

Syndicated lending: in the European Commission's sights?

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The European Commission has indicated in its 2017 Management Plan that it is contemplating engaging in a study on potential competition issues in syndicated lending. The Plan refers to potential concerns about excessively close cooperation and information sharing between banks when they come together to offer syndicated loans. Given competition authorities' continuing interest in financial services, those involved in syndicated lending should be prepared for the possibility that this could be a fresh area of scrutiny and potentially the subject of a new sector inquiry by the Commission.

What are the potential issues?

Whilst details are scant, the European Commission (Commission) observes that syndicated lending involves “close cooperation between market participants in opaque or in-transparent settings, such as over-the-counter (OTC) activities, which are particularly vulnerable to anticompetitive conduct.”¹ The Commission notes that any study would focus on gathering information on market structure, dynamics between market participants and potential competition issues.

What is a sector inquiry?

Under Article 17 of Regulation 1/2003 of the Treaty on the Functioning of the European Union (TFEU), the Commission has powers to investigate commercial practices in specific market sectors where it believes markets do not function as well as they should and breaches of competition rules may be a factor. The Commission has used these powers in a number of markets, including pharmaceuticals and e-commerce, business insurance and retail banking. Unlike investigations under Articles 101 and 102 TFEU, sector inquiries do not target specific businesses but investigate the sector as a whole, to gain a better understanding of how the market functions. Investigations against individual companies may follow.

The Commission is likely to be particularly interested in any exchange of commercially sensitive information that goes beyond what is necessary or appropriate to establish the terms of a syndicated loan.

Why now?

The Commission has given no clear indication why syndicated lending has attracted its attention at this point. However, the Commission has for several years focussed on financial services and syndicated

¹ DG Competition: [Management Plan 2017](#), February 2017, page 11.

lending has been touched upon in the past by several European competition authorities in different contexts.

The UK Financial Conduct Authority (FCA) stated this month that it had issued a number of ‘on notice’ letters to firms after uncovering evidence of anti-competitive practices in relation to syndicated lending: “*the potential infringements related to disclosures or exchanges of competitively sensitive information relating to the terms and conditions of such lending*”.² The FCA also looked at syndicated lending in its 2016 market study on corporate and investment banking, although it did not identify particular competition concerns.³

The Spanish Comisión Nacional de los Mercados y la Competencia (CNMC) is currently carrying out an investigation into possible anti-competitive agreements for pricing and the exchange of sensitive commercial information in relation to interest rate derivatives used to hedge the risk of syndicated loans.⁴ It has been reported that the CNMC sent a Statement of Objections to four banks involved in January of this year, although this has not been officially confirmed.

The market for syndicated and clubbed loans also came under scrutiny by the Nederlandse Mededingingsautoriteit (NMa) in 2010 and, in the context of property financing, in 2011. The NMa noted that the number of banks offering such deals had decreased, limiting customer choice, and that the area could be vulnerable to anti-competitive conduct although it did not find any evidence of violations of competition laws.⁵

As a result, the industry has been alerted to potential competition issues. The Loan Market Association, the trade body for the syndicated loans market in Europe, issued a notice to its members in 2014 urging caution in relation to, for example, conduct between competing origination desks during the bidding phase and interactions between syndicate members relating to the establishment or flexing of loans.

What next?

There is as yet no firm announcement that the Commission will launch a sector inquiry into syndicated lending. However, the Commission has shown a recent appetite for using its sectoral inquiry powers to investigate potential market failure. If a sector inquiry were launched, this would be the seventh such inquiry under Regulation 1/2003 and the third launched since 2015, the most recent before that being in 2008. The fact that it is contemplating studying syndicated lending more closely is - at the very least - evidence that the financial services sector remains firmly in the Commission’s sights.

If an inquiry is launched, banks and other parties involved in syndicated lending can expect to receive questionnaires requiring them to supply further information; for example, relating to the process for reaching loan syndication arrangements and how syndicates determine their pricing and other terms and

² FCA: [Regulation Round-up](#), February 2017.

³ FCA: [Investment and corporate banking market study, final report](#), October 2016.

⁴ Case S/DC/0579/16: [DERIVADOS FINANCIEROS](#).

⁵ NMa: [Limited choice for undertakings when seeking syndicated loans](#), January 2010. NMa: [Study provides insight in antitrust risks in property finance industry](#), October 2011. SEO: [sector study](#).

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conditions. The Commission also is able to launch an inquiry by carrying out unannounced dawn raids at business premises (as it did when launching the pharmaceuticals sector inquiry in 2008), although this is less usual in practice.

The Commission does not have any remedial powers following a sector inquiry. However, competition law investigations against individual businesses can (and, historically, have tended to) follow if evidence of potentially anti-competitive conduct is uncovered.

A sectoral inquiry typically lasts from 18 months to two years (there is no set timeframe). The Commission usually publishes its final report and recommendations, as well as preliminary findings to provide an opportunity for comment.



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