Lessons from Recent Antitrust Enforcement in the UK Financial Services Sector

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Background. 2019 was notable for the continuing trend among antitrust authorities globally to prosecute infringements in the financial services sector. Violations that might in the past have been considered more naturally issues of prudential regulation have increasingly become subject to investigation under antitrust law. As such, it demonstrates a commitment on the part of the antitrust authorities to continue to educate themselves and become involved in the long-term policing of the financial markets in parallel with more familiar supervisory bodies.

That this is a recent phenomenon is shown by the fact that there was very little antitrust enforcement in the financial services sector before the 2008 global financial crisis. One consequence of that crisis, however, was the coordinated investigation of a range of anticompetitive activities that had previously gone on undisturbed, perhaps the most notable one—at least in terms of how central a role it had played in global finance—being the LIBOR scandal and the manipulation of the interest rate-setting benchmarks. That, in turn, spawned investigations into other asset classes, products and sectors, such as interest rate derivatives, credit default swaps, and the foreign exchange markets.

The more recent antitrust investigations show a greater maturity, however, in that the authorities are increasingly focused less on explicit anticompetitive behaviour and more on entrenched systemic ways of doing business that to date had gone unchecked. That dovetails with a more general policy shift in the EU, UK and elsewhere reacting to concerns about possible historic under-enforcement and the need to intervene more directly in markets to address the potential for consumer harm. At the same time, authorities have become better resourced and have greater expertise, which have enabled them to delve deeper into the highly technical, and somewhat opaque, world of equity fundraisings and loan syndications.

Recent Enforcement Action in the UK. One way that trend has manifested in the UK is the statutory provision enabling the Financial Conduct Authority ("FCA") to exercise concurrent competition law powers in relation to financial services. The term 'financial services' is not defined but, in the FCA's view, includes any service of a financial nature

such as banking, credit, insurance, personal pensions or investments and therefore goes beyond financial services regulated by it or other bodies.

The FCA issued its first decision under those powers in 2019 in relation to anti-competitive information sharing between competing asset managers during an initial public offering ("IPO") and an equity placing, prior to share prices being set. A fund manager at Newton Investment ("Newton") had disclosed the volume of shares the firm was intending to bid for, along with the price they were willing to pay, to Hargreave Hale Ltd ("Hargreave"), and River and Mercantile Asset Management LLP ("RAMAM"). The FCA considered this information to be 'strategic', as it reduced uncertainty in the market by allowing Newton's competitors to know how the firm may behave. Interestingly, the FCA also found the timing of these disclosures to be significant: information shared right before the bidding period ends is more likely to be strategic, as it is less attractive for asset managers to alter a bid near the deadline.

The FCA concluded that the exchange of strategic information amounted to the asset managers acting in concert to reduce market uncertainty. In particular, the disclosure of Newton's bidding intentions had the potential to distort the price-setting process, as it could have led to competing firms placing fewer bids, which would have, in turn, reduced the final share price. The FCA ended up granting Newton immunity after they raised concerns about their own fund manager's conduct. Hargreave and RAMAM were also fined for failing to actively distance themselves from the disclosure, even though the information did not alter their final bid.

The legal principle underpinning this decision is not in itself controversial. EU guidelines clearly state that, when one party discloses strategic information to a competitor, it can amount to an anti-competitive practice. The presumption that parties who obtain strategic information, even passively, are deemed to participate in the anti-competitive conduct is also well established. For example, Royal Bank of Scotland was fined £28.6 million by the UK Office of Fair Trading back in 2010 for sharing confidential pricing information with Barclays that affected the provision of loans to large professional services firms. Those contacts typically happened socially, starting at a joint bowling event and continuing on various other occasions over dinner, lunch or drinks. The FCA decision takes a tough line in explaining what the recipient can do to rebut that presumption, which essentially involves removing itself from the bidding process entirely.

The FCA's decision is significant for a number of reasons. First, the fact that the two incidents did not form part of any wider pattern of behaviour suggests the FCA wants to be seen to be taking a 'zero tolerance' approach towards punishing anti-competitive conduct. That impression is reinforced because of the lack of any adverse impact on the outcome of the IPO or placing involved. The FCA's concern instead was that the

conduct had the potential to undermine the process, as it could have led to the issuer achieving a lower initial share price and thereby raising its cost of raising capital, or even resulted in a failed bookbuilding. Finally, context and timing were unusually important factors for a case of this sort. Some information flows are a necessary aspect of the price formation process in an IPO and/or placing, so the critical issue was the strategic importance of the disclosure—the relevance of which was affected by its time-sensitivity.

Parallel Prudential Oversight by the FCA. Another interesting element to the FCA decision is the fact that the (former) Newton manager was himself fined £32,200 for breaches of the Financial Services and Markets Act 2000. That fact is consistent with another enforcement trend which is that antitrust scrutiny often happens in parallel with investigation under financial regulations.

The UK is perhaps the jurisdiction where that trend is most clearly demonstrated because of the FCA (unusually) having concurrent competition law enforcement powers as well as being the main financial regulator. Although 2019 saw the first use of those powers in an antitrust investigation, the FCA has cooperated previously with the UK Competition and Markets Authority (the "CMA") on a number of occasions. A more general market study into asset management that was started in 2015 saw the FCA refer the investment consultancy and fiduciary management services markets to the CMA for a full investigation. That led to new rules being introduced during 2019 aiming to improve transparency, customer choice and competition. Similarly, the FCA's investment and corporate banking market study found areas where improvements could be made to encourage competition, such as a ban on the use of 'right of first refusal' and 'right to act' clauses relating to future primary market services.

The FCA has also been involved in respect of investigations into all of LIBOR; the spot foreign exchange market; the supranational, sub-sovereign and agency bonds market; and government bonds trading.

In an antitrust context, the FCA's importance is further a function of the ongoing general notification requirements under the FCA Handbook (Principle 11 and SUP 15.3) that oblige an authorised firm to report to the FCA if it "*has or may have committed a significant infringement of any applicable competition law*". This obligation is in contrast to the situation in other industries where firms are free to adopt a tailored strategy to addressing potential antitrust violations. The expectation must be, therefore, that the FCA will increasingly use its concurrent competition powers in the future.

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