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EU Takes Cautious Antitrust Approach To Loan Syndication

By **Bryan Koenig**

Law360 (April 25, 2019, 5:27 PM EDT) -- Big banks can take some solace in the results of the European Commission's long-awaited report on the bloc's $800 billion syndicated loan market that found little reason to suspect misconduct. But the findings do underscore the need for vigilant antitrust compliance as lenders coordinate to fund major projects.

Europe's top competition watchdog signaled an interest in loan syndication in 2017 with a call for an independent study to examine a market that by definition requires cooperation and coordination between lenders. Banks join forces to provide a single loan when the amount of debt a borrower needs to take on would be too much risk for a single lender to handle, typically in the case of a leveraged buyout or major project financing.

The European Commission conducted a study of competition in the loan syndication market in the U.K., Germany and four other European nations.

But despite the commission's allusion to recent enforcement work that has yielded billions of dollars worth of fines in the financial services sector, the report published earlier in April largely concluded there are few causes for immediate concern.

“I don’t see this as a prequel to a sector inquiry. Instead, this report provides guidelines or rules of the road for the industry to follow,” said Olivier N. Antoine, a partner with Crowell & Moring LLP, who argued that the report recognizes that compliance efforts are already in place for syndicated loans.

Financial services probes have been a central part of the watchdog's work for years, as a series of post-crisis banking scandals led to billions of dollars in antitrust fines for some of the world's biggest institutions over the manipulation of key benchmark rates. The agency couched the syndicated loan study in that history when it first disclosed plans to investigate in 2017.

The end result, however, appears to signal a more guarded approach than the watchdog has taken elsewhere in the sector.

Even the fact that the commission sought the 324-page report, experts say, indicates more of an interest in pointing out possible competition concerns rather than taking direct action. Instead of a sector inquiry

or formal probe, the EC sought out an academic perspective on the sector.

“It’s unusual for them to take that kind of a line. But it’s a perfectly sensible preliminary thing for them to do,” Dechert LLP partner Alec Burnside said of the decision to commission an outside report.

Researchers from Europe Economics and Euclid Law looked at several different aspects of the syndicated loan market in a handful of sample countries: some of the bloc's most robust markets like the U.K., France and Germany, as well as Spain, Poland and the Netherlands.

The commission had fretted previously that syndicated loan coordination tended to occur “in opaque or intransparent settings,” making anti-competitive collusion and other conduct easier to pull off. That could include coordination on loan rates in lieu of direct competition as well as agreements to divvy up the market.

The authors did find some cause for competition concern, especially with the level of communication and coordination required between lenders. But they raised few red flags. And most of the identified risks, the authors concluded, were low to moderate.

For example, the study found some risks in the communications between banks considering joining together to syndicate a loan. Elsewhere, the authors pointed out that borrowers are sometimes required to use the syndicate for services that are “ancillary” to the loan, such as future advisory services.

Likewise, the report highlighted the risk that lenders involved in syndicating a loan together would promise future business in exchange for current concessions like limiting the supply of a loan. Other worries include the possibility that borrowers might end up with less bargaining power if they’re in disadvantaged financial straits that would make them more desperate to cut a less advantageous deal with lenders.

Overall, experts say the report serves mainly as a sign of the EC’s curiosity in syndicated loans and as a compliance guidepost. And the fact that it was published may signal the watchdog has no specific concerns in the space beyond a general caution.

“The market dynamics apparently do not facilitate collusion as much as the commission might have thought,” said Michael Masling, a partner with Morgan Lewis & Bockius LLP.

The EU’s interest in the syndicated loan space, attorneys say, is likely rooted in just how crucial it is to the European economy. As the report notes, syndicated loans accounted for about $800 billion worth of capital provided across Europe in 2017, making it a key part of the financial markets that have drawn so much antitrust attention.

“The difference here is I can’t think of any type of coordination that’s more procompetitive than syndicated loans — by definition a syndicated loan is a loan which any bank could not do alone, so the collaboration creates the product — and I think competition agencies understand this,” Antoine said.

The EC may have commissioned the study, Antoine said, because it also recognized that syndicated loans naturally require coordination and communication. In such an environment, he said, guidelines are useful even if relatively intuitive, especially because of the size of the loan market.

The study’s authors suggested several potential fixes to reduce the risks of anti-competitive conduct in the space, including a mandate for borrowers to provide their permission to lenders to share deal-specific data, conflict-of-interest training and information-sharing protocols.

At the same time, the report found few indications of high concentration at the national level that could give a single lender or small group of lenders major market power.

“This is a highly competitive industry, and it’s not surprising to see a report which basically says, ‘This is a well-functioning market, but there are some areas where you need to be mindful, as in any other industry,’” said Jonas Koponen, head of Linklaters LLP's global competition group.

The authors did caution, however, that there are fewer choices for borrowers looking for syndicated loans in the project finance and infrastructure space than for leveraged buyouts.

At the same time, competition looks much different in western Europe, where there tend to be at least a dozen banks that could credibly lead the syndication for LBOs, a role known as a mandated lead arranger. In Poland, however, those numbers are cut roughly in half to as low as six to eight, according to the report.

“There is some degree of differentiation between west Europe and the rest of the EU, with the former likelier to have choice from more lenders to act as an MLA,” the authors said. “This may mean that Poland is a good proxy for at least other non-west European countries, particularly where the euro is not the currency borrowed in.”

The authors ultimately concluded that safeguards exist, including not just the sophistication of borrowers, but also the requirement for their consent on communications.

“I think it is more an inspiration for compliance efforts than a lighting rod for enforcement,” Koponen said.

--Additional reporting by Melissa Lipman and Mark Taylor. Editing by Philip Shea.

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