



EU, COMPETITION AND REGULATED MARKETS

HSBC and JPMorgan Chase Appeal European Commission's Cartel Decision and Fine

by **Marco Hickey**

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HSBC and JPMorgan Chase are appealing the European Commission's decision of December 2016 to impose fines on Crédit Agricole, HSBC and JPMorgan Chase for their participation in a cartel. Cartels are prohibited under EU competition law and this particular cartel related to interest rate derivatives. Notification of the appeals was published in the Official Journal of the European Union on 10 April 2017.

Background

The Commission fined Crédit Agricole, HSBC and JPMorgan Chase a total of €485 million for participating in a cartel in euro interest rate derivatives. In its press release, the Commission said the banks had colluded on euro interest rate derivative pricing elements, and exchanged sensitive information, in breach of competition rules. JP Morgan, HSBC and Credit Agricole were fined €337.2m, €33.6m and €114.7m respectively.

It was alleged that they were part of a seven-bank cartel that colluded between September 2005 and May 2008 to distort the Euribor interest rate, which was set using quotes submitted by a panel of banks and is widely used in international money markets. The alleged members of the cartel included Barclays, Crédit Agricole, HSBC, JPMorgan Chase, Deutsche Bank, RBS and Société Générale. Barclays, as the whistleblower, avoided a penalty because it notified the Commission. Four other banks had previously admitted their involvement in the cartel, enabling the Commission to settle the case with them and impose fines in December 2013.

The Commission found that the participating traders of the banks were in regular contact through corporate chatrooms or instant messaging services. The aim of the traders was to distort the normal course of pricing components for euro interest rate derivatives. They did this by telling each other their desired or intended EURIBOR submissions and by exchanging sensitive information on their trading positions or on their trading or pricing strategies. Such action constituted an infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Appeals

In response to the Commission's 2016 decision, HSBC and JPMorgan Chase have lodged appeals with the General Court of the European Union (the General Court). Both appeals aim to have the Commission's 2016 decision annulled, or else to get the fine reduced and to agree a new date for payment of the fine and interest.

The grounds for appeal are summarised below.

HSBC

The Commission found HSBC to have participated in the cartel for one month and imposed a fine of €33,606,000. HSBC appealed.

- The Commission wrongly concluded that HSBC engaged in conduct that has as its object the restriction and/or distortion of competition within the meaning of Article 101(1) of the TFEU.
- The Commission erred in law and fact and/or gave insufficient reasons for finding that the conduct identified in the contested decision pursued a single economic aim of distorting competition. Therefore, the Commission's finding that there was a single and continuous infringement is fundamentally flawed.
- The Commission made manifest errors of assessment and lacked reasoning in finding that HSBC intentionally contributed to the single and continuous infringement described.
- The Commission made manifest errors of assessment and lacked reasoning in finding that HSBC was or ought to have been aware of the conduct of the other alleged participants in the single and continuous infringement.
- The Commission infringed essential procedural requirements in the process leading to the adoption of the contested decision. It infringed HSBC's rights of defence, the principle of the presumption of innocence and the principle of good administration by adopting a staggered administrative procedure.
- The Commission wrongly calculated the fine imposed on HSBC and, as such, the fine is unjustified and disproportionate.

JPMorgan Chase

- The Commission found JPMorgan Chase to have participated in the cartel for five months and imposed a fine of €33,196,000. JPMorgan Chase appealed.
- The Commission has failed to show that JPMorgan Chase's conduct pursued the object of manipulating EURIBOR tenors or EONIA (benchmark interest rates). The evidence shows that JPMorgan Chase did not pursue any anti-competitive object within the meaning of Article 101(1) of the TFEU.
- The Commission erred in law in finding that the object of the alleged manipulation of EURIBOR tenors or EONIA was an object of preventing, restricting or distorting competition within the meaning of Article 101 of the TFEU.
- The 2016 Commission decision does not find, and the Commission cannot now argue or establish, any other anti-competitive object against JPMorgan Chase than manipulating EURIBOR tenors or EONIA.
- The Commission has failed to establish that JPMorgan Chase participated in a single and continuous infringement. In particular, the conduct found by the Commission to infringe Article 101 did not pursue a single aim. Alternatively, JPMorgan Chase was not aware of the infringing conduct of the other parties and could not reasonably have foreseen it; or did not intend to contribute by its conduct to a common plan with an anti-competitive object.
- The Commission acted contrary to the fundamental principles of EU law, good administration, the presumption of innocence, and the applicants' rights of defence, by having pre-judged the case against them in the way it applied the "hybrid" settlement process, and by expressions of pre-judgment by the then Commissioner for Competition Policy, Mr Joaquín Almunia.
- The Commission erred in calculating the fine imposed on JPMorgan Chase in a number of ways. It should have applied greater mitigation and lower gravity and "entry fee" adjustments to reflect JPMorgan Chase's peripheral and different role as found by the Commission. In addition, the Commission failed to apply the same method for calculating value of sales to each party, with the result that JPMorgan Chase has been treated less favourably without objective justification. Further, the Commission should have applied a greater discount in relation to JPMorgan Chase's cash receipts figures to reflect its relative economic strength and should not have included EONIA sales in its value of sales calculations.

For more information, please feel free to contact Marco Hickey, Partner and Head of the EU, Competition and Regulated Markets team at mhickey@lkshields.ie. Marco is the author of [Merger Control in Ireland](#) published by Thomson Reuters.

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