

Introduction

After foreign exchange, the next frontier of EU/UK antitrust enforcement within the financial services sector is anticipated to be loan syndication. In particular, it is understood that the European Commission describes this as an area that “exhibits close cooperation between market participants in opaque or in-transparent settings, such as over-the-counter ... activities, which are particularly vulnerable to anti-competitive conduct.” Therefore, the Commission is reportedly considering either launching an EU-wide antitrust sector inquiry or asking national competition agencies to take a closer look at this sector.

Financial Services: A Renewed Focus for the Commission

The financial services sector has met the gimlet eye of the Commission for some time now. More recently, the Commission fined three banks €485 million relating to euro interest rate derivatives. The Commission found that the banks exchanged confidential and sensitive information about their Euro Interbank Offered Rate (EURIBOR) positions and pricing strategies. It was made clear that this would not be the end of the Commission’s scrutiny of the sector.

What is Loan Syndication?

Loan syndication is where multiple lenders join together to provide one loan. This often occurs where the amount the borrower needs would represent too big a risk for one single bank to take.

What Are the Competition Law Issues?

Cooperation between competitors is inherently risky from an EU/UK competition law angle; although, the risk level depends on the type of cooperation and market context and it can often be mitigated with the appropriate safeguards.

For banks involved in loan syndication, the three distinct stages of the process each offer different levels of competition law risk.

- Before the syndication group has been formed – This is the stage with the most potential risk. Banks should compete individually and avoid sharing competitively sensitive information, unless subject to appropriate safeguards (e.g. within “clean teams” and subject to non-disclosure agreements).
- After the group has been formed – Banks are permitted to cooperate and exchange information; however, this must be within the scope of the borrower’s instructions.
- After the mandate has been signed – Competition law issues may arise, for example, in relation to potential events of default.



There is no specific guidance on the application of competition law to syndicated loans. However, in 2014, the Loan Market Association (the LMA) published a notice on this, which made it clear that banks involved in loan arrangements need to exercise caution when competing with each other on a prospective multi-bank deal.

The LMA notice made it clear that banks should take account of:

- General market soundings
- Their conduct during the bidding phase
- Exchanging competitively sensitive information
- Interaction regarding the “flexing” of terms
- Their conduct regarding refinancing/distressed arrangements

Guidance from the LMA included:

- Seek, and keep a careful record of, the prior consent of the borrower to any proposed contact with competitors, whether in contemplation or following the appointment of the lead arranger or underwriter as well as the formation of the banking group.
- Only act within the terms of the consent given.

Consequences of Breaching EU/UK Competition Law

The consequences of breaching EU/UK competition law can be serious and may include:

- Lengthy investigations, in addition to the costs associated with diversion of management time from the ordinary course of business

- Fines of up to 10% of global group turnover
- In the UK, personal consequences for the individuals involved including: (i) disqualification from acting as a director; and (ii) criminal sanctions, which could include fines or imprisonment
- Legal costs, as well as reputational damage caused by negative publicity

What Next?

At this stage, the Commission appears to be indicating that it will carry out a sector inquiry. It does this when it thinks that a market is not working as it should and believes that competition law breaches might be a contributory factor. At the same time, national competition agencies could also launch individual investigations if they suspect any specific conduct in their respective jurisdictions. For example, the UK's Financial Conduct Authority has just launched a competition law investigation in the sector, although it is not known whether it relates to loan syndication or other conduct.

Brexit is unlikely to affect an EU sector inquiry because of the timing of an Article 50 exit (at least two years from now). Furthermore, sector inquiries often result in individual investigations from an early stage of the inquiry (e.g. pharma, telecoms, energy) either at EU or national level. However, because of Brexit, any individual investigation in the UK could well be deferred by the Commission to the UK's Financial Conduct Authority or Competition and Markets Authority within the European Competition Network.

What to Expect

- If the Commission does decide to launch an inquiry, banks and other parties can expect information requests that will be lengthy, and the Commission can carry out inspections based on those requests.
- Although there is no set timeframe, a sector enquiry may last up to two years.
- The results of sector enquires are published in a report and interested parties are invited to submit their comments.

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