

# COMPETITIVE EDGE FINANCIAL SERVICES

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April 2016

# RECENT COMPETITION LAW TRENDS

- ▶ In a [surprise announcement](#), the Serious Fraud Office has closed the foreign exchange (**Forex**) investigation that it had been undertaking in conjunction with the CMA (amongst other organisations). It cited "*insufficient evidence for a realistic prospect of conviction*". The announcement will spur on forex traders, dismissed for improper conduct, who are challenging their dismissals in UK employment tribunals. At present it is unclear, however, what impact it will have on the equivalent action in the US, which turns on the same evidence and is subject to similar evidential thresholds.
- ▶ Money remittance is back in the spotlight. In 2014, Barclays settled a dispute with Dahabshiil, in respect of remittance to Somalia, after the High Court granted an [interim injunction](#), ordering it to continue providing banking services to Dahabshiil. Now Horyaal, a Swedish company that operates the Raqiis Express remittance service, has brought an antitrust complaint against Sweden's five largest banks, claiming they abused their market power by refusing to provide core business banking services. Meanwhile, [Western Union](#) (one of Horyaal's competitors), announced it has received a confidential information request from the Commission.
- ▶ Merger control activity is gathering pace in the payments sector. In particular:
  - ▶ Worldline has offered (currently confidential) [remedies](#) to the European Commission (the **Commission**) in its bid to purchase Equens' commercial acquiring unit, PaySquare. The deal is linked to the creation of a new processing joint venture between Worldline and Equens, which will become [Europe's largest pan-European processor](#);
  - ▶ Diebold is in discussions with authorities in Austria, Poland, Portugal, Slovakia and Spain, as well as a number of authorities outside the EU, about its proposed acquisition of rival cash-machine manufacturer Wincor Nixdorf. The [deal](#) would create the world's largest ATM manufacturer; and
  - ▶ The Commission has opened an [investigation](#) into the creation of a joint venture between Global Payments and Erste Group, to provide merchant acquiring services in the Czech Republic, Slovakia and Romania.
- ▶ The Interchange Fee Regulation (**IFR**) continues to bite on card issuers, with a [Tesco](#) trading statement directly linking it to a 5.2% decline in Bank revenues over Christmas. Meanwhile, the Payment Systems Regulator (**PSR**) has published final guidance on the approach it intends to apply in its role as "competent authority" for the IFR. Following that publication, it [confirmed](#) its provisional determination that Amex was above the 3% market share threshold for 2015, such that (for its licensed business) it must comply with the interchange fee caps from 1 April 2016 to 31 March 2017.
- ▶ Meanwhile, MasterCard (**MC**) is considering appealing a 88m forint (c.€300k) fine, [imposed by the Hungarian competition authority](#). It was found to have abused its a dominant position, by not decreasing interchange fees on its consumer debit cards to match those on equivalent Visa cards for 2011-13. MC had more luck in Italy, where it successfully defended its original appeal, against the €2.7m fine imposed by the authority in 2010.

## CMA RETAIL BANKING INVESTIGATION

- ▶ The Competition and Markets Authority (**CMA**) has invited comments on a [supplemental notice of possible remedies](#) in its retail banking market investigation. The CMA had previously concluded that customers face difficulties engaging with the market, leading to a low desire to switch. Its provisional findings identified a number of competition problems in both personal current account (**PCA**) and small and medium-sized enterprise (**SME**) banking and concluded that banks do not have strong enough incentives to compete for customers because too few customers are switching. Its initial list of remedies included several with equivalents in the proposed remedies in its energy market investigation - to prompt customers to review the services they currently receive, to make it easier to compare bank products and to raise awareness of and confidence in switching bank accounts. The supplemental remedies focus on overdraft users, with proposals for raising customer awareness of their overdraft usage and charges applied, and for helping them to manage their overdraft more effectively. They include:
  - ▶ Alerts to inform customers of imminent and actual overdraft charges;
  - ▶ A requirement that all PCA providers offer customers an 'opt-out' from unarranged overdrafts;
  - ▶ A mandatory 'no charge' period, during which a customer is notified that they are about to incur charges for going overdrawn and is given a fixed time in which to rectify the position;
  - ▶ A cap on monthly overdraft charges, as either a transparency obligation requiring providers to publish the level of their

charges or an absolute cap on charges; and

- ▶ The publication of key performance indicators on a provider's overdraft business.
- ▶ A number of third party responses to the supplemental notice have also been published.
- ▶ Most respondents were broadly in favour of implementing overdraft alerts, although views varied as to whether customers should be automatically enrolled (and even whether this is feasible, for data protection reasons) and the extent to which the format of alerts should be standardised;
- ▶ Views on a mandatory suspension period were more mixed. Some banks highlighted potential difficulties in harmonising the suspension period, which would require input from payment systems operators. Instead, most banks favoured being able to define their own grace periods. There were also concerns that significantly extending the suspension period could lead to customers using grace and retry periods on a regular basis as an extension of their planned overdraft;
- ▶ Some third parties thought the imposition and publication of a monthly maximum charge may aid transparency, but others did not believe that intervention in the form of price controls was justified. The risk of unintended consequences was raised, with certain banks arguing for the level of the maximum charge to be set individually by each bank rather than having a regulated limit.
- ▶ The CMA has also published a [working paper](#) on the corporation tax surcharge and bank levy.
- ▶ In its provisional findings in the retail banking investigation the CMA found that longer-established banks benefit from an incumbency advantage, but in this latest working paper the CMA concluded that there is no strong evidence that the surcharge and bank levy will deter entry or expansion or result in banks exiting (although there could be future effects on competition);
- ▶ However, the CMA acknowledges that taxation policy is a matter for government, so restricted its review to the potential competition impact of changes to the tax regime, whilst urging HMT to keep under review the impact of its fiscal policies on competition in retail banking;
- ▶ This approach was welcomed to some extent in the published responses, although there was also disappointment that the CMA has not taken a more robust position on taxation policy. Various challenger banks in particular emphasised the disadvantages they face in terms of capital requirements and argued for the need for a level playing field.

## ROUND UP OF OTHER DEVELOPMENTS

MATTER	UPDATE
PSR market review of payment systems infrastructure provision – interim findings and proposed remedies	<p>On 25 February 2016 the PSR published its provisional findings and initial thinking on proposed remedies in its market review into the ownership and competitiveness of the infrastructure provision which supports payments systems. Currently a small number of payment service providers (PSPs) own and/or govern the Bacs, FPS and LINK payment systems and the central infrastructure provider for these systems, VocaLink. The PSR is concerned that common ownership of VocaLink by these payment service providers restricts innovation and competition. Possible remedies include:</p> <ul style="list-style-type: none"><li>▶ Competitive procurement of infrastructure services, under clearly defined, transparent and independently audited processes.</li><li>▶ Possible divestment of the banks' interests in VocaLink.</li></ul>

MATTER	UPDATE
	<ul style="list-style-type: none"> <li>▶ Measures to ensure separation of LINK from VocaLink.</li> <li>▶ Adoption of a common international messaging standard for Bacs, FPS and LINK.</li> </ul> <p>Comments and responses on proposed remedies are sought by 21 April.</p> <p>Further information is available <a href="#">here</a>.</p>
PSR market review on access to payment systems – interim report	<p>An interim report published by the PSR on 10 March in its market review into the supply of indirect access to payment systems indicates positive steps on opening up access to payment systems. The PSR expects nine banks to secure direct access in the coming year. It notes that, although there are still some concerns about the supply of indirect access, the industry is making changes that should address these issues. It is aware of at least four organisations that are planning to start offering indirect access and of two that are expanding existing services. The PSR proposes supporting these developments rather than taking immediate regulatory action. It is consulting until 5 May on the report.</p> <p>More information is available <a href="#">here</a></p>
PSR guidance on super-complaints	<p>The PSR has published final guidance on the presentation of super-complaints under section 68 FSBRA. The super-complaint mechanism allows certain representative bodies to raise issues about features of the payment systems market that may be harming service-user interests. The representative bodies currently designated to bring super-complaints are Age UK, the Consumers' Association, the General Consumer Council for Northern Ireland, the National Association of Citizens Advice Bureaux and the National Federation of Self Employed and the National Federation of Self Employed and Small Businesses Limited.</p> <p>The PSR guidance is available <a href="#">here</a></p>
FCA and PSR guidance on voluntary redress	<p>On 30 March the FCA published its final guidance on voluntary redress schemes under the Competition Act 1998. These schemes aim to compensate those who have suffered loss, without the need for them to bring a private damages claim. In return the company in breach receives a reduction in fine, which the FCA says would normally be up to 20%.</p> <p>The PSR published its final guidance on 12 April following consultation on draft guidance late last year. Unlike the FCA, it has adopted the CMA's guidance, but subject to applying its own Administrative Priority Framework and not the CMA's prioritisation principles.</p> <p>The FCA guidance can be found <a href="#">here</a> and the PSR guidance <a href="#">here</a></p>
FCA follow-up on retirement income market study	<p>Following its Retirement Income market study in 2015, the FCA put a number of pension firms on notice that their distribution and marketing arrangements might not comply with competition law. It has now announced that the firms have taken a number of initiatives to strengthen their compliance. It is encouraging other pension providers to review their distribution and marketing arrangements.</p> <p>The FCA's statement can be found <a href="#">here</a></p>

MATTER	UPDATE
FCA use of competition powers	<p>Deb Jones, Director of Competition at the FCA, recently gave her views on the FCA's use of its competition powers. The key themes addressed covered the following: 1) the promotion of 'good' competition as opposed to a race to the bottom, e.g., the FCA's credit card market study found that firms compete strongly, often producing a positive result for consumers; 2) tackling consumer apathy by promoting informed customer switching, e.g., as identified in the cash savings market study findings; 3) the range of issues the FCA seeks to review when carrying out market studies which include competition, consumer protection, and/or market integrity; and 4) the use of the FCA's Competition Act powers - the FCA is taking active steps towards opening a Competition Act case in the near future and has issued two "on notice" or warning letters (following the Retirement Income market study).</p> <p>The full speech can be read <a href="#">here</a></p>
Interchange – European Banking Authority consults on technical standards	<p>The EBA has been consulting on draft technical standards on the separation of payment card schemes and processing entities under the Interchange Fee Regulation. The technical standards introduce specific requirements related to the independence of payment card schemes and processing entities, with requirements for proper accounting separation, use of shared services and information management systems, and the treatment of sensitive information. The EBA plans to publish the final standards in quarter 2 of 2016.</p> <p>The EBA's consultation page is <a href="#">here</a></p>
Interchange Litigation	<p>The substantive hearing in <i>Sainsbury's v MasterCard</i>, which was transferred to the Competition Appeal Tribunal in December, took place between 25 January and 16 March. Judgment is pending.</p> <p>Further information can be found <a href="#">here</a></p>
Competition defence rejected in credit facility and interest rate swap claims	<p>The Court of Appeal has confirmed a High Court decision that refused permission for the defendants to introduce a competition law defence in proceedings for breach of a credit facility agreement and for breach of an interest rate swap agreement. The defendants sought to argue that arrangements between banks for setting LIBOR until June/July 2013 were void and unenforceable because they breached Article 101 (anti-competitive agreements) with the result that the credit facility and interest rate swap agreements, which used LIBOR as a reference rate in the calculation of interest, were also void.</p> <p>For the judgment, click <a href="#">here</a></p>
Fine reduction for Societe Generale (Euribor cartel)	<p>Societe Generale has withdrawn its appeal against the Commission's settlement decision in the Euribor investigation which contested the Commission's calculation of the value of its sales, used as the basis for determining the fine to be imposed under the settlement. On 6 April the Commission announced it had recalculated the fine using the same methodology used in the original decision, but on corrected figures provided by Societe Generale. The new fine is €227 718 000 (down from €445 884 000).</p> <p>The Commission's statement can be found <a href="#">here</a> and the General Court's announcement of the removal of the appeal is <a href="#">here</a> (both in French)</p>

MATTER	UPDATE
Morningstar, Inc challenges commitments concerning real-time data feeds	<p>On 3 March the General Court heard Morningstar's application for annulment of a Commission commitments decision under which Thomson Reuters agreed formal commitments to end an investigation under Article 102 (abuse of dominance). The Commission was concerned that Thomson Reuters had created barriers preventing financial institutions from switching to alternative data suppliers through licensing restrictions which prevented them from using Reuters Instrument Codes (RICs) - used to retrieve data from Reuters real-time datafeeds - to retrieve data from other providers' consolidated real-time datafeeds. Under the commitments a new licence would be offered to customers, and third parties would be allowed to develop and maintain a switching tool that would allow RICs and rival services to interoperate. Morningstar argues the commitments are not effective.</p> <p>For further information see <a href="#">here</a> and <a href="#">here</a></p>
Deutsche Borse/LSE merger announcement	<p>On 16 March Deutsche Borse and LSE announced their plans to merge, with Deutsche Borse shareholders to own 54.4% of the new combined entity and LSE shareholders 45.6%. They will be seeking EU and US competition clearance and aim to complete the deal by the end of 2016 or first quarter of 2017.</p> <p>Further information can be found <a href="#">here</a></p>
Commission report on insurance block exemption review	<p>On 17 March 2016 the Commission reported on the functioning of the Insurance Block Exemption Regulation (IBER) with a view to making final proposals on the future of it in early 2017. The Commission has been progressively reducing the number of exemptions applicable to the insurance sector (the 2010 IBER removed the exemption for standard policy conditions and models and security devices) and this report is a step in reviewing the IBER before it expires on 31 March 2017. The current IBER contains exemptions covering information exchanges for compilations, tables and studies and also certain (re)insurance pools with relatively low market shares. The Commission has provisionally concluded that the IBER exemptions go beyond what is strictly necessary given the market conditions.</p> <p>The Commission's report can be found <a href="#">here</a></p>
State aid for financial institutions in difficulty	<p>The Commission has published an overview page with links to its guidance, decisions and ongoing investigations into national state aid measures to financial institutions in difficulty. These decisions follow the Commission's amendments to the state aid rules in light of the 2008 global financial crisis.</p> <p>The Commission's fact sheet can be found <a href="#">here</a></p>
Commission approves removal of non-performing loans from bank balance sheets	<p>The Commission has decided that Italian and Hungarian plans to transfer non-performing loans off the balance sheets of Hungarian and Italian banks do not involve state aid.</p> <p>For further information see <a href="#">here</a></p>

MATTER	UPDATE
Appeal on Commission taxation state aid decision – Fiat Finance and Trade	<p>Luxembourg is appealing the Commission's October 2015 decision that tax rulings used when calculating the corporate taxation of Fiat Finance and Trade (in Luxembourg) constituted unlawful state aid. The Commission decided that, as Fiat Finance and Trade's activities are comparable to those of a bank, its taxable profits can be determined in a similar way as for a bank, as a calculation of return on capital deployed by the company for its financing activities. However, the Commission considered that the relevant tax ruling endorsed a methodology that was not appropriate for the calculation of taxable profits reflecting market conditions - in particular it approximated a capital base lower than the company's actual capital and then applied to this lower capital an estimated remuneration that was lower than market rates.</p> <p>Details of the Commission decision can be found <a href="#">here</a> (Press release) and the notice of appeal <a href="#">here</a></p>

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