



EUROPEAN COMMISSION
Competition

CASE AT.40160

ANTITRUST PROCEDURE

**Council Regulation (EC) 1/2003 and
Commission Regulation (EC) 773/2004**

Article 7(2) Regulation (EC) 773/2004

Date: [17/5/2017]

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EUROPEAN COMMISSION

Brussels, 17.5.2017
C(2017) 3435 final

Harada Ltd.
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London, 5W7 5BW
United Kingdom

**Subject: Case COMP/AT.40160 – Foreclosure of money transmittance market
Commission Decision rejecting the complaint and supplementary complaint
(Please quote this reference in all correspondence)**

Dear Madam/Sir,

- (1) The European Commission (**Commission**) hereby informs you that it has decided to reject Harada Ltd's (**'Harada'**) complaint against Clearing Bank 1 (**'Clearing Bank 1'**) and its supplementary complaint against Clearing Bank 1 and other clearing banks in the United Kingdom (**'UK'**), pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.¹
- (2) Clearing banks are banks that have direct access to the clearing system and clear transactions for other non-clearing banks (known as **'Agency Banks'**). The four primary clearing banks in the UK are Clearing Bank 1, Clearing Bank 2 (**'Clearing Bank 2'**), Clearing Bank 3 (**'Clearing Bank 3'**) and Clearing Bank 4 (**'Clearing Bank 4'**) (together referred to as the **'UK Clearing Banks'**). Agency Banks rely on the services provided by the UK Clearing Banks to have access to the UK's payment system and to clear their transactions.

1. THE COMPLAINT

- (3) By letter dated 6 November 2013, Harada requested the Commission to launch an investigation into Clearing Bank's 1 decision to close Harada's bank account. Harada alleged that, by refusing to provide banking services to it and other Money Service Businesses (**'MSBs'**), Clearing Bank 1 has abused a dominant position in the market for

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

the provision of banking services to MSBs in the UK². Harada also claimed the existence of a concerted practice between:

- (a) the UK Clearing Banks to prevent Agency Banks from providing banking services to MSBs; and
 - (b) Clearing Bank 1, Western Union and other downstream undertakings to withdraw the provision of banking services to MSBs.
- (4) On 17 December 2013, Harada lodged a supplementary complaint claiming that the UK Clearing Banks have:
 - (a) entered into an agreement to exclude MSBs from banking services; and,
 - (b) forced the Agency Banks to conform to the concerted practice of the UK Clearing Banks referred to in paragraph 3(a) above.
- (5) On 23 January 2014, the Commission sent questions by e-mail to Harada, to which Harada replied on 3 February 2014.
- (6) On 5 February 2014, Harada provided further clarifications at a meeting at DG Competition in Brussels.
- (7) On 9 April 2014, the Commission sent additional questions by e-mail to Harada. On 16 April 2014, the Commission and Harada held a conference call to discuss the information requested. Harada replied to the additional questions on 28 April 2014.
- (8) On 15 July 2014, Harada informed the Commission that it had brought the allegations contained in its complaint and supplementary complaint to the attention of Members of the European Parliament ('MEPs'). Harada also informed the Commission that the European Union Electoral Association ('EUEA')³ had published information about Harada's complaint and supplementary complaint on EUEA's web site.
- (9) On 5 August 2014, the Commission issued a request for information ('RFI') to Clearing Bank 1 and sent, with Harada's consent, Harada's complaint and supplementary complaint to Clearing Bank 1. Clearing Bank 1 replied to the RFI on 10 and 31 October 2014. It also submitted observations on Harada's complaint and supplementary complaint on 10 October 2014.
- (10) On 13 March 2015, the Commission issued RFIs to Clearing Bank 2, Clearing Bank 3, Clearing Bank 4, Metro, Citibank, Al Rayan Bank, Banco do Brasil, The Joint Money Laundering Steering Group ('JMLSG')⁴, the Wolfsberg Group⁵, and the European

² The term 'Money Service Business' ('MSB') is used in the UK to describe any undertaking operating: (1) currency exchange services, (2) money remittance services or (3) cheque cashier services.

³ See <http://www.euelec.eu/initiatives/>

⁴ The JMLSG is a body made up of the leading UK trade associations in the financial services industry, including the British Bankers' Association. Its aim is to promulgate good practice in countering money laundering and to give practical assistance in interpreting the UK Money Laundering Regulations. This is primarily achieved by the publication of industry guidance.

See <http://www.jmlsg.org.uk/>

Payment Institutions Federation ('EPIF')⁶. The Commission received replies to these RFIs between 2 April 2015 and 5 May 2015.

- (11) On 5 August 2015, the Commission issued a RFI to the Association of UK Payment Institutions ('AUKPI')⁷, to which the AUKPI replied on 7 September, 21 September and 30 September 2015. The Commission also had contacts with the AUKPI to discuss the issue of bank account closures in the UK. As part of its reply to the RFI, AUKPI submitted to the Commission a report summarising the results of a survey it had conducted during the summer of 2015 among present and former AUKPI members, other payment institutions and electronic money institutions in relation to bank account closures ('AUKPI survey')⁸.
- (12) On 23 May 2016 the Commission informed Harada of its intention to reject the complaint and supplementary complaint ('Article 7(1) letter'). On that same day, the Commission provided Harada with access to the documents on which the Article 7(1) letter was based.
- (13) On 6 July 2016, Harada made additional observations in response to the Article 7(1) letter ('reply to the Article 7(1) letter').
- (14) On 5 December 2016 the Commission sent a RFI to Western Union, to which Western Union replied on 23 January 2017.
- (15) On 23 March 2017, the Commission provided Harada with access to the Summary of the Briefing Paper submitted by Western Union in reply to the Commission's RFI. On 15 May 2017, Harada has not made any observations on that document.

2. BACKGROUND TO THE COMPLAINT

2.1.1. Barclays closure of Harada's account

- (16) Harada is an MSB engaged in the provision of currency exchange services and, until 2013, money remittance services.

⁵ The Wolfsberg Group is an association of several global banks (Banco Santander, Bank of America, Bank of Tokyo Mitsubishi-UFJ, Barclays, Citibank, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, Société Générale, Standard Chartered Bank, UBS) aimed at developing frameworks and guidance for the management of financial crime risks.

See <http://www.wolfsberg-principles.com/index.html>

⁶ EPIF is an international non-profit association founded in June 2011 in response to the adoption of the Payment Services Directive (PSD).

See <http://www.paymentinstitutions.eu/>

⁷ AUKPI represents Payment Institutions regulated by the Financial Conduct Authority. Its principal role is to provide a forum where member firms can come together to discuss and collectively respond to issues of common concern. They also represent the interests of their industry to law makers, regulators, banks and other financial institutions and consumers at both UK and European level.

See <http://www.ukmta.org/Home.aspx>

⁸ "Access to UK Bank Accounts for Payment and E-Money Institutions. A report with recommendations commissioned by the AUKPI. September 2015" (DOC ID 465).

- (17) Following Barclays' closure of its account, Harada brought an action against Barclays before the High Court of Justice of England and Wales ('the High Court') alleging that, by closing its bank account, Barclays had infringed Article 102 TFEU and section 18(2) of the Competition Act 1998.
- (18) By judgment dated 5 November 2013⁹, the High Court granted an interim injunction ordering Barclays to refrain from closing Harada's bank account until trial or further order ('the November 2013 Judgment'). Following that judgment, Barclays presented Harada with an estimated schedule of costs for the trial of approximately £5.6m. Harada subsequently withdrew from the proceedings.
- (19) Since the closure of its account by Barclays, Harada has been unable to find alternative banking services.

2.1.2. The regulation of MSBs in the UK

- (20) In the UK, MSBs are registered at, and supervised by, the Financial Conduct Authority ('FCA') and Her Majesty's Revenue and Customs ('HMRC').
- (21) Most MSBs are non-bank Payment Institutions ('PI') subject to the Payment Service Directive PSD¹⁰ and the EU Anti Money Laundering ('AML') Directive.¹¹ The previous version of the AML Directive¹² has been implemented in the UK by the Money Laundering Regulations 2007.¹³ The previous version of the AML Directive and the Money Laundering Regulations 2007 will hereinafter be referred to as the '**AML legislation**'.
- (22) Since 2011, the UK Clearing Banks have met at different fora to discuss how to deal with the application of the AML legislation:
 - (i) the **CIB and Markets AML forum**. This forum was established by Citibank in August 2011. It holds quarterly roundtable discussions with other large corporate & investment banks on issues related to the AML legislation¹⁴. The question of how to approach MSB client due diligence has been raised within the forum¹⁵;

⁹ [2013] EWHC 3379 (Ch).

¹⁰ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

¹¹ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 05.06.2015, p. 73.

¹² Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309, 25.11.2005, p. 15.

¹³ SI 2007 No. 2157.

¹⁴ [...] reply to the Commission RFI (DOC ID 240, [...]).

¹⁵ [...] response to the Commission RFI Part II (DOC ID 674, [...]).

- (ii) **the British Bankers' Association ('BBA').** The BBA organises a number of panels under its "Financial Crime Policy Group" (FCPG) that discusses issues relevant to MSBs and the AML legislation on a regular basis. The BBA held 15 meetings in 2014 and 2015 and among the topics discussed and actions taken were "(...) to *inform, develop and support delivery of the BBA's financial crime strategy and external engagement on financial crime in the UK and internationally, including relationships with other international groupings* (...) ¹⁶ and (...) *to examine the industry arrangements for international level strategic engagement on financial crime* (...); (...) *has consulted a range of members on how the BBA can best support their efforts to address fraud, including wholesale and smaller BBA member banks* (...) "¹⁷.
- (iii) **the MSB Expert Meeting of 31 July 2013.** The meeting was organised by the BBA. The FCA, Her Majesty's Treasury, the Serious Organised Crime Agency¹⁸, a number of MSBs and several banks [...] were invited to attend. The primary purpose of the meeting was to discuss financial crime risk associated with the provision of banking services to MSBs. It was organised in advance of a roundtable meeting on MSBs hosted by the UK's Economic Secretary to the Treasury on 7 August 2013¹⁹;
- (iv) **the US-UK Public-Private Working Group.** This working group was set up by the US and UK Treasuries to engage in discussions with major US and UK financial institutions to discuss financial crime management issues, including the subject of de-risking²⁰;
- (v) **the Wolfsberg Group.** This association of thirteen global banks founded in 2000 aims to develop frameworks and guidance for the management of financial crime risks, particularly with respect to Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies. The minutes of the six meetings held by the Wolfsberg Group between 2013 and 2015 (the 'Minutes') indicate that the group regularly discussed AML issues and performed lobbying actions on behalf of its members²¹;

¹⁶ [...] response to the Commission RFI (DOC ID 205-119, [...]).

¹⁷ [...] response to the Commission RFI (DOC ID 205-122, [...]).

¹⁸ Currently the National Crime Agency.

¹⁹ [...] Commission RFI, (DOC ID 675, [...]).

²⁰ [...] response to the Commission RFI, (DOC ID 675, [...])

²¹ See minutes of the call [...] response to the Commission RFI, (DOC ID 628): "(...) *the Wolfsberg Group may be able to assist highlighting these consequences by way of coordinating the lobbying – ensuring that the right people in the right places deliver a consistent message*" (page 2); also that "*FIs are de-risking for AML purposes as they believe they are unable to manage the risk. The cost of compliance is also a factor*" (page 1); finally, one of the participants to the call, mentions that the "*de-risking decision making considers the risk v. income. Costs from a compliance angle needs to be balanced with revenue*" (page 1). See also the Minutes of the various meetings held by the Wolfsberg Group - Appendix II [...] response to the Commission RFI, (DOC ID 628, page 9): "*There is a lack of co-ordination between national regulators resulting in conflicting levels of enforcement action and therefore uncertainty in firms. (...) This has led to some institutions leaving countries and whole sectors because they see the risks as too difficult to manage based on a zero tolerance environment created by the regulatory inspection regime in many instances applying standards retrospectively*"; DOC ID 628, page 12: "(...) *the Group discussed the 'effectiveness' of the AML framework and how best to increase*

- (vi) **the Joint Money Laundering Steering Group ('JMLSG')**. This forum is made up of the leading UK trade associations in the financial services industry. Its aim is to promulgate good practice in countering money laundering and to give practical assistance in interpreting the AML legislation. The JMLG has issued guidance for the UK financial sector for the prevention of money laundering and combating terrorist financing²²;
 - (vii) **the BBA's Financial Crime Policy Group**. In its five meetings held in 2014 and respectively 2015, topics relating to AML were discussed: *"Proposed key areas of focus for 2015 include the BBA project on "de-risking", broader representational activity by the BBA in the UK and internationally (as well as coordination for the SOC FS Forum) and thematic issues. The Policy Group will act as the BBA "sign off" mechanism for strategic financial crime matters"*²³.
- (23) The wide variety of platforms and meetings is to be understood in the context of global discussions on the implementation of the AML legislation and de-risking phenomenon²⁴.
 - (24) Global standards for anti-money laundering rules have been developed by the Financial Action Task Force ('**FATF**'), a global inter-governmental body established in 1989 by 34 countries²⁵. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system²⁶. The FATF standards are included in the EU AML Directive.
 - (25) A Discussion Paper on De-risking prepared for use by the October 2014 FATF Plenary and associated working groups (including the BBA and the Wolfsberg Group) (the "Discussion Paper") raised points of concerns as regards the ability of money remitters to implement robust financial crime systems and controls: *"remittance operators work across borders and often in developing markets where there may be limited regulatory and customer identification frameworks. It can therefore be challenging for banks to establish that remittance operators have robust financial crime systems and controls and*

awareness of the key issues. This subject was considered a priority for the Group (...)" ; DOC ID 628, page 19: "(...) provided an update on the joint Wolfsberg / BBA initiative and advised that there were now a number of additional project sponsors including ICC, BAFT-IFSA, NYCH and Basel Institute on Governance. There is also interest from government, academia and society groups. The BBA have begun work on drafting a paper for submission to the B20/G20 highlighting the unintended economic and social consequences of de-risking (...)" ; or DOC ID 628, page 26: "(...) The [UK] government is considering making it an offence for a company to fail to prevent economic crime. The proposed new offence would be modelled on section 7 of the Bribery Act 2010, under which it is a crime for a commercial organisation to fail to prevent bribery, but this would be a separate offence, rather than an extension of the Act. (...) One of the FCA's key focuses will be reviewing the AML controls in small and medium banks. The PRA [The Prudential Regulation Authority] and FCA are consulting on proposals to improve responsibility and accountability in the banking sector."

²² See <http://www.jmlsg.org.uk/>

²³ [...] response to the Commission RFI ([...]).

²⁴ In 2011 a general trend emerged whereby banks have been closing accounts of small and medium sized MSBs, in particular those of money remitters. Since the closures are often presented as connected with the high 'risk' that these clients represent for the banks, the phenomenon is generally referred to as "de-risking".

²⁵ See <http://www.fatf-gafi.org/countries/#FATF>

²⁶ See <http://www.fatf-gafi.org/about/>

*have assurance that they are conducting their business with the required level of oversight and due diligence with respect of customers and transactions"; that "the supervision and regulation of international remittances is considered insufficient to reduce the risks of taking on these customers (...); that "the required level of due diligence and ongoing monitoring of remittance relationships can result in significant costs for banks and consequently may result in some business relationships becoming unattractive" and that "(...) generally the remittance sector adopt minimum standards. Compliance risk management programmes need to cover remittances from the funding to distribution of the funds"*²⁷

(26) Although the FATF has identified international remittances as an area that requires special attention in terms of AML, it has also expressed reservations on the practice by banks of addressing these issues by closing accounts of whole categories of service providers without an individual assessment²⁸:

- (a) *"De-risking can be the result of various drivers, such as concerns about profitability, prudential requirements, anxiety after the global financial crisis, and reputational risk. It is a misconception to characterise de-risking exclusively as an anti-money laundering issue."*
- (b) *"Recent supervisory and enforcement actions have raised the consciousness of banks and their boards about these issues. However, it is important to put into context that these were extremely egregious cases involving banks who deliberately broke the law, in some cases for more than a decade, and had significant fundamental AML/CFT failings."*
- (c) *"De-risking" should never be an excuse for a bank to avoid implementing a risk-based approach, in line with the FATF standards. The FATF Recommendations only require financial institutions to terminate customer relationships, on a case-by-case basis, where the money laundering and terrorist financing risks cannot be mitigated. This is fully in line with AML/CFT objectives. What is not in line with the FATF standards is the wholesale cutting loose of entire classes of customer, without taking into account, seriously and comprehensively, their level of risk or risk mitigation measures for individual customers within a particular sector."*

2.1.3. Banking services required by MSBs in the UK

(27) MSBs in the UK require a number of standard corporate banking services from banks, the most important of which is access to an account. These services may be provided by either the UK Clearing Banks or the Agency Banks. In practice, MSBs in the UK seem to obtain banking services primarily from the UK Clearing Banks²⁹. The table below shows the number of MSBs banked by each of the UK Clearing Banks in 2011 and in 2014 according to information provided by each of them in reply to the Commission's RFIs.

²⁷ See https://classic.regonline.com/custImages/340000/341739/G24%20AFI/G24_2015/De-risking_Report.pdf

²⁸ See <http://www.fatf-gafi.org/publications/fatfgeneral/documents/rba-and-de-risking.html>

²⁹ [...] internal documents refer generally to [...] as its main competitors in the MSB market ([...] reply to the Commission RFI, ([...]).

Number of MSBs banked by the UK Clearing banks ³⁰		
	2011	2014
Clearing Bank 1	[400-500]	[200-300]
Clearing Bank 2	[50-150]	[0-50]
Clearing Bank 3	[50-150]	[50-150]
Clearing Bank 4	[100-200]	[50-150]

- (28) According to information recorded at paragraphs 14 and 19-26 of the November 2013 Judgment, in late 2012, [...] decided to review the acceptance and eligibility criteria of its clients and, as a consequence, withdrew the provision of banking services from most MSBs in its portfolio, including Harada.

3. ALLEGATIONS BY HARADA AND COMMENTS BY [...] AND THE OTHER UK CLEARING BANKS

- (29) In its complaint, supplementary complaint and reply to the Article 7(1) letter, Harada makes three main allegations.

3.1.1.1. First allegation: abuse of dominance by [...] – Article 102 TFEU

- (30) Harada alleges that [...] holds a dominant position in the provision of essential banking facilities to MSBs in the UK and that its refusal to continue to provide banking services to Harada and other MSBs in the UK constitutes an abuse within the meaning of Article 102 TFEU.
- (31) [...] states that: i) it is highly debatable whether Clearing Bank 1 holds a dominant position in the provision of banking services to MSBs and/or money remitters in the UK; ii) it has not acted with the object of foreclosing operators in a downstream sector (where it is not itself a major player); and iii) its actions have not had the effect of eliminating effective competition³¹.

3.1.1.2. Second allegation: agreement or concerted practice between the UK Clearing Banks – Article 101 TFEU

- (32) Harada alleges that the UK Clearing Banks have "operated as a cartel" to exclude MSBs from the market. This conduct allegedly took place in order to favour larger MSBs such as Western Union, and the UK Clearing Banks' own MSB services³².
- (33) Harada further alleges that the UK Clearing Banks have coerced the Agency Banks to conform to their "cartel policy" through threats of disruption to services and ultimately the threat to withdraw banking services³³. According to Harada, the intention of the UK Clearing Banks was "to deprive the MSBs of banking services, which would have the effect of either closing down their business or compelling them to shelter under the

³⁰ See DOC ID 667.

³¹ [...] response to the Commission's RFI ([...]).

³² See Harada's Supplementary Complaint of 17 December 2013 ([...]).

³³ See Harada's supplementary complaint of 17 December 2013 ([...]).

sponsorship of an entity such as Western Union or Money Gram in order to provide them with continued access to banking, albeit via their erstwhile competitors"³⁴.

- (34) In response to those allegations, [...] state that bank account closures were based on an individual assessment and are the consequence of high AML risk for MSBs and strong enforcement action taken by regulators, in particular the fine imposed by US authorities on [...]³⁵.

3.1.1.3. Third allegation: concerted practice between Clearing Bank 1 and larger MSBs such as Western Union – Article 101 TFEU

- (35) Harada alleges that Clearing Bank 1 has engaged in "a concerted practice, in association with other downstream undertakings, that is to say Western Union et al. ("the Association") to close 250 competing MSBs ("The Competition") via the withdrawal of the provision of banking services"³⁶.
- (36) In response to that allegation, [...] states that it has not engaged in any such concerted practice³⁷. [...] states that it has played no role in the de-risking of any of its competitors and has not participated in any concerted practice or common policy with the UK Clearing Banks to deprive other MSBs and money remitters of access to banking services³⁸. In particular, [...] states that: (i) [BUSINESS SECRETS]³⁹ [BUSINESS SECRETS] contributed to the EPIF's response to the Commission's RFI dated 13 March 2015, which it fully endorses⁴⁰; and (ii) as the money remittances sector is only marginally profitable for banks, neither [...] would have any incentive to behave in the manner alleged by Harada⁴¹.

4. THE NEED FOR THE COMMISSION TO SET PRIORITIES AND RELEVANT CONSIDERATIONS

- (37) The Commission is unable to pursue every alleged infringement of EU competition law that is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints.⁴² As a public body charged with competition enforcement, the Commission enjoys a margin of discretion to set priorities in its enforcement activity, as stated in point 27 of Notice on handling of complaints.⁴³
- (38) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into consideration

³⁴ See Harada's Reply to the Article 7(1) Letter ([...]).

³⁵ See [...] response to the Commission's RFI, ([...]) and [...] response to the Commission RFI, ([...]).

³⁶ See Harada's complaint of 6 November 2013 ([...]).

³⁷ See [...] response to the Commission's RFI ([...]).

³⁸ See (DOC ID 771).

³⁹ [BUSINESS SECRETS] (See [DOC ID 771]).

⁴⁰ See [DOC ID 771].

⁴¹ See [DOC ID 771].

⁴² OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.

⁴³ OJ C 101, 27.04.2004, p. 65.

whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. The Commission may also consider the scope of the investigation required. If it emerges that an in-depth investigation would be a complex and time-consuming matter and the likelihood of establishing an infringement appears limited, this will weigh against further action by the Commission. Finally, the Commission may take into account whether a national court or a national competition authority appears well-placed to examine the allegations made.

5. ASSESSMENT OF HARADA'S COMPLAINT AND SUPPLEMENTARY COMPLAINT

- (39) In the Article 7(1) letter, the Commission indicated that, after a careful assessment of the factual and legal elements put forward by Harada, it intended to reject the complaint and supplementary complaint.
- (40) Moreover, the views expressed by Harada in its reply to the Article 7(1) letter do not lead to a different assessment of the complaint and supplementary complaint. This is explained further below where relevant.
- (41) The Commission has, therefore, decided not to conduct a further in-depth investigation into Harada's claims, for the reasons set out below.

5.1. The likelihood of establishing the existence of an infringement

- (42) The Commission concludes that the likelihood of establishing the existence of an infringement of Article 101 or Article 102 TFEU in this case is limited.

5.1.1. Article 102 TFEU

- (43) The Commission concludes that there is a limited likelihood of establishing an infringement of Article 102 TFEU. This is because even if the market were to be defined in the narrowest possible way, that is, the provision of banking services to MSBs (or even money remitters), it is unlikely that Clearing Bank 1 would be in a dominant position in the UK.
- (44) First, in terms of number of operators, Clearing Bank 1 estimates it had a market share of approximately [10-15]% in the banking of MSBs and of approximately [15-20]% in the banking of money remitters in 2013⁴⁴.
- (45) Second, a number of banks other than Clearing Bank 1 provide banking services to MSBs in the UK:
 - (a) as indicated in paragraph (27) above, the other UK Clearing Banks offer banking services to MSBs in the UK; and
 - (b) paragraph 65 of the November 2013 Judgment states that a number of other banks including Bank of America, BNP Paribas, Deutsche Bank, Citibank, Santander and Clydesdale provide banking services to MSBs in the UK.

⁴⁴ [...] reply to the Commission RFI, part II (DOC ID 674, pages 6 and 7, tables 1 and 2).

- (46) Third, the UK Clearing Banks do not seem to face any constraints on their ability to provide banking services to new MSB clients. Banking services required by MSBs are standard corporate banking services provided by many banks on a regular basis. Compliance with AML rules is also a necessary requirement in the banking industry.
- (47) Fourth, in the November 2013 Judgement the High Court expressed a number of doubts about Barclays' dominance in a market for the provision of banking services to MSBs in the UK. For example, at paragraph 65, the High Court referred to the fact that "*well over 3000 MSBs are registered with HMRC alone, but (...) Clearing Bank 1 has only ever provided banking services to 414 MSBs. That is plainly far too small number, taken by itself, to give rise to any inference that Clearing Bank 1 has dominant position in the sector*". At paragraph 69, the High Court further considered that the failure of Harada to find an alternative bank did not necessarily provide evidence that Clearing Bank 1 had a dominant position in the MSB sector.

5.1.2. Article 101 TFEU

5.1.2.1. Existence of an agreement or concerted practice between the UK Clearing Banks to force small and medium MSBs to exit the market and to prevent Agency Banks from providing banking services to MSBs

- (48) The Commission concludes that there is a limited likelihood of establishing the existence of an agreement or concerted practice between the UK Clearing Banks, and thus an infringement of Article 101 TFEU.
- (49) First, while there may be a certain level of awareness among the UK Clearing Banks of the "*challenges associated with the de-risking such as competition law and consumer protection issues*"⁴⁵, there is no evidence of any agreement between the UK Clearing Banks to force small and medium MSBs to exit the market.
- (50) In the first place, the discussions among the UK Clearing Banks do not refer to any strategic or commercially sensitive information such as prices, names of customers or individual assessment criteria⁴⁶.
- (51) In the second place, there is no evidence to indicate that the participants in the meetings outlined in paragraph 21 above discussed commercially sensitive information.
- (52) Second, there is no evidence that the UK Clearing Banks have engaged in a concerted practice to prevent Agency Banks from providing banking services to MSBs⁴⁷.
- (53) In the first place, the UK Clearing Banks⁴⁸ appear to have adopted different strategies in relation to MSBs:

⁴⁵ [...] on De-risking on November, 1, 2013 - [Minutes RFI – D (2015) 023929] [...] response to the Commission RFI, (DOC ID 628, page 1).

⁴⁶ Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 120. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C11/14, point 61.

⁴⁷ Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Woodpulp II*, EU:C:1993:120, paragraphs 70-71.

- (a) In 2013, UK Clearing Bank 1 carried out a review of its MSB client portfolio to lower its exposure to risk. That review did not result in UK Clearing Bank 1 withdrawing from the MSB sector as a whole;
 - (b) In 2015, UK Clearing Bank 2 defined MSBs as 'prohibited clients' and 'has not knowingly taken on any new MSBs customers since 2012';
 - (c) UK Clearing Bank 3 does not have a policy to exit the MSB sector as a whole;
 - (d) UK Clearing Bank 4 seems to have adopted a policy of refusing to take on board new MSB clients.
- (54) This is confirmed by the results of the AUKPI survey according to which UK Clearing Banks have provided a variety of different reasons for refusals to open accounts and account closures, varying from *'appetite loss for the MSB sector/ change in policy'* to *'too low a volume'* and *'insufficient capital'*.
- (55) In the second place, closures of bank accounts by each of the UK Clearing Banks seem to have taken place at different times⁴⁹:
- (a) The figures provided by UK Clearing Bank 1 indicate that most of the account closures ([40-60]% of UK Clearing Bank 1 MSBs clients) occurred in 2013 and 2014. UK Clearing Bank 1 carried out a first review of its policy towards MSBs in 2012, while most of the account closures were the outcome of its 2013 Corporate Bank Review;
 - (b) The figures provided by UK Clearing Bank 2 indicate that most of the bank account closures ([80-100]% of UK Clearing Bank 2 MSBs clients) occurred between 2012 and 2013. According to UK Clearing Bank 2, it started reviewing its AML policy in 2010 and carried out a partial exit in 2011;
 - (c) The figures provided by UK Clearing Bank 3 show an increase of [20-40]% in the number of MSBs served between 2011 and 2014. UK Clearing Bank 3 reviewed its policy in 2013 while not barring MSBs as a higher risk business type; and
 - (d) The figures provided by UK Clearing Bank 4 indicate that it has, on average, closed the accounts of [5-25]% MSB clients per year between 2011 and 2014.
- According to UK Clearing Bank 4, in 2011 its risk appetite towards MSBs was highly cautious but it had no plans to withdraw from the MSB sector, although it had a more cautious approach to certain MSBs (e.g. money remitters, to which they would be generally closed).
- (56) Third, there appear to be only three isolated instances where UK Clearing Banks may have limited the ability of Agency Banks to provide banking services to MSBs⁵⁰. These

⁴⁸ See DOC ID 669.

⁴⁹ See DOC ID 668.

three incidents can be contrasted with the large number of banks that are able to provide banking services to MSBs.

5.1.2.2. Existence of a concerted practice between Clearing Bank 1 and larger MSBs such as Western Union to withdraw the provision of banking services to MSBs

- (57) The Commission concludes that there is a limited likelihood of establishing the existence of a concerted practice between Clearing Bank 1 and larger MSBs such as Western Union to withdraw the provision of banking services to MSBs, and thus an infringement of Article 101 TFEU.
- (58) First, Harada has provided no evidence to support this allegation.
- (59) Second, the investigative measures that the Commission has undertaken have not uncovered any evidence pointing to the existence of discussions between Clearing Bank 1 and larger MSBs such as Western Union relating to a common policy and/or strategy toward MSBs or to an exchange of strategic or commercial sensitive information such as prices, names of customers or individual assessment criteria⁵¹.

5.2. The scope of the investigation required and the likelihood of finding further evidence supporting Harada's allegations

- (60) The Commission has carried-out an in-depth investigation into the allegations in Harada's complaint and supplementary complaint. Given the outcome of that investigation and the publication of Harada's complaint and supplementary complaint by the EUEA, it is unlikely that further investigation would bring to light further evidence supporting Harada's allegations.

5.3. The UK Competition and Markets Authority and the English courts appear well-placed to handle the matters raised

- (61) The Commission concludes that both the UK Competition and Markets Authority and the English courts appear well-placed to handle the matters raised by Harada's complaint and supplementary complaint.
- (62) First, the UK Competition and Markets Authority appears well-placed to deal with the allegations raised because:
 - (a) the impact of the alleged practices are essentially confined to the territory of the UK; and
 - (b) the Competition and Markets Authority is competent to apply Articles 101 and 102 TFEU.

⁵⁰ [...] reply to the Commission's [...] reply to the Commission's RFI ([...]); and [...] reply to Commission's RFI ([...]).

⁵¹ See Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission*, EU:C:2015:184, paragraph 120. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ 2011 C11/14, point 61

- (63) Second, as confirmed by the November 2013 Judgment, the English courts appear well-placed to deal with the allegations raised in Harada's complaint and supplementary complaint:
- (a) The English courts are in a position to gather the factual information necessary to evaluate whether the conduct complained of by Harada constitutes an infringement of Article 101 or 102 TFEU⁵².
 - (b) The English Courts are able to examine whether the conduct complained of by Harada:
 - restricts competition within the meaning of Article 101(1) TFEU⁵³;
 - benefits from an exemption under Article 101(3) TFEU⁵⁴; and
 - infringes Article 102 TFEU⁵⁵.
 - (c) The English courts can provide legal remedies to safeguard Harada's rights in a satisfactory manner⁵⁶. These include applying the nullity sanction provided for in Article 101(2) TFEU and awarding damages for breach of Articles 101 and 102 TFEU. In the event of doubt, the English courts may also seek a preliminary ruling from the Court of Justice.
- (64) Third, reasons pertaining to procedural economy and the sound administration of justice militate in favour of the allegations raised in Harada's complaint and in the supplementary complaint being considered by the English courts before which Harada has already brought certain of those allegations⁵⁷.

⁵² Case T-427/08 *CEAHR v Commission*, EU:T:2010:517, paragraph 173.

⁵³ Case T-24/90 *Automec v Commission*, EU:T:1992:97, paragraphs 90 and 92.

⁵⁴ Article 6 and recital 4 of Regulation No 1/2003.

⁵⁵ Case T-119/09 *Protégé International v Commission*, EU:T:2012:421, paragraph 78.

⁵⁶ Case T-70/15 *Trajektna luka Split v Commission*, EU:T:2016:592, paragraphs 45-46 and 50.

⁵⁷ Case T-70/15 *Trajektna luka Split v Commission*, EU:T:2016:592, paragraph 49.

6. CONCLUSION

- (65) In view of the above, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004⁵⁸.

7. PROCEDURE

7.1. Possibility to challenge this Decision

- (66) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

7.2. Confidentiality

- (67) The Commission reserves the right to send a copy of this Decision, or parts thereof, to [...]. Moreover, the Commission may decide to make this Decision public on its website, or a summary thereof.⁵⁹ If required for the protection of legitimate interests of the complainant, the published version of the Decision will not identify the complainant. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website.
- (68) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.
- (69) Therefore, if you consider that certain parts of this Decision contain confidential information I would be grateful if within two weeks from the date of receipt you would inform [...] or [...]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential.

For the Commission

*Margrethe VESTAGER
Member of the Commission*

⁵⁸ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

⁵⁹ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.