

# COMPETITIVE EDGE FINANCIAL SERVICES

---

January 2017

# RECENT COMPETITION LAW TRENDS

A trio of major transactions have been creating headlines recently:

- ▶ On 11 November 2016, Intercontinental Exchange (**ICE**) applied to the Competition Appeal Tribunal (**CAT**) for a [review of the CMA's decision to block its acquisition of Trayport](#). The CMA had previously [concluded](#) the merger could lead to a substantial lessening of competition in the supply of trade execution services and trade clearing services to energy traders. ICE alleges the decision was defective on several grounds and is *ultra vires*. The CAT rejected ICE's request for a swift decision on grounds of urgency and set a hearing date for 23 January 2017;
- ▶ The CMA released its provisional findings in the Phase 2 review of [Diebold/Wincor](#), provisionally concluding that the deal may be expected to result in a substantial lessening of competition in the supply of customer-operated ATMs in the UK. The final report is due on 13 February 2017; and
- ▶ On 4 January 2017, the CMA announced it would refer [MasterCard/VocaLink](#) to a Phase 2 investigation unless the parties offer acceptable undertakings to address its concerns over the loss of competition in payment infrastructure services to the LINK ATM network. On 18 January the CMA announced it had reasonable grounds for believing that the parties' offer of undertakings (or a modified version of them) might be acceptable. That offer involves VocaLink:
  - ▶ making its LINK connectivity infrastructure available to a new infrastructure competitor;
  - ▶ transferring or licensing to LINK the intellectual property rights relating to the LINK messaging standard; and
  - ▶ contributing to LINK members' switching costs.

MasterCard/VocaLink should be viewed alongside the work of the Payment Systems Regulator (**PSR**) on [the competitiveness of payment systems infrastructure](#), in which it has concluded there is currently no effective competition for the provision of central infrastructure services for BACS, Faster Payment Services (**FPS**) and LINK. Notably:

- ▶ The PSR found that LINK's latest market test for the provision of infrastructure services received only three bids (including one from VocaLink, the eventual winner). The PSR criticised that process as having been open to only a small number of bidders and not allowing for the possibility of joint ventures and consortiums, explicitly noting there may be additional providers that could compete against VocaLink for the LINK core services;
- ▶ The CMA concluded that MasterCard/VocaLink will not give rise to concerns in respect of BACS or FPS because there are many credible alternatives to VocaLink and MasterCard. At first sight, it is difficult to reconcile that finding with the PSR's conclusion that there is currently no effective competition in the market for the provision of central infrastructure services for BACS and FPS (as well as LINK – see above). Until the CMA publishes a decision, we can only speculate on the detail here but the PSR itself identifies a number of potential providers that are interested in competing, subject to the introduction of more structured competitive procurement exercises (on which, see below);
- ▶ In the medium-to-long term the PSR's proposals are likely to have a significant impact. It is aiming to formalise the procurement process for infrastructure services, thereby broadening the level of international competition.

## Q4 2016 market study activity

### **The Financial Conduct Authority (FCA)**

The FCA launched its long-expected [market study on competition in the mortgage sector](#), with the publication of [Terms of Reference](#) on 12 December 2016. Focusing on first charge residential mortgages, we expect a key aspect to be whether commercial agreements between lenders, brokers and other intermediaries lead to conflicts of interest or misaligned incentives.

### **The Competition and Markets Authority (CMA)**

The CMA launched a [market study into digital comparison tools \(DCTs\)](#). In relation to financial services, the CMA will focus on personal current accounts, private motor insurance, home insurance, credit cards, home credit, payday lending and extended warranties. A limited number of participants were invited to the workshops held in early December. The final report is due in September 2017.

The FCA published an [interim report in its asset management market study](#), finding weak price competition in several areas and proposing several interim remedies, including: (i) a strengthened duty on asset managers to act in the best interests of investors; (ii) the introduction of an all-in-fee approach to quoting charges, enabling investors to see what has been taken from the fund; and (iii) measures aimed at helping retail investors to identify the best fund for them. The FCA is seeking views on its preliminary findings and remedies by 20 February 2017.

On 4 January 2017, the CMA published [responses to its formal consultation on a draft retail banking order](#) (published on 23 November 2016) which proposes seventeen measures to implement the banking remedies identified in its final report on the retail banking market investigation. The CMA must implement the remedial actions by the statutory deadline of 8 February 2017. A number of third party responses focused on whether the Open API remedy proposed by the CMA sufficiently aligns with the requirements of PSD2, and the practicalities of implementing the proposed service quality remedy. Given the statutory deadline, however, there will be limited scope for the CMA to make substantial changes to any remedies at this stage.

The FCA also concluded its [investigation into corporate banking](#) by affirming the conclusions of its April 2016 interim report and announced that it [would not pursue a market study into Big Data](#).

#### **The Payment Systems Regulator**

The PSR published a response to the recent *Which? Super-complaint* on consumer safeguards for push payment fraud, in which it found insufficient evidence to justify pursuing the proposals put forward by *Which?*

## AUSTRALIAN BANKS VS. APPLE

- ▶ A recent application by four Australian banks to the Australian Competition and Consumer Commission (**ACCC**) illustrates the dilemma facing competition regulators around the world, when balancing the promotion of new payments technologies with upholding competition law rules in technology markets:
  - ▶ The banks sought permission from the ACCC to enter into collective negotiations with Apple following the latter's refusal to give them access to the Near Field Communication (**NFC**) on its iPhones. The banks argued that, given the popularity of the iPhone in Australia (where they represent 35% of the market), Apple has "*particularly significant bargaining power*", meaning users are more likely to use Apple Pay than any other rival digital wallet service;
  - ▶ The applicants were seeking dispensation from the competition rules which would otherwise prevent such collective negotiations, in order to counter what they allege to be a misuse of a dominant position by Apple. This raised the question of whether, and to what extent, the competition rules could and should be stretched in order to tackle novel competition issues in the sector;
  - ▶ The ACCC published its draft determination on 29 November 2016 rejecting the banks' application, on the basis that the "*likely benefits from the proposed conduct [were unlikely to] outweigh the likely detriment*". It considered that the banks could offer competing digital wallets on iPhones without direct access to NFC and that it was uncertain how the mobile payment market would develop in the future, given that consumers are used to tap and go payments with payment cards;
  - ▶ The ACCC found that collective bargaining could result in reducing competition between the banks in the supply of mobile payment services for iPhones. It may also affect the digital wallet market as granting this authorisation would allow the banks not to sign-up to Apple Pay for 3 years, thereby creating a period of uncertainty detrimental to consumers. Further, it was found that this conduct may result in distorting competition on mobile operating systems since it would alter Apple's offering on the iOS platform. The ACCC indicated that it was seeking submissions before making its final decision; and
  - ▶ Similar action against Apple seems unlikely in the EU, given that Apple's market power is not as significant as it is in Australia or in the US. Most data puts the iPhone at less than 20% in the largest EU Member States.

More information is available [here](#) and the draft determination is available [here](#).

# ROUND UP OF OTHER DEVELOPMENTS

MATTER	UPDATE
<p>KPMG and Ernst &amp; Young (<b>EY</b>) merger before the European Court of Justice (<b>ECJ</b>)</p>	<p>The merger between the Danish operations of the two accounting firms, which was first announced in 2013, may have breached competition laws on prior notification, by partially implementing the operation before receiving merger control approval. The Danish Competition Council which conditionally approved the transaction in May 2014 found that the announcement made by KPMG Denmark (prior to receiving clearance) that it was exiting KPMG International as part of the merger, amounted to a partial implementation carried out in breach of the applicable suspensory regime. EY challenged this decision before a specialised Danish court and asked the local judges to seek guidance from the ECJ on how to apply the Danish legislation on "gun jumping" where one of the concerned undertakings ends a cooperation agreement.</p> <p>More information is available <a href="#">here</a>.</p>
<p>Deutsche Börse– London Stock Exchange Group (<b>LSE</b>) merger (see <a href="#">Competitive Edge - Financial Services - April 2016</a>)</p>	<p>On 3 January 2017, Deutsche Börse announced that LSE has received an offer from Euronext to acquire its French subsidiary, LCH SA. The transaction is believed to be worth €510 million and is conditional upon Deutsche Börse successfully completing its merger with LSE. LSE had proposed to sell its French business in order to address competition concerns raised by the Commission that the merger will give too much power to the parties in the clearing of derivative transactions. It will be subject to review and approval by the Commission in connection with its ongoing Phase 2 investigation of the £21 billion merger between the two stock exchange companies, launched in 2016. A decision on the merger is due by 13 March 2017.</p> <p>More information on the merger is available <a href="#">here</a> and the Commission's latest decision is available <a href="#">here</a>.</p>
<p>Acquisition of Unicre's merchant-acquiring activity by SIBS faces in-depth review</p>	<p>On 12 December 2016, the Portuguese regulator referred, for an in-depth investigation, the acquisition by SIBS, SGPS and SA of certain Unicre assets on the grounds that the operation might distort competition in the electronic payments sector.</p> <p>The press release is available <a href="#">here</a>.</p>
<p>Simplified merger procedure clearances</p>	<p>On 21 December 2016, the European Commission (<b>Commission</b>) announced that it has cleared the proposed acquisition of Nettit, a Spanish company active in the supply chain finance sector (or reverse factoring) by Everis and Bankia concluding it did not raise competition concerns given the undertakings' moderate combined market shares. The press release is available <a href="#">here</a>.</p> <p>On 15 December 2016, the Commission announced that it has cleared the acquisition of consumer finance provider, NewDay by two equity investment funds: CVC and Cinven (active globally) on the basis that the proposed transaction would not raise competition concerns, given its limited impact on the market for the provision of personal loans in the UK. The press release is available <a href="#">here</a>.</p> <p>On 27 October 2016, the Commission announced that it has cleared the acquisition of the Danish ship financing institute Danmarks Skibskredit, by three Danish firms: Axcel IV (a private equity fund), PFA Pension (a commercial pension provider) and PKS Funds (specialist pension fund) on the basis that the proposed transaction would raise no competition concerns given the marginal overlap in the undertakings' activities. The press release is available <a href="#">here</a>.</p>

MATTER	UPDATE
<p>Latest developments in the interchange litigation</p>	<p>More claims have been lodged (by, amongst others, Aer Lingus, British Airways, Boots, Dixons Carphone, Esso, Europcar, French Connection, Greene King brewery, Nando's, Ocado, Ralph Lauren, TfL and Vueling), against Visa and/or MasterCard seeking damages in respect of the Multilateral Interchange Fee (<b>MIF</b>) charged on credit and debit transactions. This follows a decision in July by the CAT awarding £68.5 million in damages to Sainsbury's on the basis of the Commission 2007 decision which found the MIF applied by MasterCard breached article 101 TFEU.</p> <p>On 6 January 2017, the CAT published its December ruling on matters reserved for further argument following its July decision (in the Sainsbury's case). It clarified that (i) similarly to the calculation of damages, interest should be calculated on the damages after corporation tax had been deducted; (ii) the rates for calculating interest are those stated in the updated expert report; and (iii) given that the 2015-2016 data was incomplete, it should not be used; the correct rate is therefore that for the preceding year i.e. 2014-2015. In light of its ruling, the CAT found that Sainsbury's will be obliged to repay some of the damages paid by MasterCard. The CAT's ruling is available <a href="#">here</a>.</p> <p>The December ruling was made only a month after the CAT's decision to refuse MasterCard's application to appeal the decision in the Sainsbury's claim, considering that there was no "compelling reason" for the case to be heard. MasterCard has indicated it will seek permission to appeal directly from the Court of Appeal. The CAT's decision is available <a href="#">here</a>.</p> <p>It is understood that Visa has now reached an out of court settlement with Tesco following the supermarket chain's claim for damages in respect of MIFs. This follows a similar settlement reached last year with MasterCard which required the US payment company to pay £39 million to the British supermarket chain.</p> <p>In addition to these individual claims, a £19 billion class action, led by former lawyer Walter Merricks, on behalf of (potentially) 46 million UK consumers was lodged on 8 September 2016 at the CAT. The application hearing is listed for 18 January 2017. More information is available <a href="#">here</a>.</p>
<p>Loomis and Prosegur fined €46,44 million by Spanish watchdog for market sharing</p>	<p>On 16 November 2016, the Spanish competition authority (Comisión Nacional de los Mercados y la Competencia) concluded its investigation (initiated following an anonymous tip-off) into the two cash handlers and transporters with a finding that the companies had infringed competition law by partitioning the market, fixing prices and exchanging commercially sensitive information over seven years. It imposed a fine of €39.4 million on Prosegur and €7 million on Loomis and an additional €52,600 between two of its directors.</p> <p>Press release is available <a href="#">here</a> (in Spanish).</p>
<p>JP Morgan, Crédit Agricole and HSBC fined € 485 million by the Commission for their involvement in the Euro interest rate derivatives cartel</p>	<p>The Commission recently concluded its investigation into JP Morgan, Crédit Agricole and HSBC for their involvement in the euro interest rates cartel (in which it reached a settlement agreement with Barclays, Deutsche Bank, RBS and Société Générale three years ago). The Commission found that certain traders were regularly exchanging information on their desired or intended EURIBOR submissions and other sensitive information, in a cartel which took place between September 2005 and May 2008 and covered the entire European Economic Area.</p> <p>The press release is available <a href="#">here</a>.</p>
<p>Parisian Court of Appeal asked to annul decision by the French Competition Authority</p>	<p>Ten of the eleven French banks fined €385 million by the Competition Authority for charging illegal fees on cheque processing, have asked the Paris Court of Appeal to annul the French regulator's ruling. This is the latest development in long lasting proceedings which started in 2010 with the Competition Authority's decision.</p> <p>The decision of the Supreme Court is available <a href="#">here</a> (in French).</p>

MATTER	UPDATE
EU Forex investigations	<p>Following a \$2 billion settlement reached in the US between nine banks and major investors such as pension funds and hedge funds, to settle claims that the banks manipulated currency exchange benchmarks, similar actions are expected to be brought in the UK in the coming months by foreign currency buyers.</p> <p>More information is available <a href="#">here</a>.</p> <p>These settlements are in parallel to the Commission probe into foreign exchange rate manipulation and follow decisions in 2015 by the US and UK financial regulators (the US Commodity Futures Trading Commission and the FCA) to fine five banks for manipulating the foreign exchange market currency rigging (see the <a href="#">August edition of our Competitive Edge – Financial Services</a>).</p>
Austrian courts have jurisdiction to hear damages actions following Commission's decision in the Swiss derivatives cartel	<p>In August 2016, the Austrian Supreme Court found that national courts have jurisdiction to hear actions for compensation brought by unnamed Austrian borrowers in 2015, on the basis that the cartel activities which JP Morgan and RBS undertook caused them loss. The regional courts of Klagenfurt and Vienna are now to decide on the merits of the case. This follows the 2014 fines imposed by the Commission on JP Morgan as a result of the cartel it formed with RBS, aimed at influencing the Swiss franc Libor benchmark interest rate. Despite this finding, the Supreme Court recently upheld the dismissal of an action brought against RBS on the basis that the claimant filed its claim at the wrong court.</p> <p>The decisions are available <a href="#">here</a> (August 2016) and <a href="#">here</a> (September 2016) (in German)</p>
Morningstar's challenge to the Commission's decision on Reuters Investment Codes (RIC) fails (see <a href="#">Competitive Edge – Financial Services – April 2016</a> )	<p>On 15 September 2016, the General Court (<b>GC</b>) rejected Morningstar's challenge to the 2012 decision by the Commission to accept commitments which Thomson Reuters (<b>TR</b>) offered in the investigation into its conduct regarding the use of RICs. It was alleged that TR had abused a dominant position by imposing certain restrictions on the use of RICs. Morningstar challenged the Commission's decision arguing that competing providers remained unable to offer fully comparable competing services but the GC concluded that the commitments had been properly assessed as capable of dealing with the competition concerns.</p> <p>The summary of the Commission's Decision (of 20 December 2012) and the GC Press Release are available respectively <a href="#">here</a> and <a href="#">here</a>.</p>
Santander breaches the CMA Payment Protection Insurance Market Investigation Order	<p>On 9 December 2016, the CMA published a letter to Santander setting out its views that the failure by Santander to send Annual Reviews to a number of its customers with PPI during the period 2012-2015 was a serious breach of the Payment Protection Insurance Market Investigation Order 2011. After identifying and disclosing its non-compliance to the CMA, Santander issued apology letters to customers affected and refunded those who cancelled their policies within 6 months of the letter. The CMA's letter also sets out the measures taken by Santander to prevent further breaches (manual and automatic checks to identify customers not received Annual Reviews).</p> <p>More information is available <a href="#">here</a>.</p>
Retail Banking Market Investigation: Revocation of the Northern Ireland Personal Current Account Banking Market Investigation Order 2008 ( <b>Order</b> )	<p>On 14 October 2016, the CMA published a notice of revocation of the Order, following its review of the Order undertaken in tandem with its retail banking market investigation. The CMA considers that, given the change in the market and regulatory framework and the current retail banking market investigation, the Order has become unnecessary. Its revocation will be phased with implementation of the banking investigation remedies package.</p> <p>More information is available <a href="#">here</a>.</p>

MATTER	UPDATE
SME Banking undertakings released by the CMA	<p>On 14 October 2016, the CMA published its decision to release Barclays Bank plc, HSBC Bank plc, Lloyds TSB Bank plc and the Royal Bank of Scotland plc from all but one of the undertakings they provided in 2002 in order to remedy concerns outlined in the 2002 report into SME Banking of the Competition Commission. The prohibition on requiring a customer to open or maintain a current bank account in order to be able to obtain a loan or to open a deposit account has been retained.</p> <p>More information is available <a href="#">here</a>.</p>
Call for input on high cost credit and overdrafts	<p>On 29 November 2016, the FCA announced that it is launching a call for input covering high-cost products, overdrafts, high-cost short-term credit price cap (introduced in early 2015), as well as repeat and multiple high-cost short-term credit borrowing. Given the nature of these products, the FCA is keen to ensure effective protection for consumers. Responses are requested by 15 February 2017.</p> <p>More information is available <a href="#">here</a>.</p>
Insurance block exemption to lapse (see <a href="#">Competitive Edge - Financial Services - April 2016</a> )	<p>In December 2016, the Commission announced that the insurance block exemption (<b>IBER</b>) will be allowed to expire without replacement in March 2017 given that the insurance market seems to no longer warrant the application of this special instrument. The announcement follows two studies on the insurance production process commissioned to assess the functioning of the IBER.</p> <p>More information is available <a href="#">here</a>.</p>
Commission approves prolongation of the Italian bank guarantee scheme and Monte dei Paschi di Siena's bailout by the Italian government	<p>The Commission recently approved the prolongation of the Italian bank guarantee scheme put in place during the financial crisis. Solvent Italian credit institutions will therefore benefit from liquidity support measures for use in case of need until 30 June 2017. In a separate decision, the Commission approved similar support for Monte dei Paschi di Siena despite the Italian bank's capital shortfall.</p> <p>More information is available <a href="#">here</a> and <a href="#">here</a>.</p>
Commission approves Croatian bank resolution scheme	<p>On 5 October 2016, the Commission announced that it has given state aid clearance for a resolution scheme in Croatia for small banks with total assets below €1.5 billion which are experiencing financial difficulties. The scheme will enable the national authorities to carry out an orderly resolution of such banks. The clearance is valid for 6 months, subject to possible extension.</p> <p>More information is available <a href="#">here</a>.</p>

# CONTACT THE ADDLESHAW GODDARD COMPETITION TEAM

**Bruce Kilpatrick**  
+44 (0)207 544 5214  
[bruce.kilpatrick@addleshawgoddard.com](mailto:bruce.kilpatrick@addleshawgoddard.com)



**Rona Bar-Isaac**  
+44 (0)207 160 3357  
[rona.bar-isaac@addleshawgoddard.com](mailto:rona.bar-isaac@addleshawgoddard.com)



**Al Mangan**  
+44 (0)207 544 5352  
[al.mangan@addleshawgoddard.com](mailto:al.mangan@addleshawgoddard.com)



Please take a look at our other financial services publications:

[InCredit](#)

[InSure](#)

[InVest](#)

[InContact](#)

[Financial Regulation  
Industry Briefings](#)

If you would like to receive any of the above publications, please click [here](#)

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

© 2017 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 Habasi & 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](http://www.addleshawgoddard.com) or [www.aglaw.com](http://www.aglaw.com).