

EUROPEAN COMPETITION DEVELOPMENTS

ENFORCEMENT ACTIONS

EC Fines Five Banks € 1.07 bn in Forex Cartel Investigation

On 16 May 2019, the European Commission ("EC") [fined five banks](#) (Barclays, The Royal Bank of Scotland, Citigroup, JPMorgan, and MUFG) a total of € 1.07 bn for their alleged participation in two cartels in the foreign exchange market ("Forex"). UBS, the leniency applicant, was not fined.

Asset managers, pension funds, hedge funds, and major companies engage in Forex trading when exchanging currencies. The EC's decision found that Forex traders at the six banks exchanged sensitive information with respect to, and at times coordinated their responses to, spot (*i.e.*, same-day) orders from customers on eleven of the world's most liquid currencies. Via a chatroom/messaging platform, the traders allegedly exchanged details about customer orders (including trading terms) and sometimes agreed not to interfere with each other's trading activities on particular orders.

A third alleged cartel which is reported as potentially implicating an additional bank, Credit Suisse, is still under investigation.

EC Gets Inter-Regional Fee Commitments from Credit Card Companies

On 29 April 2019, the EC [accepted commitments](#) from Visa and MasterCard in what it described as the world's first such resolution in an investigation of the inter-regional multilateral interchange fees ("MIFs") that credit card companies charge to merchant's banks on consumer payments made with foreign-issued cards.

The EC had alleged that inflated payments on transactions in the EEA got passed on by

merchants' banks to the retailers, who in turn passed them on with higher prices charged to all consumers (whether or not they paid with a foreign-issued card). The companies committed to lowering their MIFs over a five-and-a-half year period to levels that the EC believes are at parity with the cost to retailers of accepting other means of payment.

EC Imposes € 52 mn Fine for Providing Incorrect Information in Merger Notification

On 8 April 2019, the EC [imposed a fine](#) of € 52 mn on General Electric for unintentionally misstating in a merger filing that it was not developing offshore wind turbines exceeding 6 megawatts.

After the EC learned from a third party that GE was offering potential customers a 12 megawatt turbine, GE withdrew and re-filed the notification. The EC cleared the deal but opened proceedings for a breach of EU Merger Regulations procedures, which permit a fine of up to 1% of aggregated turnover for negligently providing incorrect information in a merger filing. This is only the second time the EC has imposed such a fine since revising the regulations in 2014 (the previous was a € 110 mn [fine imposed](#) on Facebook in 2017).

DAMAGES ACTIONS

UK Appellate Ruling Revives Massive Consumer Class Action Over Credit Card Fees

On 16 April 2019, the UK Court of Appeal [overturned a denial](#) by a lower court to certify a collective damages action brought on behalf of MasterCard users who allege to have been overcharged as a result of excessive fees charged to merchants they shopped at.

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The decision (which MasterCard is reported as planning to appeal) establishes a lower bar for certifying a class, particularly in how much proof of damages is required and whether it can be shown on an aggregated—as opposed to individualized—basis. But the Court also made clear that certification can be modified (or revoked) based on later-developed evidence.

The case, which alleges damages of over GBP 14 bn on behalf of 46 mn consumers, could be (if certified) the largest class action to proceed in the UK since changes in 2015 to an “opt out” model akin to the US class action regime.

measuring market power (especially if arising from key data).

Specific guidance on digital platforms includes: (i) protecting competition “for” the market by scrutinizing efforts of a dominant incumbent to raise its rival’s entry costs by, for example, restricting use of other platforms; (ii) protecting competition “on” the platform by ensuring that the platform does not set rules that impede competition between its users; and (iii) putting the burden on dominant platforms to show that any attempts to advantage their own products over those of its users do not have long-run exclusionary effects.

TRENDING

DIGITAL & E-COMMERCE

EC Report Suggests Changes in Assessment of Conduct and Mergers in the Tech Space

On 4 April 2019, the EC published a report on [“Competition policy for the digital era,”](#) proposing ways to adapt the competition law framework to the high barriers to entry (e.g., economies of scale and network effects) and additional competitive parameters (e.g., consumer data) that it concludes give a competitive advantage to incumbents in the digital space and incentivize them to exclude competitors. Under such conditions, it advocates for loosening the timeframe and standard of proof for showing consumer harm and shifting the burden to the incumbent to show that its conduct is pro-competitive. It also proposes a more flexible, less formalistic approach for defining relevant markets (in particular on multi-sided platforms) and

The report considers data to be a key dimension of digital competition, and it recommends: (i) requiring dominant firms in some cases to make their data “interoperable” and “portable” for users looking to use other platforms; (ii) assessing whether “data pooling” or “data sharing” arrangements are being used to harm a rival, exchange competitively sensitive information, or discourage innovation between participants; and (iii) imposing a duty on dominant firms to give access to their data if it is needed to serve an adjacent market.

The report also looks at merger control, focusing on dominant digital platforms with strong network effects and access to key data that acquire fast-growing competing start-ups. The report finds it “too early” for the EC to adopt a “value of transaction” notification threshold to capture more of such transactions. But for deals captured by existing thresholds, it recommends heightened scrutiny, with the burden put on notifying parties to show that the procompetitive effects of a deal that seeks to stem user defection to a start-up’s platform outweigh the potential adverse effects on competition.

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CARTELS

EC Emissions-Scrubbing Investigation Relies on Innovation-Based Theory of Harm

The EC's [investigation of the rollout of emissions-scrubbing technologies](#) by car makers may put a spotlight on innovation-based theories of competitive harm in cartel enforcement.

The EC's main claim in its Statement of Objections, which went out on 5 April 2019, is that manufacturers colluded at technical meetings on the specifications and the timing of the rollout of technologies installed in their cars, which amounted to "agreements to limit or control production, markets or technical development" in violation of 101(1)(b) TFEU. But the EC will also have to consider any arguments from the car makers that the meetings improved the development of the technologies and benefited consumers, bringing them under the protection of the EC's Guidelines on horizontal cooperation agreements.

EC Report Finds Potential for Coordination Among Lenders in Syndicated Loans

On 5 April 2019, the EC published a report on "[EU loan syndication and its impact on competition in credit markets](#)." Syndicated loans are offered jointly by multiple banks for large-scale lending, such as infrastructure projects. The EC's study focused on whether market conditions for syndicated loans in leveraged buy-outs and project finance in a representative sample of six member states were conducive to competition law risks.

The report found that information shared among lenders could facilitate collusion on deal terms or bid allocation in the primary and secondary markets for syndicated lending. However, the report noted

that the risks were not high and that sophisticated borrowers have incentives to (and often do) impose safeguards in the bid process. The report also noted some—also not high—risks arising from banks bundling ancillary services (such as M&A advisory services) with a loan, especially where the lenders in the syndicate may have collective market power.

No specific investigations are known to have arisen from the inquiry.

MERGER CONTROL

EC Prohibition of Siemens/Alstom Deal Raises Policy Debate on Champions

The debate over the role that European champions should play in EU competition policy has intensified since the EC's decision earlier this year to prohibit Siemens' proposed acquisition of Alstom over the parties' objections that combining the train suppliers was needed to keep up with future competition from Chinese suppliers.

Officials in Germany and France have [called for changes to the EC competition regime](#) that would promote the global competitiveness of European companies, including the ability of the Council of the EU to overrule EC competition decisions in certain circumstances. EU competition Commissioner Margrethe Vestager and some policy advocates have opposed what they perceive as a potential politicization of competition enforcement, pointing to other regulatory instruments for promoting investment and competitiveness.

The EC's pending Phase II investigation of a planned joint venture between India-based Tata Steel and German-based Thyssenkrupp could further press the issue.

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SINGLE-FIRM CONDUCT

EC and National Abuse of Dominance Investigations of Digital Platforms Picking Up

The EC and national competition authorities across Europe are investigating abuse of dominance claims against some of the largest digital platforms.

In addition to a reported pending inquiry by the EC, Austria's BWB [is investigating](#) whether Amazon abused a dominant position by allegedly using vendor data to advantage the development and sale of its own products. Luxembourg's CC [has requested](#) comments or complaints from merchants using online sales platforms. Italy's AGCM [opened an investigation](#) into whether Amazon abused a dominant position by allegedly advantaging third party vendors who used its logistics service over those who did not. And Germany's BKartA has

[initiated a proceeding](#) that extends to various of Amazon's terms and conditions with third party vendors.

The EC is reported as having [opened an investigation](#) into whether Apple allegedly abused a dominant position by disadvantaging rivals of its music streaming service on the App Store. And the Netherlands' ACM also [is investigating](#) whether Apple abused a dominant position by advantaging its own apps over those of third party app developers.

Following the EC's third [abuse of dominance fine](#) of Google, Italy's AGCM [is investigating](#) whether the company abused a dominant position by not allowing an app that provides information about electric car recharging stations to be integrated with its own Android Auto app.

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