

European Commission's Antitrust Concerns Lead to Syndicated Loans Market Study

IN SHORT

The Situation: The European Commission has launched a tender offer to conduct a comprehensive assessment of the competitive aspects of the EU market for syndicated loans.

The Impact: While not a formal investigation by the Commission, the action could lead to a sector inquiry and enforcement actions.

Looking Ahead: The Study will involve telephone interviews and questionnaires sent to lenders and borrowers. Companies should use caution when responding to inquiries.

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.



In the past, national competition authorities have shown an interest in this (syndicated loan) market.



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.

THREE KEY TAKEAWAYS

1. The European Commission has published a notice seeking a party to assess the functioning of the EU market for syndicated loans and possible competition concerns. The successful candidate will draft a report with a specific focus on Germany, France, the Netherlands, Poland, Spain, and the United Kingdom.
2. Syndicated loans may raise competition issues before and after the lending group is formed. The Study will examine the EU syndicated market and provide key elements relevant to the Commission's assessment of potential competition concerns.
3. This Study could lead to a sector inquiry, which would entail the sending of formal requests for information, and to the possibility of opening infringement proceedings.

AUTHORS



Eric Barbier de La Serre
Paris



Matt Evans
London



Philipp Werner
Brussels



Frédéric Gros
Paris

Claire Lavin, an associate in the Paris Office, assisted with the preparation of this Commentary.

YOU MIGHT BE INTERESTED IN: [Go To All Recommendations >>](#)

[Latest Reform of German Competition Law Brings Clarity](#)

[European Commission Prioritizes Completion of Digital Single Market](#)

[European Commission Launches Competition Law Anonymous Whistleblower](#)

SUBSCRIBE

SUBSCRIBE TO RSS



Jones Day is a legal institution with more than 2,500 lawyers on five continents. We are One Firm WorldwideSM.

Disclaimer: Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.

© 2017 Jones Day. All rights reserved. 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113