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Antitrust Group Client Alert: Leveraged Finance and Syndicated Lending – Stricter Antitrust Scrutiny?

The European Commission ("Commission") has announced that it is considering studying potential competition issues in loan syndication.[1] The announcement suggests that the Commission may have some concerns regarding the close cooperation between banks and other financial institutions involved in syndicated lending. Commission studies are often followed by formal investigations and enforcement actions against entities suspected of anti-competitive conduct. Stakeholders should therefore be prepared for targeted questions from antitrust enforcers in the EU and potentially other jurisdictions.

COMMISSION`S MANAGEMENT PLAN 2017

Leveraged finance and syndicated lending have played a significant role in the resurgence of M&A after the financial crisis abruptly ended the era of "mega-buyouts" in 2007/08. By grouping together, financial institutions are able to offer larger loans while also reducing their individual risks. At the same time, the very fact that competing financial institutions form consortia without the supervision of an exchange may increase the risk of anti-competitive conduct. According to the Commission's Management Plan 2017:

> *"[t]his area exhibits close cooperation between market participants in opaque or in-transparent settings, such as over-the-counter (OTC) activities, which are particularly vulnerable to anti-competitive conduct."*

Therefore, the Commission is contemplating undertaking a study which:

> *"will focus on obtaining relevant information on market structure, dynamics between market participants and potential competition issues."*

[1] The Commission made this announcement in its "Management Plan 2017 – Competition," published on February 15, 2017, in which it describes the competition law actions for 2017.

COMPETITION LAW RISKS IN SYNDICATED LENDING

The call for an in-depth competitive analysis of the field of syndicated lending is neither new nor unprecedented:

- In 2010, the Dutch competition authority ("NMa") performed a sector inquiry into the market for syndicated loans and club deals without finding any competition law violations.
- Currently, there appear to be a number of other regulators around the world – including the Spanish competition authority ("CNMC"), the UK Financial Conduct Authority ("FCA") and the Loan Market Association – which suspect anti-competitive practices in the field of syndicated lending but have not taken any concrete action yet.[2]

The reason for the continued interest of competition authorities and regulators is that, despite the potential for significant efficiencies and pro-competitive effects of syndicated lending – in particular offering borrowers access to a larger pool of funds while allowing lenders to diversify the risk – syndicated loans also raise antitrust risks because they may facilitate anticompetitive agreements or information exchanges among the members of the syndicate that:

- Fix or standardize pricing (e.g., the level of interest rates and fees) or other economic terms (e.g., on default) that individual lender's offer;
- Allocate lending opportunities to particular financial institutions or consortia; or
- Lead to anticompetitive conduct in other areas where the financial institutions compete.

Analogous issues have arisen in the United States in the context of private equity buyouts and initial public offering ("IPO") syndicates. In 2006, for example, the Antitrust Division of the US Department of Justice ("DOJ") investigated whether private equity firms that participated in bidding consortia ("club deals") allocated leveraged buyout opportunities among participants. Although the DOJ did not pursue prosecutions, in 2008, investors in companies purchased by a private equity consortium sued several firms. Several of the defendants obtained dismissals, but others paid nearly $600 million in settlements.

Purchasers of newly issued securities have also brought antitrust claims against syndicates formed for initial public offerings, claiming that underwriters unlawfully agreed to fix the price of those newly issued securities. However, these class actions were eventually dismissed because the Supreme Court held that "where conduct at the core of the marketing of new securities is at issue," regulatory oversight by the

[2] On May 30, 2014, for example, the Loan Market Association (LMA) published a notice to its members, which warned of the application of competition law to syndicated loan arrangements. *See* Notice of the Application of Competition Law to Syndicated Loan Arrangements, http://www.lma.eu.com/membership (May 30, 2014).

Securities Exchange Commission impliedly precludes application of antitrust laws to the conduct.[3] Importantly, there is no equivalent antitrust immunity in the context of syndicated lending.

CONCLUSION AND OUTLOOK

As evidenced by the European and US investigations into LIBOR, foreign currency rates, and credit derivatives, contacts between financial institutions are already subject to heightened antitrust scrutiny. Whether the Commission's contemplated analysis or sector inquiry in the field of leveraged finance and syndicated lending will ultimately lead to additional investigations of individual market players remains to be seen.

For the time being, banks and other financial institutions should be prepared to be approached by competition authorities and regulators and should ensure that they have the appropriate safeguards in place when they are involved in syndicated lending.

Whilst the Commission's Management Plan 2017 is limited to syndicated lending, it shows a continued and extended interest of competition law enforcers in the financial industry. Again, similar issues to the ones raised with regard to syndicated loans can arise in the context of private equity firms' involvement in club deals.

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[3] *See* Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007).

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