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Competition Law Damages Actions in respect of Forex Rate Fixing Cartels: Where the Passing-on Defence Appears to Reach its Limits

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Introduction

The essence of the rule on passing-on as enshrined in EU Law under the 2014 Damages Directive is fairly straightforward: that "…the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law."[1] But beyond the practical challenges of demonstrating and quantifying pass-on that are liable to arise in many cartel situations involving overcharges being passed down supply chains,[2] significant additional layers of complexity come up where first, the original "overcharge" does not concern a "price" for goods or services in the conventional sense but rather the manipulation of a currency exchange rate and second, where the alleged pass-on of the overcharge does not take the form of a price, but rather a reduction in the value of a holding in a legal entity. Recent litigation relating to the fixing of foreign exchange markets over a 10-year period from 2003-2013 shines a light on some of the complexities that can arise in such situations, before one even gets to the significant challenges around quantification of pass-on. This article will discuss the recent decision of the Court of Appeal in *Allianz Global Investors Gmbh v Barclays Bank Plc*,[3] where the Court was required to consider whether a group of defendant banks, which had been found to have fixed foreign exchange rates, were entitled as a matter of law to avail themselves of the passing-on defence against claims brought by various investment funds.

While it will submitted that the Court of Appeal's decision that the passing-on defence was not available to the defendant banks here is the correct one, elements of the Court's reasoning will be questioned. In particular, it will be argued that the Court was over-critical of the High Court[4] for focusing on the standing of investors in the claimant funds to bring actions against the defendant banks, in that both the questions of avoided loss on the part of the claimants and standing to sue on the part of investors essentially come back to the rationale behind the rule against reflective loss[5] i.e. that from the perspective of a shareholder in a company, losses incurred by that company as a result of the wrongdoing of a third party cannot – except in a very limited number of situations – be extracted from the shareholder's more general interest in a company, the essence of which is to share in the

[1] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, Article 13.

[2] On which there is quite an extensive literature. For recent contributions see for example Sarina Williams, ""Pass-on" in the UK post-interchange: a weapon for defendants or a Pyrrhic victory?" (2020) 13 *Global Competition Litigation Review* 145-154; Urszula Jaremba and Laura Lalikova, "Effectiveness of private enforcement of European competition law in case of passing-on of overcharges: implementation of Antitrust Damages Directive in Germany, France and Ireland" (2018) 9 *Journal of European Competition Law & Practice* 226-236; Marco Botta, "The principle of passing on in EU competition law in the aftermath of the Damages Directive" (2017) 25 *European Review of Private Law* 881-907.

[3] [2022] EWCA Civ 353.

[4] *Allianz Global Investors GmbH v Barclays Bank Plc* EWHC 399 (Comm); [2021] 4 C.M.L.R. 18.

[5] *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch. 204; [1982] 2 W.L.R. 31.

fortunes of the company, for better or worse. To put this another way, to hold that the sale or redemption of a share amounts to a crystallization of loss on the part of a shareholder in respect of damage incurred by a company would, apart from creating great complication, also interfere with a well-established and perfectly coherent principle of UK company law.

In terms of where this decision leaves the passing-on defence, the main consequence of the case is to draw attention to a fundamental distinction between, on the one hand, the situation of an illegal price being identifiably passed down a supply chain and on the other, an illegal overcharge causing losses to the value of a company – or other legal entity – potentially resulting in the diminution of the value of an individual shareholder's holding. In the first case, the overcharge effectively retains a separate existence to the limited company or other legal entity, in that the company is subject to an illegal overcharge, which it then passes on, in whole or in part, by way of its own price increase. In the second situation, however, the illegal overcharge effectively becomes absorbed in the value of the company. In this sense, the decision demonstrates an important limitation on the applicability of the passing-on defence. It will finally be noted that even leaving aside the issues around reflective loss, the nature of the overcharge in cases concerning the manipulation of foreign exchange rates makes it very difficult to apply the passing-on defence in terms of proving and quantifying pass-on. In this regard, reference will be made to the recent refusal of the Competition Appeal Tribunal to certify two attempted opt-out actions against banks in respect of forex fixing.[6]

Background to the dispute in *Allianz Global Investors Gmbh and Others v Barclays Bank Plc and Others*

The case of *Allianz Global Investors GmbH v Barclays Bank Plc* arose in the context of an action by over 170 claimants – primarily investment funds ("the Funds") – against 7 banks ("the Banks"), in relation to losses allegedly suffered as a result of fixing of foreign exchange ("forex") markets by the Banks over a 10-year period from 2003-2013. Some of the claims comprised "follow-on" actions based on two Commission infringement decisions,[7] with others constituting stand-alone claims. Whereas the Banks had sought to invoke the passing-on defence against the Funds, essentially arguing that losses emanating from the infringements were passed on by the Funds to their own investors in the event that individual investors redeemed or withdrew their investments in the Funds (referred to as the "Redemption Argument"), the claimants had unsuccessfully attempted to have this defence struck-out by the High Court.[8] The Funds argued that the rule against "reflective loss" in relation to companies[9] and similar principles that applied to both trusts and partnerships, meant that investors had no standing to sue the Banks and therefore actions had to be allowed by the Funds themselves. The High Court accepted the argument of the Banks, however, that the rules on reflective loss and the equivalent rules for trusts and partnerships did not apply to *former* shareholders, beneficiaries or partners, meaning that such parties *did* have standing to sue the Banks. Largely on that basis the High Court refused to strike-out the Banks' defence.

[6] *Michael O'Higgins FX Class Representative Limited v Barclays Band Plc and others/Philip Evans v Barclays Bank Plc and others* [2022] CAT 16.

[7] Decisions of the Commission of 16 May 2019 in Case AT.40135 FOREX ("Three Way Banana Split") and AT.40135 FOREX (Essex Express). The fines imposed under the two decisions were €811,197,000 and €257,682,000 respectively.

[8] *Allianz Global Investors GmbH v Barclays Bank Plc* EWHC 399 (Comm); [2021] 4 C.M.L.R. 18.

[9] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 2004.

The Decision of the Court of Appeal

The focus on avoided loss

Between the decision of the High Court[10] and the Court of Appeal judgment,[11] the argument of the Banks at first instance with regard to the reflective loss argument had been somewhat undermined as a result of a decision of the Privy Council in *Primeo Fund v Bank of Bermuda (Cayman) Ltd*,[12] whereby the rule against reflective loss was held to be substantive rather than procedural. This meant that the relevant time for assessing whether loss is recoverable was deemed to be the time when the loss is actually suffered by the claimant. As such, a sale of shares did not render recoverable a loss that was not recoverable by virtue of the reflective rule at the time the loss was incurred.

In the light of this judgment, the Banks reformulated their appeal to make a distinction between share *sales* and share *redemptions* arguing that even if the former did not trigger a claimable loss, the latter did. But according to the Court of Appeal, the whole way in which the issue had been framed at first instance was fundamentally flawed. The question of whether investors in the Funds had standing to sue was not of itself the key issue and what mattered was whether the Funds had passed on their losses to their investors. As Lord Justice Phillips put it "the true question is whether the Funds have avoided or mitigated their loss by reason of redemptions so that the amount recoverable by them is reduced".[13] What were referred to as the "trust, company and partnership issues" instead of having been seen "…as a subsidiary argument or aspect of the avoided loss question…became the predominant and perhaps sole focus of the hearing…".[14] So, in the view of the Court of Appeal, whether a redemption by an investor resulted in the Funds avoiding a loss was crucial, but not from the perspective of whether the investor consequently gained standing to sue, but purely from the perspective of whether the loss had been avoided by the fund.[15] Furthermore, this was a question that the High Court had not actually addressed.[16] So, the key issue that the Court of Appeal focused on was whether redemptions by investors in the Funds constituted avoided loss.

What classes as a collateral benefit?

It was noted[17] from the decision of the Supreme Court in *Swynson Ltd v Lowick Rose LLP*[18] that although avoided loss is not generally recoverable, there is an exception in the case of collateral payments (*res inter alios acta*), which are not deemed to make good a claimant's loss. Collateral benefits had been defined by Lord Sumption in *Swynson* as "…those whose receipt arose independently of the circumstances giving rise to the loss",[19] with examples being gifts and payments under indemnity insurance policies. Lord Sumption had noted that "in cases such as these, as between

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[10] *Allianz Global Investors GmbH v Barclays Bank Plc* EWHC 399 (Comm); [2021] 4 C.M.L.R. 18.
[11] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353.
[12] *Primeo Fund (in official Liquidation) v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22, [2021] BCC 1015.
[13] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [24].
[14] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [25].
[15] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [25].
[16] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [26].
[17] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [31].
[18] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32 [2018] AC 313.
[19] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32 [2018] AC 313 at [11].

the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work".[20] So, according to the Court of Appeal in the present case, the question with regard to redemptions was therefore "…whether the benefit is to be regarded as arising independently of the loss, even if occasioned by it".[21] It was the contention of the Banks that redemptions at a lower price than would otherwise have been the case were not in any way collateral to the Funds' losses, because such lower redemptions related directly to the original wrongdoing and therefore constituted the "passing-on" of the losses by the Funds.[22] But in the view of the Court, in the light of *Swynson* it was "…necessary to consider the nature of the transaction which gave rise to the benefit to determine if it is to be regarded as arising independently of the Funds' loss".[23] The Banks, on the other hand, had "…focused on the benefit, not the transactions which give rise to it"[24] and in the view of the court "…redemptions, and any benefit the Funds derive from them, are independent of the Funds' losses…".[25]

There were various considerations in the Court coming to this conclusion. First, it was noted that the contracts between Funds and investors "…pre-existed the wrongdoing and their formation, and the exercise of rights thereunder, are entirely independent of the wrongdoings".[26] It was then noted that redemptions were "…not transactions entered in the course of the Funds' investment businesses, let alone consequent on…the overcharges by the Banks".[27] Third, given that "all Funds will ultimately distribute their assets to investors" it would follow that "…the ultimate conclusion of the Banks' argument must be that a Fund cannot itself suffer any recoverable loss, because that loss will inevitably, in the end, be avoided when the assets are distributed".[28]

The Court also provided public policy considerations behind its decision. These included that it would bring "vast complication…in many claims brought by companies, trusts and partnerships if lower redemptions reduced the loss that could be recovered"[29] and that "it would give defendants a potential answer (requiring extensive investigation) to what would otherwise be readily established losses".[30] Indeed, accepting the Banks' contention "…would permit defendants to escape liability for losses they have caused through their wrongdoing."[31]

The company trust and partnership issues

Having held that redemptions did *not* result in the Funds "avoiding" their losses, the Court felt the need to consider the issues around investors' ability to bring actions against companies, trusts and partnerships, solely in the context of assessing the possibility of double-recovery against the Banks.

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[20] *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32; [2018] AC 313 at [11].
[21] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [32].
[22] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [36].
[23] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [37].
[24] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [37].
[25] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [37].
[26] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [37].
[27] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [37].
[28] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [37].
[29] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [38].
[30] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [38].
[31] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [39].

In terms of reflective loss, the Court essentially held that actions by investors against companies in respect of diminutions in the value of a shareholding resulting from losses incurred by the company due to the wrongdoing of a third party, were precluded by the rule set out in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)*.[32] Lord Reed had summarised this in the case of *Sevilleja v Marex Financial Ltd*[33] when stating that:

> "…a shareholder cannot bring a claim in respect of a diminution in the value of his shareholding, or a reduction in the distributions which he receives by virtue of his shareholding, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, even if the defendant's conduct also involved the commission of a wrong against the shareholder, and even if no proceedings have been brought by the company".[34]

Lord Reed had gone on to state that "[t]he critical point is that the shareholder has not suffered a loss which is regarded by the law as being separate and distinct from the company's loss, and therefore has no claim to recover it".[35]

Whereas it was noted that the Privy Council in *Primeo*[36] rejected the notion that the rule in *Prudential*[37] did not apply where a shareholder sold their shares[38] on the basis that the shareholder's loss was crystallised at that point, the Court in the present case did not accept the proposition that the situation was any different in the case of a share redemption. First and foremost it had been established in *Marex* and *Primeo* that "…a shareholder suffers loss when the value of his shareholding is diminished by reason of damage to the company, albeit that it is not actionable because of the rule in *Prudential*"[39] and that this principle "…must apply just as much to a shareholder who subsequently redeems his shares as it applies to a shareholder who sells his shares".[40] In essence, according to the Court, "…the principle is that the recoverability of the loss is to be assessed when it is suffered, not at a later date when that loss is said to have "crystallised", whether by sale or redemption".[41]

The Court was similarly unwilling to find that beneficiaries of trusts were entitled to sue for losses incurred by the Funds that took the form of trusts (the equivalent of the rule against reflective loss in respect of companies being set out in *Webster v Sandersons Solicitors*[42]). Statutory duties owed in respect of transactions entered into by Funds that were trusts, were "…in the normal course, owed to the trustees and not to the beneficiaries of the Fund from time to time".[43] Furthermore, the beneficiaries did not suffer "…any distinct loss from that of the Fund at the time of the wrongdoing"[44] and "[t]he subsequent redemption of their interests does not give rise to a separate loss, but

[32] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204.
[33] *Sevilleja v Marex Financial Ltd* [2020] UKSC 31; [2021] A.C. 39.
[34] *Sevilleja v Marex Financial Ltd* [2020] UKSC 31; [2021] A.C. 39 at [9].
[35] *Sevilleja v Marex Financial Ltd* [2020] UKSC 31; [2021] A.C. 39 at [83].
[36] *Primeo Fund (in official Liquidation) v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22, [2021] BCC 1015.
[37] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204.
[38] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [45].
[39] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [47].
[40] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [47].
[41] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [47].
[42] *Webster v Sandersons Solicitors* [2009] EWCA Civ 830, [2009] P.N.L.R 37.
[43] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [56].
[44] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [56].

terminates their relationship with the Fund at a pre-agreed price and leaves the loss with the Fund and for the Fund to claim".[45]

Similarly, the Court of Appeal noted that it was not in dispute that claims relating to damage incurred by a limited partnership fund could only be brought by the general partner against the wrongdoer[46] (*Certain Limited Partners in Henderson PFI Secondary Fund II LLP v Henderson*[47]) and that in the case of a partner leaving the partnership with a reduced redemption value due to wrongdoing against the partnership, that much like the trust situation "…the duty is owed to the partnership, the loss is that of the partnership and the limited partner has no cause of action and does not acquire one on redemption".[48]

What the dispute in *Allianz* tells us

Key Issues from the case

While it has always been the case that the existence of the passing-on defence does not remove the obvious practical challenges that will often arise in quantifying pass-on, the dispute in *Allianz* reminds us that even at a more fundamental level, the application of the passing-on defence will not always be straightforward. While the passing-on defence has usually been predicated on an overcharge being passed down different levels of a supply chain, this case highlights a more complex scenario than the classic supply chain model. Indeed, there are a number of aspects of the situation addressed in the *Allianz* case that do not fit well on to the "conventional" model.

The first of these concerns the fact that the overcharge does not relate to an agreement to artificially raise the price of a particular product, but rather an agreement to fix an exchange rate that essentially constitutes an index against which potentially numerous transactions across a wide range of sectors, involving thousands of different parties, will be executed. In fact, this issue of "market-wide" harm did not really arise in *Allianz*, as the Court was concerned with the ability of the defendants to plead the passing-on defence in terms of the relevant legal principles, rather than attempting to assess what, if any, overcharge had actually been passed on. Nonetheless, when it comes to the fixing of exchange rates, how any level of pass-on can actually be assessed and quantified is clearly an issue that looms large. This is further discussed briefly below in relation to two recent attempted opt-out actions following-on from the Commission's infringement decisions concerning the fixing of forex rates.

As already touched on, the issues that this case really brought to the fore, however, centred on whether the redemption by an investor in a fund can be classified as the "passing-on" of a loss by that fund to the investor. Although it is submitted that the decision of the Court of Appeal was the correct one, it is questioned whether the Court's focus on "avoided loss" was right.

The Court's treatment of the High Court Decision

In the first place, as explained above, the Court took the view that the High Court had erred in placing the emphasis on the ability or otherwise of shareholders, beneficiaries or ex-partners to sue in respect of losses incurred by the companies, trusts and partnerships respectively in which they had an interest,

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[45] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [56].
[46] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [58].
[47] *Certain Limited Partners in Henderson PFI Secondary Fund II LLP v Henderson* WEHC 3259 [2013] QB 934.
[48] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [62].

rather than whether the Funds had passed-on their losses to the investors – and that for this reason, what were known as the "trust, company and partnership" issues were therefore given undue prominence.

It is submitted that while the Court of Appeal was correct to characterise the central question as whether losses had been "passed-on" by the Funds, to play down the relevance of the trust, company and partnership issues was perhaps rather harsh on the High Court – even if Lord Justice Phillips did take the view that the Banks were at least partly to blame for the dispute at first instance being focused around the trust, company and partnership issues.[49] It is not suggested here that the right of the investors to sue was the key question for the Court to address, but rather it is submitted that in assessing whether the redemption of a share by a shareholder – to take the company example – constitutes "passing-on" by the company, whether in this situation the shareholder has a right to sue essentially has the same intellectual enquiry at its root i.e. when a company suffers a loss due to the actions of a third party, does the redemption of a share effectively transfer a part of that loss to the shareholder? In this sense, the issue comes back to the relationship between company and shareholder – or trust and beneficiary, partnership and ex-partner. In the case of companies, therefore, the rationale for the rule against reflective loss[50] – if not the rule itself – *is* of significance.

The Court's focus on collateral benefits

As stated above, in coming to the decision that share redemptions did not constitute "passing-on" by the Funds of the losses incurred from the Banks' rate-fixing, the Court of Appeal asked whether any benefits derived from lower share redemptions constituted a collateral benefit as opposed to "avoided loss". While the issue of collateral benefits was brought up by the Funds, it is respectfully questioned whether the Court of Appeal gave more prominence to this matter than it merited. Specifically, it is submitted that the focus on collateral benefits may be misplaced on two grounds. First, it is evident that asking whether, for example, an insurance payment against a certain eventuality[51] constitutes a collateral benefit for a company is far more straightforward than asking whether the sale or redemption of a share constitutes a collateral benefit for the company. This is in the sense that an insurance policy is a self-standing contract that has a clearly separate existence from the main activities of a company and is quite deliberately designed to constitute a collateral benefit by way of an insurance against a certain eventuality arising. A share redemption, on the other hand, is much more intertwined with the whole business and undertaking of the company and therefore as a matter of form, if not substance, it is less clear-cut whether it constitutes a collateral benefit in the sense of being *collateral* to the original negligence. As stated above, the Court's conclusion that share redemptions did constitute a collateral benefit was based on various considerations, such as that the contracts with investors pre-existed the losses emanating from the Banks' actions.

But perhaps the bigger issue with the Court's focus on collateral benefits, is that by treating share redemptions – at a lower price than would otherwise have been the case – as potential collateral *benefits*, on one analysis, the Court was implying that the losses *were* passed on in a financial sense, but were simply not classed as "avoided loss" or passing-on in the legal sense. That is to state that if indeed the disbenefit of the wrongdoing by the Banks was – to at least some extent – obviated by share redemptions by shareholders, then because the benefits of the redemptions were a purely

[49] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [26].
[50] *Foss v Harbottle* 67 E.R. 189.
[51] This, along with benevolent payments were given as the two primary examples in *Parry v Cleaver* [1970] AC 1.

"collateral benefit", the Fund should not be deprived of its right to sue the Banks in relation to the original overcharge. The problem with the collateral benefit analysis here, is that it potentially ironically draws a greater correlation between the share redemption and the illegal overcharge than is merited. Unlike an insurance policy against damage incurred as a result of the tortious conduct of a third party, it is submitted that the relation between a share redemption and an illegal overcharge by a third party is too unrelated to the tortious conduct to even classify as a collateral benefit. It is acknowledged that the concern here may, at least partly, relate to the terminology of "collateral benefit", but it is nonetheless argued that the focus on whether lower share redemptions constitute a "collateral benefit" is also legally problematic.[52]

It is submitted that the better rationale for refusing to hold that passing-on has occurred in the legal sense is twofold. The first is that do so would be objectionable on policy grounds – and this is something that the Court did bring up as mentioned above, pointing to the "vast complication…in many claims brought by companies, trusts and partnerships if lower redemptions reduced the loss that could be recovered"[53] and that "it would give defendants a potential answer (requiring extensive investigation) to what would otherwise be readily established losses".[54] But the second and more important legal ground, it is submitted, is that to classify the sale or redemption of a share as constituting the legal passing-on of a particular overcharge by a company to its shareholder would be both artificial but also fundamentally contrary to the nature of the company/shareholder relationship. It is in this regard that it is argued that the focus of the High Court on the rule against reflective loss was a rational one – even if its application of the principle was arguably flawed.

Why does this come back to the rule on reflective loss?

As stated above, the Court of Appeal took the view that the focus of the High Court on the rule on reflective loss was mistaken, because that rule related to the right of shareholders to sue in respect of wrongdoing against the company rather than to the question of whether loss had been "passed-on" in the legal sense. But the key point here is the *rationale* for the rule on reflective loss.[55] To reiterate, the essence of the rule itself, as expressed in *Prudential*, is that a shareholder cannot:

> "…recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding".[56]

But the crux of the justification for this rule is encapsulated in the following passage:

> "The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company

[52] *Parry v Cleaver* [1970] AC 1 at p. 9.
[53] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [38].
[54] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [39].
[55] For a discussion of reflective loss see *inter alia*: Charles Mitchell, "Shareholders' claims for reflective loss" (2004) 120 *Law Quarterly Review* 457-479; Jonathan Hardman, "Sevilleja v Marex Financial Ltd: reflective loss and the autonomy of company law" (2022) 85 *Modern Law Review* 232-246.
[56] *Prudential Assurance Co Ltd v Newman Industries Ltd* [1982] Ch 204 at pp. 222-223.

> and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meetings".[57]

The point is that when one holds a share in a company one owns a piece of that entity for the time-being, the value of that shareholding going up and down with the fortunes of that company. When one sells or redeems that share one cashes out that interest based on the share price at that point in time. It would introduce a huge level of complication if at the point of "cashing-out" the ex-shareholder was deemed to have a right of action in respect of losses incurred by the company. But even leaving aside the complication aspect, fundamentally it would also let the shareholder have the best of both worlds. It is the essence of being a shareholder that one may gain from the success of a company or one may suffer due to the misfortunes undergone by the company. Similarly, a company may benefit or suffer as a result of share sales or redemptions by shareholders. The point is that the fortunes of the shareholder and the company are too intimately connected for one to apportion loss between one another – and this is the case whether one looks at the question from the point of view of the shareholder *or* the company.[58] The question of whether an overcharge is "passed-on" to shareholders in the form of a diminished share value is consequently an inherently flawed inquiry.

So, in short, it is submitted that the rule on reflective loss – or more specifically the rationale behind that rule – is more significant to the point at issue than the Court of Appeal gave it credit for and furthermore, to treat share redemptions at a lower value than would otherwise have been the case as a "collateral benefit" is a questionable approach – as rather than constituting a "benefit", a share redemption is just an occurrence that inheres in running a company. To portray the redemption or sale of a share as a "benefit" is an over-simplification.

Potential difficulties with the Court of Appeal's Conclusion?

Although it was been argued here that the decision of the Court of Appeal was ultimately the correct one, even if the Court's reasoning has been disputed, there are two main potential difficulties that may be deemed to arise from the Court's decision, one more of a theoretical nature and the other more legal. The first is the argument that it may leave the ultimate "victim" of the competition law infringement – assuming that is the investor in the fund – without access to redress. It is submitted that this argument has largely been addressed in the preceding section. If indeed it is argued that the shareholder (or other investor) suffers some sort of identifiable loss in terms of the value of their shareholding, this is just part and partial of being a shareholder. But the other answer to this argument is that the fund itself *does* have standing to sue. So as long as the shareholder retains their shareholding in the company, which has been the direct (or at least more proximate) victim of the competition law infringement, the shareholder retains a right to share in any benefits that may accrue from litigation. Of course, it is true that the company may choose not to sue in respect of the competition law infringement. But if that is the case, again, this is a potential injustice that inheres in being a shareholder in that the decisions on whether to sue are for the officers of the company to

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[57] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at p. 224.

[58] For other recent applications of the rule on reflective loss see *inter alia*: *Broadcasting Investment Group Limited v Mr Adam Smith* [2021] EWCA Civ 912; [2022] 1 W.L.R. 1; *Sevilleja Garcia v Marex Financial Ltd* [2018] EWCA Civ 1468; [2019] 1 All E.R. (Comm) 522; *Naibu Global International Co Plc v Daniel Stewart and Co Plc* [2020] EWHC 2719 (Ch); [2021] P.N.L.R. 4.

take. It is not generally the right of shareholders to interfere with the operational management of the company.

The second difficulty that might be identified with regard to the Court of Appeal's decision, is very similar to the first, but based on EU law rather than more general principles of fairness. The argument is that in implicitly denying standing to shareholders to bring actions against the Banks, it frustrates the principle of the direct applicability of Article 101 TFEU as enshrined in the cases of *Courage v Crehan*,[59] *Manfredi v Lloyd Adriatico*[60] and the Damages Directive.[61] Leaving aside the question of whether UK Courts are obliged to give effect to rights accrued before the UK's departure from the European Union in actions raised after the 31 December 2020 (the end of the implementation period), it is submitted that the Court dealt with the direct applicability point succinctly and coherently. The Court held that "…it is a matter for English law to determine how, in this jurisdiction, the rights of shareholders, beneficiaries and limited partners are to be protected in respect of losses consequent on damage to the company, trust or partnership caused by a breach of Article 101".[62] The Court further held that "…English law does so by providing that those rights are to be protected and vindicated by action through the entity…rather than by the individuals directly…".[63] Furthermore, the Court noted that "[t]here is no European authority which suggests that shareholders, beneficiaries and partners must be entitled to sue for losses they suffer by reasons of breaches of European law which cause damage to the relevant company, trust or partnership".[64]

Implications for the use of the passing-on defence

The main upshot of this case is to emphasise that for the purposes of the passing-on defence, a firm distinction needs to be made between the passing-on of a trackable price with an identifiable input and output through a company and a situation where a company suffers loss from an illegally fixed price, which may affect the share price of the company. The latter situation cannot be characterised as passing-on in any meaningful sense for practical reasons as much as anything else. Much as the Court of Appeal proceeded on the basis that the issues of avoided loss on the part of the fund and the standing of the redeeming shareholder to sue are very much separate, as has been submitted above, to do so is somewhat artificial, as in both cases the fundamental question relates to what a shareholding in a company constitutes in a legal sense i.e. ownership of a part of that company for the time-being, which is intrinsically bound up with the fortunes of the company – whether good or bad. The share price at the time of a sale or redemption of a share is simply a manifestation and aggregation of any number of transactions and activities in which the company has been involved. To try and disentangle any particular aspect of that share price to a particular loss suffered by a company, except in the most exceptional of circumstances, is both impractical but also contradictory to the very essence of the shareholder/company relationship.

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[59] *Courage Ltd v Bernard Crehan* (C-453/99) EU:C:2001:465; [2001] 5 C.M.L.R. 28.

[60] *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04 to C-298/04) EU:C:2006:461; [2006] 5 C.M.L.R. 17.

[61] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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.

[62] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [68].

[63] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [68].

[64] *Allianz Global Investors GmbH v Barclays Bank Plc* [2022] EWCA Civ 353 at [68].

Coherence with other recent important decisions on forex fixing

Given the subject matter at hand, it is worth mentioning in relation to the *Allianz* case discussed here, the recent refusal of the Competition Appeal Tribunal (CAT) to certify two follow-on class damages actions[65] against banks in respect of forex fixing[66] as meeting the criteria for "opt out" actions in terms of section 47B of the Competition Act 1998. In *O'Higgins FX Class Representative Limited v Barclays Bank and Philip Evans v Barclays Bank*, whilst the CAT took various factors into account in refusing to certify the action on an opt-out basis – one of which was the existence of the proceedings with which the *Allianz* decision discussed here is concerned – the CAT's focus on the *nature* of the alleged overcharge is significant. While the CAT noted from the Supreme Court's decision in *Mastercard Inc v Merricks*[67] that pleading and proving pass-on in collective proceedings may be much more straightforward than in individual proceedings, due to the need simply to show pass-on to the class in question as a whole rather than quantifying individual loss,[68] the Tribunal also drew attention to the difference in complication between proving pass-on in cases concerning interchange fees, from those involving market-wide harm. Whereas "…in the interchange fee cases there is an identifiable charge to the merchants", in the cases under consideration involving forex "…the cost may be much more elusive and less susceptible of identification".[69] The Tribunal held that "…we have no difficulty (as a matter of theory) in postulating or accepting that information asymmetries in the FX markets…might generate increased costs to large numbers of participants in those markets, resulting in increased spreads charged to market counterparties."[70] But equally, the Court noted that "…economic theory does not, in and of itself, constitute an arguable legal claim…" and that "…to the lawyer it amounts to no more than assertion, bereft of the particularity that is required to render the claim triable".[71]

The relevance of this with regard to the *Allianz* case, is that while the focus in the *Allianz* claim was on the issue of passing-on and avoided loss on the part of the claimant Funds, the complexity of the nature of the overcharge here, means that cases involving rate-fixing or other market-wide harm cannot be viewed in the same context as those involving identifiable overcharges – such as in the case of multilateral interchange fees (MIFs).[72] That is to state, that even if the issue in *Allianz* had concerned passing on to *customers* of the Funds as opposed to investors, proving pass-on, let alone quantifying such pass-on would be very complicated. Referring to the *Michael O'Higgins* claim, the CAT noted that "[t]he essence of the claim put forward is that the actions of the Respondents reduced the efficiency of the inter-dealer FX market (by, in effect, increasing the costs of doing business) and that this weakening of competition/increase in cost led to passing on this inefficiency/cost in the form of a

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[65] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others/Philip Evans v Barclays Bank PLC and Others* [2022] CAT 16.

[66] Relating to Case AT.40135 FOREX (Three Way Banana Split) and Case AT.40135 FOREX (Essex Express).

[67] *Mastercard Inc v Merricks* [2020] UKSC 51; [2021] 3 All E.R. 285.

[68] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others/Philip Evans v Barclays Bank PLC and Others* [2022] CAT 16 at [226].

[69] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others/Philip Evans v Barclays Bank PLC and Others* [2022] CAT 16 at [227].

[70] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others/Philip Evans v Barclays Bank PLC and Others* [2022] CAT 16 at [231].

[71] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others/Philip Evans v Barclays Bank PLC and Others* [2022] CAT 16 at [232].

[72] See in particular *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24; [2020] 4 All E.R. 807.

widening of the spreads on the market".[73] The Court went on that "[p]repared though we are to accept that there is the potential for an increased cost, it must be identified in some way" and that "[i]t is not enough to assert: "I have incurred some costs: you the defendant, caused it"."[74] This, in a sense, is one of the trickiest questions that requires to be addressed both in relation to the passing-on defence but in relation to private damages generally. At what point do the effects of the illegal conduct become just too abstract and untraceable for the cause of action to stand – and in such cases should any right to damages be limited to the direct purchaser from a cartel participant who can demonstrate an identifiable overcharge – even if that means that theoretically the direct purchaser may end up overcompensated? This is a key issue that the courts will continue to grapple with. The litigation on forex fixing certainly puts into focus the point at which passing-on becomes just too hard to demonstrate.

Conclusion

This article has sought to analyse the decision of the Court of Appeal in *Allianz Global Investors GmbH v Barclays Bank Plc*. While it has been argued that the Court of Appeal was correct to overturn the decision of the High Court, it was equally submitted that the Court of Appeal was harsh on the analysis of the High Court in downplaying the significance on the rule on reflective loss in its analysis of whether investment funds "passed-on" illegal overcharges to their own investors. While the Court of Appeal was correct that the key question was whether pass-on had occurred, issue has been taken here with how it sought to answer that question. With regard to companies in particular, it has been argued that the essence of the shareholder/company relationship is that specific losses as between shareholders and companies cannot be "unpicked" except in the most exceptional of circumstances. Furthermore, it has been argued that to characterise any potential pass-on as a "collateral benefit" is perhaps unhelpful, because first, it seems to imply that there *has* been some level of "pass-on" of the overcharge and second, a lowered share redemption value is rather different to the situation of an insurance policy or benevolent payment specifically aimed at mitigating the effects of tortious conduct.

Notwithstanding the criticisms of the Court's reasoning, however, the key significance of this case is that an illegal overcharge to which a company, trust or partnership is subjected, is not deemed to be transmitted to an outgoing shareholder, beneficiary or partner respectively by way of a reduced redemption value. In this sense, in the absence of a contrary decision of the Supreme Court, the decision constitutes an important practical limitation on the passing-on defence.

It was also finally noted that in the case of the fixing of the forex rate – unlike a conventional price overcharge – proving loss as a result of wider "market harm" is likely to prove tricky. Consequently, it may be difficult for those who have not been subject to an identifiable overcharge in a specific transaction with a cartelist to demonstrate loss – something which renders the prospect of actions by indirect purchasers even less likely.

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[73] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others/Philip Evans v Barclays Bank PLC and Others* [2022] CAT 16 at [238].

[74] *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others/Philip Evans v Barclays Bank PLC and Others* [2022] CAT 16 at [238].