

FINANCIAL SERVICES ANTITRUST BULLETIN

Welcome to the Clifford Chance Financial Services Antitrust Bulletin. This provides an overview of developments relating to the application of competition law to the financial services sector each quarter.

KEY THEMES

Amidst rising interest rates and volatile financial markets, the financial services sector has continued to attract the attention of competition authorities and other regulators around the globe. This edition of the Clifford Chance Financial Services Antitrust Bulletin charts the following key themes derived from developments over the last quarter in Europe, North America and the Asia Pacific region:

- **"Big Tech" entry into the financial services sector** – The UK Financial Conduct Authority published a Discussion Paper on potential competition impacts of "Big Tech" entry and expansion in retail financial services.
- **Insurance under the spotlight** – The insurance sector has been subject to significant cases and decisions. In particular, in a landmark case in the UK, the Competition Appeal Tribunal overturned a decision on most favoured nation clauses in contracts between home insurers and a price comparison website. In addition, the European Commission accepted commitments offered by Insurance Ireland to resolve concerns about third party access to its data sharing platform.
- **Regulatory environment in flux** – Regulators and legislators in several jurisdictions are exploring changes to the regulatory environment that would impact competition. For example, in Europe, the Bundeskartellamt submitted comments on surcharging to the European Commission in response to its consultation on the review of the Second Payment Services Directive and the Spanish competition authority has also been granted more monitoring powers relating to the financial sector. In the US, the Federal Reserve's new regulatory leader has signalled increased scrutiny of bank mergers.
- **Focus on payment systems** – Claimants and competition authorities have continued to focus on payment systems. In Japan, the authorities have announced new measures to improve transparency regarding interchange fee rates. In the US, Apple has been sued for attempted monopolisation regarding Apple Pay.

This regular bulletin is a digest of key antitrust developments in the financial services sector in the following regions:

- Asia Pacific
- Europe
- North America

This edition focusses on developments from 1st July 2022 – 30th September 2022. If you would like to know more about the subjects covered, please refer to the list of contacts on page 11.

EUROPE

UK

CMA clears London Stock Exchange Group PLC / Quantile Group Limited merger

On 26 October 2022, the Competition and Markets Authority ("**CMA**") [cleared](#) the anticipated acquisition by London Stock Exchange Group PLC ("**LSEG**") of Quantile Group Limited ("**Quantile**") (together, the "**Merged Entity**") following an in-depth Phase II investigation. At Phase I, the CMA considered that the merger could potentially harm competition in multilateral compression for over-the-counter interest rate derivatives ("**OTC IRDs**") in the UK. In its Final Report for the Phase II review, the CMA found that post-merger LSEG would have the ability to foreclose Quantile's rivals in the provision of multilateral compression for OTC IRDs, but it would not have the incentive to do so. This was due to the relatively small revenues associated with multilateral compression services relative to LSEG's other services for the same customers post-merger. Further, customers could switch both their clearing business and other types of business away from the Merged Entity in response to any foreclosure attempts. The CMA therefore concluded that the merger may not be expected to result in a substantial lessening of competition as a result of vertical effects in the supply of multilateral compression services for OTC IRDs in the UK.

FCA explores potential competition impacts of "Big Tech" entry and expansion in retail financial services

On 25 October 2022, the Financial Conduct Authority ("**FCA**") published a [Discussion Paper](#) on "Big Tech" entry into retail financial services, focussing on payments, deposits, consumer credit and insurance. For each sub-sector the FCA considered scenarios in which "Big Tech" firms could expand in the future, along with potential benefits and concerns regarding competition. Stakeholders can respond to the questions the FCA outlined in the Discussion Paper until 15 January 2023. Although the FCA is not proposing regulatory changes at this stage, it plans to publish a Feedback Statement in the first half of 2023 setting out its response to the feedback received from industry participants.

The FCA will hold an online panel event to launch the Discussion Paper on 28th November 2022. There will also be sector-specific roundtable discussions on 6th and 7th December 2022.

CAT overturns CMA's decision in the Compare the Market case

On 8 August 2022, the Competition Appeal Tribunal ("**CAT**") overturned a decision of the CMA which found that wide most favoured nation clauses ("**wide MFNs**") included by Compare the Market Limited ("**CTM**") in its agreements with a number of home insurance providers infringed Chapter I of the UK Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union. CTM appealed the CMA's decision in two main respects: the CMA's market definition as the provision of price comparison website services for home insurance in the UK and the CMA's finding that wide MFNs had an anticompetitive effect. The CAT substantially agreed with the appeal and set aside the CMA's decision. In its [judgment](#), the CAT found that the CMA had erred in defining the relevant market and that the CMA was wrong to find that the CTM's wide MFNs had anticompetitive effects.

The fact that the CAT found that CTM's wide MFNs had no proven anticompetitive effects calls into question the logic behind their legal characterisation as "hardcore" in the UK's Vertical Agreements Block Exemption Order and their presumptive "by object" status. In contrast, the European Commission has opted to treat wide MFNs as "excluded restrictions" that must be assessed individually for anticompetitive effects under the equivalent EU block exemption for vertical agreements.

Cryptocurrency exchanges face class action over delisting of BSV

On 29 July 2022, BSV Claims Limited [initiated a class action](#) against cryptocurrency exchanges Binance, Kraken, Bittylicious and ShapeShift over alleged collusion in delisting Bitcoin Satoshi Vision ("BSV") currency from their exchanges. The claim, led by class representative David Currie acting through BSV Claims, alleges that the exchanges colluded to delist BSV in April 2019 through public statements on Twitter. It is alleged that delisting harmed competition by reducing the value of BSV, causing loss to holders and investors of the coin. The claim also alleges that following the delisting, Binance and Kraken seized some users' BSV coins to deprive them of their holdings.

FCA publishes new Consumer Duty rules

On 27 July 2022, the FCA published [its policy statement](#) and [finalised guidance](#) on its new Consumer Duty rules, linked to its competition objective. The new Consumer Duty requires that a firm must act to deliver good outcomes for retail customers. In line with the FCA's competition objective, the new rules aim to ensure that firms compete in a fairer and more consumer-focused space, with competition acting more effectively in the interests of consumers where firms design products and services to meet customers' needs. However, the FCA has stated that the value assessment performed by firms under the duty will be a different assessment to the one carried out in the context of competition law on excessive pricing as abuse of a dominant position.

CMA issues letters to major UK banks in breach of banking rules

On 22 July 2022, the CMA published letters to six major banks ([Bank of Ireland](#), [Barclays](#), [HSBC](#), [Lloyds Banking Group](#), [Metro Bank](#) and [NatWest](#)) for breaches of the Retail Banking Market Investigations Order 2017 ("**Retail Banking Order**"). As part of the Retail Banking Order, banks are required to make certain information available to customers (such as interest rates and overdrafts for current accounts, branch opening times etc.). Although the breaches differ between the banks, they include failures to update records on branches, failure to publish information on overdraft changes, and overcharging customers on unarranged overdrafts, amongst others. All six banks have confirmed they are making changes to prevent further breaches, and Metro Bank has refunded affected customers.

Class actions against Mastercard and Visa over interchange fees continue

On 4 July 2022, the President of the CAT made an [Umbrella Proceedings Order](#) grouping various proceedings against Mastercard and Visa in relation to multilateral interchange fees. As a result, the CAT will deal with common matters collectively in the "Umbrella Proceedings" rather than in individual cases.

European Commission

Commission approves a second amendment of commitments for Banca Monte dei Paschi di Siena ("MPS")

On 2 August 2022, the European Commission [approved](#) revised commitments, submitted by Italy in connection with the precautionary recapitalisation of MPS, Italy's fifth largest bank in terms of total assets. The revised commitments will amend and supplement the original set of commitments approved by the Commission in [July 2017](#) and later amended in [September 2019](#).

Italy asked the Commission for additional time to fulfil certain of its existing commitments – notably, to sell its stake in MPS – and for MPS to implement certain divestments and continue its restructuring through a further reduction of the staff and of the operational costs relative to the revenues. To minimise distortions of competition caused by the extension, Italy proposed additional commitments, which provide for certain additional disposals and divestments, new branch closures and a continued obligation to respect certain limitations on the way MPS conducts its business.

The Commission approved both the extended deadline and the commitments put forward by Italy, indicating that new commitments counterbalance the revision of the deadline, and concluded that the aid granted to MPS in 2017 remains compatible with EU state aid rules.

Monitoring of Insurance Ireland's commitment to ensure fair and non-discriminatory access to its data sharing platform

On 29 July 2022, the European Commission [approved](#) the appointment of Advolis Orfis SAS as monitoring trustee to track Insurance Ireland's compliance with the commitments attached to its [decision](#) of 30 June 2022. The Commission's [acceptance of the commitments](#) offered by Insurance Ireland was intended to resolve concerns about third party access to its data sharing platform. This related to third party access to its Insurance Link data pooling system for motor insurance. The case highlights the increased focus on competition law implications arising out of data pooling and its growing importance in the market.

Pivo pulls out of merger with Vipps and MobilePay after Commission raises competition concerns

On 28 July 2022, a notification was withdrawn regarding the proposed acquisition and merger of Scandinavian payment services providers Vipps, Pivo and MobilePay by Danske Bank, OP Financial Group of Finland and a consortium of Norwegian banks. The parties had planned to create a single payments app with a combined user base of more than 10 million consumers across Finland, Denmark and Norway. However, the Commission raised concerns that the consolidation of Danske Bank-owned MobilePay and OP Financial Group-owned Pivo's Finnish customer bases would adversely impact competition in Finland's mobile payment services industry.

On 16 September 2022, the transaction was [refiled](#), after OP Financial Group and Pivo backed out of the merger. The Commission's decision will be covered in the next edition.

Commission clears Enel and Intesa acquisition of Italian fintech joint venture

On 17 June 2022, the European Commission issued a [decision](#) approving the joint acquisition of Italian payment services provider Mooney S.p.A. by the energy group Enel S.p.A., acting through its Enel X S.r.l. subsidiary, and Intesa Sanpaolo S.p.A., a banking group active in retail, corporate banking, wealth management, digital banking and fintech. Mooney is in turn expected to acquire Enel X's portfolio of tax and utility payment services providers.

The Commission concluded that the proposed acquisition leading to the fintech joint venture would not raise competition concerns, given the moderate combined market positions resulting from the transaction, and the presence of several alternative providers of payment services in the Italian market.

France

French Competition Authority clears a merger in the insurance sector

On 28 July 2022, the French Competition Authority [authorised](#) a merger between Mutuelle Générale de l'Économie des Finances et de l'Industrie (primarily active in the health insurance sector) and the insurance group Matmut (mainly active in the personal and property insurance sector). The French Competition Authority reached the conclusion that the merger would not give rise to competition concerns on the markets affected.

Germany

Consultation on Revised Payment Services Directive (PSD2) – Bundeskartellamt submitted comments on surcharging

In response to the European Commission's on-going consultation on the review of the Second Payment Services Directive ("PSD2"), the Bundeskartellamt [submitted](#) a response, focussing on the right of the payee to request charges for the use of a given payment instrument (so-called 'surcharging'). The Bundeskartellamt considered that the goal to promote competition among payment schemes through the use of surcharging was counteracted by the exemption introduced by Article 62(4) PSD2, whereby the payee cannot request charges for the use of payment instruments for which interchange fees are regulated under Chapter II of the Interchange Fee Regulation ("IFR"). The Bundeskartellamt observed that in practice this exception means that merchants are prohibited from surcharging in most cases where consumers pay with a debit or credit card. This, in the Bundeskartellamt's view, would suppress competition on lower merchant fees. The Bundeskartellamt suggested that this could be solved by implementing a clear surcharge cap standard and corresponding enforcement measures as well as complementary measures such as the review of the IFR. According to the Bundeskartellamt, this reform would be in line with the EU Digital Markets Act which prohibits digital gatekeepers from using several price and non-price steering/anti-steering measures.

Italy

Italian Competition Authority clears Zurich's acquisition of loan portfolio from Deutsche Bank

On 30 August 2022, the Italian Competition Authority ("ICA") [cleared](#) the acquisition by Zurich Insurance Company Ltd of a loan portfolio – consisting of loan products such as secured and unsecured overdrafts, secured direct loans and other secured loan products, all aimed at households and small businesses – from Deutsche Bank S.p.A.. This acquisition is aimed at further broadening the DB

Financial Advisors business unit purchased in November 2021 from Deutsche Bank S.p.A..

ICA closes proceedings against BPER for failure to divest bank branches

On 19 July 2022, the ICA [closed proceedings](#) against BPER Banca S.p.A. ("BPER") for non-compliance with the commitments which were required by the ICA for BPER's acquisition of Unipol Banca S.p.A.. These commitments included the divestment of five bank branches in Sardinia.

On 19 April 2022, after the deadline set by the ICA, BPER accepted the offer submitted by Banco di Desio e della Brianza S.p.A to complete the divestment. The ICA closed the proceedings without sanctioning BPER for failing to comply with its order within the prescribed time limit due to the difficulties in finding a suitable party interested in acquiring the bank branches and the challenges posed by the Covid-19 pandemic.

Netherlands

Data Mobility and the Financial Sector

The Dutch Central Bank and the Dutch Authority for the Financial Markets published a [discussion paper](#) setting out its preliminary policy vision for data mobility in the financial sector. The report emphasises that financial and non-financial data concentration can stifle competition and contribute to market concentration. It states that data-sharing regulations can affect the structure and level of concentration and competition in the financial sector, especially due to the growing role of non-financial firms in the financial system.

Poland

The Polish Competition Authority files charges against three banks for practices related to applying for mortgage release under government "repayment holidays" programme

On 5 September 2022, the Polish Competition Authority ("OCCP") [announced](#) that three banks (BNP Paribas Bank Polska S.A., Getin Noble Bank S.A and Bank Pocztowy S.A.) were charged with violations related to application for suspension of mortgage repayments under "repayment holidays" law, which entered into force in connection with increases in instalments of the mortgages. The regulations provide for the postponement of mortgage repayments for eight months between 2022 and 2023. According to the OCCP, many banks illegally required a separate application for each instalment or term, despite the fact that regulations allow consumers to choose between a one-time application for the whole period or to do so successively in separate applications. After the OCCP's intervention most of the banks changed their practice except for BNP Paribas, Getin Noble Bank and Bank Pocztowy.

The OCCP is also investigating other potential violations related to the implementation of the "repayment holidays" programme, among others, hindering the application process and threatening of the loss of credit rating.

The Polish Competition Authority files charges against five banks for the unlawful refusal to refund unauthorised payment transactions

The OCCP [announced](#) on 18 July 2022, that it charged five banks for failing to reimburse consumers for unauthorised payment transactions within the statutory deadline. These include Bank Millennium S.A., BNP Paribas Bank Polska S.A., Credit Agricole Bank Polska S.A., mBank S.A. and Santander Bank Polska S.A..

According to the OCCP, the banks did not reimburse customers who had fallen victim to fraud, despite their obligation to reimburse affected consumers with the amount of the unauthorised payment transaction, or to restore the debited payment account to the status prior to such transaction, by the end of the next business day following the notification. At the same time, the banks rejected consumers' complaints related to these practices. The OCCP is currently investigating 13 banks in relation to this conduct.

Spain

The CNMC sees no competition law infringement in CaixaBank, Santander and Sabadell ICO Covid loans

On 24 September 2022, the Spanish National Commission on Markets and Competition (the "CNMC") [proposed](#) closing proceedings opened in 2021 related to Covid credit lines from Spain's Official Credit Institute ("ICO"). The CNMC spent 15 months investigating whether banks had forced clients to contract other financial products in order to access ICO Covid loans. However, it concluded that it had not found evidence of an infringement of competition law.

The CNMC to be given more powers to monitor the banking sector

On 26 July 2022, the Spanish Government [announced](#) that it intends to pass a new temporary tax that will affect the energy and banking sectors. To ensure that banks do not transfer the burden of this new tax to end consumers, the Government has revealed that it plans to entrust the CNMC with the duty of ensuring banks comply with this obligation. The Government is working on granting such powers to the CNMC and on creating a new department within the CNMC dedicated to this new task. The Government expressly refused the possibility of granting such powers to the Bank of Spain or the Spanish National Securities Market Commission.

CNMC's study on ATM cash withdrawals

On 12 July 2022, the CNMC made a series of recommendations in its "Study on ATM cash withdrawals". This aimed to ensure that individuals who are at risk of financial exclusion, such as those in vulnerable groups or rural areas, have easier access to ATM cash withdrawals. It recommended the adoption of a legal framework to promote cashback to enable cash withdrawals in local shops. It also recommended that the granting of aid for the installation of ATMs should encourage competition and avoid driving out private initiatives.

Turkey

The Turkish Competition Authority ("TCA") introduces new thresholds to review "killer acquisitions" including acquisitions in the fields of financial technologies and digital platforms

Earlier this year, the TCA introduced a separate, lower, turnover test for transactions that concern acquisition of "technology undertakings" with activities in Turkey (i.e., having turnover or research and development activities in Turkey or providing services to users in Turkey). This change was designed to capture what the TCA considered to be "killer acquisitions". Under the new regime, a technology undertaking is defined as undertakings or related assets operating in the fields of digital platforms, software, and financial technologies, amongst others.

Last month, the TCA published its reasoned decision concerning the acquisition of sole control over International Financial Group Limited ("IFGL") by Cinven. The parties' turnover in Turkey did not exceed standard thresholds. However, the authorities considered that the transaction was subject to merger control review on

the basis that IFGL provided some services through a digital platform that had around 230 registered users in Turkey.

NORTH AMERICA

US

Federal Reserve's new regulatory leader signals increased scrutiny of bank mergers

On 7 September 2022, in his first public speech since taking office, Federal Reserve Vice Chairman Michael Barr [indicated](#) that the central bank is considering how to more closely scrutinise bank mergers, suggesting that it may enact more rigorous requirements for banks to plan for their own failure. The speech is consistent with concerns expressed by other regulators in the Biden administration about how banking mergers and growth could introduce systemic risks.

Major US banks win antitrust appeal over invalidated software patent

Bank of America Corp. and Wells Fargo & Co., along with an industry group that both banks allegedly co-own, successfully obtained a [ruling](#) from a federal appellate court upholding the dismissal of antitrust claims against them. The lawsuit had accused the banks of evading a settlement with a developer of multi-factor authentication technology, specifically by engineering an industry group to challenge and ultimately invalidate one of the developer's key patents. In August 2022, the US Court of Appeals for the Third Circuit affirmed the district court's dismissal of the claims, noting that while the timing of the patent challenge was "suspicious", the industry group's LLC agreement "actually shows the banks do not control which patents" it challenges.

UK and Europe- based financial institutions settle US claims over London gold fix

In August 2022, a federal judge [approved](#) a \$50 million settlement that included Barclays Plc, Société Générale SA, Scotiabank and a class of financial traders. The case, filed in the US District Court for the Southern District of New York in 2014, alleged a conspiracy by top global financial institutions to fix or manipulate the price of gold by rigging the London gold fix, a key benchmark that affects other gold markets. The settlement was the third in the case, following settlements by Deutsche Bank AG and HSBC Holdings Plc.

Apple's Apple Pay system target of antitrust lawsuit

In July 2022, Apple Inc. was [sued](#) for "tying the tap and pay iOS mobile wallet market to iOS mobile device markets" as well as the monopolisation and attempted monopolisation of the "tap and pay iOS mobile wallet market." The lawsuit, filed in the California federal court, was brought under the Sherman Act by a payment card-issuing credit union that seeks to represent a class of financial institutions and credit unions. The complaint accuses Apple of denying competitors' access to Apple Pay mobile wallet technology that could be used to develop competing mobile wallet apps on iOS devices, thus making Apple Pay the only "tap and pay mobile wallet that can be used on Apple's iOS devices." The complaint alleges that, as a result, Apple can charge "payment card issuers fees that no other mobile wallet ventures to impose." The complaint claims that "more than 4,000 banks and credit unions" use Apple Pay, and that Apple Pay fees "generated a reported \$1 billion for Apple in 2019".

ASIA PACIFIC

Australia

Authorisation of Customer Owned Banking Association 2022 Code

On 9 August 2022, the ACCC [granted](#) the Customer Owned Banking Association ("COBA")¹ authorisation until 19 August 2027 to enable it to implement certain provisions of its Customer Owned Banking Code of Practice (the "Code"). COBA's members are mutual banks, credit unions and building societies that provide retail banking services and in some cases business banking services in competition with national and regional banks. The provisions in the Code relate to commitments by signatories to limit fees and charges, and enhance protections offered to customers and guarantors including in cases of financial hardship.

ANZ proposed acquisition of Suncorp Bank

On 18 July 2022, Suncorp Group [announced](#) it had entered into an agreement to sell its banking business, Suncorp Bank (a Queensland-based bank), to Australia and New Zealand Banking Group Limited ("ANZ") for AUD 4.9 billion. The transaction, which looks to be the biggest banking deal in Australia in over a decade, is expected to face intense regulatory and political scrutiny, requiring approval from the Australian Federal Treasurer Jim Chalmers, the Australian Competition and Consumer Commission ("ACCC"), in addition to amendments to be made to the *State Financial Institutions and Metway Merger Act 1996* (Qld). The ACCC's review is expected to involve extensive consultation with market participants, interested parties and regulators.

India

PayU receives unconditional approval for its acquisition of India's BillDesk

On 5 September 2022, the Competition Commission of India ("CCI") [announced](#) that it had approved PayU Payments' proposed USD 4.7 billion acquisition of India's domestic payment gateway provider BillDesk. The initial notification was filed with the CCI in December 2021. PayU renewed its merger filing in April 2022, arguing that the market is competitive and highly regulated by the Indian government. The deal was further delayed after a show-cause notice in July 2022 seeking a detailed explanation from PayU on why the deal should not enter a Phase 2 merger review. This is the first instance of the CCI clearing the transaction without imposing any remedies after issuing a show-cause notice. However, despite the clearance, PayU's parent company Prosus [announced](#) on 3 October 2022 that they were not proceeding with the deal due to unfulfillment of certain conditions precedent by the 30 September 2022 long stop date.

Malaysia

Malaysian insurers win appeal against MyCC in cartel case

On 2 September 2022, the Malaysian Competition Appeal Tribunal ("MCAT") [overturned](#) a financial penalty of RM 173.3 million (approximately USD 37.4 million) against the General Insurance Association of Malaysia ("PIAM") and its 22 member insurers. In 2020, the Malaysia Competition Commission ("MyCC") found PIAM and its 22 member insurers guilty of entering into a horizontal agreement fixing trade discounts of automotive parts and labour rates of motor vehicle repairs. The alleged

¹ The authorisation was obtained on behalf of COBA's current and future members.

cartel agreement was a member's circular issued by the PIAM, which set out the maximum trade discounts on automotive part prices that insurers can ask for from workshops and the minimum labour rate they have to pay to the workshops.

The MCAT overturned the decision on the basis that PIAM does not engage in any commercial activities and was therefore not an "enterprise" under Malaysian competition laws. Further, the circular was not concluded solely between member insurers and did not have the object to fix prices.

Japan

Japanese authorities announce publication of interchange fee rates

On 14 September 2022, the Japan Fair Trade Commission ("**JFTC**") and the Ministry of Economy, Trade and Industry ("**METI**") [announced](#) that by the end of November 2022 the three international credit card brands (namely MasterCard, Union Pay and Visa) will publish their standard interchange fee rates. The JFTC and METI also announced that they will take steps to ensure that these international credit card brands publish the average rate of issuer fees. This would help to ensure fair competitive conditions between international brands in the credit card issuance market and increase the transparency of the credit card market as a whole.

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