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## Recent EU Antitrust Investigations into Financial Services—What Is the Scope for Antitrust Intervention?

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### I. Introduction

When the financial crisis hit in 2008, the European Commission (“the Commission”) swiftly joined the global efforts to save the financial industry. The state aid powers granted to the Commission have allowed it to be a key player in crisis management. The Commission reviewed and approved vast amounts of government assistance aimed at rescuing financial institutions in various EU Member States and calming the financial markets.<sup>2</sup> As the financial sector recovers, the Commission has taken a tougher stance, and has adopted measures aimed at reducing banks’ reliance on state support.<sup>3</sup> It has proposed a package of regulatory measures to strengthen the supervision of the financial sector in Europe. It has also indicated that it will subject the financial sector to a rigorous antitrust scrutiny. However, to date, its antitrust bark has been more than its bite, as its principal regulation tool remains the state aid rules.

The Commission’s antitrust enforcement arm has shifted more resources to the financial sector and has recently initiated several antitrust investigations targeting many major financial institutions. Senior EU officials confirmed that they view rigorous competition enforcement as a necessary complement to more stringent regulation of financial markets.<sup>4</sup> Competition Commissioner Almunia indicated that concentration in the financial industry was a growing concern and that the Commission will closely scrutinize in particular practices linked with privileged access to market information.<sup>5</sup> At the recent ICN meeting in The Hague, the Commissioner urged other competition enforcers to address “serious structural weaknesses” and “regulatory gaps” in financial services markets and to become “more involved in the design of a modern and effective regulatory framework.”<sup>6</sup>

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<sup>2</sup> For an overview of the recent developments in the state aid field *see, e.g.*, Thomas Jestaedt & Marcus Pollard, *The Application of European Competition Law in the Financial Services Sector*, 1(4) J. EUR. COMPETITION L. & PRACTICE at 348-356 (2010) and Damien M.B. Gerard, *EC Competition Law Enforcement at Grips with the Financial Crisis: Flexibility on the Means, Consistency in the Principles*, (1) CONCURRENCES at 46-62 (2009).

<sup>3</sup> This is reflected in the Commission’s Communication of December 1, 2010: *Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis*, O.J. C 6, 11.1.2011, p.5.

<sup>4</sup> Director General Italianer’s Speech, *The new economic climate: driving competition in key sectors*, The Annual Competition Policy Conference 2011, June 24, 2011, Chatham House, London, *available at*: [http://ec.europa.eu/competition/speeches/text/sp2011\\_09\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2011_09_en.pdf).

<sup>5</sup> Commissioner Almunia’s Speech, *Competition Policy Issues in Financial Markets*, CASS Business School London, May 16, 2011 (Almunia’s Speech of May 16, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/337&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>6</sup> Commissioner Almunia’s Speech, *A new decade for the International Competition Network*, 10th Annual Conference of the International Competition Network The Hague, May 18, 2011, *available at*: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/346&format=HTML&aged=0&language=EN&guiLanguage=en>.

Antitrust authorities around the globe need no prompting to scrutinize the financial sector. The Dutch competition authority made banking, insurance, and other business services its enforcement priority in 2011.<sup>7</sup> There are indications that the U.K. Competition Commission will soon launch an investigation into the U.K. banking industry. Across the Atlantic, the U.S. Department of Justice (“DOJ”) has initiated a series of enforcement actions in the financial services sector, including an investigation into an alleged bid-rigging scheme in the municipal bond market,<sup>8</sup> an investigation into the credit default swaps (“CDS”) market, and into the fixing of London interbank offered rate (“LIBOR”). A series of linked antitrust class actions against the investigated banks have also been initiated.

Like their U.S. counterparts, the EU antitrust enforcers have decided to probe practices that attracted criticism in the wake of the recent economic and financial turmoil. The Commission has opened two investigations into the functioning of the CDS market. It is also looking into possible misconduct with respect to the setting of LIBOR in times of financial crisis. The focus of these new investigations is markedly different from the Commission’s previous enforcement efforts, which, until recently, have been focused on the payment card sector (which has been among the subjects of the Commission’s financial services sector enquiry that was closed in 2007<sup>9</sup>). Having reached an agreement with VISA on the Multilateral Interchange Fee,<sup>10</sup> the Commission seems to focus now on wholesale banking and on practices that may impede access to market data and decrease market transparency.

This note gives more background on the antitrust enforcement actions recently initiated by the Commission in the financial industry and attempts to identify the Commission’s likely concerns.

## II. TARGETING CONTROVERSIAL PRACTICES

In April 2011, the Commission launched three separate investigations: two into the CDS market and one into the setting of the LIBOR.

### A. CDS Investigations

CDS are financial instruments that function as a form of insurance against the risk of credit default. In return for an annual premium, the buyer of a CDS is protected against the risk of default. CDS can apply to various forms of debt, including municipal bonds, corporate debt, and mortgage securities. A loan for which a CDS was purchased becomes an asset that may be swapped for cash if the loan defaults. CDS are traded by banks, hedge funds, and other financial institutions. CDS made subprime loan securitization easier and contributed to the development of the credit derivatives market. The use of CDS as speculative tools and the lack of transparency in the CDS market (which, unlike the banking or insurance markets, was largely unregulated) have attracted much criticism.

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<sup>7</sup> See [http://www.nma.nl/en/about\\_the\\_nma/nma\\_priorities\\_for\\_2010\\_2011/default.aspx](http://www.nma.nl/en/about_the_nma/nma_priorities_for_2010_2011/default.aspx).

<sup>8</sup> The municipal bonds derivatives investigation has so far resulted in two large settlements between banks and the DOJ.

<sup>9</sup> The Commission launched inquiries into the financial services sector in 2005, focusing on three areas: payment cards, core retail banking, and business insurance.

<sup>10</sup> Commission Decision of December 8, 2010 in Case COMP/39.398 – VISA MIF. Visa Europe committed to reduce the maximum weighted average Multilateral Interchange Fee for consumer debit cards for cross-border transactions and national transactions in those EEA countries where it sets the fee directly.

In April 2011, the Commission announced the opening of two antitrust investigations targeting the major financial institutions involved in CDS trading.<sup>11</sup>

In the first case, the Commission is investigating data-sharing agreements between 16 investment banks and Markit (a U.K.-based information services company that provides credit derivative pricing services to financial institutions). According to the Commission, these banks provide Markit with privileged access to their CDS transaction data (pricing, indices, and other essentials daily). Markit, itself, is reportedly owned by several large banks. The 16 banks involved represent the majority of the CDS trading business, so the data in question gives the widest picture of the CDS market. The Commission's concern appears to be that restricting the access of other information service providers to this information might result in market foreclosure and impede the development of competition in the market for the provision of CDS information. The theories of harm that the Commission could pursue in this case range from collusion to an abuse of a possible collective dominant position.

The second case targets CDS clearing arrangements between ICE Clear Europe and 9 of the 16 banks mentioned above. According to the Commission's press release, the Commission will examine whether the preferential tariffs granted by ICE Clear Europe to these banks have the effect of locking them in the ICE system to the detriment of competitors. Most of the banks in question also have a stake in ICE Clear Europe and, according to the Commission, promote this platform at the expense of others. The banks targeted by this investigation are the major players in the trans-Atlantic derivatives market. As in the Markit case, the theory of harm and the legal basis for the suspected infringement are unclear.

Although in both cases many of the banks targeted by the investigation own stakes in the data and clearing businesses, the EU investigation appears to focus on market behavior and contract terms (provisions relating to exclusivity and access in particular), rather than on the market structure.

## **B. LIBOR Investigation**

It has been reported that the Commission sent questionnaires to a number of banks relating to the setting of LIBOR rates in April 2011. This probe appears to be linked to antitrust investigations and class actions in the United States, as well as regulatory investigations into the setting of LIBOR currently taking place in the United States, Japan, and the United Kingdom. In a recent SEC filing, UBS revealed that it had been granted conditional immunity by the DOJ and in certain other jurisdictions in investigations regarding the setting of Japanese yen LIBOR rates and of the Tokyo interbank offered rate.<sup>12</sup> UBS said that it understood that these investigations focused on whether there were improper attempts to manipulate these rates. LIBOR is a primary benchmark for short-term interest rates. LIBOR is used as a reference rate for approximately \$350 trillion of financial products (ranging from simple mortgages to complex

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<sup>11</sup> See Commission press release IP/11/509 of April 29, 2011, *available at* <http://sec.gov/news/press/2010/2010-136.htm>, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/509&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>12</sup> See Brooke Masters, Caroline Binham and Megan Murphy, *Interbank loan probe focuses on yen rates*, *Financial Times*, July 26, 2011.

derivatives) globally.<sup>13</sup> It is also used as the basis for settlement of interest rate contracts on many of the world's major futures and options exchanges. In addition, it is used for an increasing range of retail products, such as mortgages and college loans.

LIBOR is calculated daily by the British Bankers' Association (Thomson Reuters are the designated calculation agent) for ten currencies with 15 maturities quoted for each, ranging from overnight to 12 months, using eight to 20 contributor banks. The contributor banks are surveyed daily for the rates at which they believe they could borrow money from each other. LIBOR is the mean of middle values (quotes in the top and bottom are eliminated; all rates are published). This technique is meant to minimize manipulation. It is meant to represent "the lowest real-world cost of unsecured funding in the London market."<sup>14</sup>

As the financial crisis erupted in August 2007, the spread between rates quoted by various reference banks widened as worries about counterparty risk and credit quality increased. Following the collapse of Lehman Brothers, many banks refused to lend to the perceived weaker banks, fearing another bankruptcy. Banks that posted higher LIBOR rates were perceived as weaker and had more difficulties getting access to funding. The U.S. class actions allege that the reference banks colluded to keep the LIBOR at an artificially low level and took advantage of insider trading opportunities in the LIBOR-based derivatives market which their inside information provided.

The regulatory and antitrust probes into possible improper conduct relating to the setting of LIBOR are currently at a very early stage and it remains to be seen whether they will result in any enforcement action.

### **III. ACCESS TO DATA—COMPULSORY LICENSING IN THE FINANCIAL INDUSTRY?**

The arrangements within the data vendor community and, in particular, the control and dissemination of market data are the focus of the recent Commission's investigations targeting Standard & Poor's ("S&P") and Thomson Reuters. Both investigations were initiated in 2009 but, unlike the CDS and LIBOR investigations mentioned above, they do not concern practices that attracted criticism during the time of the financial crisis. The Commission's focus is the access to essential financial infrastructure (trading and clearing platforms or pre-trading services).

#### **A. Standard & Poor's**

The S&P investigation concerns access to trading data and raises interesting questions on the intersection between IP rights, standardization, and competition law. Following a complaint by several investor associations, the Commission opened an investigation into S&P's practices relating to disseminating International Securities Identification Numbers ("ISINs"). S&P and the Commission are currently in settlement discussions and the draft commitment decision was published in May 2011.<sup>15</sup>

ISINs are alphanumeric codes used to identify securities, such as bonds and equities. They are based on a standard developed by the International Organization for Standardization

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<sup>13</sup> See the explanations at the British Bankers' Association website: <http://www.bbalibor.com/bbalibor-explained/the-basics>.

<sup>14</sup> *Id.*

<sup>15</sup> OJ C 144, 14.5.2011, p. 28.

(“ISO”) and issued by the National Numbering Agency (“NNA”) of the country of issuance. ISINs are distributed to market participants for the purposes of clearing and settlement, custody, reporting to authorities, and reference data management. They are used by financial data vendors such as Bloomberg, Reuters, etc. (direct users), who then typically distribute ISINs together with other data to financial institutions (indirect users).

S&P acts as the NNA for U.S. securities and enjoys a monopoly for the first-hand distribution of ISINs for U.S. securities. The Commission took the view that S&P may be abusing its dominant position as the U.S. national numbering agency by charging excessive license fees for the use of ISINs. It appears that the Commission has also been questioning the scope of intellectual property rights (“IPRs”) claims over certain information licensed by S&P.<sup>16</sup>

S&P includes the information gathered from securities issuers in a descriptive database. According to the draft settlement decision, S&P licenses only a complete ISIN database consisting of the ISIN Record (the ISIN number and the minimum descriptive data necessary to identify a security) and other value-added information. The Commission asserted that financial institutions “generally only need” the ISIN Record and the practice of selling only the whole database allowed S&P to charge excessive fees to direct users. It also questioned the practice of charging license fees to indirect users (according to the complaint, S&P forced its contractual partners, the information services providers, to cut off financial institutions from data feeds on U.S. securities unless the latter entered into licensing agreements with S&P for the use of U.S. ISINs). The Commission noted that S&P is the only NNA that charges license fees to indirect users. In the Statement of Objections, the Commission took the view that the fees are “unfair” and violate the ISO’s cost recovery principle, under which NNAs cannot charge for the distribution of ISINs more than what is necessary to recover their costs, and can only charge direct users (there should be no charges to indirect users).

It is not clear what the theory of harm pursued by the Commission would be, as the challenged practice could be construed as tying, unfair pricing, or an IPRs abuse (the Commission officials alluded that the scope and perhaps the validity of S&P’s IPRs was questionable). It also has elements of a compulsory licensing case (the case was described as the Commission’s attempts to discipline companies that handle information that is indispensable for the financial industry.)<sup>17</sup>

S&P offered to distribute ISIN records to information service providers separately from other added value information, capping the price of this service at \$15,000 per year. It is also offering to abolish all charges to users that source ISINs not directly from S&P but from information service providers. The Commission is currently market-testing the commitments offered by S&P.

## **B. Thompson Reuters**

Less information is publicly available about the Thompson Reuters case that was also initiated by the Commission in 2009. This case concerns the Reuters Instrument Codes

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<sup>16</sup> See Almunia’s Speech of May 16, 2011.

<sup>17</sup> Commissioner Almunia’s Speech, *SGEI reform and the application of competition rules to the financial sector: themes for dialogue with the European Parliament*, European Parliament, ECON Committee, Brussels, 22 March 2011, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/197&format=HTML&aged=0&language=EN&guiLanguage=en>.

(“RICs”)—short, alphanumeric codes that identify securities and their trading locations. RICs are used to retrieve news and information on financial instruments from Thomson Reuters real-time data feeds (i.e., market data sent to software applications developed by banks and financial institutions). Thomson Reuters enforces its IPRs over the RICs and prevents users from translating RICs to alternative identification codes of other database providers to access data from other market data vendors (so-called “mapping”).

The Commission’s concern is that this practice creates barriers to switching to a different provider. Replacing RICs by reconfiguring or rewriting software can be long and costly, so the customers of Thomson Reuters may be “locked into” working with Thomson Reuters. Commenting on the Commission’s case, Thompson Reuters stressed the value created by RICs and the services it provides to its customers.

As in the S&P case, the investigated practice could be analyzed under several different theories of harm, but the key competition concerns here are clearly interoperability and standardization. It remains to be seen how the Commission frames its case.

#### **IV. CONCLUSIONS**

The Commission investigations into the financial industry focus on a wide variety of practices and possible competitive concerns. The CDS cases focus on the vertical links between banks and data and clearing businesses that may limit competition in the CDS market. The LIBOR case relates to possible information sharing between competing banks. Standard & Poor’s and Thompson Reuters are abuse of dominance cases targeting practices that could be characterized as unfair pricing, tying, or a refusal to license.

All these investigations are very recent, and it has yet to be seen how the Commission will frame its cases. However, irrespective of the substance of these cases, the message is clear: Financial institutions need to be aware that they are in the spotlight and make antitrust compliance a priority. This may mean having to defend the traditional way they do business before the antitrust authorities; most notably, with respect to practices that have been the subject of criticism in the context of the recent financial crisis.