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European Commission fines Rabobank over bonds trading cartel

Introduction

On 22 November 2023, the European Commission announced its decision to fine Dutch lender Coöperatieve Rabobank U.A. €26.6 million for its participation in a bonds trading cartel. Deutsche Bank, who was also found to have participated in the cartel, was granted full immunity under the Commission's leniency programme for revealing the existence of the cartel.

Background

On 6 December 2022, the Commission announced that a statement of objections (SO) had been sent to Rabobank and Deutsche Bank for their participation in a Euro-denominated bonds trading cartel. The SO set out the Commission's preliminary view that, between 2005 and 2016, both parties had breached EU antitrust rules by colluding to distort competition when trading Euro-denominated SSA bonds (Supra-Sovereign, Foreign Sovereign, Sub-Sovereign / Agency bonds) and Government Guaranteed bonds in the EEA.

The Commission's findings

In its final decision the Commission has found that, between 2006 and 2016, the two banks, acting through their traders, exchanged commercially sensitive information and coordinated their trading and pricing strategies in relation to Euro-denominated SSA bonds and Government Guaranteed bonds. According to the Commission, traders on Deutsche Bank's EUR SSA desk in Frankfurt and Rabobank's Investment Grade Bonds desk in London exchanged information via email, instant messages and online chatrooms. The information concerned: (i) prices, volumes, and current and future trading strategies and positions; (ii) counterparties' identities; and (iii) their respective requirements for buying or selling bonds.

On the basis of these exchanges, the Deutsche Bank and Rabobank traders would adjust price levels and trading strategies, including coordinating on prices to be offered and displayed on Bloomberg terminals and warning each other when the other's on-screen price was considered too low or too high.

Fines

In setting the level of fines for both parties, the Commission notes that it has taken into account the value of sales for the products which were the subject of the cartel in the EEA, as well as the severity, geographic nature and duration of the infringement. Taking all factors into account, the Commission set Rabobank's fine at €26.6 million.

Under the leniency programme, Deutsche Bank received full immunity for disclosing the existence of the cartel and cooperating with the Commission during the investigation. In its press release, the Commission states that Deutsche Bank would have been fined almost €156 million for its participation in the absence of immunity.

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In response to the decision, Rabobank is considering lodging an appeal.

Conclusion

This represents the third recent fine from the Commission in respect of cartels affecting European bond markets. In April 2021, five banks were fined €28.5 million for their participation in the secondary trading market for EEA SSA bonds denominated in US Dollars, in which Deutsche Bank was also a leniency applicant. In May 2021, the Commission also fined three banks a total of €371 million for their participation in a trading cartel in the primary and secondary markets for European Governments Bonds during the financial crisis.

The Commission has made clear that it will "*remain vigilant and committed to preserv[ing] effective competition in financial markets*". When announcing Rabobank's fine, Didier Reynders, the EU's Competition Commissioner, noted that "*Trustworthy and well-functioning bonds trading markets are crucial not only for the national authorities issuing bonds but also for the investors buying and trading them*".

OTHER DEVELOPMENTS

MERGER CONTROL

Broadcom's proposed acquisition of VMware conditionally cleared by SAMR

On 21 November 2023, the Chinese competition regulator, the State Administration for Market Regulation (SAMR), conditionally cleared Broadcom's proposed acquisition of VMware after a merger review process that lasted 14.5 months. Broadcom is a US designer, developer and supplier of semiconductors. VMware is a US software production and technological services company, whose virtualisation software is mainly used in data centres and cloud computing.

SAMR found that the merged entity would have the ability to eliminate or restrict competition in the non-public cloud virtualisation software, fibre channel adapters, storage adapters and ethernet network adapters markets. First, VMware's non-public cloud virtualisation software and Broadcom's fibre channel adapters, storage adapters and ethernet network adapters (collectively, Broadcom's Hardware) are all used on servers and largely overlap in their customer base. SAMR was concerned that the merged entity may tie VMware's non-public cloud virtualisation software with Broadcom's Hardware.

Second, VMware has a hardware certification procedure to ensure interoperability of the hardware with its non-public cloud virtualisation software. VMware requires hardware manufacturers to provide certain competitively sensitive information (CSI), such as product plans, as part of the certification process. SAMR was concerned the merged entity may refuse or delay the certification of the hardware of Broadcom's competitors and reduce the interoperability of VMware's non-public cloud virtualisation software with the hardware of Broadcom's competitors. Finally, SAMR was also concerned that Broadcom would make use of the CSI obtained by VMware in relation to Broadcom's competitors to further enhance the competitiveness of its products.

To address these concerns, SAMR imposed a number of conditions, two of which were not disclosed due to confidentiality. These conditions included:

- when selling Broadcom's Hardware and VMware's server virtualisation software in the Chinese market, they cannot, without justifiable reasons, engage in tying or impose any unreasonable trading conditions. They cannot prevent or restrict customers from purchasing or using these products separately or discriminate against customers which purchase these products separately;
- the parties must ensure the interoperability between VMware's server utilisation software and relevant third-party hardware products sold in China;
- Broadcom's fibre channel adapter certification team must maintain its existing practices, and continue to develop, certify and release drivers for Broadcom's fibre channel adapters in order to ensure interoperability with third-party server virtualisation software; and

- the parties must adopt measures to protect the confidential information of third-party hardware manufacturers, including entering into confidentiality agreements, clarifying the scope of use of the information, ensuring that the confidential information is stored separately, ensuring separation of duties of the relevant personnel and prohibiting cross-appointments.

The conditions will be in place for a relatively long duration of 10 years and will expire automatically after the end of the period. This is the second time Broadcom has offered 10-year behavioural commitments to obtain PRC merger clearance – it offered similar commitments in relation to its acquisition of Brocade Communications Systems in 2017, which still has four years left to run.

ANTITRUST

AG delivers opinion on Deutsche Telekom's default interest

On 23 November 2023, Advocate General (AG) Anthony Collins handed down a non-binding opinion on the European Commission's appeal of the General Court (GC) judgment which awarded Deutsche Telekom compensation for the Commission's refusal to pay default interest, following a ruling reducing the fine imposed for an abuse of its dominant position.

In October 2014, the Commission fined Slovak Telekom and its parent company, Deutsche Telekom, for excluding its competitors from the Slovak market for broadband services for a period of five years. Whilst Deutsche Telekom paid the €31.07 million fine, the fine was reduced to €19.03 million on appeal to the GC in 2018. Following this ruling, the Commission repaid Deutsche Telekom the amount in fines that were wrongly imposed, but refused to pay default interest on the sum for the period between the date of payment of the initial fine and the date of repayment of the portion of the fine found not to be due.

Deutsche Telekom subsequently brought an action before the GC, arguing that the Commission should pay compensation for the loss of revenue, or alternatively, compensation for the harm suffered due to the Commission's refusal to pay default interest on the reimbursed amount. In its ruling of 19 January 2022, the GC upheld the action affirming that the Commission's refusal to pay default interest constituted a serious breach of the first paragraph of Article 266 TFEU (which resulted in the EU incurring non-contractual liability) and awarded Deutsche Telekom a compensation of €1.75 million. The Commission appealed this judgment before the Court of Justice (CJ).

Article 266 TFEU provides that where an EU court annuls a Commission decision, the legal effect of the decision is rendered void as at the date of the annulled decision. However, AG Collins considered it is impossible for the Commission to contravene Article 266 prior to delivery of the judgment. Therefore, he considered the GC's finding, that the Commission had been in breach prior to this judgment, was unfounded. The AG stated that the GC erred in holding Article 266 to impose an "*unconditional obligation*" on the Commission to pay default interest. Rather, he opined that the Commission had complied with, and therefore did not default, on its obligation to repay the money. He further took the view that Article 266 only requires the Commission to put the applicant in the same position it was in prior to the adoption of the measure, with no obligation to pay the sum back at "*excessive or punitive rates of interest*".

The Advocate General observed that default interest is more suitable for cases in which the obligation to make a payment has been delayed, rather than the repayment of unduly paid fines. Even though repayment must consider any depreciation in the value of money between the date of provisional collection and the date of the 2018 judgment, this does not extend to an obligation to pay default interest rates. The AG therefore concluded that the CJ should uphold the appeal and set aside the GC's 2022 judgment.

GENERAL COMPETITION

CMA sets out latest findings and next steps in grocery sector review

On 29 November 2023, the CMA released the latest findings in its ongoing review of competition in the grocery sector, following its initial assessment report on retail competition in July. The initial assessment identified ten

indicative product categories which required further analysis into the price dynamics and competition across the complex supply chains, with a particular focus on branded and own label food suppliers.

In its most recent publication, the CMA observed that food price inflation is at an all-time high, despite falling to 10.1% in October 2023. This is largely due to higher input costs, such as energy and agricultural input (like fertilisers), which is putting "*a huge strain on household budgets*". Significantly, the CMA has nonetheless observed that, over the last two years, around 75 % of branded suppliers have increased their unit profitability which, in turn, has contributed to higher food price inflation.

As a result of the increased prices, in all but one of the ten product categories, customers have switched from brands to cheaper own label products, or reduced their consumption, which has led to a decrease in the market share of branded suppliers and a corresponding increase in competition within this sector. Strong competition is imperative within the grocery industry, as this is required to contain the "*cost of living pressures*".

The CMA has also noted that against the background of increased prices, customer loyalty pricing has increased. Thus, the CMA has announced its intention to review these schemes in 2024. It also aims to further investigate consumer behaviour and barriers to entry, specifically in relation to the baby formula product category, where there is little evidence of consumers switching to cheaper branded options as prices have risen and there is very limited availability of own-brand alternatives.

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