

UK FINANCIAL CONDUCT AUTHORITY ISSUES FIRST COMPETITION DECISION

The UK's Financial Conduct Authority (**FCA**) has imposed antitrust fines on three asset management firms, for sharing strategic information during one initial public offering (**IPO**) and one placing, shortly before the share prices were set. This is the FCA's first formal decision under its competition enforcement powers.

THE INFRINGEMENT

The FCA's decision found that three asset management firms had committed the relevant infringement of the Competition Act 1998: Hargreave Hale Ltd, which was fined £306,300; River and Mercantile Asset Management LLP (RAMAM), which was fined £108,600; and Newton Investment Management Limited (Newton), which obtained immunity from fines by reporting the infringement to the FCA.

The ultimate parent companies of RAMAM and Newton were held jointly liable for the infringement and therefore jointly liable for fines and any resulting damages claims. In line with European antitrust standards, UK competition agencies can, and usually do, pierce the corporate veil and extend liability to parent companies, irrespective of whether they participated in their subsidiary's infringement, or had any knowledge of it.

While the FCA's decision on the competition infringement has not yet been published, its press release indicates that the infringements consisted of the sharing of strategic information, on a bilateral basis, between the competing asset management firms during one IPO and one equity placing, shortly before the share prices were set. The firms "disclosed and/or accepted otherwise confidential bidding intentions, in the form of the price they were willing to pay and sometimes the volume they wished to acquire", allowing them "to know another's plans during the IPO and placing process when they should have been competing for shares".

In addition, the FCA has indicated that the infringement shares "some of the same facts" with those described in its [published decision](#) to impose a £32,200 fine under the Financial Services & Markets Act 2000 (**FSMA**) on Paul Stephany - an employee of Newton at the time of the infringement - for failure to observe proper standards of market conduct and to act with due skill, care and diligence. That decision describes how Mr. Stephany contacted external fund managers at several competitor firms in relation to a placing of shares of Market Tech Holdings Limited and, subsequently, the IPO of On The Beach Group plc, and attempted to influence them so that they would cap their orders at the same price or valuation limit as his order.

Key issues

- When do communications with rival bidders in an IPO or placing give rise to antitrust concerns?
- How should compliance teams anticipate and react to such concerns?
- Is collusion aimed at lowering prices of securities for buyers treated differently to a price fixing cartel that pushes prices of goods or services higher?

For example, prior to the On The Beach IPO, Mr Stephany sent an email to fund managers at 11 competitor firms stating: *"I wanted to urge those considering or in for the OTB IPO to think about moving to a 260m pre money valuation limit. I have done that first thing this morning with my 17m order."*

During the book building exercise for the Market tech placing Mr. Stephany had telephone conversations with two external fund managers at competitor firms in which he engaged in similar communications, e.g. *"...I think push them [the bookrunner] for it to kind of 220 price rather than 230 plus they're talking about [...] [I] will be submitting a chunky order at that 220 level."*

What did the other firms do wrong?

It is not yet clear how Hargreave Hale and RAMAM participated in the breach. However, EU and UK competition law imposes a punishingly high compliance standard for recipients of unsolicited information about a competitor's future pricing intentions. Unless they take active steps to reject that information, they are presumed to have accepted it, which is in and of itself an antitrust breach, even if no reciprocal disclosures are made.

It is, however, clear what a number of parties did right. At least one fund manager who received an email from Mr. Stephany contacted their compliance department immediately, which in turn raised concerns with the compliance department of Mr Stephany's firm, Newton (which subsequently reported the conduct to the FCA and obtained immunity from fines). Another recipient of the email objected to it and asked not to be canvassed in that way in the future.

One firm went as far as pulling out of the IPO book building, telling the bookrunner that there was correspondence "flying around, which, from a compliance perspective, looks quite tricky". However, if a proper compliance response to unsolicited disclosures is made, firms are not required to deprive themselves of business opportunities in this way.

Comment

This first antitrust enforcement action by the FCA shows that collusion between rivals regarding prices of securities will be treated by the FCA as harshly as that which affects pricing of goods or services. This creates compliance challenges for financial services firms that may be active on both the buy and sell sides of a securities market and for whose employees the line between illegal disclosures of specific pricing intentions and permissible discussions of market colour may not be immediately obvious.

The decision also underlines how competition law can catch competitors who collude to buy at artificially low prices, not just price-fixing cartels comprised of sellers setting artificially high prices. As the FCA put it, such collusion "could reduce the share price achieved by the IPO or placing and so raise the cost of equity capital for the issuing company. Firms rely on such capital as a way of financing investments, so unlawful information sharing could increase the cost of related investments or even make them unviable."

"Asset management firms must take care to avoid undermining how prices are properly set for shares in both IPOs and placings."

Christopher Woolard,
Executive Director of Strategy and Competition at the FCA.

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