

COMPETITION LAW AND LIBOR IN THREE JURISDICTIONS: US, UK AND EU

The London Interbank Offered Rate, better known as LIBOR, has ridden turbulent times over the last decade. Major banks, either through the collusion of individual traders operating on a discrete basis or on the instructions from more senior personnel, but always trading across national borders and on a global level, fixed the rate for at least four years. This resultant rigged market worked to limit competition and led to massive profits for the banks and individual traders. Furthermore it enabled banks to be insulated from the shocks of the market during the financial crisis of 2007-2008 and the consequences of that crisis.

The USA and UK are currently the largest and most important financial markets in the world, markets where most of the LIBOR manipulation took place, with the EU setting competition law standards for the European region. Therefore, this chapter will investigate this market manipulation through the lens of competition law, and specifically price fixing, from the perspective of the three jurisdictions of the USA, the EU, and the UK. Part one will describe the LIBOR system and the manipulation that took place before part two details the competition law requirements for each jurisdiction for enforcements at the public level, both civil and criminal, and at the private level. Part three will document the competition actions in the three jurisdictions that have taken place so far. Finally in part four the effectiveness of these actions will be examined, identifying problems and solutions for competition regulation of banking practices and questioning the current philosophical basis for competition regulation in general.

LIBOR AND MANIPULATION

The LIBOR was established in 1986 when the British Bankers' Association (BBA), the trade association of banks, recognised that banks were trading with each other in many new financial instruments without any reference rate against which these trades could be assessed. It was considered that in a market of floating interest rates, the underlying principle of which was to allow the market to determine the borrowing costs¹, a benchmark rate would allow banks to trade with one another with relative market certainty thereby ensuring the stability of the global interbank trading system. LIBOR is the benchmark interest rate as determined in London, which over time became the average market rate, against which the largest and ostensibly safest banks in the world can borrow from, or lend to, each other on the global market. This London interbank market has enabled banks in need of cash to obtain

¹ J Macey, 'LIBOR: Three Scandals in One' <https://www.foreignaffairs.com/articles/2012-07-20/libor-three-scandals-one>, last accessed 1 April 2016

US Dollar deposits (known as Eurodollar deposits) either overnight or for fixed terms from banks with excess cash. Consequently LIBOR, over time, came to be utilised by major banks as a tool to enable large corporate loans to be referenced to a collective interest rate objectively accepted by multiple banks and parties in such deals. These LIBOR-based interest rates were incorporated into financial contracts, the value of which grew significantly until LIBOR was eventually given the dubious epithet as the “world’s most important number”².

At the time of the LIBOR scandal the rate was constructed under the umbrella and ownership of the BBA, though it was Thomson Reuters who gathered the information, calculated the rate and published it. During the scandal time period, each day LIBOR was set for fifteen maturities in ten different currencies. Banks were selected by the BBA to make up panels of banks for each currency (known as Contributor Banks), on the basis of the scale of market activity, credit rating, and perceived expertise in the currency concerned. Purported rules for the conduct of LIBOR and Contributor Banks were published by the BBA³, to which Contributor banks had to agree in order to remain on the LIBOR panels. Each Contributor Bank had to submit its contribution by answering the question, “At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?” and without reference to rates contributed by other Contributor Banks, determined by the Contributor Bank’s staff primarily responsible for management of that bank’s cash rather than its derivative trading book, without reference to the pricing of any derivative financial instrument, and that represented the rates it could borrow unsecured inter-bank funds in the London money market⁴. These rates were tabulated, the top and bottom sections (normally between the top and bottom 15-25%) excluded and the remaining figures averaged to create a mean rate published as the LIBOR fixing at about 1130 each day.

Regulation of the LIBOR setting process by the BBA and Thompson Reuters was highly limited. As a consequence LIBOR manipulation could be instigated by one of two different levels of market players, for two different purposes. The first market player was at the trader level, where individual traders could collude with other traders for Contributor Banks to submit rates conducive to the individual traders

² D MacKenzie, ‘What’s in a Number?’ (2008) 30 LRB 11, “The British Bankers Association’s London Interbank Offered Rate matters more than any other set of numbers in the world.”

³ At the time these were published on the website <http://www.bbalibor.com/explained/the-basics>, not now available. They can still be accessed at <http://www.bbatrent.com/explained/the-basics>, last accessed 1 April 2016

⁴ At the time these were published on the website <http://www.bbalibor.com/technicalaspects/setting-bbalibor>, not now available. They are set out in the US Department of Justice’s Letter, Reference USB AG, <http://www.sec.gov/Archives/edgar/data/1114446/000119312513106100/d497201dex43.htm>, dated 18 December 2012 Appendix A, paragraph 7, last accessed 1 April 2016

stock and trade portfolios (known as “trader manipulation”⁵). The purpose here was to fix prices with the sole motivation of profit by seeking to benefit the bank’s trading positions. When the bank was operating alone to manipulate LIBOR then the bank and traders involved benefitted materially by this misconduct at the expense of other traders, banks and market participants. Where the bank colluded with other market operators, profit was maximised at the expense of those banks and traders that were not a party to this collusion.

The second market player was at more senior management level, where instructions were given to traders to submit artificially lower LIBOR submissions (known as “lowballing”⁶). The purpose here was to fix prices in order to increase market confidence in the banks and thus either sustain or increase profits. Liquidity of banks was a central concern during the 2007-2008 financial crisis and it was considered that if a bank over a period of time submitted higher than average assessments for LIBOR then this indicated an issue with liquidity and an inability to raise funds. This would then be reported in the media, undermining confidence in the bank and its trading position on the market, and thereby reducing bank profits. A further problem could occur if it became clear that some Contributor Banks were submitting higher than expected rates for LIBOR, thereby leading to claims that these banks were afraid to lend to one another, reducing confidence in those banks and diminishing profits. Therefore manipulation of submission rates, and consequently LIBOR itself, through collusion between banks would again fix prices at the expense of other market operators.

COMPETITION LAW PROVISIONS AND REGIMES OF THE US, EU & UK

Competition law is a relatively simple concept⁷, although the policy that underpins it is more complex and vague. In a perfectly competitive market there are a large number of buyers and sellers with perfect information, producing homogenous goods and services, and with no barriers to entry or exit to or from the market⁸. The market under perfect competition provides optimum allocative and productive efficiency⁹, with consumer welfare maximised, a measure aimed specifically at the limited group classified as consumers rather than the wider society in general.

⁵ Financial Service Authority, Internal Audit Report: A review of the extent of awareness within the FSA of inappropriate LIBOR submissions’ March 2013, <http://www.fsa.gov.uk/static/pubs/other/ia-libor.pdf>, last accessed 5 April 2013, 3

⁶ Ibid.

⁷ R Whish, D Bailey, *Competition Law* (8th edn OUP, Oxford 2015) 4. See also RM Steuer, ‘The Simplicity of Antitrust Law’ (2012) 14 University of Pennsylvania Journal of Business Law 543 where antitrust law is summarised as combating bullying and ganging up

⁸ Whish, *Competition Law* (n 7) 4

⁹ Ibid 5

Unfortunately perfect competition and the resultant perfect market are for the most part illusions, never to occur in the real world. The assumptions are theoretical and unlikely to be replicated in the practical world¹⁰, where human intervention and behaviour can lead to distortions in competitive conditions leading to market failure and imbalance, and subsequently concerns over fairness and harm to consumer welfare. It is at this point of failure of the market that the law steps in. The result of leaving the market to function devoid of legal and regulatory control is clearly demonstrated by the “Robber Barons”¹¹ of the nineteenth century that led to the adoption of the Sherman Act in the USA.

There are three possibilities for the law to regulate competition through legal regimes and enforcement: civil public; criminal public; and, civil private.

i. The USA

a. Civil Public Enforcement

In the USA the principle legislative instrument dealing with price-fixing is Section 1 of the Sherman Act 1890, which states, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” To establish infringement four element must be proved: an agreement; between separate parties; an unreasonable restraint of trade; and, that operates inter rather than intrastate. The Antitrust Division of the Department of Justice (DoJ (AD)) has exclusive jurisdiction to enforce Section 1 of the Sherman Act, although the Federal Trade Commission (FTC) can investigate non-hard core cartel violations under Section 5 of the Federal Trade Commission Act 1914¹².

The most important element of any Section 1 infringement is the establishment of an agreement¹³. This can be formed either horizontally, between competitors, or vertically, between companies operating on different levels of economic activity. At the horizontal level, it must be established that there was a meeting of minds between the parties¹⁴, which can be proved by either primary, direct proof, or

¹⁰ Indeed as Whish points out (ibid 8), perfect competition will lie at one end of a scale with monopoly at the other

¹¹ For a layman’s account see T McNeese, *The Robber Barons and the Sherman Antitrust Act* (Chelsea House Publishers 2009). For a more robust legal account see WD Collins, ‘Trusts and the Origin of Antitrust Legislation’ (2013) 81 Fordham Law Review 2279

¹² Section 5(a)(2) empowers the FTC to enforce the prohibition of unlawful “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce” set out in Section 5(a)(1). See FTC Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, dated 13 August 2015

https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf, last accessed 1 April 2016

¹³ D Broder, *U.S. Antitrust Law and Enforcement* (2010 OUP, Oxford) 37

¹⁴ *Copperweld Corp v Independence Tube Corp*. 467 US 752, 771 (1984)

secondary evidence, made up primarily of circumstantial evidence from which an agreement can be inferred.

The second element comes into play when a corporate entity trades with a subsidiary. If that subsidiary is whole owned by the corporation then there is not enough separation between the two entities for there to be meaningful trade on which Section 1 can bite, and so the parent and subsidiary companies are a single enterprise¹⁵. However, the Supreme Court in *Copperweld* left open the situation where the subsidiary was less than wholly owned by the parent company. As such the legal position of parent and subsidiary remains ambiguous, not helped by equivocal Supreme Court judgments on the matter¹⁶.

The unreasonable restraint of trade requirement has been split up into two possible categories by the courts – agreements deemed *per se* illegal and agreements considered to be unreasonable after examination under the rule of reason principle. It is enough for present purposes to state that horizontal price fixing is the classic *per se* Section 1 violation¹⁷, which requires no further investigation once proven.

Finally the need for intrastate violation requires the Sherman Act, like all federal statutes, to comply with the Commerce Clause of the US Constitution¹⁸. Section 1 does so explicitly but also provides for an international dimension by including agreements that restrain trade with foreign nations.

b. Criminal Public Enforcement

The latest updated version of Section 1 of the Sherman Act 1890 continues with, “Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.” The DoJ(AD) has exclusive authority for criminal enforcement at the federal level.

The effect of Section 1 is that all abuses of the antitrust laws are criminal violations. However, in practice the DoJ only instigates criminal action against hard-core cartels, which includes price-fixing, and will prioritise criminal enforcement for these activities over civil enforcement¹⁹.

¹⁵ Ibid 771-777

¹⁶ E.g. *American Needle, Inc. v. National Football League* 560 US 183 (2010) – see JM Schmitt ‘Antitrust’s Single-Entity Doctrine: A Formalistic Approach for a Formalistic Rule’ (2012) 46 Columbia Journal of Law and Social Problems 93 for a highly critical analysis

¹⁷ (n 13) 46

¹⁸ Article 1, Section 8, Clause 3 of the US Constitution

¹⁹ US Department of Justice, “Antitrust Division Manual” (5th edn Department of Justice, Washington 2015) III-12

In September 2015 the Deputy Attorney General Sally Quillian Yates sent a memorandum²⁰ to all DoJ attorneys instigating a DoJ initiative to hold individuals responsible for corporate misdeeds, both criminal and civil. Although it was suggested that this was a new initiative, it actually simply reinforced previous policy, and this was emphasised by Deputy Assistant Attorney General Brent Snyder of the Antitrust Division in a conference speech at Yale School of Management in February 2016²¹.

c. Civil Private Enforcement

The third strand of antitrust enforcement is that by private litigants. Section 4 of the Clayton Act 1914 allows the recovery of damages by “any person injured in his business or property by reason of anything forbidden in the antitrust laws”, with a successful litigant being able to claim three times the damage (treble damages) and costs. Section 4A enables the US to act as a private litigant and to also claim treble damages. To prove a claim, the claimant must establish both constitutional and antitrust standing. For the former, a mere showing of harm will establish the necessary injury. The latter, however, is more complex.

Two strands must be proven for antitrust standing. The first is an infringement of the antitrust laws, which follows the principles above (antitrust violation). The second is the actual establishment of antitrust standing. This antitrust standing itself contains two requirements: that the claimant suffered a special type of antitrust injury; and, the claimant is a suitable candidate to pursue the alleged antitrust violations and thus is an ‘efficient enforcer’ of the antitrust laws²². In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*²³ the Supreme Court held that for the claimant to prove an antitrust injury then it must be an “injury of the type the antitrust laws were intended to prevent”²⁴ and that the antitrust laws were designed to protect competition rather than competitors. As such this question is one of causation²⁵ in which the claimant must prove the particular injury was caused by the proven anti-competitive activity of the defendant. In *Illinois Brick Co. v. Illinois*²⁶ the Supreme Court identified a number of factors when considering this issue including *inter alia*: the causal connection between the alleged antitrust violation and the plaintiff’s harm; the defendant’s motive; the nature of the alleged injury; and “the directness or indirectness of the asserted injury.” For the efficient enforcer a number of factors are taken into account: the directness or remoteness of the violation and cause of injury; the identifiable

²⁰ Deputy Attorney General Sally Quillian Yates’ Memorandum ‘Individual Accountability for Corporate Wrongdoing’ dated 9 September 2015 <https://www.justice.gov/dag/file/769036/download> last accessed 12 August 2016

²¹ Deputy Attorney General Bent Snyder ‘Individual Accountability for Antitrust Crimes’ dated 19 February 2016 <https://www.justice.gov/opa/file/826721/download> last accessed 12 August 2016

²² *Gatt Comm., Inc. v. PMC Assocs., LLC*, 711 F.3d 68, 75 (2d Cir. 2013)

²³ 429 US 477, 489 (1977)

²⁴ *Ibid.*

²⁵ 431 US 720 (1977)

²⁶ *Ibid.* 536-545

other class of persons whose self-interest would normally lead them to sue for the violation: the speculative nature of the injury; and, the possibility to identify further claimants who could recover duplicate damages and the difficulty in apportioning damages to actual and potential victims.

A party suffering an antitrust injury as the result of an antitrust infringement that is a *per se* violation, such as price-fixing, would be highly likely to satisfy the necessary elements to establish liability.

ii. The European Union

a. Civil Public Enforcement

The EU equivalent to Section 1 of the Sherman Act is Article 101(1) TFEU. This holds that “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions...” To establish infringement there are three elements: an agreement between undertakings, decisions by associations of undertakings or a concerted practice; the impact of which affects trade between Member States; and, has the object or effect to prevent, restrict or distort competition within the internal market. The Directorate-General for Competition of the European Commission is responsible for investigation and enforcement of the competition law provisions²⁷. Any agreements or decisions found to infringe Article 101(1) TFEU are automatically void²⁸.

The first, and most important, element is the requirement for an agreement, a decision of an association of undertakings or a concerted practice. For an agreement there must be “the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties’ intention”²⁹. As with the situation in the USA, agreements can be either horizontal or vertical with the Court of Justice of the European Union (CJEU) holding that the standard of proof, as set out above, is applicable to both³⁰. If a cartel is coordinated through decisions of a trade agreement then these can also come within the scope of Article 101(1) TFEU in so far as their own activities or those of the undertakings affiliated to them are calculated to

²⁷ First granted powers under Regulation 17/62 the First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 204/62, now updated by Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1

²⁸ Article 101(2) TFEU

²⁹ Case T-41/96 *Bayer v Commission* [2000] ECR II-3383 para 69 – see O Black, ‘Agreement: Concurrence of Wills, or Offer and Acceptance?’ (2008) 4 European Competition Journal 103

³⁰ Case C-260/09 P *Activision Blizzard German GmbH v Commission* [2009] ECR I-419

produce the results which the association aims to suppress³¹. The third situation that comes within the scope of Article 101(1) TFEU is that of concerted practices. The aim of the term “concerted practices” is to extend the prohibition of Article 101(1) TFEU to “a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition”³². The CJEU further developed this so that Article 101(1) TFEU strictly prohibits “any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.”³³

The second element requires inter-Member State trade, which defines “the boundary between the areas respectively covered by [EU] law and the law of the Member States”³⁴. With the introduction of Regulation 1/2003³⁵, the “Europeanisation” of most Member States’ competition laws and the introduction of the European Competition Network³⁶ this delineation takes on greater importance with the Commission issuing ‘Guidelines on inter-State trade’³⁷.

The third and final element requires there to be an object or effect of preventing, restricting or distorting competition. As the CJEU has made clear this is to be read disjunctively rather than conjunctively³⁸. Article 101(1) TFEU provides a non-exhaustive list of examples of hard-core cartels, one of which is price-fixing. This effectively means that price fixing is a *per se* violation and the Article 101(3) TFEU defence would not apply.

b. Criminal Public Enforcement

Competences of the European Union are outlined in Title I, TFEU and do not include criminal enforcement of EU laws. Therefore the Commission has no powers to bring a criminal enforcement action against a cartel.

c. Civil Private Enforcement

As with criminal enforcement, once again there is no option for individuals to bring an action for damages in the CJEU or General Court (GC). However, the CJEU has given guidance over private actions in national courts for the enforcement of rights

³¹ See Joined Cases 96-102, 104, 105, 108 & 110/82 *IAZ International Belgium NV v Commission* [1983] ECR 3369 para 20

³² Case 48/69 *ICI v Commission* [1972] ECR 619 para 64

³³ Joined Cases 40-48, 50, 54-56, 111 & 113-114/73 *Suiker Unie v Commission* [1975] ECR 1663 para 174

³⁴ Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869 para 17

³⁵ (n 27)

³⁶ See the Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43

³⁷ Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81

³⁸ Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, 249

under the competition laws when the national courts are acting as European courts. Indeed as Articles 101 and 102 TFEU are directly applicable and thus produce direct effects, any individual can bring an action in a domestic court to enforce the right to damages³⁹. In *Manfredi*⁴⁰ the CJEU stated that to ensure the total effectiveness of Article 101(1) TFEU “any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101(1) TFEU]”⁴¹. The difficulty though is to determine whom to include as “any individual”. In the 2014 Damages Directive⁴² Article 3 requires Member States to ensure that “any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm”. Full compensation must be available for direct and indirect purchasers from an infringer⁴³, although the infringer may claim a partial defence of the passing on of overcharge compensation⁴⁴. However, the injured party must still be fully compensated and so this provision seeks to regulate compensation levels between multiple parties, with full compensation being equated with actual damage and devoid of augmentation by “punitive, multiple or other types of damages”⁴⁵.

iii. The UK

a. Civil Public Enforcement

The central provisions of the UK's Competition Act 1998 were designed to mirror two central competition laws of the EU, namely Articles 101 and 102 TFEU. As such the Chapter I prohibition⁴⁶ in section 2(1) matches the wording of Art 101(1) TFEU albeit applicable just to the UK with similar elements to those outlined above for Article 101(1) TFEU. At the time of the LIBOR scandal the UK's national competition enforcement agency was the Office of Fair Trading (OFT), although this has now been replaced by the Competition and Markets Authority (CMA).

b. Criminal Public Enforcement

³⁹ Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297 para 26

⁴⁰ Joined Cases C-295-298/04 *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619

⁴¹ *Ibid.* para 61

⁴² Directive 2014/14/EU of the European Parliament and Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1

⁴³ *Ibid.* Article 12(1)

⁴⁴ *Ibid.* Article 12(3)

⁴⁵ *Ibid.* Article 3(3)

⁴⁶ As labeled in section 2(8)

In 2002, the UK introduced the Cartel Offence⁴⁷ into criminal law in section 188 of the Enterprise Act 2002, with a maximum sentence of five years imprisonment on indictment⁴⁸. For the Cartel Offence to be successful it must be proved that an individual dishonestly agreed, the agreement being necessarily reciprocal⁴⁹, with one or more other persons that undertakings would engage in conduct as specified in the legislation⁵⁰. That conduct includes direct and indirect price-fixing⁵¹ but only for horizontal agreements⁵², with proceedings only able to be conducted by the Director of the Serious Fraud Office or the Office of Fair Trading⁵³.

c. Civil Private Enforcement

The UK has been at the forefront of the drive in the EU to enable individuals to claim damages for harm caused by infringements of Articles 101 and 102 TFEU⁵⁴. Although the Competition Act 1998 does not specifically provide for a right to bring an action to claim damages under the Act, there is no doubt that damages are available⁵⁵. A claimant can either bring a direct standalone action in the High Court, without a previous anticompetitive finding by the Commission or OFT, or a follow-on action where there has already been a decision finding competition infringement.

For the former, the claimant would have to prove anticompetitive infringement. As there is no specific measure enabling a private action, the cause of action must be founded in tort, be that breach of statutory duty⁵⁶ or conspiracy⁵⁷, and as such the rules of the specific tort must be followed. Unfortunately these tortious rules can be restrictive and, according to the CJEU in *Courage v Crehan*⁵⁸, procedural rules of a domestic tortious action must not be employed to prohibit a party suffering damages to be able to recover. However, the right to damages is purely compensatory with no possibility of restitutionary damages being awarded⁵⁹ where compensatory damages would be sufficient⁶⁰, thereby prohibiting the possibility of double or treble damages. Indeed as Longmore LJ notes restitutionary damages can be awarded outside of the regular categories in exceptional cases but cartels are not exceptional as it would be

⁴⁷ For comprehensive analysis of the Cartel Offence see M Furse, S Nash, *The Cartel Offence* (Hart Publishing, Oxford 2004) and for a more theoretical examination see P Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (OUP, Oxford 2014)

⁴⁸ Enterprise Act 2002 section 190(1)

⁴⁹ Enterprise Act 2002 section 188(3)(a)

⁵⁰ Enterprise Act 2002 section 188(1)

⁵¹ Enterprise Act 2002 section 188(2)(a)

⁵² Enterprise Act 2002 section 189(1)

⁵³ Enterprise Act 2002 section 190(2)

⁵⁴ *Garden Cottage Foods v Milk Marketing Board* [1984] AC 130 (HL)

⁵⁵ Whish and Bailey (n 7) 328

⁵⁶ *Garden Cottage Foods* (n 54)

⁵⁷ *WH Newson Ltd and Others v IMI plc and Others* [2014] Bus LR 156 (CA)

⁵⁸ (n 39), and recognised by the Court of Appeal in the same case, *Crehan v Innpreneur Pub Company CPC* [2004] EuLR 693

⁵⁹ *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2009] Ch 390 (CA) para 109

⁶⁰ *Ibid.* para 104

difficult to see how one cartel could be more exceptional than another⁶¹. This does not mean that exemplary damages for particularly serious anti-competitive behaviour cannot be awarded⁶², so long as no penalty had already been ordered by a public competition authority⁶³. These are in addition to compensatory damages and are only awarded if the original sum is not adequate to punish the defendant⁶⁴.

Follow on actions are regulated by section 47A and 47B of the Competition Act 1998, with the procedural aspects of such regulation, at the time of the LIBOR scandal, set out in Part IV of the Competition Appeal Tribunal's 2003 Rules (CAT Rules)⁶⁵. Follow on actions can be started in the CAT or High Court, with individual action covered by section 47A and collective actions through specified consumer bodies on behalf of consumers by section 47B.

COMPETITION LAW ACTIONS

- i. The USA
 - a. Civil Public Enforcement

The DoJ has focused on criminal public enforcement rather than civil public enforcement, especially over infringement of the Sherman Act. However, the Commodity Futures Trading Commission has fined six banks a total of \$2605 million and two interdealer brokers a total of \$66.2 million for non-antitrust infringements of the Commodity Exchange Act 2006⁶⁶

- b. Criminal Public Enforcement

The DoJ has been proactive in enforcing section 1 of the Sherman Act against the banks involved in the LIBOR scandal with prosecutions of five banks. The DoJ accepted a guilty plea agreement for both Royal Bank of Scotland Plc (RBS) and Deutsche Bank AG for one count of wire fraud and one count of price fixing, which led to deferred prosecution agreements (DPAs) and fines totaling \$150⁶⁷ and \$775⁶⁸

⁶¹ Ibid. para 148

⁶² *2 Travel Group Plc v Cardiff City Transport Services Ltd* [2012] CAT 19

⁶³ *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] 2 WLR 637 (Ch) para 52

⁶⁴ *Rookes v Barnard* [1964] 1 AC 1129, 1228 (HL)

⁶⁵ SI 2003/1372, now replaced by the 2015 Rules, SI 2015/1648 Part IV for section 47A and Part V for section 47B. The CAT has also provided a more comprehensive Guide to Proceedings with, rather confusingly, Section 5 dealing with Part IV of the CAT Rules and section 47A, and Section 6 dealing with Part V and section 47B

⁶⁶ See <http://www.cftc.gov/PressRoom/PressReleases/pr7159-15> last accessed 25 April 2016. The banks were Deutsche Bank, UBS, Rabobank, RBS, Barclays and Lloyds, and the traders Icap Europe Ltd and RP Martin Holdings Ltd & Martin Brokers (UK) Ltd

⁶⁷ There were two actions, one brought against the parent company (RBS AG) and one against the subsidiary (RBS Securities Japan). The former received a fine of \$150 million for wire fraud and price fixing (see *USA v RBS* dated 5 February 2013 <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/04-12-13the-royal-bank-of-scotland-dpa.pdf> last accessed 25 April 2016) whilst the latter in a Connecticut District

million respectively. UBS, Barclays and Rabobank pleaded guilty to one charge of wire fraud and in their deferred prosecution agreements were fined \$500⁶⁹, \$160⁷⁰ and \$325⁷¹ million respectively. UBS were subsequently found to have violated the deferred prosecution agreement and were fined a further \$203 million⁷². The total fines against banks for LIBOR manipulation now amounts to \$2113 million. Although the elements of the antitrust action were not tested in court, it can be inferred that there was an agreement between banks, their employees or traders operating under their instructions, operating as individual corporate entities on the international stage by price fixing, that antitrust practice being a *per se* illegal restraint of trade. However, this only applied to RBS and Deutsche Bank.

The DoJ has also been proactive in bringing criminal proceedings against individual bank employees and traders, but these are for wire fraud rather than for price fixing. The first two Rabobank employees, Anthony Allen⁷³ and Anthony Conti⁷⁴, were convicted on 5 November 2015 after a jury trial. After an unsuccessful appeal to the District Court on Fifth Amendment grounds⁷⁵, they were sentenced to 24 months and

Court judgment received a fine of \$50 million for wire fraud that was incorporated in the total \$150 million fine of the parent company (see *USA v RBS Securities Japan* dated 6 January 2014

<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/01-13-14the-royal-bank-of-scotland-securities-japan-limited-judgment.pdf> last accessed 25 April 2016)

⁶⁸ Like RBS there were two actions, one brought against the parent company (Deutsche Bank AG) and one against the subsidiary (Deutsche Bank Group Services UK Ltd). The former received a fine of \$625 million for wire fraud and price fixing (see *USA v Deutsche Bank AG* DPA dated 23 April 2015

https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/db_dpa.pdf last accessed 25 April 2016) whilst the latter received a fine of \$150 million for wire fraud (see *USA v Deutsche Bank Group Services UK Ltd* Plea Agreement dated 23 April 2015

https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/23/dbgs_plea_agreement.pdf last accessed 25 April 2016)

⁶⁹ Like RBS there were two actions, one brought against the parent company (UBS AG) and one against the subsidiary (UBS Securities Japan Co., Ltd). The former received a fine of \$500 million for wire fraud (see *USA v UBS AG* DPA dated 18 December 2012 <https://www.justice.gov/criminal-fraud/file/836466/download> last accessed 25 April 2016) whilst the latter in a Connecticut District Court judgment received a fine of \$100 million for wire fraud that was incorporated in the total \$500 million fine of the parent company (see *USA v UBS Securities Japan Co. Ltd* dated 18 September 2013 <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/09-18-13ubs-securities-japan-co-ltd-judgment.pdf> last accessed 25 April 2016)

⁷⁰ *USA v Barclays Bank Plc* DPA dated 26 June 2012

<https://www.justice.gov/iso/opa/resources/337201271017335469822.pdf> last accessed 25 April 2016

⁷¹ *USA v Coöperatieve Centrale Raiffeisen-Boerenleenbank BA* (Rabobank) DPA dated 29 October 2013

<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/10-29-13rabobank-deferred-prosecution-agreement.pdf> last accessed 25 April 2016

⁷² *USA v UBS AG* Plea Agreement dated 20 May 2015 <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/05/22/ubs-plea-agreement.pdf> last accessed 25 April 2016

⁷³ *USA v Anthony Allen* dated 10 March 2016 <https://www.justice.gov/criminal-fraud/file/839511/download> last accessed 25 April 2016

⁷⁴ *USA v Anthony Conti* dated 10 March 2016 <https://www.justice.gov/criminal-fraud/file/839516/download> last accessed 25 April 2016

⁷⁵ *USA v Allen, Conti et al* dated 11 February 2016

<http://www.leagle.com/decision/In%20FDCO%2020160216727/U.S.%20v.%20Allen> last accessed 25 April 2016. The defendants that involuntary compelled evidence to the UK's Financial Conduct Authority could not be used in trial. Judge Rakoff held that the government had proved that its evidence derived from legitimate sources wholly independent of the compelled testimony

12 months and a day of imprisonment respectively in March 2016. They have both petitioned the US Court of Appeals for the Second Circuit appealing both their conviction and sentence. A further three defendants, Paul Robson, Lee Stewart and Takayuki Yagami, pleaded guilty through a plea bargain arrangement and await sentencing in June, whilst a further two, Tetsuya Motomura and Paul Thompson, await trial⁷⁶.

c. Civil Private Enforcement

Unsurprisingly customers of the banks involved in LIBOR manipulation and other parties suffering subsequent losses have commenced actions to claim damages for antitrust actions. These antitrust claims focused on losses through contracts for interest rate swaps that were tied to LIBOR, debt securities that paid interest tied to LIBOR (mainly individual pension accounts), futures contracts where the price paid at the settlement date was again fixed to LIBOR, and individuals who purchased or held LIBOR-based financial instruments (frequently mortgages where loans were overpaid). The first court case came before the Southern District of New York District Court in 2012⁷⁷ but Buchwald J did not allow the case to progress far. She first correctly identified the need for an antitrust injury for there to be antitrust standing⁷⁸, but then found that a *per se* violation of section 1 of the Sherman Act would not necessarily establish antitrust injury⁷⁹. For that to happen, she claimed, there would need to be competition. However, LIBOR itself was a benchmark standard, not intended to be competitive and not itself tradable⁸⁰. In effect this narrowly defined the market where an antitrust injury needed to occur as LIBOR was, by its very definition, without a competitor.

Buchwald J went on to find that the claimants could have suffered harm under normal conditions of free competition⁸¹. She based this finding on two judgments of the US Supreme Court. The first, *Brunswick Corp v Pueblo Bowl-O-Mat Inc*⁸², involved a bowling equipment company purchasing failing bowling centres, which rival centres claimed caused losses through antitrust injury. The Supreme Court held that even if rival bowling centres were injured by the continued operation of the failing centres after the takeover, that injury was not by reason of anything forbidden

⁷⁶ See DoJ Press Release dated 10 March 2016 <https://www.justice.gov/opa/pr/two-former-rabobank-traders-sentenced-prison-manipulating-us-dollar-and-japanese-yen-libor> last accessed 25 April 2016

⁷⁷ *In re LIBOR-Based Financial Instruments Antitrust Litigation* 935 F.Supp.2d 666 (2013). It should be noted that Buchwald J's judgment has been confirmed and followed in two further LIBOR cases, namely *Laydon v. Mizuho Bank, Ltd.* dated 28 March 2014 <http://www.plainsite.org/dockets/mxv0451w/new-york-southern-district-court/laydon-v-mizuho-bank-ltd-et-al/> last accessed 4 May 2016 and *7 West 57th Street Realty Co. v. Citigroup, Inc.* dated 31 March 2015 <http://cases.justia.com/federal/district-courts/new-york/nysdce/1:2013cv00981/407735/172/0.pdf?ts=1427977380> last accessed 4 May 2016

⁷⁸ Ibid. 686

⁷⁹ Ibid. 687

⁸⁰ Ibid. 688-689

⁸¹ Ibid. 689

⁸² 429 US 477 (1977)

in the antitrust laws. In the second, *ARCO*⁸³, the defendant oil company supplied petrol to its own dealers and franchised dealers that operated under its name. It conspired with these dealers to implement a vertical price-fixing scheme, setting below-market prices and forcing many independent discount dealers out of business. The Supreme Court found that cutting prices to above cost price would not involve anti-competitive activity but was in fact the very essence of competitive activity. Only by cutting prices below cost price and therefore engaging in predatory pricing would there be a possibility of antitrust injury. These cases demonstrated that injury suffered under normal conditions of free competition was not antitrust injury⁸⁴. In the LIBOR situation Buchwald J found the harm could have occurred under normal conditions of free competition because banks acting independently could have rationally submitted manipulated LIBOR figures⁸⁵. The rationality of these submissions lay in the fact that the LIBOR submission-process was not competitive⁸⁶. Therefore collusion would not have allowed them to do anything that they could not have done already⁸⁷. Indeed Buchwald J found that in both *Brunswick* and *ARCO* there was more harm to competition than in the LIBOR situation⁸⁸.

This judgment came under sustained criticism from academic and judicial sources. Foster⁸⁹ identifies the root of the problem to be Buchwald J's holding that manipulating LIBOR was not a competitive process, which is not a recognised antitrust injury requirement. The authority used to support this finding, namely *Brunswick* and *ARCO*, were not horizontal price-fixing cases, whereas the LIBOR manipulation situation was straightforward horizontal price-fixing, with consumers rather than competitors suffering harm⁹⁰. Indeed as Foster notes⁹¹ the LIBOR scenario is analogous to a situation where competitors with significant market power set and manipulate unregulated industry standards. This results in harm to competition and harm to consumers, which establishes antitrust injury without any need to consider whether the benchmark setting constituted a competitive process.

In the same District Court of the Southern District of New York, but with different judges, two cases have commented on *In re LIBOR*. In *In re FX*⁹² a number of major banks had colluded to manipulate benchmark rates in the foreign exchange markets but this benchmark rate, distinguished from *In re LIBOR*, was not a cooperative

⁸³ *Atlantic Richfield (ARCO) v USA Petroleum* 495 US 328 (1990)

⁸⁴ (n 77) 690

⁸⁵ *Ibid.* 691

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* 692

⁸⁹ SE Foster, 'Harm to Competition and the Competitive Process: A Circular Charade in the LIBOR Antitrust Litigation' (2014) 10 *International Law & Management Review* 91, 95 and SE Foster, 'LIBOR Manipulation and Antitrust Allegations' (2013) 11 *De Paul Business & Commercial Law Journal* 291

⁹⁰ *Ibid.* 104

⁹¹ *Ibid.* 106

⁹² *In re Foreign Exchange Benchmark Rates Antitrust Litigation* 74 F.Supp.3d 581 (2015)

endeavour but set by transactions in the foreign exchange market⁹³. Schofield J in an *obiter dictum* went out of her way to disagree with the findings of Buchwald J in *In re LIBOR*, predominantly on the basis of the difficulties with *Brunswick* and *ARCO* described above⁹⁴. In the more recent *Alaska Electrical Pension Fund, et al v Bank of America Corp., et al*⁹⁵ the benchmark being manipulated was the US Dollar ISDAfix, a benchmark interest rate incorporated into a broad range of financial derivatives. Furman J declined to follow *In re LIBOR* for two reasons⁹⁶. The first was that although the two situations were similar, in that the ISDAfix was formulated in a similar way to LIBOR, the traders in this case also conspired to move prices for swaps in the inter-dealer market by acting as a trading bloc, so distinguishing the cases. This was the very essence of anticompetitive behaviour that the antitrust laws were intended to prevent⁹⁷. Second it was found that a lack of competitive process in a cooperative endeavour did not insulate otherwise competing entities from antitrust liability to parties harmed by that manipulation. Furman J gave four reasons for this. First the Supreme Court had long held that the machinery employed by a combination for price-fixing is immaterial to the antitrust laws. Competing entities acting together as part of a cooperative endeavour meant that there should be greater scrutiny not less, and was definitely not a basis for absolute immunity from antitrust liability⁹⁸. Second the gravity and level of harm alleged was on the basis of a horizontal price-fixing conspiracy, the quintessential antitrust injury⁹⁹. Third courts had long held that collusion in the setting of a benchmark rate (or its functional equivalent) that was then used as a component of price, resulted in antitrust injury¹⁰⁰. Finally, most antitrust collusions involved misrepresentations or deliberate falsehoods and it would be perverse to grant such parties immunity from liability merely on the basis of taking steps to conceal such activity, as well as engaging in it¹⁰¹.

The rejection of the antitrust claims was appealed to the Second Circuit of the Federal Courts of Appeal but was itself rejected before arguments were heard on the grounds that the case was ongoing and a final order had not yet been made¹⁰². The Supreme Court ordered the Second Circuit to hear the cases as the rejection of the

⁹³ Ibid. 596

⁹⁴ Ibid. 597-598

⁹⁵ *Alaska Electrical Pension Fund, et al v Bank of America Corp., et al* dated 28 March 2016 <https://cases.justia.com/federal/district-courts/new-york/nysdce/1:2014cv07126/432152/209/0.pdf?ts=1459258628> last accessed 25 April 2016

⁹⁶ Ibid. 15

⁹⁷ Ibid. 15-16

⁹⁸ Ibid. 16-17

⁹⁹ Ibid. 17-18

¹⁰⁰ Ibid. 18-19

¹⁰¹ Ibid. 19-20

¹⁰² *In re LIBOR-Based Financial Instruments Antitrust Litigation* dated 30 October 2013 <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/04/Gelboim-2dCirorder.pdf> last accessed 4 May 2016

claims in their entirety left the claimants with no recourse of action¹⁰³. In May 2016 the Second Circuit overturned Buchwald J's judgment¹⁰⁴. They were critical of her approach, finding that she had blurred the necessary procedural distinction of first determining antitrust violation, before then considering antitrust standing, which requires consideration of antitrust injury and an efficient enforcer inquiry¹⁰⁵. The court found that horizontal price-fixing constituted a *per se* antitrust violation with the claimants alleging that LIBOR was an inseparable part of the price, and the fixing of a component of price violated the antitrust laws¹⁰⁶. Examining antitrust injury the court held that a claimant did not need to plead harm to competition, or any further inquiry made, as horizontal price fixing was *per se* unlawful¹⁰⁷. This was because of, as the Supreme Court emphasised in *Socony-Vacuum*, horizontal price fixing's actual or potential threat to the economy¹⁰⁸, particularly one based on the free market's interaction between supply and demand¹⁰⁹. Thus a consumer who paid a higher price on account of that horizontal price-fixing suffered antitrust injury. The case was remanded to the District Court to determine the efficient enforcer element of antitrust standing, which had not been considered by Buchwald J at first instance, with considerable guidance provided¹¹⁰.

ii. The EU

a. Civil Public Enforcement

The Commission conducted surprise investigations of banks to commence the investigation into manipulation of the European equivalent to LIBOR, the EURIBOR (the Euro Interbank Offered Rate) beginning on 18 October 2011¹¹¹. This resulted in full investigations by the Commission into the manipulation of Swiss Franc LIBOR (and the market for Swiss Franc interest rate derivatives (CHIRDs)) and of Yen LIBOR (and the market for Yen interest rate derivatives (YIRDs)), along with the market for European interest rate derivatives (EIRDs). Currently only three Decisions have been published¹¹². The first involved anti-competitive activity on Swiss Franc LIBOR (CHF LIBOR) which then impacted on the CHIRD market, addressed to RBS and JPMorgan with the latter being fined €61.676 million and RBS granted leniency immunity under the Leniency Notice¹¹³ for total cooperation with the Commission's investigation. In the second and third Decisions, Barclays, Deutsche Bank, RBS and Société Générale (EIRD cartel) and UBS, RBS, Deutsche Bank, Citigroup,

¹⁰³ *Gelboim, et al v Bank of America Corp., et al* 135 S.Ct. 897

¹⁰⁴ *Gelboim, et al v Bank of America Corp., et al* 823 F.3d 759 (2nd Cir.2016)

¹⁰⁵ *Ibid.* 770

¹⁰⁶ *Ibid.* 771

¹⁰⁷ *Ibid.* 773

¹⁰⁸ *United States v Socony-Vacuum Oil Co.* 310 US 150, 224

¹⁰⁹ *Ibid.* 221

¹¹⁰ (n 104) 777-780

¹¹¹ Commission Memo/11/711 dated 19 October 2011, http://europa.eu/rapid/press-release_MEMO-11-711_en.htm last accessed 4 May 2016

¹¹² Case AT.39924 *Swiss Franc Interest Rate Derivatives Cartel (CHF LIBOR)* [2015] 4 CMLR 19

¹¹³ Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C296/17 as amended by Commission Communication [2015] OJ C256/1

JPMorgan and the broker RP Martin (YIRD cartel) were fined a combined total of €1.494 billion after agreeing a settlement over the operation of two cartels to fix the EURIBOR, Yen LIBOR and Euroyen TIBOR (Tokyo interbank offered rate) which then impacted on the market for interest rate derivatives where prices were also fixed. The Commission continued proceedings against Crédit Agricole, HSBC and JPMorgan under the standard, non-settlement, cartel procedure¹¹⁴, which is ongoing. Third RBS, UBS, JP Morgan and Crédit Suisse were fined €32.355 million for operating a cartel on bid-ask spreads of CHIRDS¹¹⁵ but this did not involve any benchmark interest rate manipulation. Finally in connection with the YIRD cartel, the broker Icap was fined €14.9 million¹¹⁶ but a Decision has yet to be published and Icap has appealed¹¹⁷.

In the benchmark cartels, the Commission established that there were agreements or concerted practices between the parties from direct evidence, notably through online chat rooms messages, emails and phone contacts. The collusive arrangements constituted an interrelated string of occurrences united by the common objective of the restriction and/or distortion of competition that constituted a single and continuous infringement of Article 101 TFEU. That common objective meant that there was no need to demonstrate the anticompetitive effect of the agreements. As the benchmark interest rates were utilised extensively on the international money markets by international banks, brokers and traders then the anticompetitive practices were capable of appreciably affecting trade between Member States.

b. Criminal Public and Civil Private Enforcement

Neither of these two options were open to either the Commission or private parties at the EU level. It should be noted however that the Commission's press releases invited and encouraged private parties to bring actions for private redress in their domestic civil courts.

iii. The UK

a. Civil Public Enforcement

¹¹⁴ Commission Press Release IP/13/1208 dated 4 December 2013 http://europa.eu/rapid/press-release_IP-13-1208_en.htm last accessed 6 May 2016. See Commission Decisions in Case AT.39924 *Swiss Franc Interest Rate Derivatives* dated 21 October 2014

http://ec.europa.eu/competition/antitrust/cases/dec_docs/39924/39924_1156_3.pdf last accessed 6 May 2016 and Case AT.39861 *Yen Interest Rate Derivatives* dated 4 December 2013

http://ec.europa.eu/competition/antitrust/cases/dec_docs/39861/39861_4152_13.pdf last accessed 6 May 2016

¹¹⁵ Commission Press Release IP/14/1190 dated 21 October 2014 http://europa.eu/rapid/press-release_IP-14-1190_en.htm last accessed 6 May 2016

¹¹⁶ Commission Press Release IP/15/4104 dated 4 February 2015 http://europa.eu/rapid/press-release_IP-15-4104_en.htm last accessed 6 May 2016

¹¹⁷ Case T-180/15 *Icap a.o. v Commission* [2015] OJ C-245/30

The Office of Fair Trading (OFT) first became aware of concerns over LIBOR rigging and anti-competitive practices in November 2008¹¹⁸. Indeed both the OFT and the Competition Commission expressed their opinion to the FSA of possible collusive activity by submitting banks that could be harmful to consumers and other banks¹¹⁹. The OFT was urged not to launch an investigation into LIBOR manipulation by the head of the FSA as it was felt that the BBA was already improving the process of LIBOR setting and an investigation could pose potential risks to the stability of the financial markets¹²⁰. The result of this is that no UK public authorities investigated any manipulation of LIBOR for anticompetitive practices and even though the FSA and its successor, the Financial Conduct Authority (FCA), have penalized banks, traders and brokers with significant financial penalties, none of these were found in competition law.

b. Criminal Public Enforcement

There have been three prosecutions of traders involved in the LIBOR scandal. The first was successful with the UBS and Citibank trader sentenced to 14 years for fraud¹²¹, reduced to 11 on appeal¹²². In the second six traders were found not guilty of fraud. In the latest case four Barclays traders were given sentences ranging from 2 years and nine months to 6 ½ years for fraud¹²³, with a further two traders facing retrial. It should be noted that no action was brought under the Cartel Offence.

c. Civil Private Enforcement

Just as in the USA, clients and customers of the banks involved, and third parties economically affected by the LIBOR manipulation, sought to recover damages in the UK courts. Before the cases began the claimants were already facing some difficulty as any action, unless based upon the Commission's Decisions examined previously, would have to be standalone as the OFT had not conducted a cartel investigation and so they would need to prove all the elements of Article 101 TFEU or a Chapter 1 Prohibition of the Competition Act 1998.

The only case so far to come before the courts is *Deutsche Bank v Unitech*¹²⁴. Here Unitech argued that the anticompetitive manipulation of LIBOR meant that the

¹¹⁸ FSA, *Internal Audit Report: A Review of the Extent of Awareness Within the FSA of Inappropriate LIBOR Submissions* dated 2013, last accessed 5 May 2016, 80

¹¹⁹ *Ibid.* 80-81

¹²⁰ PJF Huizing, *Parallel Enforcement of Rate Rigging: Lessons to be Learned from LIBOR* (2015) 3 *Journal of Antitrust Enforcement* 173, 178

¹²¹ *R v Tom Hayes* sentencing remarks of Mr Justice Cooke dated 3 August 2015 <https://www.judiciary.gov.uk/wp-content/uploads/2015/08/r-v-tom-hayes-sentencing1.pdf> last accessed 5 May 2016 paras 1 and 17

¹²² *R v Tom Hayes* [2015] EWCA Crim 1944 paras 101-108

¹²³ *R v Peter Johnson and Others* sentencing remarks of Mr Justice Leonard dated July 2016 <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/r-v-johnson-and-others-sentencing.pdf> last accessed 24 August 2016

¹²⁴ *Deutsche Bank AG and others v Unitech Global Ltd. and another* [2014] 2 All ER (Comm) 268 (QB) and [2016] EWCA Civ 119 (CA)

contracts for the bank loan of \$150 million and interest rate swap of \$11 million should be void as they were calculated on the basis of LIBOR. Before Teare J at first instance and in the Court of Appeal, with Longmore LJ delivering the judgment of the court, it was held that the agreement was vertical between bank and customer. As such although the customer could obtain damages for anticompetitive infringement, following *Courage v Crehan*¹²⁵, the contracts could not be held void. Indeed misrepresentations as to Deutsche Bank's submissions to LIBOR could not lead to an implied term excluding such LIBOR manipulation being read into the contracts, although Teare J appeared to be sympathetic to this if dishonesty could be proved. If the contracts had been between banks then these would have been horizontal agreements and thus capable of being declared void.

COMPETITION LAW'S IMPACT ON LIBOR AND POST-LIBOR

1. How Effective Was Antitrust Regulation of Banking Activity?

In the aftermath of the LIBOR scandal, it was claimed that competition law could undergo regulatory scope creep and surpass specific financial sector regulation¹²⁶. However, it must be questioned how effective competition law has actually been in regards to the LIBOR price-fixing collusion. The UK's Independent Commission on Banking, established to provide recommendations for banking regulation after the 2008 global financial crisis, contained a significant section on competition law¹²⁷. However, although recommendations were made to improve supply and demand side competitiveness in the sector, and to create a primary duty of the new Financial Conduct Authority to promote effective competition, no mention was made of the LIBOR scandal. There is now a primary mandate in the Financial Services and Markets Act 2000 (FSMA2000)¹²⁸ to promote competition, such that the FCA must act in a way that is compatible with its strategic objective and advances one or more of its three operational objectives. The strategic objective is to ensure that the relevant markets operate well¹²⁹, and the operational objectives are consumer protection, integrity and competition¹³⁰. The FCA now has a competition duty to discharge its general functions in a way, which promotes effective competition in the

¹²⁵ *Courage v Crehan* [1999] ECC 455 (CA)

¹²⁶ R Nicholls, J O'Brien, 'Hanging Together or Hanging Separately: Is Competition Law in the Process of Eclipsing Financial Regulation?' (2014) 8 Law and Financial Markets Review 178

¹²⁷ Independent Commission on Banking, *Final Report: Recommendations* dated September 2011 [http://webarchive.nationalarchives.gov.uk/20131003105424/https://hmt-sanctions.s3.amazonaws.com/ICB%20final%20report/ICB%2520Final%2520Report\[1\].pdf](http://webarchive.nationalarchives.gov.uk/20131003105424/https://hmt-sanctions.s3.amazonaws.com/ICB%20final%20report/ICB%2520Final%2520Report[1].pdf) last accessed 24 August 2016

¹²⁸ FSMA2000 s 1B(1)

¹²⁹ FSMA2000 s 1B(2)

¹³⁰ FSMA2000 s 1B(3)

interests of consumers¹³¹. The FCA's competition duty is empowered through the provisions in the FSMA s234I-O¹³², though it is notable that the cartel offence is not part of its remit.

The result of this in the UK so far has been minimal use of competition law against the banks. Despite numerous investigations, identifying dishonest behaviour by banks¹³³, bank traders¹³⁴ and brokers¹³⁵, no competition law enforcement action has been instigated by the FCA or the CMA. This can also be seen on the criminal side, with no prosecution of any banks or brokers, and no use of the cartel offence against individuals involved in LIBOR manipulation. Furthermore, after the clear and precise decisions of the European Commission finding horizontal price-fixing in the benchmark cartels, UK courts have been reluctant to allow private parties to advance their cases.

There are some parallels with the situation in the US. Although individuals have been found criminally liable for LIBOR manipulation, the prosecutions have been for wire

¹³¹ FSMA2000 s 1B(4)

¹³² For analysis see D Jones, M Bethell, I Cameron, 'Competition at the Financial Conduct Authority' [2015] Comp Law 179

¹³³ FSA Final Notice to Barclays Bank Plc. Reference Number 122702 dated 27 June 2012 <http://www.fsa.gov.uk/static/pubs/final/barclays-jun12.pdf> last accessed 26 August 2016; FSA Final Notice to UBS AG Reference Number 186958 dated 19 December 2012 <http://www.fca.org.uk/static/documents/final-notices/ubs.pdf> last accessed 26 August 2016; FSA Final Notice to The Royal Bank of Scotland Plc. Reference Number 121882 dated 6 February 2013 <https://www.fca.org.uk/static/fca/documents/final-notices/rbs.pdf> last accessed 26 August 2016; FCA Final Notice to Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank) Reference Number 171596 dated 29 October 2013 <https://www.fca.org.uk/static/documents/final-notices/rabobank.pdf> last accessed 26 August 2016; FCA Final Notice to Lloyds Bank Plc. and Royal Bank of Scotland Plc. Reference Numbers 119278 and 169628 dated 28 July 2014 <https://www.fca.org.uk/static/documents/final-notices/lloyds-bank-of-scotland.pdf> last accessed 26 August 2016; FCA Final Notice to Deutsche Bank AG Reference Number 150018 dated 23 April 2015 <https://www.fca.org.uk/static/documents/final-notices/deutsche-bank-ag-2015.pdf> last accessed 26 August 2016

¹³⁴ FCA Final Notice to Paul Robson, Reference Number PXR01202 dated 27 February 2015 <http://www.fca.org.uk/static/documents/final-notices/paul-robson.pdf> last accessed 26 August 2016; FCA Final Notice to Lee Bruce Stewart Reference Number LBS01002 dated 21 July 2015 <http://www.fca.org.uk/static/documents/final-notices/lee-bruce-stewart.pdf> last accessed 26 August 2016; FCA Final Notice to Arif Hussein Reference Number AXH01348 dated 22 January 2016 <https://www.fca.org.uk/static/documents/decision-notices/arif-hussein.pdf> last accessed 26 August 2016; FCA Final Notice to Michael Ross Curtler Reference Number MRC01098 dated 29 February 2016 <http://www.fca.org.uk/static/documents/final-notices/michael-ross-curtler.pdf> last accessed 26 August 2016; FCA Final Notice to Paul White, Reference Number PMW01135 dated 8 April 2016, <https://www.fca.org.uk/static/documents/final-notices/paul-white.pdf> last accessed 26 August 2016; FCA Final Notice to Peter Charles Johnson Reference Number PCJ01019 dated 26 August 2016 <http://www.fca.org.uk/static/documents/final-notices/peter-johnson.pdf> last accessed 28 August 2016

¹³⁵ FCA Final Notice to ICAP Europe Ltd. Reference Number 188984 dated 25 September 2013 <http://www.fca.org.uk/static/documents/final-notices/icap-europe-limited.pdf> last accessed 26 August 2016; FCA Final Notice to Martins Brokers (UK) Ltd. Reference Number 187916 dated 15 May 2014 <http://www.fca.org.uk/static/documents/final-notices/martin-brokers-uk-ltd.pdf> last accessed 26 August 2016; FCA Final Notice to David Caplin Reference Number DSC01046 dated 22 January 2015 <http://www.fca.org.uk/static/documents/final-notices/david-caplin.pdf> last accessed 26 August 2016; FCA Final Notice to Jeremy Kraft Reference Number JDK01054 dated 22 January 2015 <http://www.fca.org.uk/static/documents/final-notices/jeremy-kraft.pdf> last accessed 26 August 2016

fraud and not antitrust violations. This is mirrored in the criminal actions brought against financial institutions, with only RBS and Deutsche Bank pleading guilty to a charge of price fixing. For private antitrust actions, there are considerable hurdles yet to overcome before any actions can claim success.

It may have been that enforcement agencies were communicating effectively with one another to ensure that over enforcement was avoided, be that within a single, overarching or global jurisdiction as suggested by Huizing¹³⁶. However, the wholly ineffectual enforcement of competition law provisions to police the blatant horizontal price fixing of the LIBOR benchmark by financial institutions and their employees cannot be explained by this fear of over protection. There must therefore be policy reasons for a lack of antitrust action by the competition authorities, with the notable exception of the European Commission, and a reluctance to allow private antitrust enforcement.

2. Why was the Cartel Offence Not Used in the UK?

It is clear from the actions of the public regulatory authorities that the US criminal enforcement of antitrust is stronger than that in the UK, with the EU having no competence in this area. There are a number of reasons for this. The first is that section 1 of the Sherman Act is centred on the crime of cartel activity, and prosecution is reinforced in such instruments as the Yates Memo. This can be compared to the Cartel Offence in the UK that was an 'add on' to the main competition provisions in the Enterprise Act 2002. The second is the length of time of the existence of the two criminal competition regimes. The UK's regime is considerably younger than that in the USA and therefore the culture of antitrust criminalisation will need time to take hold. Indeed competition culture is a relatively new aspect to enterprise in the UK, beginning with a highly politically controlled regime in the 1950s and only developing into a modern and effective system from the start of the twenty-first century¹³⁷. The third is the perceived weakness of the UK's Cartel Offence. When it was introduced it was necessary to prove that an individual had acted with dishonesty, which commentators considered to have introduced a moral element into competition law¹³⁸. The test for dishonesty was the normal criminal two-stage test set out in *Ghosh*¹³⁹, consisting of both an objective and subjective standard, both of which were jury questions. First was the defendant acting dishonestly according to the standard of reasonable and honest people and then, if the answer to the first question was in the affirmative, did the defendant realise that what she or he was doing was dishonest according to those standards. Unfortunately since the introduction of the Cartel Offence there has only been one

¹³⁶ Huizing (n 120) 191-200

¹³⁷ N Green, A Robertson (Eds), *The Europeanisation of UK Competition Law* (Hart Publishing, Oxford 1999) 1

¹³⁸ A MacCullough, 'The Cartel Offence: Defining an Appropriate "Moral Space"' (2012) 8 European Competition Journal 73

¹³⁹ *R v Ghosh* [1982] QB 1053

successful prosecution¹⁴⁰, and one failed prosecution¹⁴¹, where the prosecution offered no evidence due to issues concerning disclosure of evidence. As a result the Cartel Offence was amended, through the Enterprise and Regulatory Reform Act 2013, by removing the dishonesty requirement¹⁴², reducing the scope of the Cartel Offence by outlining circumstances when the Cartel Offence would not be applicable¹⁴³, and by introducing three specific defences¹⁴⁴. The result is a seriously diluted action, which has yet to be tested before the courts, but with defences so easily satisfied that liability should be easily avoided¹⁴⁵. Indeed in the case of the LIBOR manipulation offences, prosecution under the Cartel Offence was not even considered. As Michels points out, this is almost certainly the result of a lack of both public support, particularly over the moral wrongdoing of cartel formation, and political support¹⁴⁶.

The difficulties with the UK's Cartel Offence mean that we must question the policy considerations behind it. However, this should not just be reserved to the UK, as there appears to have also been significant reluctance in the US to utilise criminal law to bring the white-collar crime of the financial institutions and their employees to account. Indeed the question of policy goes further, questioning why the financial institutions were not investigated for competition law violations swiftly and with zeal. It is further suggested that the very basis for competition law itself needs investigating, with an attempt to establish the philosophical underpinning of the concept.

3. What Policy Considerations Led to Limited Antitrust LIBOR Regulation?

The policy considerations behind antitrust or competition legislation as set out earlier are relatively straightforward¹⁴⁷ and indeed Steuer spells them out as combatting bullying and ganging up. Underneath that though there are, as set out in this chapter, three specific enforcement regimes to ensure compliance – civil public, criminal public and civil private. It could be argued that each of these enforcement regimes has its own set of policy considerations but this ignores the fact that all three are directed at serving the public interest, and as Yeong points out¹⁴⁸, competition law is a form of public law that aims to protect that public interest. It is how that public interest is defined that determines the policy considerations. Since the late 1970s the Chicago School of Economics has come to dominate the debate over competition

¹⁴⁰ *R v Whittle and others* [2008] EWCA Crim 2560

¹⁴¹ *R v Burns and others*, Unreported Judgment, Southwark Crown Court dated 10 May 2010

¹⁴² See CMA9, *Cartel Offence Prosecution Guidance* (CMA, London 2014) on the CMA's advice over prosecution of the amended Cartel Offence

¹⁴³ Enterprise Act 2002 s188A

¹⁴⁴ Enterprise Act 2002 s188B

¹⁴⁵ EM Michels, 'The Real Shortcoming of the UK Cartel Offence: A Lack of Public and Political Support' [2014] *Global Antitrust Review* 53

¹⁴⁶ *Ibid.* 71

¹⁴⁷ See Steuer (n 7)

¹⁴⁸ K Yeung, 'Privatizing Competition Regulation' (1998) 18 *OJLS* 581, 594

law's public interest, with the sole aim being the protection of consumer welfare as determined through a mathematical analysis of the economic data, and the justification for consumer welfare being economic efficiency¹⁴⁹. This has resulted in a narrow and very strict containment of antitrust focused almost entirely on markets and consumers operating in those markets, to the exclusion of the wider society. This is most clearly stated by Hovenkamp that 'antitrust is an economic, not a moral, enterprise'¹⁵⁰. That wider society is also affected by antitrust activity, as clearly demonstrated in the LIBOR manipulation scenario, but the neoliberal Chicago School account does not take this into consideration when investigating anti-competitive activity. From this perspective the market is mainly self-righting and as such the State should intervene only on specific and rare occasions.

If consumer welfare was the sole aim of competition law then the competition authorities and financial regulators totally abrogated their responsibilities over the LIBOR scandal as consumers were undoubtedly damaged by financial institutions' horizontal price fixing. What interests then overruled those of consumer welfare? Two can be identified. The first was the interests of the banks as drivers of national economies. Following the financial and economic crisis of 2008, it was undoubtedly in the banks and bankers' interests to avoid a deep antitrust inquiry and subsequent criminal convictions. The lowballing behaviour of the banks was certainly influenced by the financial crisis, though the true motivation may have been personal profit rather than the larger picture of safeguarding a bank's existence. This interest then, although possibly wider than consumer welfare as a public interest, appears weak and undermined by the financial institutions' self interests and trader manipulation. The second was the national interest that meant that full prosecution of competition law violations could have significantly impacted on the banks ability to survive and strive competently in the global market following the financial crisis. If this full antitrust prosecution had resulted in the collapse of a bank then this could have had significant national and global consequences. This appears at first blush to be a valid interest but on closer inspection is shallow and lacks justification. The US Second Circuit has raised the possibility of triple damages creating such a problem for the banks¹⁵¹ but the evidence would suggest that it is rare for triple damages to apply¹⁵² and that the banks are likely to settle civil private actions¹⁵³. This then undermines the national interest argument.

So the limited competition law investigation remains unjustified, particularly for the UK. In the EU, benchmark manipulation was prosecuted to the maximum effect by

¹⁴⁹ For a thorough review of the efficiency model of competition law see A Ayal, *Fairness in Antitrust: Protecting the Strong from the Weak* (Hart Publishing, Oxford 2015) 38-64

¹⁵⁰ H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard University Press, London 2005) 10

¹⁵¹ *Gelboim* (n 104)

¹⁵² JM Connor, 'Effectiveness of Antitrust Sanctions on Modern International Cartels' (2006) 6 *Journal of Industry Competition and Trade* 195

¹⁵³ See Barclays' \$100bn settlement with 44 US States dated 8 August 2016

https://ag.ny.gov/sites/default/files/ag_barclays_settlement_agreement_signed_execution_copy_8_8_16.pdf
last accessed 26 August 2016

the Commission, but in the US, and even more in the UK, there has been very limited action. It could possibly be explained by an over-complicated and over-crowded regulatory environment where the competition law violations took place within multiple jurisdictions. As such, liaison between different agencies and across borders meant that competition matters slipped between the investigatory cracks. This would appear to be supported by the lack of LIBOR commentary in the UK Independent Commission on Banking's Report, and the lack of competition law commentary in the Wheatley Report on LIBOR¹⁵⁴. However, the use of DPAs and limited antitrust criminal charges in the US, coupled with no horizontal price fixing investigation or Cartel Offence charges in the UK, suggest that the financial service industries were regarded as being too delicate for further competition law scrutiny.

4. Justifications for Competition Law

The final part of this chapter is to consider briefly¹⁵⁵ the philosophical underpinning of antitrust on a broader spectrum. It is clear from the discussion above that the weak competition regulatory response to LIBOR manipulation did not protect consumer welfare. If consumer welfare was not protected then it must be questioned if it can satisfactorily underpin an antitrust regime¹⁵⁶. A number of commentators have started to question this consumer welfarist, constricted approach with the quite significant emasculation of competition law as a tool of public policy. Black¹⁵⁷ suggested in 2005 that he would analyse competition law through a philosophical approach, but on closer inspection this was merely based on economics and not philosophy. Atkinson¹⁵⁸ has suggested that antitrust policy should be adjusted to include objectives based on distributive justice. This is an interesting approach but has yet to be further developed. Whelan¹⁵⁹ investigates the justificatory theory of the Cartel Offence, but this is more directed towards the philosophy underpinning criminal punishment rather than competition law *per se*. Similarly Wardhaugh¹⁶⁰ uses the philosophy of JS Mill and John Rawls to establish a normative liberal justification for criminal law as it applies to antitrust, rather than as a justification for competition law. This demonstrates much of the literature where philosophy is used to justify part of the enforcement mechanism of competition law, descends into an alternative disciplinary justification of antitrust, or makes a suggestion for change without any justificatory argument.

¹⁵⁴ M Wheatley, *The Wheatley Review of LIBOR: The Final Report* dated September 2012 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf last accessed 31 August 2016

¹⁵⁵ Anything deeper is outside the scope of this chapter and is a matter for further research

¹⁵⁶ For a well-reasoned and persuasive argument for consumer welfare see L Kaplow, S Shavell, *Fairness Versus Welfare* (Harvard University Press, London 2006)

¹⁵⁷ O Black, *Conceptual Foundations of Antitrust* (CUP, Cambridge 2005) 40

¹⁵⁸ AB Atkinson, *Inequality: What Can Be Done?* (Harvard University Press, London 2015) 126

¹⁵⁹ Whelan (n 47)

¹⁶⁰ B Wardhaugh, 'A Normative Approach to the Criminalisation of Cartel Activity' (2012) 32 LS 369

One of the more interesting attempts to fashion a new theory of antitrust justification is that of Ayal¹⁶¹ in which he identifies societal goals¹⁶², economic efficiency predominantly, and individual goals, based on fairness¹⁶³. Fairness comes into play, as there has to be a balancing exercise¹⁶⁴ conducted between the rights of victims of monopolists, predominantly consumers¹⁶⁵, and the rights of monopolists¹⁶⁶. Consumer welfare therefore is an element of the balancing exercise and not the justification for competition law. That is the idea of fairness, built on the notion of distributive justice and considered through the lens of Rawls' Theory of Justice¹⁶⁷, which is probably the moral underpinning of antitrust, though this is never fully spelt out. This is a credible attempt at an alternative approach to that of consumer welfare but it is submitted it only goes partially to the heart of the question, with only a spartan consideration of the tools of legal philosophy to justify a legal discipline.

How then may a rational justification for antitrust be established, that cuts across jurisdictions and gets beyond the shallow skirmishes relating to the purpose of competition law, to provide a deeper and defensible anchoring of competition law? The starting point must be that the law only steps in when conditions of perfect competition fail and the impact of that failure falls on society and natural or legal persons in that society¹⁶⁸. Legal enforcement then is a public interest as it ensures the protection of societal interests, where those interests also reflect relationships between individuals. Those societal interests could be limited to economic efficiency and fairness, as suggested by Ayal, but it is submitted the public interest must extend further than this as competition law impacts other interests, rights and public policies¹⁶⁹. These areas include the environment, intellectual property, consumer protection, employment, industrial policy, non-discrimination and human rights. With such impact on different public interests, and the interaction of antitrust law on relationships between natural and legal persons, then the value-laden nature of the law means that any justification needs to go further than just consumer welfare. It is here that we have to turn to legal philosophy but this is outside the constraints of a book chapter and will be a matter for future research.

CONCLUSION

¹⁶¹ Ayal (n 149)

¹⁶² Ibid. ch 2

¹⁶³ Ibid. chs 3 and 4

¹⁶⁴ Ibid. ch 5

¹⁶⁵ Ibid. ch 3

¹⁶⁶ Ibid. ch 4

¹⁶⁷ J Rawls, *A Theory of Justice* (2nd edn OUP, Oxford 1999)

¹⁶⁸ Where the law is defined as 'the human attempt to establish social order as a way of regulating and managing human conflict' in D Beyleveld, R Brownsword, *Law as a Moral Judgment* (Sweet & Maxwell, London 1986) 2

¹⁶⁹ See G Monti, *EC Competition Law* (CUP, Cambridge 2007) ch 4

The LIBOR manipulation scandal was a deeply shocking event, in which market-players manipulated the self-regulated market, and where outside regulation, particularly over competition law concerns, failed to adequately investigate and prosecute the blatantly infringing banks and traders. This serious white-collar crime undoubtedly has significant implications for financial institutions, their regulation and competition law in general, some of which have been examined by the authorities and changes implemented. It is clear, as the Bank of England's Governor, Mark Carney, has recently stated in a letter to the G20 Meeting in Hangzhou¹⁷⁰, "financial sector misconduct has risen to a level that has the potential to create systemic risks by undermining trust in both financial institutions and markets". The institutional, systemic, procedural and jurisdictional failings by US and UK national competition authorities to investigate financial institutions' antitrust violations undoubtedly had a negative impact on the welfare of consumers, and thus calls consumer welfare into question as the basis for competition law. It is hoped that in the UK especially, where competition law violations were not investigated by any regulatory authority, the new competition law duties and powers for the FCA will see a significantly more robust approach by FCA investigators in any future similar scenario¹⁷¹.

¹⁷⁰ M Carney, 'Building a Resilient and Open Global Financial to Support Sustainable Cross-Border Investment' dated 30 August 2016 <http://www.fsb.org/wp-content/uploads/FSB-Chair's-letter-to-G20-Leaders-in-advance-of-their-meeting-in-Hangzhou-on-4-5-September..pdf> point 5 last accessed 13 September 2016

¹⁷¹ See FCA, 'FG15/8: The FCA's Concurrent Competition Enforcement Powers for the Provision of Financial Services – A Guide to the FCA's Powers and Procedures under the Competition Act 1998' dated July 2015 <https://www.fca.org.uk/publication/finalised-guidance/fg15-08.pdf> last accessed 2 September 2016