EUROPEAN COMMISSION
Competition

CASE COMP/39803 Italian Association of Lehman Brothers' Bond Holders v Consorzio Patti Chiari, Banche Consorziate e Agenzie di Rating

ANTITRUST PROCEDURE

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

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

Date: 30/11/2011

This text is made available for information purposes only.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as […].

EUROPEAN COMMISSION

Brussels, 30.11.2011
SG-Greffe(2011) D/21836
C(2011) 8935 def.

PUBLIC VERSION

ONLY THE ITALIAN TEXT IS AUTHENTIC

To the complainant: […]

Subject: **Case COMP/D2/39803 Italian Association of Lehman Brothers' Bond Holders v Consorzio Patti Chiari, Banche Consorziate e Agenzie di Rating - Commission Decision rejecting the complaint**

Dear Sir / Madam,

I refer to your complaint of 2 April 2010 lodged with the Commission against the Patti Chiari Consortium, the Bank Consortium and the global parent companies and Italian subsidiaries of Standard & Poor's, Moody's and Fitch ('the CRAs') regarding alleged violations of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') in connection with the credit ratings given to bonds issued by companies belonging to the Lehman Brothers group ('Lehman Brothers'). It is alleged that these parties acted as a result of an agreement or concerted practice to maintain Lehman Brothers ratings or to disseminate incorrect or misleading information about the risk associated with Lehman Brothers bonds which resulted in losses to investors using the Patti Chiari Consortium.

I should also like to refer to the Commission's letter of 4 March 2011 addressed to you on the above matter and to your further submission of 25 March 2011 by which you provided additional information on that matter.

For the reasons set out below, the Commission considers that there is no sufficient degree of European Union interest for conducting a further investigation into the alleged infringement(s) and rejects your complaint pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.[1]

[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.

1. THE COMPLAINT

The complainants in this matter are a group of Italian investors[2] in Lehman Brothers bonds[3] ("the Lehman stock") who sustained losses after the collapse of Lehman Brothers of 15 September 2008, as their investments have volatilized after that date.

The Patti Chiari Consortium was created by a consortium of Italian banks ("the Bank Consortium") in 2003 in order to provide citizens with tools for understanding financial services products. Its principle aim is to promote transparency, product quality and choice, market efficiency and financial education in Italy. The Patti Chiari Consortium disseminates information to end users of financial services products about certain investments through their website.

The complainants allege that there was an agreement or concerted practice by the Patti Chiari Consortium and the Bank Consortium in the establishment of the Patti Chiari Consortium, in the dissemination of information to investors by the Patti Chiari Consortium, and specifically by the inclusion of bonds in Lehman Brothers companies on the list of bonds deemed 'low risk/low return'. This list was made publically available to investors on the Patti Chiari Consortium website on the basis of criteria they had established. Patti Chiari Consortium continued to include Lehman stock in their list of Government stock and bonds regarded as safe and reliable, known as "List of low risk/return bonds" ("the Patti Chiari List"), despite the failure of the Lehman stock to meet the qualitative and quantitative criteria imposed by the Patti Chiari Consortium.

More concretely, bonds issued by Lehman Brothers were not removed from this Patti Chiari List in the run up to the collapse of Lehman Brothers on 15 September 2008. The complainants point out that, in deciding to purchase the Lehman stock, they were relying on information circulated by Patti Chiari Consortium, who continued to promote confidence in the positive ratings provided by the Credit Rating Agencies ("CRAs") up to the very date of the default. As a consequence, the complainants saw their investments' value disappearing.

The complainants consider that Patti Chiari Consortium and the Bank Consortium based themselves on the Agencies' rating and failed to their duty to take due account of the overall situation, especially that all the financial operators were envisaging the bankruptcy of the issuer by resorting to Credit default swaps spread, which had risen sharply. Against this context, Patti Chiari Consortium failed to implement their own procedures for the control and monitoring of the financial situation of the Lehman Brothers group. Given that the CRAs did not downgrade the rating of the Lehman bonds, Patti Chiari Consortium did not eliminate them from the List, and the Bank Consortium did not inform customers of the increased risk.

The complaints' opinion is that the European Commission should verify whether this happened merely as a result of gross negligence or whether this uniform and coordinated behaviour was the result of a prohibited agreement or concerted practice.

---

[2] Investors belonging to AIROLB - the Italian Association of Lehman Brothers Savers and Bondholders.

[3] Bonds issued under the Euro Medium Term Note Program, German Note Issuance Program, Swiss Certificates Program and Italian Inflation Linked Notes by companies belonging to the Lehman Brothers Group and primarily the parent company, Lehman Brothers Holdings Inc. and Dutch subsidiary, Lehman Brothers Treasury Co. B.V.

It is also alleged that the CRAs agreed to adopt a common line of behaviour regarding the rating of Lehman Brothers' bonds. This allegation is made on the basis that none of the CRAs, took steps to downgrade the Lehman stock which should not have retained an A rating until a few days before the default. CRAs are required to undertake continuous monitoring of ratings and, if needed, to intervene by correcting the ratings. Ratings exert a substantial influence over the financial markets given that, although based on complex assessments, they are immediately and readily intelligible to investors across the board, irrespective of their profile and expertise levels. Investor confidence in the opinions expressed by rating agencies is high, given the solid reputation they enjoy.

The IOSCO code of conduct, to which all the CRAs subscribed, is implementing the fundamental principles to be applied to rating agencies: "*Agencies shall take steps to avoid publishing any credit analyses or reports that contain misrepresentations or are otherwise misleading as to the general creditworthiness of an issuer or issue and must monitor and update ratings on the basis of regular reviews of credit worthiness, undertaking to communicate changes in ratings rapidly to the market*".

The complainants also refer to Directive 2003/6/EC of 28.01.2003 on insider dealing and market manipulation, which in its Part 1 section 2(c) prohibits the dissemination of false or misleading information concerning financial instruments if the person disseminating such information was or should have been aware that the information was false or misleading. Also, the complainants mention Directive 2000/12/EC of 20.03.2000 which states that external ratings can only be issued by specialist agencies accredited by the Bank of Italy, known as E.C.A.I (External Credit Assessment Institutions) and lists the requirements[4] to be met by E.C.A.I.s before they can be recognized and accredited by the competent authority. Moreover, the complainants point out that on 13.11.2008, the European Commission submitted a proposal for regulation concerning CRAs, announcing the creation of a regulatory authority and affording increased responsibilities to the CRAs.

The Technical Report on Lehman brothers of 5.02.2010 which the complainants have commissioned concludes that the failure of Lehman risk was not unexpected, but in fact, was the end point of a process which had been apparent to financial analysts since the second half of 2007.

The complainants consider that the unanimous dissemination of such misleading information by the Agencies, in the light of overall economic developments and the particular crisis affecting the LBHI group cannot be explained in any other way, given their role and responsibilities, than by the fact that their behaviour is stemming from prohibited concerted practice restrictive of competition.

In their submission of 25 March 2011, the complainants maintain the allegations they have initially put forward in the complaint and have provided further documents which they consider as evidence of concrete agreements and/or concerted practice between, on the one hand, Patti Chiari Consortium and the Bank Consortium and, on the other hand, between the CRAs.

---

[4] For instance, their ratings must be awarded in an objective and independent manner and regularly reviewed, their procedures must be sufficiently transparent and the competent authority must also verify whether, on the market, the creditworthiness assessments of a given E.C.A.I. are regarded as credible and reliably b users on the market.

The complainants also consider that the alleged agreements/concerted practices have had a devastating effect not only on Italian investors, but on the whole market of the European Union. They also point out that the fact that the Italian National Competition Authority is now conducting a preliminary investigation, limited to the Italian market, should not preclude the Commission from launching an investigation. However, the complainants conclude by inviting the Italian Competition Authority to start an official investigation in order to verify the infringements complained of.

Moreover, it is alleged that the action for compensation brought by the complainants before the Court of Milan (6th Civil Section)[5] in case 19639/10, which concerns relations between private parties, does not have any link to the alleged competition infringement, in which the complainants have asked the European Commission to act in the public interest in order to safeguard competition and freedom of the market.

2. ASSESSMENT

As already explained in the European Commission's article 7(1) rejection letter, according to the settled case law of the Courts of the European Union, the Commission is not required to conduct an investigation into each complaint it receives.[6] The Courts of the European Union have also recognised that the Commission has discretion in its treatment of complaints.[7] In particular, the Commission is entitled to give differing degrees of priority and refer to the European Union interest in order to determine the degree of priority to be applied to the various complaints brought before it.[8]

In assessing the European Union interest as regards the continuation of an investigation into a case, the Commission may in particular balance (i) the significance of the alleged infringement in view of the functioning of the internal market, (ii) the probability of establishing the existence of the infringement and (iii) the scope of the investigation required.[9]

Further to our preliminary examination, it is apparent that the effects of the alleged collusion between Patti Chiari Consortium and the Bank Consortium are essentially confined to the territory of Italy. In particular, Patti Chiari Consortium is a self-regulatory consortium composed of 97 financial institutions which are of Italian nationality or at most Italian branches of foreign financial groups (Deutsche Bank for example).

Moreover, the Patti Chiari Consortium is particularly aimed at Italian investors or at foreign investors in Italy. As mentioned on the Patti Chiari's website[10] (which is exclusively drafted in

---

5 Tribunale di Milano, Sez. VI Civile.

6 See inter alia Case T-24/90, *Automec v Commission*, [1992] ECR II-2223, para. 76., Case T-62/99 *Sodima v Commission* [2001] ECR II-655, paragraph 36; Case T-5/93 *Tremblay and Others v Commission* [1995] ECR II-185, paragraphs 59 and 60 and Judgment of 15 December 2010 in Case T-427/08 *CEAHR v Commission* , nyr, paragraphs 27.

7 See Cases C-119/97 P, *Ufex v Commission*, [1999] ECR I-1341, para. 88; T-193/02, *Laurent Piau v Commission*, [2005] ECR II-209, paras. 44 and 80.

8 *Automec*, *supra*, paras. 77 and 85.

9 *Automec*, *supra*, para. 86.

10 http://www.pattichiari.it/home/pattichiari-e-gli-impegni/chi-siamo/.

Italian): "*Set up in 2003, Patti Chiari is the self-regulatory system of banking industry promoting quality and efficiency of market and financial regulation in our country" (Italy).*

Furthermore, all of the reported activities of the Patti Chiari Consortium (the developing of programs, rules and tools concerning bank-clients relationship, the promotion of implementation of "commitments to quality", the promotion of financial education) concern the Italian territory. This is also shown by its ties with the Italian authorities: *"Patti Chiari consortium adopts governance rules based on a model of "concerted self-regulation" inspired by a systematic dialogue with Authorities (Bank of Italy, Italian Competition Authority), Institutions (Parliament and Government) and consumer Associations who are part of inspection bodies of the consortium."* In addition, all the complainants in the present case are Italian.

Although the CRAs' alleged concerted practice refers to the absence of downgrading of the Lehman Brothers in general, on a worldwide scale, the complainants' concerns stem from the fact that the Patti Chiari Consortium based its assessments on these ratings, without any additional checks, for the purposes of Italian investors or of investors in Italy. Therefore, the complainants focus on the effects of an alleged concerted practice between CRAs in Italy.

In addition, we understand that the Italian National Competition Authority is already conducting a preliminary investigation in this matter. Pursuant to Article 13 of Council Regulation 1/2003, the Commission may reject a complaint on the ground that a competition authority of a Member State is dealing or has dealt with the case.

Moreover, a civil law claim for damages has been filed before the Court of Milan. It is established case-law that a pending decision by a national Court is an element which the Commission can take into consideration when deciding whether the criteria of the existence of European Union interest is fulfilled or otherwise.[11] In the case at hand, given that the behaviour complained of is subject to litigation before a national court, the Commission considers that it would be disproportionate to further allocate resources to examining the complaint.

The alleged infringement concerns the individual rights of private persons in their relations *inter se* which are normally safeguarded by the civil courts whereas the European Commission as a public enforcement authority must act in the public interest. Indeed, there is no indication that the alleged infringement in Italy forms part of a wider pattern or scheme which would affect consumers other than the complainants and thus would have a significant impact on the functioning of the internal market.

The complainants fail to adduce any concrete evidence of an agreement or concerted practice between the CRAs or between the Patti Chiari Consortium and the Bank Consortium. They themselves do not exclude that the alleged behaviour could have resulted from gross negligence when it comes to the Patti Chiari Consortium or from the CRAs' expectations that there was a capacity on the market to repay the bonds.

Indeed, the Patti Chiari Consortium might have been negligent in fulfilling their duties, with the consequence that, if this were demonstrated, they would be answerable at the appropriate levels and their responsibility could be engaged on civil law grounds.

---

[11] Case T-114/92, *BEMIM v. Commission* [1995] ECR II-147, para. 80

Establishing the proof of the alleged infringement in the present case would thus require a large scale investigation. Given the limited likelihood of proving the alleged infringements and the substantial investigatory resources which the Commission would have to invest in order to obtain any evidence of their existence, allocating the resources necessary to further investigate the case would be disproportionate, in particular given the investigation of the Italian Competition Authority and the civil law proceedings in front of the national jurisdiction.

3. CONCLUSION

In view of the above considerations, the Commission has come to the conclusion that there is an insufficient degree of European Union interest to merit conducting a further investigation into the alleged infringements and therefore rejects the complaint.

4. PROCEDURE

An action challenging this Decision may be brought before the General Court of the European Union in accordance with Article 263 TFEU.

For the Commission

Joaquín Almunia
Vice-President