

# European Commission's Antitrust Concerns Lead to Syndicated Lending Market Study

Kluwer Competition Law Blog  
May 29, 2017

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Please refer to this post as: *Eric Barbier de la Serre, Matt Evans, Philipp Werner, 'European Commission's Antitrust Concerns Lead to Syndicated Lending Market Study', Kluwer Competition Law Blog, May 29 2017, <http://competitionlawblog.kluwercompetitionlaw.com/2017/05/29/european-commissions-antitrust-concerns-lead-to-syndicated-lending-market-study/>*

In April 2017, the European Commission ("Commission") published a tender offer seeking an assessment of the EU market for loan syndication and possible implications under EU competition rules. The successful candidate will draft a report providing an overview of the market and the relevant elements that the Commission may use for assessing the competitive environment ("Study"). While this is not a formal investigation, the Study could lead to enforcement actions.

A syndicated loan is the joint lending of large loans by several banks and institutional investors. These loans are provided to public or private borrowers for projects with large financing needs (e.g., mergers or acquisitions). Loan syndication reduces risks borne by a single bank and plays a crucial role in providing capital for large investments.

In the past, national competition authorities have shown an interest in this market. In 2010, the Dutch Competition Authority assessed the syndicated loan market, and the European Commission informed the Organisation for Economic Co-operation and Development ("OECD") that a close scrutiny of syndicated loans may be warranted. In 2016, the UK Financial Conduct Authority sent "on notice" letters to a number of syndicated lenders after reviewing evidence suggesting that they may have infringed competition law by disclosing or exchanging information on terms and conditions of loans. Finally, the Spanish competition authority is currently investigating whether four Spanish banks fixed prices and exchanged commercially sensitive information when offering syndicated loans.

## Potential Antitrust Issues

Article 101(1) of the Treaty on the Functioning of the European Union prohibits agreements between undertakings that restrict competition in the EU. This provision covers the exchange of commercially sensitive information between competitors.

According to the Commission, syndicated loans involve close cooperation "between market participants in opaque or in transparent settings such as over-the-counter activities, which are particularly vulnerable to anticompetitive conduct." In a submission to the OECD in 2010, the European Union raised the concern that banks could coordinate on prices or share markets, "possibly in the segments related to very large transactions where a small number of banks dominate," "bid together for an investment banking mandate and reduce significantly the alternatives for the client," or "refrain from bidding too aggressively for a book runner mandate in the syndicate on the promise of being later selected as a member of the syndicate."

In its 2017 tender offer, the Commission specified that syndicated loans could raise issues at two stages:

During loan origination, banks and institutional investors are likely to exchange information to determine the terms and conditions of the agreement with the borrower; as these entities remain competitors, they should not exchange commercially sensitive information nor collude; and

After the lending group is formed, discussions between banks and investors may, in certain instances, exceed the scope of the agreement and infringe competition rules.

## The Study's Focus

The Study will include:

An overview of the EU syndication market, including market structure and a comparative overview of loan syndication markets with regard to project finance, leveraged buyouts, and infrastructure projects in Germany, France, the Netherlands, Poland, Spain, and the United Kingdom; and

Key elements of loan syndication relevant for the Commission's assessment of any competition concerns; these elements should cover (i) loan origination, particularly the nature of information exchange and risks of anticompetitive coordination before closure of the loan origination; (ii) formation and operation of the syndicate (i.e., recurring contract terms including market-flexing, ancillary services, and cross-selling); (iii) refinancing and restructuring, including the effects of recurring standard clauses such as market-flexing clauses, financial compliance covenants, and forbearance agreements for payment defaults; (iv) ancillary arrangements; and (v) future developments such as blockchain solutions.

## What's Next

The Study will involve telephone interviews and questionnaires sent to lenders and borrowers of various tiers, EU public lenders (e.g., European Investment Bank or European Bank for Reconstruction and Development), and regional or national procurement authorities. Companies should be wary of responses provided to questionnaires. The successful candidate will submit its preliminary report within four months and its final report within nine months.

The Study could lead to the opening of a sector inquiry should it reveal certain competition concerns. A sector inquiry aims at gathering evidence on potential barriers to competition linked to the functioning of a defined market and understanding the prevalence of potentially anticompetitive business practices. Such sector inquiry could entail requests for information and on-site surprise inspections (known as "dawn raids"). At this stage, the interplay between this Study and a possible sector inquiry remains unclear. In the past, sector inquiries in the pharmaceutical sector have led to formal procedures and the fining of certain companies.