



EU Commission antitrust decision

The European Commission (Commission) has fined Crédit Agricole, HSBC and JPMorgan Chase a total of €485m for participating in a cartel in euro interest rate derivatives (EIRD). This follows an earlier settlement decision regarding the same cartel, where a total fine exceeding €1 billion was imposed on Barclays, Deutsche Bank, the Royal Bank of Scotland (RBS) and Société Générale.

The European Commission Decision: Key facts

The Commission has found that seven major banks participated in a cartel during various periods between September 2005 and 30 May 2008 covering the entire European Economic Area (EEA). According to the EU Commission, the banks colluded when making their Euro Interbank Offered Rate (EURIBOR) submissions and also exchanged sensitive information on trading positions and strategies. The Commission's decision provides a solid basis for third parties to claim damages for losses suffered as a result of the EURIBOR manipulation.

By its decision of 7 December 2016 fining Crédit Agricole, HSBC and JPMorgan Chase a total of €485m between them, the Commission concluded its investigation of a EURIBOR cartel that was initiated back in 2011 following a series of dawn-raids. This latest infringement decision comes three years after the Commission reached a settlement with the other four banks involved in the cartel.

In a decision issued on 4 December 2013, the Commission found that **Barclays, Deutsche Bank, RBS and Société Générale** had infringed EU competition law by manipulating EURIBOR. **Between 29 September 2005 and 30 May 2008**, traders employed by Barclays and Deutsche Bank communicated their submissions for the calculation of the EURIBOR. Their traders also discussed trading and pricing strategies. Société Générale and RBS also participated in these communications from 31 March 2006 and 26 September 2007 respectively. The Commission found that these communications between the banks' traders "*consisted of agreements and/or concerted practices that had as their object the distortion of the normal course of pricing components in the EIRD sector*". These four banks acknowledged their involvement and agreed to settle the case with the Commission, in exchange for a 10% reduction of the fine. Barclays, who blew the whistle on the EIRD cartel, was granted immunity from fines in this case.

Crédit Agricole, HSBC and JPMorgan Chase chose not to settle and were later fined a total of €485m on 7 December 2016. Although the decision regarding the involvement of Crédit Agricole, HSBC and JPMorgan Chase is yet to be published, in its press release the Commission confirmed that these three banks'

involvement also took place between September 2005 and May 2008 and covered the whole EEA.

The Commission's press release emphasised that the EIRD market is very important not just to banks but also to many companies in the Single Market, who rely on such derivatives to hedge their financing risk. **Thus, businesses are encouraged to review their contractual terms that feature EURIBOR and seek either contractual redress or competition damages for the loss.**

The Commission has previously also found that a number of major banks infringed EU competition law in respect of Yen interest rate derivatives (which involved manipulation of JPY LIBOR and Euroyen TIBOR) and Swiss Franc interest rate derivatives (which involved manipulation of CHF LIBOR).

How does this apply to you?

As the Commission's 2013 decision notes, the EURIBOR rate is widely used in the international money markets and underpins countless financial products. It is also the basis on which interest rates in all kinds of contracts are calculated. Therefore, many companies will have suffered harm as a result of this manipulation of the EURIBOR benchmark – for example a company that agreed to pay interest calculated on basis of EURIBOR will have suffered harm if the rate was kept high as a result of the banks' collusion.

It is also possible that the EURIBOR manipulation may render certain contracts invalid. German retailer Edeka, for example, is currently looking into whether the cartel rendered certain swap trades it had entered invalid.



Edeka has requested the EU General Court to order access to the Commission's investigation files in order to assess its own claim.

The Commission decision establishes the banks' liability for infringing EU competition law. The liability is joint and several for all the banks that were involved. This means that any potential claimant will only need to establish (i) the amount of the loss suffered as a result of the EURIBOR manipulation; and (ii) that the loss was caused by the conduct described in the infringement decision.

It is likely that you will have a choice of whether to bring a claim in the High Court in London or in the specialist Competition Appeal Tribunal (CAT). Limitation periods differ between the two tribunals, but broadly they run for six years from the start of the competition investigation in the High Court and for two years from the infringement decision becoming final in the CAT.

The EU Damages Directive seeks to facilitate competition damages claims across the EU and is due to be implemented in the UK before the end of 2016.

Assessing a potential claim

Step 1 Establish value of loss suffered as a result of EURIBOR manipulation. You should estimate the ballpark value of the loss you have suffered as a result of the EURIBOR rate being kept artificially high or low between September 2005 and May 2008. A very high level ballpark indication of the overall size of likely damage will allow us to establish whether it is worthwhile claiming for damages. We can advise you on how to develop this analysis.

Step 2 Jurisdiction. You should identify in which countries within Europe your group companies suffered loss. Typically, the UK, Germany and the Netherlands are the key jurisdictions for bringing such claims. We can advise you on which jurisdiction might be best suited for your claim if, as in most cases, you have a choice.

Step 3 Consider Litigation Funding. There are many ways to fund competition damages actions which can significantly reduce claimants' exposure to costs. In the UK, options range from the traditional retainer to third party funding as well as getting a group of potential claimants together in a joint or parallel action or an action via a trade body. In some instances, the way in which you fund your litigation can shift the whole or part of the risk to a third party in return for a share of the potential damages.

Third party funding typically involves a commercial funder agreeing to pay some or all of a claimant's legal fees (and disbursements) in return for a fee. This fee is usually a proportion of the proceeds recovered as part of the litigation process whether by judgment or settlement. If the claim is unsuccessful then the funder loses its investment and is not entitled to receive any payment from the claimant.

The usual rule in the UK is that the loser pays the winner's reasonable costs (typically in the region of around 60% of actual costs incurred). This means that in large stake damages claims such as this one, the incidence of costs can be a big issue and, indeed, can determine whether a case should be pursued.

After the Event Insurance ('ATE') is a form of legal expenses insurance which is taken out after a legal dispute has arisen. An ATE insurance policy insures the claimant against potential liability in the event you lose the case. An ATE policy typically covers claimant's own disbursements, including certain legal fees, and the other side's costs (subject to a maximum limit). ATE, if disclosed, can also be used as a tactical weapon to encourage settlement as the other side will know that an insurer has conducted an independent analysis of the merits of the case and decided it was strong enough to cover. Third party funders often cover ATE as part of an overall package. We can advise you on the choice of third party funders and assist you in obtaining such funding.

Third party funding is becoming increasingly attractive, particularly for large companies, as an alternative to self-funding litigation. It can protect cash-flow, it can reduce risk or it can turn a legal department into a self-standing profit centre.

Shepherd and Wedderburn

Shepherd and Wedderburn competition law experts and litigators have experience of competition damages claims. We regularly act not just in the defence of companies but also to pursue individual large claims for companies both in the High Court and in the CAT. Outside of the UK we work with specialist local lawyers to pursue such claims.

We have significant experience in arranging third party funding for clients. We do not receive a commission nor do we have a financial stake in arranging such funding. This is part of our service in protecting your interests and maximising the chances of success where appropriate.



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