

●●● FEBRUARY 2017

## EU Officials to Prioritise Review of Potential Competition Issues Relating to Loan Syndications

### Background

The European Commission Directorate-General for Competition (DG Competition), the Commission's Department responsible for enforcing competition law, has just published its Management Plan setting out the Department's priorities and strategic objectives for competition law enforcement in 2017. One of the Department's objectives is to review competition issues relating to loan syndications in the EU. According to the Commission, the area of loan syndication exhibits close cooperation between market participants in opaque settings, and so the Commission will review the structure of the sector, dynamics between market participants, and potential competition law issues.

### EU Competition Law Issues Relating to Loan Syndications

EU competition law forbids arrangements between syndicate members to fix prices, share markets/customers, rig bids, and fix/limit capacity. EU competition law also prohibits the sharing of certain information between syndicate members, such as commercially sensitive price information (margin, credit terms, fees, etc.), lender cost information (as this could inform on price information), and other confidential information.

In the UK, in May 2014 the Loan Market Association ("LMA") published a Notice on the application of competition law to syndicated loans, which highlighted the need for banks involved in loan arrangements to recognise the need for caution when competing with each other on a prospective multi-bank deal.

The LMA Notice made clear that banks should take account of:

- general market soundings;
- their conduct during the bidding phase;
- exchanging competitively sensitive information;
- interaction regarding "flexing" of terms; and
- their conduct regarding refinancing/distressed arrangements.

### Avoiding a Violation

It is important to keep in mind that a violation of EU competition law can take place by companies acting outside of the EU, where customers in the EU are affected. It is also easier to fall foul of EU competition law than U.S. antitrust law.

As a minimum, those involved in syndicated lending must:

- Obtain and record borrower consent to the sharing of information before discussions with other lenders or potential syndicate members.
- Keep a paper trail consisting of justifiable reasons for commercial decisions and evidence of the borrower's consent to, amongst other things, the sharing of information before discussions with other lenders or potential syndicate members.
- Avoid discussions of individual pricing or future commercial strategy with other actual or potential lenders.
- Ensure that all staff involved in the syndication process are trained on what to do if they see a potential breach of competition law (as valuable immunity programs exist).

Our Antitrust/Competition Practice runs CLE programs and other tailored seminars to help employees avoid breaches of EU law. These events provide an ideal opportunity to discuss day-to-day issues in a fully interactive session.

If you would like to discuss holding such a training session, or if you have any other queries about the impact of EU competition law on your loan syndication or other activities, please contact your usual Winston & Strawn contact or Peter Crowther, Managing Partner of the London and Brussels Offices.



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