

COMPETITIVE EDGE FINANCIAL SERVICES

August 2016

RECENT COMPETITION LAW TRENDS

- ▶ In July the German competition authority [found](#) that clauses agreed by a committee of banks, discouraging online customers from using their PIN codes with alternative providers, were anticompetitive. It has since been reported that four banking associations have filed appeals. The European Commission (the **Commission**) opened a similar case in 2011, into the standardisation of e-payments that the European Payments Council (**EPC**) was leading at the time. It was concerned about the exclusion of new entrants. It [closed](#) the matter in 2013, after the EPC ended the process, although it ultimately led to the more explicit access requirements being proposed in the [Revised Directive on Payment Services](#).

Payment cards	
The Competition Appeal Tribunal has ordered MasterCard to pay £68.6m to Sainsbury's, on account of overcharges on multilateral interchange fees (MIFs). This was the first cartel damages action to be litigated through to judgment in the UK. A number of related actions are being prepared against both MasterCard and Visa, including a £19bn "class" action against MasterCard. See our full briefing here .	The Financial Conduct Authority (FCA) has published the final findings in its credit card market study. It proposes remedies to help consumers " <i>shop around more effectively, budget more efficiently, and – where appropriate – repay debt faster</i> ". Remedies include giving customers timely prompts before a promotional period ends and allowing customers to specify their own payment dates.
The French competition authority has upheld domestic MIF commitments which MasterCard gave (until October 2017), despite the entering into force of the Interchange Fee Regulation (IFR), which provides higher rate caps.	It has been reported that the Commission has requested information from Visa, relating to whether its rules and pricing for card payment currency conversions are anticompetitive.

- ▶ Brexit has placed renewed focus on the application of State aid rules in times of financial crisis. Italy is at the forefront:
 - ▶ In June, in line with the 2013 Banking Communication, the Commission [gave the go-ahead](#) for the Italian government to provide liquidity support until 31 December 2016, if required, in the form of guarantees for solvent banks;
 - ▶ Spurred on by that decision, Prime Minister Renzi is [reported](#) to be considering a capital injection of a further €40bn for his country's banks, which are struggling with the uncertainty caused by Brexit, as well as €360bn of non-performing loans, sluggish growth and low interest rates;
 - ▶ EU Competition Commissioner Margrethe Vestager has [warned](#), however, that under the State aid rules, unless there is a systemic risk (i.e. a threat to financial stability) investors will have to share in the burden, by accepting losses as the price of government support;
 - ▶ That sentiment was echoed when, on 19 July, the EU's Court of Justice [upheld](#) the Commission's 2013 Banking Communication rules that require a "bail-in" by investors as a pre-requisite for state funding; and
 - ▶ Meanwhile, the EU's General Court has been published details of an [appeal](#), lodged by the Italian Banca Tercas, against a Commission decision that found €295m of Italian funding breached the State aid rules. Amongst other things the appeal contests the finding that State resources were being used, on the basis that the measures were not under the control of the State. (In this case, the Italian legislature had left it entirely to the guarantee schemes' discretion to determine both the aim and scope of any measures.)

If you would like to receive our payments team's regular publication, [InContact](#), please click [here](#).

CMA RETAIL BANKING INVESTIGATION

- ▶ On 17 May 2016, the CMA published its provisional decision on remedies in its retail banking market investigation. For more details, see our previous e-alert [here](#).
- ▶ The CMA's proposed remedies focus on the demand-side concern of low customer engagement. They comprise:
 - ▶ three cornerstone remedies, namely an open API banking standard, provision of service quality information and customer prompts; and
 - ▶ a further three areas of focus, namely current account switching measures, PCA overdraft measures and additional SME banking measures.

- ▶ The CMA intends to implement the package of measures soon after its final report is [published on 9 August 2016](#). It is already intending to conduct [qualitative research](#) into the development of different types of communication for two potential remedies (service quality measures and a maximum monthly charge for unarranged overdrafts).
- ▶ The CMA has been criticised for focusing on demand side issues and for expecting that the industry issues identified can be solved merely by improving the means through which customers engage. Challenger banks, in particular, have repeatedly highlighted what they see as underlying problems in retail banking, primarily the incumbency advantages that the larger banks derive over the smaller banks by virtue of lower capital requirements and ownership of payment systems.
- ▶ In June, the House of Commons Treasury Committee launched its own Retail Banking Market Review [inquiry](#), to consider the CMA's report and recommendations. On 7 July Andrew Tyrie, Chairman of the Treasury Committee, [wrote](#) to the Chief Executives of 13 banks, citing concerns over pricing transparency, to ask for information about their charges for both authorised and unauthorised overdrafts. The Committee is particularly interested in understanding the steps and actions a bank undertakes when a customer falls into an unarranged overdraft.

ROUND UP OF OTHER DEVELOPMENTS

MATTER	UPDATE
Challenger banks outline Brexit opportunity	<p>The House of Commons Treasury Committee has published a letter from a group of seven challenger banks outlining how Brexit will provide an opportunity to improve competition in the banking market. The letter sets out the challenger banks' views on the key barriers to competition, namely the treatment of capital, bank funding and the taxation system. They also suggest solutions to these barriers, for the Treasury to consider implementing.</p> <p>Further information can be found here and a direct link to the letter here.</p>
More work required to establish the FCA's reputation	<p>Andrew Bailey, the head of the Financial Conduct Authority (FCA), has reportedly said that more work is required to establish the FCA as an enforcer of both competition law and financial markets regulation. One of Bailey's priorities will be to fully introduce and embed competition across financial services and fully establish the FCA as a competition authority.</p>
PSR publishes final report on supply of indirect access to payment systems	<p>The Payments Systems Regulator (PSR) has published its final report following a market review into the supply of indirect access to payment systems. The PSR found overall satisfaction with indirect access quality, and had no widespread concern on price and evidence of investment and innovation. The regulator's concerns were restricted to the limited choice of indirect access providers for small non-agency indirect payment service providers, certain service quality related issues and barriers to switching. The PSR will monitor access developments in the market and take further action if required; an update is expected in Q1 2017.</p> <p>Further information can be found here.</p>
PSR guidelines on FSBR 57/58	<p>The PSR is consulting on draft guidance to provide clarity on how it uses its powers to require a payment system operator, or an indirect access provider, to grant access. The consultation is relevant to banks, building societies and other payment service providers. The deadline for responses is Friday 16 September 2016.</p> <p>Further information can be found here.</p>

MATTER	UPDATE
PSR publishes final report on the ownership and competitiveness of infrastructure provision	<p>The PSR has published its final report following a market review of the ownership and competitiveness of infrastructure provision. It has found that there is no effective competition for the provision of UK payments infrastructure for the three interbank payment systems. It is seeking feedback, by 22 September 2016, on potential remedies to open up the market. These include an option for divestment of the four largest banks' stakes in VocaLink, the single infrastructure provider that operators use to process payments.</p> <p>Separately, Hannah Nixon, Managing Director of the PSR, has commented that common ownership and control remains a key issue and that, while MasterCard's proposed buy-out of VocaLink could address the issues identified by the PSR, the problem runs deeper than just the ownership of the infrastructure provider – the PSR is looking for further changes in the market if competition is to be effective.</p> <p>The full report can be found here, a factsheet summarising the findings and proposed remedies here and the PSR's statement here.</p>
Payments Strategy Forum publishes draft strategy	<p>The Payments Strategy Forum, created by the PSR in March 2015 to develop a strategy for collective action in the payments sector, has published its draft strategy for consultation (until 14 September 2016). The strategy has the longer term aim of addressing the needs of users through competition. It proposes: (i) a series of collaborative measures to help smaller payment services providers compete on a level playing field with larger ones; and (ii) the consolidation of the interbank governance of BACS, the Cheque & Credit Clearing Company and Faster Payments into one entity, as the springboard for a new payments architecture to emerge in the future.</p> <p>The draft strategy and consultation questions can be found here, and the PSR's statement on it here.</p>
EBA Regulatory Technical Standards under Article 7(6) of the IFR	<p>The European Banking Authority (EBA) has published the final draft of its Regulatory Technical Standards (RTS) for the separation of payment card schemes and payment processing entities. That separation is required by Article 7 of the IFR, which aims to expose schemes to stronger competition from rival processors, by preventing them from cross-subsidising their processing arms.</p> <p>Although Article 7(6) expressly invited the EBA to develop the RTS, the final draft was not ready before the IFR provisions took effect on 9 June 2016. The final draft is available here.</p>
FCA publishes new 'Competition Report'	<p>The FCA has published its third Annual Report and a further new report summarising the activities it has undertaken to promote competition in financial services in its first three years. Those activities include:</p> <ul style="list-style-type: none"> ▪ launching ten new market studies or calls for input; ▪ publishing the final findings of the Retirement Income Market Study which proposed remedies such as improving awareness of annuity rates and simplifying pension provider communications; and ▪ investigating the credit card market and analysing over 34 million consumers' credit card accounts. <p>The report can be found here.</p>

MATTER	UPDATE
Speech by Director of Competition at the FCA	<p>Mary Starks, Director of Competition at the FCA, gave a speech on competition policy in the financial markets on 10 June 2016. The three areas reported as displaying the greatest progress were 'Market Studies', 'Understanding the Consumer Perspective' and 'Understanding New Entrants'. Starks outlined what she considered to be the two biggest challenges: (i) allowing firms to fail; and (ii) the distribution of the benefits of competition, specifically looking at which consumers benefit from competition and which consumers are left behind.</p> <p>The full speech can be found here.</p>
Credit Default Swaps investigation - commitments accepted	<p>In July the Commission accepted 10 commitments from ISDA and Markit in relation to IP licensing. The Commission's primary concern was that the refusal to licence IP related to prices and indexes was preventing or delaying the "emergence of an effective, safer and cheaper market for exchange traded credit derivatives".</p> <p>The press release can be found here.</p>
Spanish inquiry into fixing interest rate derivatives	<p>Following a complaint, the Spanish competition authority has opened a probe into possible collusion over the setting of prices for interest-rate derivatives. Currently the regulator is looking into four Spanish lenders - Banco Santander SA, Banco Bilbao Vizcaya Argentaria SA, CaixaBank SA and Banco de Sabadell SA.</p> <p>Further information can be found here.</p>
EU Forex investigation	<p>The Commission asked banks to gather sales data by the end of July for its the investigation into currency rigging. This data could be used to calculate penalties. If settlements can be reached with the banks then the case could be completed within a year; if a multi-bank settlement is not possible then the regulators may need several more years to finalise the investigation.</p> <p>Further information can be found here.</p>
Cartes Bancaires appeal against Commission findings on payment card system	<p>Following a 2014 judgment of the EU Court of Justice, the General Court handed down its second judgment in the <i>Cartes Bancaires</i> case on the 30 June 2016. It rejected most of Cartes Bancaires' appeal against the Commission's decision but, because the Court of Justice had found the object of the pricing measures was not anticompetitive, the General Court annulled the part of the Commission's decision prohibiting Cartes Bancaires from adopting measures or behaviour in the future with the same or a similar object.</p> <p>The judgment can be found (in French) here.</p>
Commission approves acquisition of Visa Europe by Visa Inc	<p>On 3 June 2016 the Commission announced that it will approve the acquisition of Visa Europe by Visa Inc under Article 6(1)(b) of the EU Merger Regulation. The Commission concluded the acquisition would not raise any competition concerns as Visa Europe is active in the EEA and neighbouring countries and Visa Inc is active in the rest of the world.</p> <p>Further information can be found here.</p>
CMA statement on Intercontinental Exchange / Trayport merger	<p>In May, the CMA published an issues statement on the completed acquisition, by Intercontinental Exchange, Inc of Trayport as part of its Phase 2 investigation. The provisional findings are expected to be published in mid-August.</p> <p>The CMA press release can be found here and issues statement here.</p>

MATTER	UPDATE
Approval of Santander/BANIF merger	<p>The Commission has approved the acquisition of BANIF by Banco Santander Totta. Both companies are active in retail banking, corporate banking and card payment services in Portugal. The Commission found no competition concerns, as long as BANIF's and Santander's activities remained at national level only.</p> <p>Further information can be found here.</p>
Diebold/Wincor Nixdorf merger inquiry	<p>As reported in the last edition of Competitive Edge, Diebold was in discussions with authorities in Austria, Poland, Portugal, Slovakia and Spain, as well as 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.</p> <p>To date authorities from Austria, Portugal, Slovakia and Spain have cleared the deal. However on 24 June the CMA also launched a merger inquiry into the proposed acquisition and aims to decide by 19 August 2016 on whether to clear the deal or refer it for an in-depth review.</p> <p>Further information can be found here.</p>
Crédit Mutuel/ GE merger approved	<p>The Commission has cleared the proposed acquisition, by Crédit Mutuel, of GE Capital in France and Germany. The Commission concluded that the proposed transaction would not raise competition concerns because the merger was not likely to alter the market structure significantly. In France the merged entity would face competition from at least four large banking groups active in the factoring and leasing sectors.</p> <p>The Commission decision can be found here and Commission press release here.</p>
State aid approvals	<p>As well as the Italian liquidity support described above, the Commission has approved extensions to guarantee schemes in Portugal, Poland, Cyprus and Greece.</p> <p>Commission notifications of the decisions are available here (Italy), here (Portugal), here (Poland) and here (Cyprus and Greece).</p>

CONTACT THE ADDLESHAW GODDARD COMPETITION TEAM

Bruce Kilpatrick

+44 (0)207 544 5214

bruce.kilpatrick@addleshawgoddard.com



Rona Bar-Isaac

+44 (0)207 160 3357

rona.bar-isaac@addleshawgoddard.com



Al Mangan

+44 (0)207 544 5352

al.mangan@addleshawgoddard.com



To unsubscribe from this update please click [here](#)

© 2015 Addleshaw Goddard LLP. All rights reserved. Extracts may be copied with prior permission and provided their source is acknowledged.

This document is for general information only. It is not legal advice and should not be acted or relied on as being so, accordingly Addleshaw Goddard disclaims any responsibility. It does not create a solicitor-client relationship between Addleshaw Goddard and any other person. Legal advice should be taken before applying any information in this document to any facts and circumstances.

Addleshaw Goddard is an international legal practice carried on by Addleshaw Goddard LLP (a limited liability partnership registered in England & Wales and authorised and regulated by the Solicitors Regulation Authority) and its affiliated undertakings. Addleshaw Goddard operates in the Dubai International Financial Centre through Addleshaw Goddard (Middle East) LLP (registered with and regulated by the DFSA), in the Qatar Financial Centre through Addleshaw Goddard (GCC) LLP (licensed by the QFCA), in Oman through Addleshaw Goddard (Middle East) LLP in association with Nasser Al Habsi & Saif Al Mamari Law Firm (licensed by the Oman Ministry of Justice) and in Hong Kong through Addleshaw Goddard (Hong Kong) LLP (a limited liability partnership registered in England & Wales and registered and regulated as a foreign law firm by the Law Society of Hong Kong) in association with Francis & Co. In Tokyo, legal services are offered through Addleshaw Goddard's formal alliance with Hashidate Law Office. A list of members/principals for each firm will be provided upon request.

The term partner refers to any individual who is a member of any Addleshaw Goddard entity or association or an employee or consultant with equivalent standing and qualifications.

For further information please consult our website www.addleshawgoddard.com or www.aglaw.com.