

Competition authorities increase scrutiny in banking industry

In recent years, competition authorities have not only become more vigorous in investigating anti-trust claims in financial services, but also more diligent in imposing significant fines on banks. In a recent decision, the European Commission (EC) has imposed unprecedented fines of up to EUR 1.07 billion on Barclays, the Royal Bank of Scotland (RBS), Citigroup, JPMorgan and MUFG Bank (formerly Bank of Tokyo-Mitsubishi) for getting involved in a foreign exchange spot trading cartel¹. One of the addressee of the decision, UBS, was however exempted from fines due to its cooperation with the EC under the EC's Leniency Program².

After an extensive investigation, the EC found that competing Forex spot traders exchanged competitively sensitive information via various online professional chatrooms to coordinate their strategies on behalf of five banks³. The in-depth investigation revealed that there were two distinct cartels as part of the overall collusive behaviour in the market for Spot Foreign Exchange⁴. The first one, the so-called '*Forex-Three Way Banana Split*' cartel involving Barclays, RBS, Citigroup and JPMorgan, lasted from December 2007 to January 2013, while the second one, known as the '*Forex- Essex Express*' cartel, involved Barclays, RBS and MUFG Bank and extended from December 2009 to July 2012⁵.

Similarly, the Antitrust Division of the U.S. Department of Justice (DOJ) addressed the guilty pleas of five banks for colluding to manipulate the price of U.S. Dollars and Euros exchanged in the foreign currency exchange (FX) spot market in 2015⁶. The DOJ concluded that euro-dollar traders at Citicorp, JPMorgan Chase & Co., Barclays PLC and RBS, the members of the cartel, communicated through an exclusive electronic chat room to influence benchmark exchange rates between December 2007 and January 2013⁷. Citicorp, JPMorgan, Barclays and RBS eventually agreed to pay fines in excess of 2.5 billion Dollars⁸.

In Turkey, on the other hand, the Turkish Competition Board ("TCB") investigated similar claims against 14 leading banks including the RBS Istanbul Branch, Barclays Bank PLC., and Citibank A.Ş. in 2016. Interestingly, however, the TCB decided not to initiate a full-fledged investigation against these banks after an extensive preliminary investigation. As far as can be understood from the reasoned decision, the TCB found that the traders exchanged competitively sensitive information, but concluded that the information exchange was not sufficient to create anti-competitive effects in Turkey⁹.

Growing anti-trust enforcement efforts and the resulting penalties indicate that the industry is subject to increased scrutiny because of its particular vulnerability to the exchange of information between sector traders. While it may bring certain efficiencies to the sector, the sharing of competitively sensitive poses risks when traders reach tacit collusion at the expense of competition. Considering these issues, a recently published EC Report referred to the *Royal Bank of Scotland Group plc v Barclays Bank* decision of the UK's former Office of Fair Trading ("OFT") involving charges on exchange of confidential and commercially sensitive loan pricing information between October 2007 and February 2008¹⁰.

The Report noted that lenders could harm the competitive process by sharing information with one another during the bid process to coordinate their offerings¹¹. In *RBS v Barclays*, after an in-depth investigation, the OFT had found that the banks violated competition rules by engaging in a concerted practice regarding the supply of loan products to various professional

services companies and imposed fines on RBS, whereas Barclays benefitted from total immunity under the OFT's Leniency Policy.¹²

Given the secret nature of information exchange, it is hard for competition authorities to detect collusive behaviours without employing leniency programs. These programs thus constitute crucial tools for agencies to uncover secret cartels, and provide a significant incentive for companies to disclose a cartel to competition authorities in exchange for full immunity or a reduction in fines. Similarly to the EC, the TCB has adopted a leniency program in 2009 and successfully applied it in various industries, including in the financial industry.¹³ One example was the leniency application submitted by Bank of Tokyo-Mitsubishi UFJ Turkey A.Ş. (BTMU), which led to the TCB's investigation of 13 international banks for exchanging competitively sensitive information in the syndicated loan market in April 2016¹⁴.

The investigation revealed that the banks granting corporate and commercial loans to corporate customers had violated Article 4 of Law no. 4054 on the Protection of Competition, by engaging in concerted practice through the exchange of sensitive information on prices and other traded terms¹⁵. After the comprehensive investigation, the TCB decided to impose fines on ING and RBS while it granted BTMU full immunity under the Turkish Leniency Program¹⁶. The decision is noteworthy since the TCB admitted phone (voice) records submitted by BTMU as admissible evidence under free evaluation of evidence rules¹⁷. The Administrative Court affirmed the TCB decision, by rejecting ING's defences regarding the inadmissibility of the phone records on the grounds that the records were obtained from the phone conversations recorded without its consent¹⁸.

Lastly, a recent Council of State decision in the *12 bank case*, a landmark case initially handled by the TCB back in 2013, has brought back to the fore a hotly debated issue¹⁹. The Turkish Council of State rectified its own ruling affirming the TCB's decision, which had imposed record fines on 12 leading banks for sharing sensitive information with regard to cash deposits, credits and credit cards services, and remanded the case to the lower court for re-examination²⁰. In its rectification ruling, the Council of State concluded that the TCB had made significantly erred in the application of the "*single continuous infringement*" concept to the facts of the case²¹. In particular, the Council of State noted that the TCB had failed to meet the required standards of proof in establishing each bank's participation in a single and continuous infringement²².

The concept of single continuous infringement has been adopted by many competition authorities in prominent cases, including the above mentioned OFT decision in *RBS v. Barclays*, following its first application by the EC in the 1986 Polypropylene decision²³. Established case law indicates that the authority must demonstrate that each party is aware of its contribution to the overall plan, or may be reasonably expected to be aware of such agreement or common plan pursuing a common objective²⁴. The decision of the Council of State will thus be crucial to future competition analysis of the financial industry in Turkey.

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ENDNOTES:

¹ European Commission - Press release “Antitrust: Commission fines Barclays, RBS, Citigroup, JPMorgan and MUFG €1.07 billion for participating in foreign exchange spot trading cartel” Brussels, 16 May 2019 “europa.eu/rapid/press-release_IP-19-2568_en.pdf”

² *ibid*

³ *ibid*

⁴ *Ibid.*

⁵ *ibid*

⁶ See: <https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas>.

⁷ *ibid.*

⁸ *ibid*

⁹ The TCB Decision dated 24.11.2016; numbered 16-41/667-300

¹⁰ EU Loan Syndication and Its Impact on Competition in Credit Markets (Final Report), European Commission Directorate-General for Competition (2019) page 154 footnote:168. See also: Decision of the Office of Fair Trading: Infringement of Chapter I of the CA98 and Article 101 of the TFEU by Royal Bank of Scotland Group plc and Barclays Bank plc Decision No. CA98/01/2011 Case CE/8950/08 20 January 2011.

¹¹ EU Loan Syndication and Its Impact on Competition in Credit Markets (Final Report), European Commission Directorate-General for Competition (2019) page 154 footnote:168.

¹² Decision of the Office of Fair Trading: Infringement of Chapter I of the CA98 and Article 101 of the TFEU by Royal Bank of Scotland Group plc and Barclays Bank plc Decision No. CA98/01/2011 Case CE/8950/08 20 January 2011 para.3-4.

¹³ Active Cooperation/Leniency Regulation (2009) of the TCB

¹⁴ The TCB Decision dated: 28.11.2017 numbered: 17-39/636-276

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ Ankara 14th Administrative Court Decision dated 29/03/2019, numbered: 2018/1106 E.; 2019/681 K.

¹⁹ The TCB Decision dated 08 March 2013; numbered 13-13/198-100.

²⁰ 13th Chamber of the Council of State, decisions no. 2019/1977 dated 21 May 2019, no. 2019/1778 dated 21 May 2019, no. 2019/1779 dated 21 May 2019, no. 2019/1780 dated 21 May 2019, no. 2019/1781 dated 21 May 2019, no. 2019/1782 dated 21 May 2019, no. 2019/1783 dated 21 May 2019, no. 2019/1784 dated 21 May 2019, no. 2019/1785 dated 21 May 2019, no. 2019/1786 dated 21 May 2019, no. 2019/1787 dated 21 May 2019, and no. 2019/1787 dated 21 May 2019.

²¹ *Ibid.*

²² *Ibid.*

²³ Commission Decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/ 31.149 — Polypropylene) (86 / 398 / EEC) para 81. See also: JUDGMENT OF 8. 7. 1999 — CASE C-49/92 P. see also: JUDGMENT OF THE COURT (Sixth Chamber) 8 July 1999 para 42, 43.

²⁴ In Joined Cases T-204/08 and T-212/08, TEAM RELOCATIONS AND OTHERS v COMMISSION JUDGMENT OF THE GENERAL COURT (Eighth Chamber) 16 June 2011. ECR II-3569, para. 36-37. See also: CIMENTERIES CBR AND OTHERS V COMMISSION JUDGMENT OF 15. 3. 2000 — JOINED CASES T-25/95, T-26/95, T-30/95 TO T-32/95, T-34/95 TO T-39/95, T-42/95 TO T-46/95, T-48/95, T-S0/9S TO T-6S/95, T-68/95 TO T-71/95, T-87/95, T-88/95, T-103/95 AND T-104/95 JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition) 15 March 2000 para. 4027 and 4112.