBS was granted conditional immunity. JPMorgan also applied for immunity and/or leniency. In July 2013 the Commission initiated proceeding against RBS and JPMorgan with a view to engaging in settlement discussions. The parties submitted to the Commission their formal request to settle and in September 2014 the Commission adopted an SO addressed to the parties.

4.9.2. Decision of the Commission

According to the settlement decision, between March 2008 and July 2009, a trader at JPMorgan discussed on certain occasions with a trader at RBS forthcoming CHF Libor submissions of RBS. The discussions between the traders of the undertakings were occasionally complemented by exchange of information concerning current and future trading positions and intended prices. Consequently, the traders conduct can be characterised as a complex infringement of Article

[31] *Case AT.39924 – Swiss Franc Interest Rate Derivatives*

101 TFEU. According to the Commission the conduct had as its object the prevention, restriction and/or distortion of competition in the CHIRD sector within the EEA within the meaning of Article 101 TFEU and Article 53 of the EEA Agreement. Since the infringement covered the entire EEA and were related to trade within the EEA, it was capable of having an appreciable effect on trade between Member States.

The subsidiaries of the undertakings participated directly in the infringement, however, since the parent companies acknowledged that they exercised decisive influence over their subsidiaries, pursuant to the case-law, the liability for the infringement is therefore imputed jointly and severally to the undertakings.

RBS received full immunity (instead of a fine of 110 million EUR), while a fine of 61.7 million EUR was imposed on JPMorgan.

4.10. Comments on the EU cartel cases

Settlement decisions have two sides. On the one hand they reduce the administrative costs for the Commission. On the other hand, they decrease transparency relating the approach of the Commission for the market players and all the stakeholders since settlement decisions are very short, without elaborated arguments developing case-law and European competition law in general. Additionally, they do not help action for damages. The decisions of the EIRD and the YIRD cartels have not been published yet although they were adopted in December 2013. The only information we have on these cases are from the press releases. Nonetheless, it seems like the Commission is in favour of settlement decisions, however, the Commission should reconsider accepting settlements in such landmark cases like the proceedings concerning the Libor Scandal where not all the undertakings settled.

The high degree of the willingness of the undertakings to settle might be surprising. It should be noted, however, that the reward is not only the 10 percent of the fine but the less sophisticated decision and the less attraction which, in some cases, might be more valuable than the 10 percent reduction. The undertakings are interested in maintaining their good reputation and if they settle the case they might receive less attraction avoiding consequences of bad reputation, i.e. loss of consumers.

The idea of settlement procedures is to accelerate the proceedings, nevertheless, if one of the undertakings rejects settling the case it makes no sense going for settlement decision regarding the other parties to the cartel since the Commission has to continue the proceedings in connection with the one undertaking not settling. The Commission should reconsider carrying out hybrid cases.

II. Abuse of dominance

Article 102 TFEU and Tpvt. 21. § prohibit the abuse of a dominant position. Just like for Article 101 TFEU, EU law shall be applied if the action may have an effect on trade between Member States. Our paper gives an overview of the most important decisions adopted by the EU Commission in this field. The GVH has not adopted decisions prohibiting an abuse against financial institutions during the review period.

5. Standard and Poor's Case[32]

5.1. Scope and background of the Commission's investigation

The Commission, after receiving several complaints, opened its antitrust proceedings against Standard and Poor's (S&P) in January 2009. The subject matter of the case was the conduct of the rating agency concerning a suspected abuse of securities numbering, and to establish the role it played in the financial markets as well as the financial crisis.

The investigation of the Commission focused on the allegedly abusing behaviour of S&P, namely that the undertaking set unfairly high prices on the market of International Securities Identification Numbers (ISINs).[33] The Commission suspected that S&P, breaching the provisions of Article 102 TFEU, abused its dominant position by forcing financial institutions to pay licensing fees for the use of US ISIN codes in their own databases.

5.2. Facts of the case

The undertaking concerned, S&P is a rating agency and the sole-appointed National Numbering Agency (NNA) for US securities and thus the only issuer and disseminator of US ISIN numbers, the identification unit for a security to be traded, therefore these numbers are crucial for international trading. Additionally, S&P is the only operator to receive first-hand information from all US securities issuers. ISIN identifiers are issued by S&P on the basis of an agreement between its bureau, CUSIP and the American Bankers Association.

ISINs are indispensable for certain operations that financial institutions carry out (e.g. clearing and settlement, asset and portfolio valuation, internal reporting, etc.) and cannot be substituted by other identifiers for securities.

[32] *Case COMP/39.592 – Standard & Poor's*

[33] European Commission – MEMO/09/6.

S&P distributes ISINs to two groups of users. Direct users are Information Service Providers (ISPs) financial data vendors and some financial institutions who want to obtain their numbers directly from S&P. Indirect users are the users obtaining ISINs from ISPs together with other data. S&P charges both direct and indirect users a license fee for the distribution and the use of ISINs.

Under the ISO cost-recovery principle (the ISO-system was developed by the International Organisation for Standardisation) NNAs – such as S&P – must not charge, for the distribution of ISINs, more than what is necessary to recover the costs incurred for such distribution and only in case they are the direct supplier of ISINs. Additionally, NNAs should not charge for indirect users.

In July 2008 the European Fund and Asset Management Association (EFAMA) lodged its complaint regarding ISINs for securities traded on the European markets. EFAMA complained on the way S&P operates ISIN numbers, since other data-feed companies request fee to access trading data based on the numbers, S&P also requested separate end-user licenses thereby forcing them into signing these agreements resulting in extra profit for S&P.

S&P argued that its practice is completely transparent and that its licenses are "*fair, reasonable and non-discriminatory*".

The concern of traders was that if S&P can legally engage in this practice then all the other agencies issuing different securities in different countries could apply the same prices as S&P, resulting in a global increase in the prices hindering cross-border trading.

5.3. The decision of the Commission

In its decision[34] the Commission concluded that pursuant to its statement of objections (SO), S&P had infringed point a) of Article 102 TFEU (directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions) and Article 54 of the EEA Agreement by setting unfairly high fees for the supply of US ISINs.

The Commission's SO identified the market for first-hand electronic distribution and licensing of US ISINs via data feeds as the relevant market. Since securities are listad and/or traded globally, the geographic market is global, includes the whole territory of the EEA.

The Commission came to the conclusion that S&P, since it is the only issuer of ISINs for US securities, had a monopoly on the market for the allocation of ISINs. Additionally, since S&P is the NNA for the United States, it is the only undertaking which has the right to provide first-

[34] *Case COMP/39.592 – Standard & Poor's*

hande electronic distribution of ISIN records for US securities, it had a dominant position for first hand electronic distribution and licensing of US ISINs via data feeds.
Therefore the Commission investigated S&P's charging policy whether it was in line with the cost-recovery principle and stated that the undertaking in question obliged its indirect users to enter into license agreements and to pay license fees for the use of US ISINs provided by S&P. Concernig S&P's practice for direct users the Commission found that there is no objective reason why ISIN records and additional data should necessarily be provided together and why direct users should not be given the possibility to obtain ISIN records without the additional data. The Commission concluded that the fees that the undertaking in question demands from direct users significantly exceed the costs incurred by S&P for providing US ISINs, amounting to unfair pricing. According to the case-law[35] of the European Court of Justice a price is excessive where it has no reasonable relation to the economic value of the product supplied.
In its SO, the Commission stated that by charging unfairly high fees to direct users, and by charging a licensing fee for indirect users, S&P failed to comply with the cost-recovery principle.
Concerning the effect on trade between Member States the Commission concluded in its SO that it is affected since S&P's dominant position covers the whole territory pf the EEA and its illegal conduct imposing unfair prices affects both direct and indirect users located in all MSs and Contracting Parties to the EEA Agreement.

In order to address the Commission's competition concerns, S&P offered commitments. The amended commitments submitted on 13 September 2011 were accepted and made binding, pursuant to Article 9 of the 1/2003/EC Regulation, for S&P for a period of five years starting in November 2011. S&P *i.* in respect of indirect users undertook to abolish all charges to indirect users for the use of US ISINs within the EEA and not to impose licensing fees on any indirect user who does not have currently a contract with it; *ii*. in respect of direct users and ISPs who decide to obtain US ISINs from S&P, it undertook to distribute US ISIN records separately from other added value information, on a daily basis. In order to ensure that direct, indirect users and ISPs which currently have a contractual relationship in place with S&P for the use and/or distribution of US ISINs, S&P committed to let them to have a right to early termination of their existing contracts.

[35] *C-27/76 United Brands v Commission* EU:C:1978:22, para 250.

5.4. Comments on the case

Joaquín Almunia, Commissioner responsible for competition at the time of the commitment decision, commented[36] that by abolishing the unreasonably high fees for direct users and unreasonable fees of S&P licensing fees for indirect users, the costs of banks and other financial service providers would be reduced significantly, which would improve the efficiency of the European financial markets.

For the proper functioning of the financial markets it is crucial that access to information be available without any restrictions. Having access to up to date and reliable information on financial products is of great importance both for undertakings and individuals active on the financial markets. Financial data-feed markets are characterised by high degree of concentration which might raise competition concerns just like in the S&P case. In order to ensure proper access, the Commission investigated the conduct of the undertaking having significant market power whether its conduct was in line with European competition law. The Commission came to the conclusion that the competition concerns regarding the excessive pricing of S&P might be solved by commitments correcting the conduct of the undertaking.

It can be seen from the intervention of the Commission that it considers important allowing consumers to have accurate and transparent access to market data, in which credit rating agencies and other financial information providers play a key role.

[36] European Commission – IP 11/1354

6. Thomson Reuter's Case[37]

6.1. Scope and background of the Commission's investigation

The Commission initiated its antitrust proceedings against Thomson Reuters concerning a potential infringement of Article 102 TFEU, abuse of dominance in the area of real-time market data-feeds on 30 October 2009. The proceedings concern alleged practices of prohibiting the mapping of RICs with identifiers of alternative providers, thereby creating substantial barriers for customers that want to switch to a different provider of a consolidated real-time data-feed. The Commission investigated whether Thomson Reuters prevented its clients from mapping RICs to alternative identification codes of other data-feed suppliers. If clients cannot do this mapping, they might be locked into working with Thomson Reuters because replacing RICs can be a long and costly process.

6.2. Facts of the case

Reuters Instrument Codes (RICs) are alphanumerical codes that identify financial instruments like securities and their trading locations, used for getting information from Thomson Reuters' real-time data-feeds, for instance real-time information on stock prices at a certain exchange. RICs are crucial for software applications developed and used by banks and financial institutions.

The undertaking concerned, Thomson Reuters is a news agency and a provider of business and financial information. According to the preliminary assessment issued by the Commission on 19 September 2011 Thomson Reuters had dominant position in the market for consolidated real-time data-feeds. It should be noted that dominance in itself is not anti-competitive, however, if an undertakings uses its dominance to reduce or eliminate competition in the market, it is considered as if the undertakings abused its dominant position and shall be considered a violation of Article 102 TFEU.

The main purchasers of financial market data are operators in the financial services industry, such as banks, hedge funds and asset managers. They use it, among other things, to make investment decisions, to provide financial advice and to monitor and validate transactions.

The relevant product market was the market for consolidated real-time data-feeds, the market for consolidated real-time data-feeds was worldwide in scope.

[37] Case COMP/39.654 – Reuters Instrument Codes (RICs)

6.3. The decision of the Commission

The Commission in its preliminary assessment stated that Thomson Reuters was dominant in the world-wide market for consolidated real-time data-feeds and its restrictive licensing practices as regards the use of RICs were in breach of Article 102 TFEU and Article 54 of the EEA Agreement. The Commission stated that Thomson Reuters i. prohibits its customers from using RICs to retrieve data from consolidated real-time data-feeds from other providers and ii. prevents third parties from creating and maintaining mapping tables incorporating RICs that would allow the systems of Thomson Reuters' customers to incorporate with consolidated real-time data-feeds from other providers. Consequently, the restriction creates substantial barriers to switching.

Thomson Reuters had to offer commitments several times (8 November 2011, 27 June 2012 and 7 November 2012) in order to properly address the competition concerns of the Commission.

The Commission, pursuant to Article 9 of the 1/2003/EC Regulation, in its decision adopted on 20 December 2012 made binding the following commitments offered by Thomson Reuters. Thomson Reuters offered a license (an ERL) to customers that, at the time of applying for the ERL, are subscribed to a Thomson Reuters Consolidated Real-Time Data-feed Service. This license comprises all applications authorised as part of Thomson Reuters's consolidated real-time data-feed. The ERL allows customers to license additional RIC symbology usage rights for the purpose of switching providers of consolidated real-time data-feeds. This license allows them, for a monthly licence fee, to use RICs to retrieve real-time financial data from consolidated real-time data-feeds sourced from Thomson Reuters' competitors for the purpose of switching some or all of their server-based applications and desktop-based applications to alternative consolidated real-time data-feed providers. Additionally, Thomson Reuters undertook to provide ERL licensees with regular and timely updates of the relevant RICs. Customers can use ERLs worldwide. Thomson Reuters' Customers will not be obliged to subscribe or to continue to subscribe to any Thomson Reuters data or other services after subscribing to the ERL. The duration of the commitments is five years from the commencement day. Regarding third party developers Thomson Reuters committed to allow to develop and maintain a switching tool, that is to say mapping tables. Subject to a monthly license fee, third party developers can use and keep RICs in the switching tools they develop.

The Commission, in order to monitor the compliance of Thomson Reuters with its commitments, ordered Thomson Reuters to appoint a monitoring trustee.

6.4. Comments on the case

Commitment decisions are not really useful for competition lawyers, neither for undertakings other than the undertaking concerned to understand the approach of the Commission in the particular case since commitment decision are not detailed and thus do not contribute to the development of European competition law. Therefore this case leaves many questions, like the question how the Commission came to the conclusion that Thomson Reuters' practice constituted an abuse of its dominant position in the global consolidated real-time data-feeds market.

The significance of the decision is multi-layered. Considering the fact that it is the second commitment decision, after the Standard and Poor's decision, in the financial services market, we can see that the Commission indeed focuses and tries to foster competition in this market. It should be noted that the Commission made this market, where according to the decision Thomson Reuters had a dominant position, a competitive market. At the same time the decision could foster transparency and better acces by consumers to consolidated real-time market data, what plays a crucial role in making investments, and thus contributes to the more efficient and transparent operation of financial markets.

A recent development concerning the decision is that one of the competitors of Thomson Reuters, Morningstar filed an appeal in February 2014 at the General Court against the commitment decision because the decision excluded providers of consolidated real-time data-feeds from the opportunity to secure RICs licenses. The decision has not been taken yet.