Botond Horváth – Szabolcs Szentléleky

Competition Law Enforcement in the Financial Markets

Summary: The authors intend to give a comprehensive view on the most recent antitrust competition law developments in the financial markets. Within the field of restrictive agreements, the authors present the Commission's decision on the manipulation of interbank reference rates, the Hungarian bank cartel case which resulted in a record fine, the Commission's investigations concerning the credit default swap markets, and the EU and Hungarian competition authority proceedings concerning multilateral interchange fees. Within the field of abuse of dominance, the authors present two specific cases concerning the data-feed market, namely the cases of Standard & Poor's and Thomson Reuters, which were both settled with commitments, while with respect to mergers, they sum up the competition law-related problems that arose in connection with the merger of the New York Stock Exchange Euronext and the Deutsche Börse.

Keywords: bank cartel, CDS, MIF, financial market data-feed, merger
JEL code: K21

The financial crisis which broke out in 2008 posed grave challenges for the European Union. This was true for the application of law and legislation as well. Competition policy – as one of the most important policies of the EU – plays a key role in promoting economic development and mitigating the damage caused by the crisis. For this reason, it merits special attention what economic and legal approaches the European Commission (hereinafter: the Commission) employs in the financial sector, which sector was responsible for the crisis through – among other things – the introduction to the market of various new products which carried great risk. The Commission and Member State competition authorities have to face great difficulties since they have to select from thousands of financial instruments to investigate those where abuse is likely to have the greatest risk or represent the highest restrictions on competition. In the majority of cases presented in this paper, proceedings were launched after the onset of the crisis, therefore, they illustrate EU measures aimed at mitigating the effects of the crisis well, at the levels of both law application and legislation.

E-mail address: horvath.botond@gvh.hu
szentleleky.szabolcs@gvh.hu

RESTRICTIVE AGREEMENTS

The Commission and the national competition authorities have proven their commitment to fight cartels at all times, well illustrated by the number of proceedings opened and the amount of fines imposed *(Cartel Statistics).* The cases presented in this paper reflect the position well that ensuring competition – regardless of which economic sector this may be in – is of crucial importance with respect to economic development, and thus ensuring consumer welfare.

The manipulation of interbank reference rates

Investigations related to interbank reference rates

The LIBOR[1] scandal, and the related EURIBOR manipulation scandal broke out in June 2012, when British bank Barclays settled with the UK Financial Services Authority, admitting to manipulating interbank rates. The authorities initially started to investigate the manipulation of the LIBOR, which investigation was later extended to examining the manipulation of other interbank rates as well. A main difference between the investigations conducted by the financial regulators and the Commission is that the former investigated the behaviour of certain banks, while the latter investigated and sanctioned participation in cartels of several banks (European Commission – MEMO/13/1090). In contrast with the financial regulatory bodies, in its proceedings launched at the beginning of 2013 in relation to interbank reference rate manipulation, the Commission investigated whether the enterprises concerned violated competition law in any way, in this case, whether there was any collusion between the competitors in the interest rate derivatives market, thus violating Article 101 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). During the EIRD (euro interest rate derivatives) and the YIRD (yen interest rate derivatives) cartel proceedings, the Commission concluded that bank traders consulted each other on negotiation and pricing strategies, on occasion sharing sensitive data with one another, thereby participating in an illegal cartel, which is prohibited under Article 101 of TFEU. The responsibility of banks as enterprises was determined in connection with the activities of bank traders, as pursuant to European competition law, the enterprise is in all cases responsible for the behaviour and conduct of its employees.

EIRD and YIRD cartel

With respect to the manipulation of interbank rates, which has come to be known as the LIBOR scandal, the authorities investigated two potentially illegal activities. One of these was that panel banks published false figures when calculating the LIBOR in order to reinforce trading positions[2] or to communicate a stronger financial position, thereby, diverting the media's attention from the banks' financial standing (Tween, D. M. – Murray, G., 2012). The other supposed infringement was committed by bank traders who manipulated the LIBOR indicator in collusion with one another. Initially, the US authorities only investigated the LIBOR manipulation of the USD, but as the investigations progressed, it came to light that the currencies of other countries were also concerned, which led the article by *Douglas Tween* and *Grant Murray* (2012) to state that the LIBOR scandal is a so-called '*cascading cartel*'. In addition to the United States, there have been or there are investigations currently in progress in, amongst others, the European Union, Switzerland, Japan and Canada as well. The reasons behind such global cartel investigations can be traced back to globalisation, the repeat infringements by diversified multinational companies and the "*Amnesty Plus*"[3] programme that is part of the US leniency programme, which encourages those under investigation to reveal information on other, as yet unknown cartels in exchange for immunity, which in turn allows authorities to uncover further cartels (Batchelor, B. – Pardo, C. – Funk, K. et al., 2013).

On 4 December 2013, the Commission announced in a press release that (we must note that at the time of the writing of this article, the text of the Commission's decision was not published yet) it had fined 8 banks a record total of EUR 1,71 billion for participating in illegal cartels in markets for interest

rate derivatives (European Commission – IP/13/1208). Four of these banks participated in a cartel relating to interest rate derivatives denominated in euro (EIRD cartel), while six banks participated in a cartel relating to interest rate derivatives denominated in Japanese yen (YIRD cartel).

The EIRD cartel operated between September 2005 and May 2008, and aimed at distorting the pricing components for euro-denominated interest rate derivatives. According to the Commission, traders of different banks discussed their bank's rate figures required for the calculation of the EURIBOR in advance, as well as their trading and pricing strategies. In the case of the EIRD cartel, Barclays Bank applied for the leniency policy (Commission Notice on Immunity from fines and reduction of fines in cartel cases), and received full immunity for revealing the existence of the cartel and thereby avoided the fine. Pursuant to the Commission's Leniency Notice, enterprises that voluntarily provide information on a cartel and cooperate with the authorities continuously during the proceedings may receive partial or full immunity from the fine which they would have to otherwise pay for participating in a cartel. Thanks to the Commission's leniency policy, the other banks participating in the cartel – RBS, Deutsche Bank, Société Générale – received a reduction of their fines for their cooperation with the Commission and their admittance to the infringement as part of the settlement with the Commission.

With respect to the YIRD cartel, the Commission uncovered 7 bilateral infringements lasting between 1 and 10 months in the period from 2007 to 2010. In this case as well, similarly to the EIRD cartel, the traders involved also exchanged their banks' submissions needed to calculate the JPY LIBOR, as well as trading positions and figures concerning future JPY LIBOR submissions. UBS received full immunity from the fine for revealing to the Commission the existence of the cartel. The other participating banks – RBS, Deutsche Bank, Citigroup and JPMorgan – were granted fine reductions under the Commission's leniency programme for their cooperation and their admittance to the infringement as part of the settlement with the Commission.

We must emphasise that these are the first two decisions by the Commission concerning cartels in the financial sector since the start of the financial crisis. With the two decisions adopted in the two cartel cases, the Commission indicated the kinds of behaviour banks should avoid in the future if they wish to comply with EU competition rules (European Commission – IP/13/1208). At the time the decision was made public, *Joaquin Almunia,* Commissioner Responsible for Competition stated: *"What is shocking about the LIBOR and EURIBOR scandals is not only the manipulation of benchmarks, which is being tackled by financial regulators worldwide, but also the collusion between banks who are supposed to be competing with each other."* (European Commission – IP/13/1208).

In addition to the EIRD and YIRD cartels, the Commission is currently conducting investigations in connection with CHF-denominated interest rate derivatives products, as well as other products of the financial sector.

The Hungarian bank cartel case

On 23 November 2011, the Hungarian Competition Authority (hereinafter: GVH) opened competition supervision proceedings against several Hungarian banks[4] in connection with the following: the banks under investigation *"a) after 22 September*

2011, on a date nearly identical to one another, significantly raised the interest rates for their retail mortgage loans, and introduced new, higher interest rate products, which was most likely due to an agreement among the banks, according to which the above named commercial banks offered higher interest products related to the final repayment of foreign currency-denominated loans and restricted access to lower interest rate products, and b) these banks also took part in the events now known as »retail risk« breakfasts, where it is likely that information was exchanged among participants regarding fixed exchange rate final repayment of foreign currency-denominated loans. The exchange of information probably included – but was not limited to – information related to the future conduct, strategy, expected behaviour and measures of participants in connection with the fixed exchange rate final repayment of foreign currency-denominated loans. Thus the information shared was probably suitable for influencing the market behaviour of market players in connection with the fixed exchange rate final repayment of foreign currency-denominated loans. c) The GVH considers the activities connected to the aforementioned »retail risk breakfasts« an element of the conduct investigated as part of the competition supervision proceedings and investigates these as such starting from August 2011, particularly with regard to the restriction of access to the products related to the fixed exchange rate final repayment of foreign currency-denominated loans." (Section 12 of the GVH Resolution filed under no. Vj/74-873/2011).

The proceedings were aimed at uncovering whether the undertakings in question disclosed to one another their future market behaviours and whether they encouraged their competitors to do the same. If an enterprise does so, *"it can then reasonably assume that its competitors will exhibit behaviour in line with the information disclosed by it, or at least will take such information into account when determining their market behaviours. All this leads the enterprises concerned to replace the risks of competition with the cooperation with one another."* (Section 369 of the Resolution)

The Early Repayment Act (Act CXXI of 2011), which amended the provisions of the Credit Institution Act, ensured the option of fixed exchange rate final repayment for customers with foreign currency-denominated mortgage loans when it obligated credit institutions to apply a fixed exchange rate when determining the HUF amount of the final repayment. Thus the statute created a special situation on the market, under which the legislator allowed clients with foreign currency mortgage loans and home equity loans to repay these loans – within a certain limited timeframe – in Hungarian forint converted at a preferential foreign currency exchange rate. However, the position of the Competition Council proceeding in the case is that the experiences of the period since the entry into force of the final repayment Act on 29 September 2011 *"show that the various financial institutions applied the regulations helping debtors differently from each other, and in certain cases in a manner that was not in line with the original legislative intent"* (Section 70).

According to the position of the Competition Council proceeding in the case, the market of real estate mortgage loans can be considered the relevant market in this case, while the relevant geographic market is the territory of Hungary (Section 104). Based on the documents acquired, the relevant sales revenue of the enterprises under investigation exceeded the turnover threshold set out in the European Commission's Notice entitled *Guidelines on the effect on trade concept contained in Articles 101 and 102 of the Treaty*, and the market weight and market share of the undertakings concerned exceeded 5 per cent, therefore, the appreciability requirement was fulfilled, providing grounds for the application

of Article 101 of theTFEU. The banks under investigation are the largest participants of the domestic banking system, with their joint market share exceeding 90 per cent (Section 626).

According to the resolution (Sections 119–133), in 2011 the undertakings under investigation participated at so-called "*retail risk*" breakfasts, to which employees responsible for risk management of banks active in mortgage lending were invited. With respect to these *retail risk* breakfasts, the Competition Council proceeding in the case investigated whether the undertakings in question disclosed to one another their future market behaviours and whether they encouraged their competitors to do the same. Pursuant to the resolution, based on the evidence available it can be determined that the goal of the banks under investigation in the period examined, from 15 September 2011 to 30 January 2012, as discussed at the *"retail risk"* breakfasts was to hold back final repayments (Section 386). According to the position of the Competition Council proceeding in the case, *"all enterprises that attended the »retail risk« breakfast on 15 September 2011 agreed to restrict the provision of loan refinancing loans as part of a uniform, comprehensive plan, which they planned to consistently implement during the final repayment period, until 30 January 2012,"* (Section 453), while "the *»retail risk« breakfast of 3 October 2011 can be considered to be a direct continuation of the breakfast on 15 September 2011"* (Section 456). Regarding the two *"retail risk"* breakfasts, in addition to the statement made by the protected witness and the customer declarations, during the dawn raids on the entities under investigation, the GVH came into possession of written evidence (emails, written records, notes) (Sections 136–152 and 159–172). According to the Competition Council proceeding in the case, the great majority of the information and data discussed at the breakfast pertaining to strategy and inquiring customers qualifies as business secret (Section 473).

In addition to these *"retail risk"* breakfasts – based on internal correspondence seized at an on-site inspection at one of the banks under investigation (Sections 174–176) –, the banks also conducted bilateral negotiations, which led to *"the uniform, complex and continuous infringement being elevated to a multi-level infringement"* (Section 485). According to the position of the Competition Council proceeding in the case, the strategic information shared during the bilateral consultations qualify as business secrets (Sections 486 and 493). According to the resolution, *"the bilateral consultations among the banks were conducted as part of a uniform, comprehensive plan, as the given banks specifically exchanged information of strategic nature that was suitable to harmonise their individual strategies aimed at restricting final repayments through the restriction of access to loan refinancing loans"* (Section 499).

The Competition Council proceeding in the case concludes that at the *"retail risk"* breakfast of 15 September 2011, the entities under investigation *"harmonised their strategies in order to reduce the number of fixed rate final repayments, by way of limiting access to loan refinancing loans; which strategies were aimed at avoiding intense competition in the field of providing loan refinancing products" (Section 504).* Based on the great number of written evidence, the position of the Competition Council proceeding in the case is that the banks under investigation – with the exception of certain banks – kept themselves to the uniform comprehensive plan accepted at the *"retail risk"* breakfast of 15 September 2011, which was aimed at restricting final repayment, until 30 January 2012, however, the Competition Council proceeding in the case found no evidence that the banks had

also agreed on the method of the restriction of final repayment (Section 505–506). The banks under investigation restricted the provision of loans by way of

- raising interest rates,
- the limited provision of loan refinancing products,
- distinguishing between own and new customers, and
- the combination of the above three methods (Section 506).

The resolution stipulates that the undertakings under investigation not only drew up a comprehensive plan aimed at hindering final repayments but actually implemented this plan (Section 513).

Pursuant to the resolution, *"the Competition Council proceeding in the case, based on the evidence available, determines that the entities under investigation harmonised their strategies in order to reduce the number of fixed rate final repayments, by way of limiting access to loan refinancing loans. This infringement qualifies as an issuing restriction which is viewed by the practice of competition law as hardcore cartel activity"* (Section 515). The comprehensive plan implemented by the banks under investigation, which manifested itself as a uniform, continuous and complex infringement of law, restricted competition between the banks under investigation that was actively generated by consumers (Section 519). The severity of this infringement is well illustrated by the fact that the banks under investigation consistently implemented the unlawful plan accepted at the "*retail risk*" breakfast of 15 September 2011, despite the GVH's competition supervision proceedings opened against them on 23 November 2011 (Section 520).

Pursuant to the resolution of the Competition Council proceeding in the case, the infringement committed by the entities under investigation, by violating the provisions of Article 11(2) of Act LVII of 1996 on the prohibition of unfair and restrictive market practices (hereinafter: Unfair Market Practices Act), infringes Article 11(1)[5] of the same Act; furthermore, by violating the provisions of Point *b)* of Article 101(1) of the TFEU, infringes Article 101(1)[6], due to which infringements, the Competition Council proceeding in the case imposed a HUF 9 488 200 000 fine on the undertakings in question (Section 601).

CDS markets

In 2011, the European Commission (hereinafter: Commission) also opened two investigations in a relatively new financial field, namely the so-called Credit Default Swaps[7] (hereinafter: CDS) market.

On 29 April 2011, the Commission launched investigations against 16 banks[8] as well as Markit (Markit Group Limited), the leading provider of financial information in the CDS market. In its press release (European Commission – IP/11/509), the Commission stated that the aforementioned banks may have colluded with Markit and abused their collective dominance by making the most recent key market data available only and exclusively to Markit, as a result of which other information service providers did not have access to required data. Through this behaviour, they were presumably in violation of Articles 101 and 102 of the TFEU.

Some time during the examined period (2006–2009), CDS were traded over the counter, which means that they were negotiated privately and bilaterally, rather than traded on exchanges. In this period, adapting to investor needs, Deutsche Börse and the Chicago Mercantile Exchange (CME) attempted to launch central clearing and exchange trading specifically for such derivatives, which attempt failed. This activity

would have required a license from Markit and the International Swaps and Derivatives Associations (ISDA), which – presumably upon instructions from the banks – they were refused and thus were unable to enter the market. (European Commission – SPEECH/13/593.) The exchange-trading of CDS increases transparency and thereby contributes to market stability, as during such transactions counterparty risk is much more predictable because transactions are settled through a central clearing house. This would reduce the risk of the bankruptcy of a major financial service provider, such as Lehman Brothers for instance, destabilising the global financial market, as the system of the off-exchange trading of derivatives carries great risk. The Commission stated: the banks under investigation presumably delayed the introduction of exchange trading of these financial products on purpose, because they feared that it would considerably reduce their profits. (European Commission – SPEECH/13/593.)

The only information on the proceedings in progress is that on 1 July 2013, the Commission sent its preliminary position to the 13 banks concerned as well as Markit and the ISDA.

The second investigation concerns 9 of the aforementioned 16 banks as well as the ICE Clear Europe (Intercontinental Exchange Group, Inc.) clearing house. The banks concerned may have concluded agreements, based on which they would use only ICE as a clearing house, thereby preventing the entry of other clearing operators and limiting the choice of other banks for clearing their transactions. (Lebrun B. & Balthazar T., 2011)

We must note that the investigations in progress may have greatly contributed to whether the planned amendment of the MiFID Directive (Directive 2004/39/EC of the European Parliament and of the Council) should be restricted to the re-regulation of the sector or should it be complemented by competition law regulations, adherence to which would be ensured by way of stricter audits. (European Commission – SPEECH/13/593, and Lebrun B., Balthazar T., 2011) One thing is for certain, the increased enforcement of competition regulations, and thus the increasing of competition, improves stability in the financial sector, therefore, the Commission is currently on the position that the reinforcement of prudent regulations, along with the stricter enforcement of competition rules, would jointly establish a more appropriate regulatory environment. (Lebrun B. – Balthazar T., 2011)

Multilateral interchange fees

Recently, the Commission once again focused its investigations on the system of bank card use fees (*multilateral interchange fees, hereinafter: MIF*).

The present article does not allow for a detailed presentation of the four-party card system of multilateral interchange fees, therefore, we will only draw attention to issues that carry competition law significance.

The interchange fee is the fee paid by the credit institution enabling the acceptance of payment cards to the credit institution issuing the card in the course of the card payment transaction. (Keszy-Harmath Z. – Kóczán G. – Kováts S. et al., 2011)

The Commission investigated the interchange fee systems of the two large card companies, namely Visa and MasterCard, on several occasions.

With some interruptions, there were proceedings in progress against Visa, and its predecessor Ibanco, from 1977 to 2002, during which two resolutions were reached. The investigation extended to Visa's relationships

with card issuer and card acquiring banks, as well as the relationships between merchants and acquiring banks, in particular interchange fees. The so-called Visa I Decision (Case No COMP/29.373 – Visa International, 2001/782/EC) dealt with the relationships of card issuer and card acquiring banks. Reacting to the Commission's Statement of Objections published on 6 May 1999, Visa considerably amended its rules related to – among other things – its cross-border services. As a result of the amendments made, the Commission felt that the rules amended by Visa do not violate Article 81(1) of the EC Treaty [today: Article 101(1) of theTFEU] with respect to regional authorisations, prohibition of discrimination, cross-border issuing, cross-border acquiring, prohibition of premiums and honouring all cards. An independent decision was reached in connection with Visa's interchange fee system, which is usually called Visa II. As a result of the contents of the Commission's additional statement of objections, Visa undertook to amend its MIF structure according to the following four main aspects. Firstly, it undertook to introduce fixed-rate MIFs for debit card transactions, therefore, the yearly weighted average MIF rate drops to at least EUR 0.28 [Case No COMP 29.373 – Visa International, 2002/914/EC Section (18)]; and with respect to fees related to transaction values, it undertook to reduce these continuously over a five-year period, which would leave the weighted average MIF at 0.7 per cent by 2007 [Case No COMP 29.373 – Visa International, 2002/914/EC Section (19)]. Secondly, in connection with the cost analysis, Visa undertook to determine, as part of a cost study, the costs concerning the processing of transactions, the free funding period for cardholders and the cost of providing the payment guarantees in relation to immediate debit cards, deferred debit and credit cards, the sum of which cost elements would establish a cap on MIF rates. [Case No COMP 29.373 – Visa International, 2002/914/EC Sections (21)–(24).] The third component was Visa's undertaking, pursuant to which in the future it will disclose the MIF rates to merchants, and fourthly, separate MIFs would be determined with respect to mail order/telephone orders. [Case No COMP 29.373 – Visa International, 2002/914/EC Sections (25)–(26)]. It was in light of these undertakings, that the Commission's individual exemption decision (Case No COMP 29.373 – Visa International, 2002/914/EC Section 1) on Visa's regional multilateral interchange fee structure was born. Visa's argument that the MIF was introduced in order to promote the wider distribution and acceptance of Visa cards and all the services they provide met the exemption requirements set out in Article 81(3) of the EC Treaty. According to the Commission, the amended MIF rates contribute to technological and economic development, of which consumers (namely card-holders and merchants) can get a fair share [Case No COMP 29.373 – Visa International, 2002/914/EC Sections (74) and (91)]. With respect to indispensability, the Commission noted that former MIF values, which the banks were entitled to determine without any objective criteria, had an anticompetitive effect, and that the modified MIF values are based on an appropriate criteria-system and are appropriately transparent, and thus have lower anticompetitive effect [Case No COMP 29.373 – Visa International, 2002/914/EC Section (99)]. In connection with the exemption criteria pursuant to Article 81(3) of the EC Treaty, the Commission determined that the MIF does not eliminate competition between issuers, which remain free to set their respective customer fees. Moreover, (although it sets de facto a floor in merchant fees), it does not eliminate competition between acquirers either, since the MIF is just one cost component among the fees

charged to merchants, and acquiring banks can still compete on the other components. [Case No COMP 29.373 – Visa International, 2002/914/EC Section (106)] Furthermore, the Commission also noted that the five-year exemption is sufficient to examine and assess the newly established MIF structure, in addition to the possibility of launching a repeated investigation [Case No COMP 29.373 – Visa International, 2002/914/EC Section (93)]

In 1992, the Commission started investigating – among other things –the underlying interchange fees applied to cross-border transactions of the other large card company, MasterCard. The Commission's decision of 19 December 2007 (COMP/34.579) determined that the impact of the currently applied interchange fee system restricts competition between acquiring banks, as in effect, it sets a threshold with respect to the service fees charged to merchants. (COMP/34.579. Article 1) In its decision, the Commission stated that the interbank commission system applied by MasterCard infringes the law and cannot be exempted, as MasterCard has failed to appropriately prove that the operation of MIFs would lead to economic and technological benefits and, furthermore, that all consumers would share fairly in the benefits resulting from the MIF. (COMP/34.579. Sections 701, 740 and 747) The Commission also found it indeterminable whether the MIF, and the ensuing restriction of competition, is indispensable to achieve the supposed advantages. (COMP/34.579. Section 751) At the same time, the Commission noted, that is does not dispute that there may exist an interchange fee system that is appropriate from the aspect of competition law, which also complies with the exemption requirements set out in Article 81(3) of the EC Treaty [today: Article 101(3) of theTFEU]. (COMP/34.579. Section 679) The Commission called on MasterCard to repeal the interchange fees, that were the subject of the investigation, within six months, in other words to abolish the MIF, and furthermore, to repeal all its decisions related to the MIF, and to inform all financial institutions that are part of the MasterCard network of these actions. (COMP/34.579. Article 5) MasterCard complied with the Commission's decision, but requested legal remedy against the decision. The case is currently before the Court of Justice of the European Union (Case No. C 382/12. P.), regarding which Advocate General *Paolo Mengozzi* submitted his opinion on 30 January 2014. (Opinion of Advocate General Paolo Mengozzi) In his opinion, the advocate general stated that despite the fact that the Commission applied a different approach than in the 2002 Visa decision, its findings are correct, therefore, he recommends the dismissal of the appeal and proposes that the plaintiffs bear the costs of the proceedings. (Opinion of Advocate General Paolo Mengozzi, Sections 50 and 168)

Following the expiration of the individual exemption period, on 26 March 2008, the Commission opened proceedings against Visa (Case AT.39398 – Visa-MIF), investigating the rate of MIFs for cross-border transactions, as well as the adherence of the 'Honour-All-Cards-Rule'[9]. (European Commission – MEMO/08/170) In its proposed commitments (Commitments CASE COMP/39.398), Visa undertook to cap its yearly weighted average intra-regional MIF applicable to immediate debit transactions at 0.2%, and to abolish so-called blending[10], and furthermore, to continue to apply the Honour All Cards Rule as well as to a introduce a series of measures that serve transparency. (Commitments CASE COMP/39.398) These commitments were accepted by the Commission on 8 December 2010. These commitments, however, did not concern consumer credit cards. Accordingly, the proceedings currently cover the following:

- intra-regional multilaterally agreed credit interchange fees set by Visa (hereinafter: intra-regional MIFs), applying either directly to cross-border transactions or by default to domestic transactions,
- country-specific credit MIFs set by Visa Europe,
- the potential default application of inter-regional MIFs in the absence of equivalent interchange fees and their direct application to transactions when using cards issued outside the EEA at merchants located in the EEA, and
- the rules relating to cross-border acquiring as a restriction of competition.

The Commission wishes to make its decision after analysing the responses to the market test. (Communication of the Commission in Case AT.39398 — VISA –MIF)

On 31 January 2008, the Hungarian Competition Authority opened competition supervision proceedings under No. Vj-18/2008 against 23 issuing banks as well as Visa and MasterCard. The investigation extended to the rate of applied interchange fees, which the banks investigated determined as part of a horizontal agreement. (Competition Council Resolution No. Vj-18/2008) In its resolution, the Competition Council proceeding in the case determined that the MIF is an artificially standardised cost factor which *"represented the lower threshold of the price of acquiring service, thus the agreement on interchange fees led to a restriction of price competition among acquiring banks on the market of acquiring services."* (Competition Council Resolution No. Vj-18/2008 Section 199) In its resolution, the Competition Council stated that the fact that the agreement treated the cards of both companies in a uniform manner and that Visa and MasterCard commissions were also recorded in a uniform manner distorted competition between the two large card systems and thus had a detrimental effect on competition. The Competition Council proceeding in the case also determined that *"within the framework of the Bank Card Forum, Hungarian banks (supported by the card companies), concluded an agreement with the objective of hindering the exaggerated drop in merchant fees."* (Competition Council Resolution No. Vj-18/2008 Section 198) Furthermore, it is presumable that in the absence of such an agreement, commission rates would have changed in a different manner, which in turn would also have had an impact on merchant commissions. (Competition Council Resolution No. Vj-18/2008)

It must also be noted that during the competition supervision proceedings, the banks terminated their MIF-related agreements with the two card companies, and submitted commitments to the GVH. Following the termination of the agreement, Visa began to apply the fees valid for cross-border transactions (as also contained in the commitments proposed in the Visa–MIF case), while MasterCard introduced new fees. (Competition Council Resolution No. Vj-18/2008) As regards the commitment, the Competition Council proceeding in the case concluded that *"the detrimental effects arising from past overpricing due to the nature of the cartel cannot be eliminated through commitments. According to current practice, the proceedings cannot be terminated either by way of proposing commitments in case of past behaviours that have already ended. It also became clear that the fate of the interchange fee to be applied in Hungary is not directly in the hands of credit institutions, but rather the card companies."* (Competition Council Resolution No. Vj-18/2008, Section 228) In terms of objective as well as effect, the behaviour of those under investigation was competition restricting according to the opinion of the Competition Council proceeding in the case, which based its approach on that employed by the Commission in the MasterCard case. The Competition Council proceeding in the

case fined the entities under investigation that were actively involved in concluding the competition distorting agreement to a total amounting to more than HUF 1.9 billion. (Competition Council Resolution No. Vj-18/2008)

With respect to exemption, it must be emphasised that those under investigation had the opportunity to request individual exemption until 1 January 2004, however, they opted not to take advantage of this opportunity and also failed to prove this exemption during the competition supervision proceedings. It is also interesting that the entities investigated lined up the same, inappropriately proven arguments to support their exemption that were referenced by MasterCard during its Commission proceedings. (Competition Council Resolution No. Vj-18/2008)

The Hungarian Competition Authority currently has open competition supervision proceedings against MasterCard under No. Vj-46/2012, and a decision is expected in the second quarter of 2014. The GVH press release states that MasterCard *"is allegedly in a dominant position on the Hungarian market of cards, as in addition to its market share exceeding 75%, its sole competitor, Visa is facing a pricing barrier regarding debit cards as a result of the competition proceeding conducted by the European Commission earlier. In contrast to this, MasterCard does not have to face the pricing barriers that Visa does and therefore, it is presumed that the prices (multilateral interchange fees) applied by MasterCard are sufficient for disclosing competitors."* (GVH Press Release, 2012) The GVH's proceedings were aimed at uncovering whether it has abused the dominance under review in the period investigated.

The regulation of interchange fees arose at the level of legislation during the proceedings of both the European and the Hungarian competition authorities. Act CL of 2009 amended the Payment Services Act by introducing a cap with respect to interbank commissions and the fees to be paid by merchants. This regulation, however, was repealed as of 1 January 2011, which means there are currently no regulations on this matter. (Keszy-Harmath Z. – Kóczán G. – Kováts S. et al., 2011.) The GVH welcomed legislative efforts to regulate the rate of interchange fees. According to the GVH's position, it would be an appropriate solution if it were possible to review the effects of regulation from time to time or, should market dynamics so require, adjust the interchange fee rates to a necessary degree, taking into account the aspects of long-term consumer welfare. (GVH Press Release, 2009)

At the EU level, the Commission prepared a proposal that would cap the interchange fees for cross-border card payments for consumer debit cards at 0.2 per cent, while in the case of credit cards, this would come to 0.3 per cent. [2013/0265 (COD)] Pending approval, the directive could enter into force in 2015 at the earliest, and Member States would have two years to adapt these regulations into national law. (Electronic Money Association)

In light of all this, we can see that at the levels of both the EU and individual Member States, competition authorities acted and are still acting strictly and consistently against competition restricting agreements.

ABUSE OF DOMINANCE ON THE FINANCIAL DATA-FEED MARKET

The efficient operation of financial markets requires access to information, as well as reliable and up to date market data on financial instruments. The world's largest financial institutions and information services providers enjoy significant market power on the financial data-feed market. These markets are characterised by a high degree of concentration

which raises competition law concerns (Report on Competition Policy, 2011). With respect to financial data services, there have been two cases connected to grave abuse of dominance on the financial markets. In these two cases, the Commission investigated whether the undertakingsdominant in different markets abused their dominant positions.

The Standard and Poor's case

Following complaints received, in 2009 the Commission opened formal proceedings against Standard & Poor's (hereinafter: S&P) with respect to access to financial data, as it presumed that the enterprise, abusing its market dominance, set unfairly high prices on the market of International Securities Identification Numbers (ISINs) (European Commission – MEMO/09/6). In its decision (Case COMP/39.592 – Standard & Poor's), the Commission stated that pursuant to its statement of objections, S&P had infringed

- point *a)* of Article 102 of the TFEU (directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;), and
- Article 54 of the EEA Agreement by setting unfairly high fees for the supply of US International Securities Identification Numbers (Case COMP/39.592 – Section 2).

S&P has a dominant position on the market of the distribution and licensing of ISINs as it has a monopoly on the market for the allocation of ISINs (Case COMP/39.592 – Sections 24–25). Pursuant to the ISO cost-recovery principle (the ISO-system was developed by the International Organisation for Standardisation, and is a wholly unique, standardised and internationally recognised securities identifier system – Case COMP/39.592 – Sections 15–16), national numbering agencies – such as S&P – must not charge, for the distribution of ISINs, more than necessary to recover the costs incurred for such distribution and only if they are the direct supplier of ISINs. (Case COMP/39.592 – Section 29) In accordance with the principle, if they do not directly provide the ISIN, there should be no charges at all to users. In its decision, the Commission stated that by charging unfairly high fees to direct users, and by charging a licensing fee for indirect users, S&P failed to comply with the aforementioned principle (Case COMP/39.592 – Sections 31 and 37).

In order to address the Commission's competition-related concerns, S&P made commitments, of which the amended commitments submitted on 13 September 2011 were accepted in November 2011 by the Commission, which in its decision made these compulsory for S&P for a period of five years. Pursuant to Article 9 of the 1/2003/EC Regulation, the Commission may accept commitments from enterprises against which there is suspicion of competition law infringement, provided these commitments are in line with the expectations set out for them by the Commission in its preliminary assessment. Such decisions can be accepted for a fixed period, and stipulate that no further measures may be justified on the Commission's part. In accordance with the commitments offered, S&P undertook

- to abolish all charges to indirect users for the use of US ISINs within the EEA (Case COMP/39.592 – Section 45);
- in respect of direct users and information service providers that decide to obtain US ISINs from S&P, to distribute these for them separately from other added value information, on a daily basis (Case COMP/39.592 – Section 46);
- to ensure that direct and indirect users as well as ISPs which currently have a contractual relationship in place with

S&P for the use and/or distribution of US ISINs, will have a right to early termination of their existing contracts (Case COMP/39.592 – Section 47).

According to *Joaquín Almunia*, Commissioner Responsible for Competition, by abolishing the unreasonably high and unreasonable fees of S&P licensing fees, the costs of banks and other financial service providers will be reduced significantly, which will improve the efficiency of European financial markets (European Commission – IP 11/1354).

The Thomson Reuters case

In 2009, the Commission opened formal proceedings against Thomson Reuters for the abuse of its dominant market position in the area of real-time market data-feeds and in connection with the rules accepted in connection with the use of Reuters Instrument Codes (RICs are short, alphanumerical codes developed by Thomson Reuters that identify securities and their trading locations) (European Commission – IP/09/1692). The Commission voiced its concerns over the fact that Thomson Reuters violated competition law when it prevented consumers as well as competitors from using the RIC codes to access data from consolidated real-time data-feeds offered by other service providers. One of the concerns was that Thomson Reuters prohibits third parties from creating and maintaining mapping tables incorporating RICs that would allow the systems of Thomson Reuters' customers to interoperate with consolidated real-time data-feeds of other providers [Case COMP/39.654 – Reuters Instrument Codes (RICs) – Section 3]. The Commission came to the preliminary conclusion that the practices of Thomson Reuters create substantial barriers for datafeed providers who are looking to switch. As a result, it is deemed to be liable for the damages caused to consumers as well as for restricting competition on the market for real-time data-feeds [Case COMP/39.654 – Reuters Instrument Codes (RICs) – Section 43]. According to the Commission's findings, Thomson Reuters appears to be dominant in the worldwide market for consolidated real-time data-feeds [Case COMP/39.654 – Reuters Instrument Codes (RICs) – Section 33]. Dominance in itself is not anti-competition, however, if a given enterprise uses said dominance to reduce or eliminate competition in the market – as Thomson Reuters did in the opinion of the Commission –, this must be viewed as if said enterprise abused its dominant position and shall be considered a violation of Article 102 of theTFEU.

On 7 November 2012, Thomson Reuters, while disagreeing with the Commission's opinion, submitted a proposal for commitments to the Commission, a proposal amended several times. Pursuant to this, it would offer a license (an ERL) to customers that, at the time of applying for the ERL, are subscribed to a Thomson Reuters Consolidated Real-Time Data-feed Service [Case COMP/39.654 – Reuters Instrument Codes (RICs) – Section 49]. This license comprises all applications authorised as part of Thomson Reuters's consolidated real-time data-feed. The ERL allows customers to license additional RIC symbology usage rights for the purpose of switching providers of consolidated real-time data-feeds. [Case COMP/39.654 – Reuters Instrument Codes (RICs) – Section 50]. In addition, Thomson Reuters undertook to provide ERL licensees with regular and timely updates of the relevant RICs [Case COMP/39.654 – Reuters Instrument Codes (RICs) – Section 51]. Customers can use ERLs worldwide. In its decision, the Commission accepted the commitments proposed by Thomson Reuters [Case COMP/39.654 – Reuters Instrument Codes (RICs) – Section 98].

The competition law significance of the Commission's decision is multi-layered. According to the study by *Mairi McMartin* (2014), this decision reaffirms that the Commission is determined to enforce competition law on the market of financial services, which objective is also reinforced by the LIBOR/EURIBOR decision of 4 December 2013. We must also draw attention to the fact that with this decision, the Commission made a market, where until now there was no competition due to Thomson Reuters' monopoly, competitive. At the same time, the decision also contributed to greater and more transparent access by consumers to real-time market data, which plays a crucial role in making investments, and thus contributed to the more efficient and transparent operation of financial markets.

MERGERS

Deutsche Börse/NYSE

On 29 June 2011, NYSE Euronext (hereinafter: NYSE) and Deutsche Börse (hereinafter: DB) requested the Commission to authorise the merger of the two companies, which companies qualify as major market players on the market of exchange-traded financial derivatives. If the NYSE and DB merger had been allowed to go ahead, it would have created the largest exchange in the world. [C(2012) 440 final] On 4 August 2011, the Commission announced that it is declaring the proposed merger to be a second-phase (so-called in-depth) merger procedure. A proposed concentration is declared to be a second-phase procedure if the given competition authority must examine the given sector more thoroughly and comprehensively to see what impact the merger would have on the given market(s). During the second-phase procedure, over 150 questionnaires were sent to industry players. [C(2012) 440 final] In its decision, the Commission determined that authorising the transaction would create a quasi-monopoly (over 90 per cent) on the global on-exchange derivatives market. Due to the high barriers to entry, it would be practically impossible for other players to enter the market, players that would be able to compete with the post-merger mammoth company. Thus would eliminate competition on a global scale, and would thus also have a negative effect on the European economy. (European Commission – IP/12/94) In their commitments, NYSE and DB – amongst other things – argued that consumers would pay a lower amount to insure their investments. Furthermore, they also proposed that in the case of certain agreements, they would ensure access to the post-merger company's clearing services. The Commission felt that these potential benefits do not offset the disadvantage caused to consumers by the merger. Pursuant to Article 2(3) of Council Regulation (EC) No 139/2004 Merger Regulation): a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market. Consequently, on 1 February 2012, in decision No. C(2012) 440, the Commission did not clear the merger. Deutsche Börse appealed against the decision at the Curia and the case is currently in progress under case no. T-175/12. (Curia)

SUMMARY

With its decisions regarding the EIRD and YIRD cartels, the Commission made its first decisions on the financial markets since the onset of the 2008 economic crisis. These may be considered sort of guidelines for banks

with respect to the future, but shall also serve as guidelines for proceedings already in progress, thus the two decisions definitely have outstanding significance. With the record fine imposed, the Commission reaffirmed its already declared position that it would act in the strictest manner possible against cartels, which position will presumably also be reflected in future decisions. We must note that in addition to the investigations launched in connection with the manipulation of interbank reference rates, the re-regulation of the calculation of these rates was also started, as the authorities concluded that the calculation method cannot be replaced by another system, and as such, the method must be regulated more prudently.

In the Hungarian bank cartel case, the Hungarian Competition Authority determined that banks, that otherwise compete with each other, harmonised their behaviour, and thus while exhibiting anti-competitive conduct, they participated in illegal cartel activity in order to restrict the provision of loan refinancing loans. For this reason, the Hungarian Competition Authority fined the banks under investigation to a record amount.

It is clear that over-the-counter trading of credit default swaps carries grave economic risks, which is why it shifted into the focus of regulatory efforts at the EU level as well. With respect to the issues arising in relation to the planned amendment of the MiFID Directive, we can determine that the increased enforcement of competition rules, and thus the increasing of competition, improves stability in the financial sector, therefore, the Commission is currently on the position that the reinforcement of prudent regulations, along with the stricter enforcement of competition rules, would jointly establish a more appropriate regulatory environment – amongst others – on the CDS market as well.

In connection with interchange fees, we must note that the Commission granted individual exemption to Visa in 2002, whereas it employed a different approach in its 2007 decision concerning MasterCard, where the entity under investigation was unable to prove that its anticompetitive behaviour fully meets all four exemption criteria. During its competition supervision proceedings, the Hungarian Competition Authority – in line with the most recent Commission approach – employed the approach utilised in the MasterCard case. At the EU level, the Commission prepared a proposal that would cap the interchange fees for cross-border card payments for consumer debit cards at 0.2 per cent, while in the case of credit cards, this would come to 0.3 per cent. The directive could enter into force in 2015 at the earliest, and Member States would have two years to implement these rules into national law.

In the two cases that arose on the market of financial information provision, the Commission dissolved arising competition law concerns by making commitments pursuant to Article 9 of Regulation 1/2003/EC made by enterprises mandatory, as opposed to the fines applied in connection with the manipulation of interbank reference rates. This proves that not all anti-trust decisions end with fines, and this is especially true for swiftly changing markets such as the market of financial information provision for instance. Through the strict commitments, amended several times, the Commission showed its determination to enforce competition law on the market of financial services, thus allowing consumers more accurate and transparent access to market data, in which credit rating agencies and other financial information providers play a key role.

The most recent significant merger case related to money markets was the planned merger of the NYSE and DB. During the investigation that was declared to be second-

phase, it was determined that the entity thus created would have a more than 90 per cent market share on the global market of exchange traded financial derivatives, therefore, the Commission prohibited the proposed concentration pursuant to Article 2(3) of the Merger Regulation, despite the fact that the parties were ready to make several commitments in the interest of authorisation. The Commission concluded that these potential benefits do not offset the disadvantage caused to consumers by the merger. It must be noted that in this case, the Commission viewed the global financial derivatives market as the relevant market, which reflects how carefully the Commission acts in its competition supervision proceedings.

In light of all this, we can observe that competition authorities at both EU and national level have made considerable effort to mitigate the damages caused by the global financial crisis, and are thus promoting the protection of consumers and the transparent and efficient operation of the various sectors.

Notes

[10] London Interbank Offered Rate = benchmark interbank interest rate offered to banks in London.

[2] If a panel bank were to receive short term interbank credit for a large loan amount, it would in essence admit having liquidity problems, whereas if it submits a lower number, it signals that it considers itself financially sound and stable.

[3] As part of the Amnesty Plus programme, US prosecutors may offer and grant immunity or fine reduction to those that during cartel investigations provide the authorities with valuable information regarding an undetected anti-trust infringement or another undetected cartel. For more details see: Criminal Enforcement Of Antitrust Laws: The U.S. Model. Online: http://www.justice.gov/atr/public/speeches/218336.pdf

[4] Against OTP, Erste, MKB, Raiffeisen, CIB, Unicredit, Budapest Bank, Citibank, FHB, K&H, Magyar Cetelem, Takarékbank and UCB.

[5] *"The following shall be prohibited: all agreements and concerted practices between undertakings […] which have as their object or effect the prevention, restriction or distortion of competition."*

[6] *"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market […]"*

[7] *"The essence of CDS transactions […] is that the issuer of the CDS provides insurance against the default of the issuer of a debt security for a specific, regular fee. The fee paid by the buyer of the CDS is called the CDS spread. Since the developments in CDS spreads follow the probability of default of the issuer (companies, states) of the insured product, the spread has become one of the most important indicators of risk assessment in recent years."* (Horváth D. – Kuti Zs. – Ligeti I., 2013)

[8] JP Morgan, Bank of America Merrill Lynch, Barclays, BNP Paribas, Citigroup, Commerzbank, Crédit Suisse First Boston, Deutsche Bank, Goldman Sachs, HSBC, Morgan Stanley, Royal Bank of Scotland, UBS, Wells Fargo Bank/Wachovia, Crédit Agricole and Société Générale

[9] The honour-all-cards rule: *"According to the honour-all-cards rule, the merchant is obliged to accept all types of cards issued by a given card company."* (Keszy-Harmath Z. – Kóczán G. – Kováts S. et al., 2011, p. 10)

[10] Blending is a method applied by card acquirer banks, where in contracts concluded with merchants, they do not discriminate between the cards of different card companies with respect to the merchant fee. In such cases, the acquirer bank charges the same merchant fee, irrespective of the card used for payment. (Keszy-Harmath Z. – Kóczán G. – Kováts S. et al., 2011)

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