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— News —

Antitrust

Banks fined 1,7 billion EUR for participating cartels in the interest rate derivatives segment

The cartels affected financial derivatives, such as forward rate agreements, swaps, futures and options. These are instruments linked to a specific financial instrument or indicator or commodity, and through which specific risks can be traded in financial markets. They are used by banks or companies for the purpose of managing the risk of interest rate fluctuations.

Four banks (i.e. Barclays, Deutsche Bank, RBS and Société Générale) would have colluded to set interest rate derivatives in the EURO currency (Euribor) and six banks (i.e. UBS, RBS, Deutsche Bank, Citigroup and JP Morgan) would have colluded to fix the rates in the Japanese YEN (Libor). The European Commission has adopted two decisions under its cartel settlement procedure after a two-year investigation. This is the reason why all banks involved have been granted a 10% reduction in fines. The Euribor cartel was operated on the period between September 2005 and May 2008; whereas Libor cartel, covered the period from 2007 to 2010. In addition, the broker RP Martin was also involved in the Libor cartel and has been fined for facilitating the contacts between the banks. Two of the eight banks involved, i.e. Barclays and UBS, benefitted from total immunity under the 2006 Leniency Notice for revealing the existence of each of the cartels respectively.

In the context of the same investigations, proceedings were initiated against Credit Agricole, HSBC and JP Morgan concerning the Euribor cartel and against the cash broker ICAP regarding the Libor cartel. These investigations are currently ongoing under the standard (i.e. not settlement) cartel procedure.

Spanish CNMC fines audiovisual company Mediapro and four football clubs 15 million EUR

The Spanish competition authority, Comisión Nacional de los Mercados y la Competencia (CNMC) has imposed fines of 6,5 million EUR to the audiovisual company Mediapro and fines ranging from 30,000 EUR to 3,9 million to the footballs clubs Real Madrid, Barcelona, Sevilla and Racing Santander, for not complying with a previous CNMC's decision dated 14 April 2010.

Prior to this decision, the Spanish authority had carried out an assessment of various agreements concerning the acquisition and resale of media rights for both the Spanish League and the King's Cup, which involved several wholesaler operators, TV channels and all participating clubs. This investigation ended up with the decision of 14 April 2010 by way of which the authority declared that these negotiations led to market sharing agreements between the concerned

broadcasters. Moreover, the CNMC established that any future exclusive agreement allocating these rights for a period exceeding three seasons would be automatically considered as contrary to Article 101 (1) TFEU. Finally, it stated that undertakings participating in the infringement should cease in their behaviour and refrain from entering into any similar agreements in the future.

It has now been proved that theabovementioned football clubs entered into exclusive agreements with Mediapro that did not comply with the "three season rule" established in the 2010 decision.

When calculating the fines, the CNMC has taken into consideration the agreements entered into by the parties against the said rule (i.e. those that exceeded three seasons); the profit the clubs obtained per season when implementing those contracts and the turnover of each club.

— *Case-law & Analysis* —

The Court of Justice dismisses the appeals brought by the companies Gascogne Sack Deutschland, Groupe Gascogne and Kendrion against the General Court judgments concerning the industrial bags cartel

In November 2005, the European Commission fined 16 companies active in the industrial bags industry over 290 million EUR. The Commission considered that the cartel consisted on fixing prices and establishing common price calculation models; sharing markets and allocating sales quotas; assigning customers, deals and orders and exchanging sensitive information.

Several of these companies lodged appeals before the General Court of the EU (GC). Among the appellants, Gascogne Sack Deutschland, Groupe Gascogne and Kendrion saw their arguments dismissed on 2011 by the GC -which upheld the original fines- and therefore decided to appeal the judgment to the Court of Justice of the EU (CJEU).

The CJEU has confirmed that Groupe Gascogne and Kendrion failed to evidence that their respective subsidiaries acted autonomously and therefore the presumption that parent companies that own 100% of a subsidiary that participated in the cartel are jointly and severally liable for payment of the fine is still in valid and applicable.

The CJEU has also indicated that, in the case of Kendrion, the fine imposed to its subsidiary was lower because, at the adoption of the decision, the two companies no longer constituted the same undertaking. Therefore, after Kendrion sold its subsidiary, the maximum amount of the fine that could be imposed -10% of the annual turnover- had to be calculated differently for each of the two companies. This solution being contrary to what Advocate General Eleanor Sharpston proposed in her opinion of May 2013.

Finally, the CJEU has analysed whether the proceedings before the GC were of an excessive duration and the possible infringement of the right to have a case heard within a reasonable time, as recognized Article 41(1) the Charter of Fundamental Rights of the European Union. The CJEU has first noted that where the excessive length of the proceedings does not affect their outcome, the failure to deliver a judgment within a reasonable time cannot lead to the annulment of the judgment under appeal. In this sense, it has considered that the parties did not submit proof as to the contrary.

However, the CJEU has then acknowledged that "*The length of the proceedings before the General Court, which amounted to approximately five years and nine months, cannot be justified by any of the circumstances in connection with those cases*".

The CJEU has indicated that, in this case, this constitutes a separate issue from the appeal –i.e. it did not affect the outcome- and therefore the parties cannot be compensated by a reduction

of the fines, as previously recognized in Baustahlgewebe/Comission, C-185/95. Thus, in order to obtain redress; the parties shall initiate a new action for damages before the GC as stated in case Der Grüne Punkt – Duales System Deutschland/Comission, C-385/07 P.

It is now for the parties to bring a claim for damages under Article 340 of the TFEU before the GC. This solution seems nevertheless paradoxical, or at least striking, given that the GC would be examining its own behavior and eventually condemning itself for a violation of the principle of good administration.

— *Currently at GA&P Brussels* —

Miguel Troncoso Ferrer has participated as a lecturer in the conference « *Le contrat de distribution à l'aune du règlement 330/2010* » held at the University of Caen Basse-Normandie, France on 4 October 2013. His speech focused on selection criteria in selective distribution and exposed the most recent case-law concerning this matter. Materials of the conference will be published in Concurrences / Competition Law Journal.