

EU INSURANCE BRIEFING



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'Carrot and stick' approach from the European Courts regarding cartels in the financial services sector

In recent months, the European financial services sector has focused its attention on the antitrust retail banking and business insurance inquiries launched by the European Commission.

Financial services players should, however, bear in mind the crucial role played by the European Court of Justice (and the Court of First Instance). The Courts intervene in a dual capacity: firstly, in order to assist national courts to interpret provisions of Community law; and, secondly, as a court of appeal against enforcement decisions adopted by the Commission. Three important cases over the last nine months in the financial sector illustrate the "carrot and stick" approach of the Courts.

In sum:

- In *Manfredi* and others¹, the Court insisted on the right of individual claimants to effective redress in a cartel case involving the Italian motor insurance market;
- In *Asnef-Equifax*², a case referred from Spain, the Court provided guidelines for lawful exchange of banking data on credit risks; and
- In the *Lombard Club*³, the Court of First Instance largely upheld a €124 million fine levied by the Commission on Austrian banks in a complex breach of the prohibition of cartels.

This briefing sets out the background to each of the above cases, reviews the legal arguments and the Court's judgements. In addition, we provide some conclusions with reference to antitrust "do's and don'ts".

Italy: *Manfredi* and the individual's right to effective redress for antitrust damages

Facts

In July 2000, the Italian national competition authority declared that three insurance companies, *Lloyd Adriatico Assicurazioni SpA*, *Fondaria Sai SpA* and *Assitalia SpA* had implemented an unlawful agreement for the purpose of exchanging information on the insurance sector. The agreement had facilitated an increase in premiums for compulsory civil liability insurance in the motor insurance market.

Mr. *Manfredi* and others sued the companies in Italy for restitution of the increase in the premiums paid by reason of the unlawful arrangement. The Italian Court referred several questions to the European Court of Justice. The reference sought a preliminary ruling from the Court on the interpretation of Community competition rules, specifically: (i) whether the agreement infringed not only Italian competition rules but also Community competition rules, in so far as insurance companies of other Member States also operating in Italy had taken part in the agreement ruled unlawful; (ii) whether third parties (such as Mr. *Manfredi* and his co-plaintiffs) might claim damages for harm caused by the prohibited agreement; and (iii) whether relevant national rules on jurisdiction, the limitation period for actions for damages and the amount of damages were compatible with Treaty provisions.

¹ Cases C-295/04 to 298/04, *Vicenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA; Antonio Cannito v. Fondaria Sai SpA; Nicolo Tricarico, Pasqualina Murgolo v. Assitalia SpA*, 13 July 2006.

² Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, 23 November 2006.

³ Cases T-259/02 to T-264/02 and T-271/02, *Raffaelsen Zentralbank Österreich AG and Others v. Commission of the European Communities*, 14 December 2006.

Legal arguments

Having first dismissed certain points regarding admissibility of the questions from the Italian court, the European Court addressed certain substantive arguments and concluded, firstly, that EC competition rules are different from national rules in that they remove restrictions to inter-State trade; individuals may rely on the EC rules and enforce rights, even in order to override a contrary national rule. Where agreements partition national markets (including a market in liability insurance), inter-State trade may be affected, so EC rules apply; an agreement consisting of exchange of information enabling an increase in civil liability auto insurance premiums infringes national rules and may also infringe EC rules.

Secondly, prohibited agreements are void (invalid). Thus the Court reminded the Italian referring court that "...[the] principle of invalidity can be relied on by anyone..." and national courts must apply the invalidity; any individual may therefore invoke the principle subject to a causal relationship between the harm and the prohibited agreement. The Court insisted on "full effectiveness" to enable individuals to seek compensation.

One of the insurers, *Assitalia*, then argued that availability of damages depended on which national court was competent. The European Court agreed, provided that Community law rights enjoy equivalent protection before the national court and can be effectively exercised. *Assitalia* advanced similar, national arguments regarding the limitation period for seeking compensation. Again, the European Court concurred, adding, however, that the national court should determine the limitation period in such a way as to ensure that an individual can exercise his rights to seek compensation (the period must not be too short or capable of suspension). As for the amount of damages, *Assitalia* (again) argued that national rules determined the extent of the damages. The Court noted that national rules must comply with Community law principles of equivalence and effectiveness, so that any damages awarded for breach of a Community rule would be no less than those awarded under national rules.

Held

The Court held that an agreement or concerted practice, such as that at issue may infringe the EC Treaty, as well as national rules, if "...in the light of the characteristics of the national market at issue, there is a sufficient degree of probability that the agreement or concerted practice at issue may have an influence...on the sale of ...insurance policies in the relevant Member State by operators established in other Member States and that that influence is not insignificant".

Furthermore, an individual can rely on the invalidity of an agreement or practice prohibited under Article 81, EC Treaty (prohibition of cartels) and, where there is a causal relationship between the prohibited agreement and harm suffered, claim compensation for that harm.

The Court further held that, in the absence of Community rules governing the matter:

- Member States designate the courts and tribunals having jurisdiction and prescribe the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions ("principle of equivalence"). Furthermore, such rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law ("principle of effectiveness"); and
- Member States prescribe the limitation period for seeking compensation for harm caused by an arrangement or practice prohibited under Article 81, EC Treaty and set the criteria for determining the extent of the damages, provided that the principles of equivalence and effectiveness are observed.

The national court determines when the limitation period for seeking compensation begins to run. Lastly, the European Court stated that, if it is possible to award particular damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award them in actions founded on

Community rules; injured persons must be able to seek compensation not only for actual loss but also for loss of profit plus interest.

Spain: *Asnef-Equifax* and the ‘overall effect’ of data exchange among competitors

Facts

In common with many other Member States, in Spain, a register, managed by *Asnef-Equifax*, exists “... to provide solvency and credit information through the computerised processing of data relating to the risks undertaken by participating organisations engaging in lending and credit activities”; in short, Spain has a register for exchange of information on credit risks.

Questions arose in national anti-trust proceedings whether the register constituted an agreement in breach of Article 81.1, EC Treaty (prohibition of cartels) and, if so, whether the register could be exempted in accordance with conditions set out in Article 81.3, EC Treaty. The Spanish *Tribunal Supremo* therefore referred these questions to the European Court for a preliminary ruling.

Legal arguments

The Court first addressed whether the reference was admissible. Doubt existed as to whether Community law questions could be raised by the *Tribunal Supremo* and whether evidence existed of an effect on inter-State trade. The Court promptly settled the questions by invoking the duty of cooperation between the European and national courts and by finding that sufficient information had been provided to enable the European Court “...to give a useful reply to the referring court”.

With regard to substantive arguments, these firstly analysed whether trade between Member States was affected: the Court recalled that it is necessary to examine the economic and legal context; an agreement covering the whole of the territory of a Member State has “by its very nature” the effect of partitioning national markets and so, subject to the national court’s assessment, would normally affect inter-State trade.

Secondly, did the register have as its object a restriction of competition? The Court found this was not the case: registers exist to reduce the rate of borrower default and thus improve credit supply.

Thirdly, would the register have the effect of restricting competition?

Referring to the leading case of *John Deere* and the UK “tractor exchange”, the Court noted that agreements on exchange of information can reduce the degree of uncertainty and of autonomous action by economic operators which are inherent to competition in a given market. The Court acknowledged that an information exchange system, such as a register, must be assessed in the light of “...the economic conditions on the relevant markets and of the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchange – be that, for example, public or confidential, aggregated or detailed, historical or current – the periodicity of such information and its importance for the fixing of prices, volumes or conditions of service”.

The Court then considered the position for a register of credit/default risk and whether, in a market where “...supply is fragmented, the dissemination and exchange of information between competitors may be neutral, or even positive, for the competitive nature of the market...” The Court emphasised that registers must be anonymous and non discriminatory.

Lastly, the Court considered whether, faced with a potentially restrictive effect on competition, the register could enjoy an exemption from the prohibition of cartels. The Court applied the classic tests for exemption (such as, economic progress, benefits for consumers, etc.) and concluded that, in order to be exempted, “...the beneficial nature of the effect on all consumers in the relevant markets must be taken into consideration, not the effect on each member of that category of consumers”. Furthermore, the Spanish register could, under favourable conditions, be “...capable of leading to a greater overall availability of credit, including for applicants for whom interest rates might be

excessive if lenders did not have appropriate knowledge of their personal situation”.

Held

The Court reached the following comprehensive conclusions:

- The system for the exchange of information on credit between financial institutions, such as the register of information on customer solvency used in Spain, does not, in principle, have as its effect the restriction of competition within the meaning of Article 81.1, EC Treaty (prohibition of cartels), provided that the relevant market or markets are not highly concentrated, that that system does not permit lenders to be identified and that the conditions of access in use by financial institutions are not discriminatory, in law or in fact;
- Furthermore, in the event that a system for the exchange of information on credit, such as the Spanish register, restricts competition within the meaning of Article 81.1, the applicability of the Article 81.3 exemption is subject to cumulative conditions laid down in that Article. It is for the Spanish Court to determine whether those conditions are satisfied. In order for the condition that consumers be allowed a fair share of the benefit to be satisfied, it is not necessary, in principle, for each consumer individually to derive a benefit from an agreement, a decision or a concerted practice. However, the overall effect on consumers in the relevant markets must be favourable.

Austria: the ‘Lombard Club’ banking cartel and the ‘smoking gun’

Facts

In 2002, the Commission found that eight banks were participating in a cartel in the Austrian banking market. The cartel was known as the “Lombard Club”, namely a group of regular meetings in which the banks acted in concert as regards key parameters of competition. Following a complaint filed (rather unusually) by FPO, an Austrian political party, the Commission launched a “dawn raid” in 1998 which disclosed hundreds

of documents setting out a network of cartel committees (“round tables”) covering the whole of Austria and all banking products and services. The cartel fixed interest rates for loans and fees for various services; it extended to money transfers and export financing. The evidence showed that the banks knew they were acting unlawfully. Their actions were comprehensive and designed to cover Austria “...down to the smallest village”. They were orchestrated by the CEOs and specialist committees and depended on a constant flow of information and prompt reactions by the participants. The eight banks played a key role.

The Commission fined the banks €124.26 million. The banks appealed the fines to the Court of First Instance; they did not deny participation in the cartel, but argued for annulment of the decision or a reduction of the fines on the ground that the Commission had erred in its assessment of their behaviour.

Legal arguments

In addition to certain procedural questions, the banks contested application of the EC competition rules on various substantive grounds⁴. Firstly, the cartel was not a “single agreement” and had been purely national in scope and so did not “...affect trade between Member States”. The Commission had not distinguished between the different practices, nor analysed the banking products as separate product markets. The Court dismissed these arguments: the various practices taken together constituted a “single infringement”; the cumulative effect of all the meetings, involving the whole of a Member State territory, confirmed the presumption that inter-State trade was affected.

The eight banks also argued that the Commission had not proceeded against all of the banks involved. The Court confirmed the Commission had discretion to pick out key players.

With regard to reduction of the fines, the banks argued that certain Commission guidelines were inapplicable. The Court nevertheless approved the Commission finding that the infringement was “very serious” and confirmed that it was

⁴ The judgement is 87 pages long and highly technical. This briefing is necessarily restricted to highlighting the principal arguments.

irrelevant, contrary to the claims of the banks, that there had been no significant effect on competition in a small market such as Austria; in sum, implementation of the cartel, as part of a “global scheme”, covering the whole of a Member State, was sufficient to conclude that there would be an impact on the market. The banks had also challenged the fines on the ground of incorrect allocation of the amounts amongst the participants due to factors such as the merger of participants, the structure of groups, market shares, etc.

The Court upheld the arguments of only one bank and agreed a modest reduction. *In extremis*, the banks had also raised arguments based on the duration of the cartel and on a crisis in the sector. These did not find favour with the Court; in particular, a crisis in the sector was not a mitigating circumstance. Lastly, the Court dismissed the banks’ claims that the Commission had incorrectly applied provisions on cooperation in competition enquiries.

Held

With the exception of a modest reduction in the fine applied to one bank, the Court dismissed the appeal by the eight banks⁵. The Court also dismissed a counter-claim by the Commission to increase the fine applied against one bank on the ground that the bank had, in effect, delayed cooperating with the Commission.

Conclusion

A close reading of these three significant judgements brings out some common strands.

Firstly, the Court resists arguments that EC competition rules do not apply and that, for example, only national rules are relevant (*Manfredi* and *Asnef*). Secondly, the Court is creative, for example, in *Asnef*, it readily accepted that an agreement can be exempted where there is an overall benefit for consumers (and not just for each, individual consumer). This flexibility depends on economic circumstances: financial services players therefore need to have their arguments duly rehearsed in order to satisfy

themselves that an agreement will be exempt. The *Asnef* judgement gives valuable guidance. Thirdly, the Court protects the “little guy” (bank customers in *Lombard Club*, and motorists in *Manfredi*). Individuals who have suffered harm must be able to obtain redress and national courts must respect principles of equivalence (of damages) and effectiveness (of remedies). The *Manfredi* judgement supports those who seek more effective “private enforcement” of Community law, in particular “antitrust damages actions”. Commission officials have expressly linked the judgement to the Commission’s 2005 Green Paper on damages actions for breach of the EC antitrust rules. They have questioned whether national rules on effective redress, damages, limitation periods, etc. “...are best remedied at the pace of the case law of the Court of Justice or whether there is a need for Community legislation on the matter”⁶. As for the more egregious breaches of the prohibition of cartels, as the *Lombard Club* case demonstrates, the Court remains intransigent to the most imaginative arguments, such as admissibility, time bar, equity or mitigating circumstances.

Meantime, financial services providers need to apply the lessons of these judgements to their anti-trust compliance programmes. Typically, such programmes set out what behaviour is acceptable under anti-trust (cartel and monopoly) rules (“do’s”) and what is not (“don’ts”). Too often, such guidance is framed in the traditional language of tangible products and goods, rather than reflecting the service basis of the financial sector.

The judgements therefore add welcome substance, not least in the particularly thorny area of data exchange; the parallels with conduct at association meetings and other professional bodies are also obvious, for example, it is clearly beneficial to consumers (whether “overall” or individually, per *Asnef* above) to run a register of dubious IFAs; it would equally clearly not be lawful for an association or another forum to set prices, rates or commissions (per *Lombard Club*).

⁵ The parties had a two month period within which to appeal (on points of law only) against the Court’s judgement to the European Court of Justice. To the best of our knowledge, no appeal has been lodged.

⁶ European Commission Competition Newsletter, Autumn 2006. A White Paper is expected by the end of 2007. See Commissioner Kroes’ speech of 8 March and Commissioner Kuneva’s press release of 13 March.

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