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# CONCURRENCES LAW & ECONOMICS WEBINARS

# Financial Services and Antitrust: A live update with DG COMP and UK FCA

**Webinar – 13 October 2020***

**Webinar organised in partnership with Shearman & Sterling and Compass Lexecon, as part of Concurrences Law & Economics Webinar series.**

## Matthew Readings

Matthew Readings introduced the panelists. He emphasised their different experience and expertise to contribute to the discussion on competition-related enforcement trends and dynamics with regards to financial services as well as recent legal and policy developments that could have a material commercial impact on business models. Mr Readings noted that, in financial services, assessing classic antitrust enforcement in isolation is insufficient. Other intervention tools used by regulators, the UK Financial Conduct Authority in particular, to pursue the competition policy agenda have some impact on financial services. Matthew Readings invited the panelists to comment on enforcement tools but also the market investigation powers of authorities and available remedies.

**"IN FINANCIAL SERVICES, ASSESSING CLASSIC ANTITRUST ENFORCEMENT IN ISOLATION IS INSUFFICIENT."**
MATTHEW READINGS

## Barbara Brandtner

Barbara Brandtner provided an update on the Interchange Fee Regulation (Regulation 2015/751 of the European Parliament and the Council on interchange fees for card-based payment transactions) and presented the conclusions of a recent report published on 29 June 2020 by the European Commission on the application of the Interchange Fee Regulation and its effectiveness.

> SEE SPEAKERS' PRESENTATIONS, VIDEO AND TRANSCRIPT ON CONCURRENCES.COM WEBSITE (CONFERENCES > 13 OCTOBER 2020)

* Concurrences drafted the present synthesis. The views and opinions expressed in this Document do not necessarily represent those of the speakers' institution or clients.

The Interchange Fee Regulation based on experience gained in antitrust enforcement cases as regards interchange fees for cards. Ms Brandtner started by explaining the rationale and describing the content of the Interchange Fee Regulation. The Regulation entered into force in June 2015 after concluding from the *MasterCard* and the *Groupement Cartes Bancaires* cases that interchange fees level and their divergence could have a detrimental effect on competition. The Interchange Fee Regulation was precisely adopted to address the fragmentation of the internal market, the issue of reverse competition (i.e. the card schemes competing for issuers tend to increase their fees, leading to cheaper domestic schemes exiting the market) and the floor effect of interchange fees (high merchant charges leading to merchants and consumers not willing to accept the cards). Caps on interchange fees were introduced, concerning consumer cards (not commercial cards) under four-party schemes, but also three-party schemes if acting with co-branded partners and agents. Additional provisions allow for more effective market functioning: by allowing merchants to refuse expensive cards and steer customers to their preferred means of payment, by increasing fee transparency, by introducing unblending, etc.

**"CONTINUOUS AND ROBUST ENFORCEMENT AND MONITORING AND REINFORCED DATA GATHERING ARE STILL NECESSARY FOR SEVERAL AREAS."**
**BARBARA BRANDTNER**

Turning to the report of the Commission, Ms Brandtner explained that it was based on an extensive study and stakeholder input, which revealed that the Interchange Fee Regulation has achieved its main objectives, in particular a significant decrease in interchange fees for consumer cards, reflected in reduced merchants' charges for card payments. However, pass on by acquirers has only been gradual; but reductions in merchant charges have been passed on to final consumers.

Also, the increase in scheme fees for international card schemes has been limited. Ms Brandtner noted that continuous and robust enforcement and monitoring and reinforced data gathering are still necessary for several areas, especially in assessing the implementation of caps and their possible circumvention. Furthermore, the issue of transparency and that of the separation of schemes and processing entities appear critical. The report concludes that it is too early to decide on the need for a legislative review. Finally, Ms Brandtner explained that the Commission is organising a public hearing in December to discuss the Interchange Fees Regulation with stakeholders. She also stressed that the pandemic situation has had an important and possibly lasting impact on the payment sector, which materialised in a significant increase in contactless payment, a strong rollout of mobile digital solutions, and the entry of big techs in payment markets. This requires additional reflection.

## Sheldon Mills

Sheldon Mills then commented on the issues which the Financial Conduct Authority is currently focusing on. Mr Mills first reminded that the FCA is a concurrent regulator which has antitrust powers; it can enforce the UK Competition Act prohibitions and Articles 101 and 102, and conduct competition-based market studies. On digital competition, he remarked that digital markets are rapidly changing financial service markets. Big tech companies are entering insurance and payment markets and traditional financial services providers are increasingly using digital platforms and new technologies. Another aspect of how digital competition is changing the way financial services markets work is the potential development of digital currencies. Furthermore, digital markets give large platforms a competitive advantage due to network effects; that advantage and the appropriate tools to tackle it need to be carefully considered. Sheldon Mills noted that antitrust remains one of the most powerful tools to address firm conduct. The FCA will be participating in the Digital Markets Taskforce, through observation and

**"ANTITRUST EXPANDING BEYOND THE NARROWLY DEFINED CONCEPT OF CONSUMER WELFARE TO ENCOMPASS CONSUMER BENEFITS IN A BROADER SENSE, SUCH AS ENVIRONMENTAL AND SOCIETAL ISSUES."**
**SHELDON MILLS**

contribution. The FCA's toolkit includes antitrust and regulatory powers and this experience can contribute to the conversation about the pro-competition approach for digital markets.

Then, Mr Mills dealt with the impact of Covid-19. He noted that Covid-19 has the potential to change market structure and how consumers interact with financial services and raised the question of whether the structural competition challenges will accelerate as the result of the crisis. The pandemic has also led authorities to consider responses to the increased collaboration between competitors to serve the public interest. He stressed that the FCA supports guidance issued by the Competition and Markets Authority on essential cooperation in the face of the pandemic and that we are proactively monitoring for indicators of any issues in the market.

Finally, Mr Mills made some remarks on sustainable finance and antitrust. He noted that recently there have been more signs about antitrust expanding beyond the narrowly defined concept of consumer welfare to encompass consumer benefits in a broader sense, such as environmental and societal issues. Competition authorities have been reducing barriers to co-ordination to tackle environmental issues. Sheldon Mills also gave the example of the Facebook decision rendered by the German authority, noting that it may be a decision on abuse of dominance, but significant consideration is also given to enhancing data protection standards. In closing, Mr Mills also noted that the FCA is expecting to engage with more antitrust cases going forward, particularly in light of Brexit. To conclude, Mr Mills stated that the FCA is expecting more antitrust cases, especially as a consequence of Brexit.

## Frédéric Palomino

Frédéric Palomino mentioned that the European Commission has dealt with many cases over the past years concerning financial markets, such as the *CDS* case, the *LIBOR* cases, the *Forex* case and the *Euribor* case, in which the General Court brought another layer of thinking on what could be undertaken. Mr Palomino noted that financial services are a heavily regulated industry and that those cases have been conducted by DG COMP rather than a sector regulator. He draws an analogy with the settlement of Barclays in 2012 in the U.S.; the case was not brought by the antitrust division but the fraud division of the Department of Justice.

**"MORE ELABORATED THEORIES OF HARM BE DEVELOPED TO DEAL WITH THE EXCHANGE OF NON-PRICE-RELATED INFORMATION."**

**FRÉDÉRIC PALOMINO**

Furthermore, Frédéric Palomino distinguished cases about the exchange of information on prices or information related to prices, which the General Court confirmed constitutes an infringement by object and other types of exchange of information. The General Court found, for example, that exchange of non-price-related information (e.g. information on trading positions) is not an infringement by object. Theory of harm is necessary to find infringement by effect. Mr Palomino expressed hope that more sophisticated analysis and more elaborated theories of harm be developed to deal with the exchange of non-price-related information. Then, he focused on syndicated loans and bundling, concerning which several risks were identified by the European Commission in its report released in 2019, including antitrust risk and market manipulation risk. The different risks raise the question of what authority has jurisdiction over those issues.

## Daniela Bowry-Blum

Daniela Bowry-Blum reminded the scope of antitrust rules, noting that market investigations are useful for looking at some of the structural market problems and competition issues that antitrust rules do not capture. She insisted on the fact that, although competition authorities are both implementing antitrust rules and conducting market investigations, it should be made clear what tool is being used. When financial regulators are also investigating companies' conduct and prudential elements, it becomes unclear whether the analysis is that of competition dynamics or that of the company's conduct. Ms Bowry-Blum noted the increasing trend of regulators to look not just into the functioning of markets, barriers to entry and expansion innovation, but also into consumer outcomes.

In response to the question raised by Matthew Readings of whether there is a risk of regulators deciding how the market outcomes ought to be rather than just letting markets evolve and intervene depending on the outcomes observed, Ms Bowry-Blum noted that authorities are not picking winners or losers but rather focus on consumers. She mentioned that the work of the UK Competition and Markets Authority on loyalty penalty, explaining that it is interesting in that regard since loyalty penalty is a symptom of the good functioning of markets; it reveals that firms are competing to attract new customers. If regulators were to discourage that sort of behaviour, they would focus on market outcomes rather than letting the markets operate. Ms Bowry-Blum emphasised the intersection between economics and competition policy.

**"ALTHOUGH COMPETITION AUTHORITIES ARE BOTH IMPLEMENTING ANTITRUST RULES AND CONDUCTING MARKET INVESTIGATIONS, IT SHOULD BE MADE CLEAR WHAT TOOL IS BEING USED."**
DANIELA BOWRY-BLUM

## Questions & Answers

Following Sheldon Mills's remarks on sustainability, a participant asked about the risk that competition drives financial services firms to continue seeking profit from investments that are not sustainable. Sustainable finance raises questions of information sharing and collective boycott in case of collaboration. Mr Mills explained that normally markets respond to demand signals and signals that not only come from consumers but society as a whole. Markets respond and correct when science, information and transparency flow through. Despite those dynamics, a nudge might be necessary, to empower firms to act more rapidly. Mr Mills mentioned the Netherlands' guidelines aiming at allowing certain types of coordination and collaboration to proceed.

A participant raised the question of whether card schemes and other big tech firms with a global dominant position acting as gatekeepers should be treated similarly, in the sense that similar tools should apply to them. Ms Brandtner noted that some of those firms have in common to operate as their ecosystems. She stressed that some of them can leverage market power resulting from their gatekeeper position while not being dominant. Some of them even compete with the users of their own platforms, such as companies offering services on their platforms. Ms Brandtner observed that it is unclear whether card schemes operate in the same way as digital platforms. She also reminded that the European Commission is in the process of preparing the Digital Services Act, which would apply to companies with strategic market significance. Those companies may want to pivot into regulated industries, such as financial services. This raises the question of whether additional regulatory tools should be adopted about financial services.

Another participant asked about the cooperation between the European Union and the United Kingdom regarding financial services and antitrust enforcement, as we are nearing the end of the transition period. Ms Brandtner and Sheldon Mills mentioned that regarding existing cases the same cooperation arrangements that have been in place for decades will remain applicable. They explained that intense negotiations on both sides of the Channel are taking place and referred to information on those negotiations that has been made publicly available.

Finally, Sheldon Mills answered a question about cooperation between the FCA and the CMA in the post-Brexit era. He explained that the intention is to maintain the regime currently in force, which already allows for considering which authority is best placed to investigate the case. Going forward, the allocation of cases and deciding who is best placed between the FCA and the CMA may increasingly need to consider the resources available across both authorities. He clarified that both authorities are perfectly able to drive forward all financial services' antitrust cases but the assessment of resources of each authority will allow prioritisation and foster efficiency. ■