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Antitrust Client Alert

EU Study on Loan Syndication

On April 5, 2019, the European Commission ("Commission") published its study on "EU loan syndication and its impact on competition in credit markets". The study identified several areas in which syndicated loans can give rise to competition concerns (partly, even as potential restrictions by object), namely (i) exchange of sensitive information between lenders; (ii) provision of ancillary services by banks participating in the syndicate; (iii) combination of advisory and debt arranging services; and (iv) refinancing situations. With a view to these sensitive areas, the study describes potential mechanisms which aim at avoiding or at least decreasing the risk for lenders of committing antitrust infringements.

Grounds for Study

Syndicated lending plays a significant role in the context of large M&A and finance transactions. By grouping together, financial institutions increase their ability to offer larger loans while also reducing their individual risks. At the same time, the very fact that competing financial institutions cooperate and form consortia can increase the risk of anti-competitive conduct. Against this background, the Commission had announced in February 2017 to launch a study into potential competition issues in loan syndication.

Scope and Approach of Study

The results of the study are mainly based on the analysis of two specific segments of the syndicated loan market in a set of six selected EU Member States. The specific segments are Leveraged Buy-Outs ("LBOs") on the one hand and Project Finance and Infrastructure Finance on the other hand.[1] The Member States evaluated – the UK, Germany, France, Spain, the Netherlands and Poland –[2] are the most significant in terms of the locations of borrowers, lenders and investors. Together, they account for three-quarters of the syndicated lending in Europe.

The study assesses different stages of the syndicated loans process in light of the legal framework of Art. 101 and 102 TFEU and identifies both existing competition risks and possible safeguards for each of the stages. The stages examined are (i) bidding process for appointing individual banks to the lead banking group; (ii) post-mandate to loan agreement; (iii) allocation of ancillary services across banks and the pricing of such services; (iv) use of debt advisors which are also involved in the syndicated loan; (v) coordination by lenders on the sale of the loan on the secondary market; and (vi) refinancing in conditions of default.

[1] Due to the similarities and overlaps between Project Finance and Infrastructure Finance, both segments are being treated as one by the study.
[2] Top-to-bottom order concerning loan volumes.

Core Findings of Study

As regards the bidding process for appointing individual banks to the lead banking group, the study identified a risk of exchanging competitively sensitive information especially in the course of market soundings undertaken by the so-called origination team/function of the Mandated Lead Arranger ("MLA"). These market soundings conducted in advance of the bidding process should, ideally, only be of generic nature. For this purpose, the scope of the soundings and exchange of information should be defined carefully by the borrowers/sponsors. To ensure antitrust compliance, the MLA's team conducting the soundings and initiating the loan process (origination team) should also be personally different from the MLA's team syndicating the loan (syndication team) in order to ensure workable information barriers. Finally, the MLA should have clear guidelines and protocols on how to deal with sensitive information. The study considers the risk of an exchange of competitive sensitive information to be higher in the LBO segment than in the Project and Infrastructure segment.

Concerning the post-mandate to loan agreement stage, the study found that the risk of lenders colluding on loan terms is low since the loan terms are usually agreed upon bilaterally between the borrower/sponsor and the individual lenders. Joint discussions between the lenders are usually limited to loan documentation and syndication strategy. This does not necessarily hold true in cases where the borrower/sponsor gathers all lenders to discuss loan terms collectively. In these cases, it is essential to ensure antitrust compliance.

With regards to the allocation of ancillary services across banks and the pricing of such services, the study finds that in cases in which the allocation of ancillary services (like, e.g., hedging) is decided as part of the initial loan terms or by means of a competitive process after the loan has closed, there are no particular competition concerns. Only in cases in which the MLAs make the provision of ancillary services by them a condition to the loan, the risk of achieving a suboptimal economic outcome for the borrower/sponsor is increased since the borrower/sponsor is prevented from choosing an ancillary services provider of his choice. As the study considers this scenario an area of at least moderate concern, this strategy should, as a safeguard, be omitted by lenders in order to avoid antitrust uncertainties. Even ancillary services not directly related with the loan can be negotiated as part of the loan negotiation.

With respect to the use of debt advisors, it is highly advisable for the providers to keep the lending role and the advisory role clearly separated and to have respective internal protocols in place. In addition and in the interest of transparency, the advising bank should in no case try to advise the borrower/sponsor towards a strategy suiting the bank's lending arm without the client being fully aware of this.

Regarding the sale of the loan on the secondary market, the study identified that in Project and Infrastructure Finance, sponsors/borrowers often impose restrictions on the lenders (e.g. no small transfers; transfer being subject to borrower's approval; etc.). These restrictions warrant a closer review since they are capable of limiting the development and efficiency of the secondary market and can have knock-on effects on the primary market.

As regards the refinancing in conditions of default, the study stipulates that in case of a default risk, the lenders have designated restructuring teams to take over the loan discussions from the origination team (unless the borrower allows otherwise). The restructuring teams need to have undergone competition and antitrust training in order to minimize the risk of the banks colluding on the negotiations regarding potential restructuring. If possible, it is favorable to have lender banks participate in the restructuring process that had not been part of the origination function.

Conclusion and Outlook

It is to be noted that the study was not undertaken by the Commission itself but commissioned to external advisers. Hence, the findings of the study do not necessarily express the official opinion of the Commission.

However, studies undertaken or commissioned by the Commission are often followed by formal investigations and enforcement actions against individual market players. Furthermore, it is to be expected that both the EU and the national competition authorities will put a stronger focus on syndicated loans due to the attention caused by the study.[3]

Stakeholders should therefore be prepared for targeted questions from antitrust enforcers in the EU and potentially other jurisdictions. They should ensure that they have both the suggested compliance measures and the appropriate safeguards in place when they get involved in syndicated lending.

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Antitrust Group.

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[3] In Spain, syndicated loans already are on the competition authority's radar. In February 2019, the Spanish Markets and Competition Commission ("CNMC") fined four banks for fixing prices of interest rate derivatives that had been concluded as an ancillary service of a syndicated loan.