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Hybrid Settlements and The Presumption of Innocence: The ECJ Rubber Stamps the Commission's Practice in HSBC Holdings and Others v Commission (C-883/19 P)

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On January 12th 2023, the European Court of Justice (ECJ) issued its long-awaited judgment in C?883/19 P *HSBC v Commission* setting aside the judgment of the General Court (GC) but confirming the European Commission's finding that HSBC had participated in a cartel in the market for Euro Interest Rate Derivatives (EIRD).

The judgment clarifies the procedural safeguards that the Commission needs to respect in order to guarantee the presumption of innocence of the parties in hybrid settlements and ratifies the Court's previous endorsements of the Commission's practice in this type of case. The judgment also provides critical guidance on the assessment of information exchanges in the financial services sector and in what scenarios they can amount to a restriction by object of Article 101 TFEU.

The Commission's Decision

On December 4th 2013, the Commission issued a decision fining Barclays, Deutsche Bank, RBS and Société Générale for their participation in a cartel in the market for Euro Interest Rate Derivatives linked to the Euro Interbank Offered Rate (Euribor) and/or the Euro Over-Night Index Average (EONIA). The decision was adopted following the Commission's Settlement procedure under which the four banks admitted to the facts presented by the Commission and obtained a 10% reduction of the fine (the Settlement Decision).

The investigation into HSBC, Crédit Agricole and JP Morgan involved in the conduct under investigation was finalised under the standard sanctioning proceedings, insofar as there was not sufficient common understanding with the Commission and the EC decided to discontinue the settlement procedure in relation to them.

On December 7th 2016, the Commission issued a decision establishing the participation of HSBC, Crédit Agricole and JP Morgan in the EIRDs cartel (the 2016 Decision). In particular, the Commission found that HSBC had participated in a single and continuous infringement of Article 101(1) TFEU consisting of the exchange of commercially sensitive information relating to trading positions and pricing intentions and strategies concerning EIRDs as well as the manipulations of

submissions to Euribor. A fine of EUR 33,606,000 was imposed on HSBC.

HSBC challenged the 2016 Decision before the General Court (Case T-105/17) arguing, in essence, that the Commission had erred in finding an infringement by object and violated the presumption of innocence and rights of defence of HSBC throughout the sanctioning proceedings

The GC largely dismissed HSBC's action and upheld the Commission's findings that HSBC had participated in an infringement. However, the Court annulled the fine imposed on HSBC on the basis of the Commission's failure to state sufficient reasons in the determination of the value of the sales used as the basis for calculating the fine and the reduction factor. The General Court was, therefore, unable to conduct a review of the fine imposed on HSBC.

Subsequently, the European Commission adopted a decision amending the 2016 Decision and imposing a slightly lower fine of 31.7 million euros in 2021 on HSBC. This subsequent decision was also challenged in a separate case (Case T-561/21).

The judgment of the Court of Justice

HSBC appealed the GC judgment and put forward six grounds for appeal. The first ground concerned the presumption of innocence, the right to good administration and HSBC's rights of defence. The second, third and fourth grounds concerned the Commission's finding that the manipulation of the three-month EURIBOR rate and the exchange of information on mids (a term used to refer to the mid-point or average of the bid and offer prices for a particular product) constituted an infringement by object. Finally, the fifth and sixth grounds of appeal related to the Commission's finding that the conduct pursued a single aim and HSBC's participation in a single and continuous infringement.

The ECJ upheld the first and third grounds of appeal and as a result set aside the GC judgment, as explained in more detail below. The other grounds were rejected for being unfounded, ineffective or inadmissible. Finally, the Court considered the state of the proceedings and allowed it to give a final judgment on the matter.

The presumption of innocence, the right to good administration and the rights of the defence

In the first place, HSBC claimed that the GC erred in assessing its pleas that the Commission had already prejudged the liability of the company before the 2016 Decision was adopted since the Settlement Decision already found that HSBC was part of the anticompetitive practices, although the settlement procedure was not addressed to this particular company.

In particular, HSBC argued that the GC applied the wrong test when it held that the lack of objective impartiality by the Commission would only lead to an annulment of the Commission's decision if HSBC had established that the 2016 Decision would have been different if the Commission had respected the presumption of innocence of HSBC.

In its ruling, the ECJ first noted that the principle of impartiality, which is part of the right to good administration, must be distinguished from the presumption of innocence. In addition, the ECJ

highlighted that the principle of impartiality applies in competition law cases in which fines or periodic penalty payments can be imposed. Finally, the Court clarified that the presumption of innocence would be infringed if, in the absence of a final conviction, there is a clear declaration by the authority that the person concerned has committed the infringement.

However, the Court added that it could be objectively necessary for the Commission to refer to certain facts and conducts concerning participants in the alleged cartel which are the subject of the standard procedure. In such situations, no more information than that strictly necessary should be included in the settlement decision about those undertakings that are not part of it. Additionally, the wording of the settlement decision should be carefully considered in order to ensure that the presumption of innocence of non-settling undertakings is preserved.

The Court concluded that a violation of the principle of impartiality and of the presumption of innocence can vitiate the entire procedure that led to the adoption of the 2016 Decision and therefore the GC should have analysed the Settlement Decision in its entirety to ascertain whether the conditions above were met in this case.

As a result, the ECJ upheld the first ground of appeal. However, as regards the substance of the case, when the Court moved to render its final judgment on the matter, it concluded that the Commission had taken adequate drafting precautions to respect the presumption of innocence of HSBC throughout the proceedings.

In its reasoning, the Court considered that the Commission had included various explicit disclaimers in order to exclude the establishment of liability of the non-settling parties. The Court, therefore, considered that the Commission did not prejudge the liability of those parties, and were only mentioned to the extent strictly necessary for the understanding of the facts of the case.

Interestingly, the Court also analysed the public statements made by the Commissioner in charge of competition policy back then but concluded that, although the declarations may have not reflected the caution required from a Commissioner in these cases, they could not vitiate the legality of the 2016 Decision, thereby finally dismissing HSBC's action in this regard.

The characterisation of the exchanges of information as an infringement by object

Through its second ground of appeal, HSBC claimed that the GC incurred an error of law in concluding that the attempt to manipulate the three-month tenor of Euribor constitutes an infringement by object.

The ECJ rejected this argument and endorsed the GC's finding that the exchange of information revealed a sufficient degree of harm to competition and constituted an infringement by object. In particular, the ECJ ruled that even if the exchange of information did not have an effect on consumer prices, it did alter the normal structure and functioning of the market and, therefore, competition as such. In addition, the ECJ confirmed that the GC was right to conclude that, by agreeing on the level of a variable capable of determining the fixed rate of EIRDs, the traders knowingly substituted the risk of competition for practical cooperation between them, created a situation of informational asymmetry between market participants and reduced the degree of uncertainty in the market for EIRDs to the detriment of competition. Therefore, the GC was entitled to conclude that these information exchanges constituted an infringement by object.

In the third ground of appeal, HSBC challenged the GC's consideration that, apart from the ancillary restraints doctrine, the alleged procompetitive effects of the exchange of information on mids could only be analysed in the context of Article 101(3) TFEU, concluding as a result that HSBC should have demonstrated that the information exchanges "*were directly related and necessary to the functioning of the EIRD market or that they met the conditions in Article 101(3) TFEU*" (para 142).

The ECJ ruled that the GC erred in law, and it should have examined the arguments concerning the pro-competitive effects of the information exchanges on mids argued by HSBC as elements capable of calling into question the overall assessment of whether the concerted practice revealed a sufficient degree of harm to competition and should therefore be characterized as a restriction by object. As a result, the ECJ decided to uphold the third ground of appeal.

However, when giving its final judgment on the matter, the Court rejected HSBC's arguments that the exchange on mids was pro-competitive and allowed the banks to narrow the bid/offer spread and, therefore, the price paid by customers. In particular, the ECJ ruled that, even if they were established, the alleged pro-competitive effects were not sufficiently significant to cast doubts on the degree of harm to competition caused by the exchanges in a case in which it had established that the exchanges of information reduced the uncertainty as to the key aspect of the banks' strategy and conduct in a market in which the management of risk and uncertainties constitutes one of the key parameters of competition.

Conclusion

The judgment is significantly important for all the parties involved in the so-called hybrid settlements. On the one hand, it validates the Commission's practices in those cases in which parties drop from the settlement discussions and the Commission decides to continue with the rest not allowing the non-settling parties to hijack the process. On the other hand, it gives comfort to the parties involved in this type of case as to the boundaries that the Commission has to consider in order to respect their rights of defence. Finally, it also makes clear the legal standard against which the Commission decisions will be reviewed by the courts.

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