Antitrust Infringements in the Financial Sector – An Overlooked Area of Regulatory Risk?

While financial institutions are subject to a certain degree of financial / prudential regulation, and the sector is generally competitive, they are certainly not immune from the risk of antitrust infringements. In many jurisdictions, including Singapore, there have been cases where competition authorities have investigated and acted, imposing large fines and resulting in follow-on civil liability to third parties. In some jurisdictions, both the institution and the relevant individuals may even face criminal charges / sanctions for antitrust related offences.

In Singapore, while mergers and acquisitions which require the approval of the Monetary Authority of Singapore ("**MAS**") may, in certain cases, be excluded from the general merger control regime under the Competition Act, it is important to note that the other two substantive prohibitions (on anti-competitive agreements and abuse of dominance) apply equally to regulated financial institutions in Singapore.

We have also seen antitrust enforcement actions being taken in recent years which arise from capital markets activities, where financial institutions have traditionally been more mindful of securities / market misconduct related regulations. This update outlines some of the key antitrust enforcement actions in the financial sector and key points that financial institutions should keep in mind when thinking about layering on an antitrust compliance perspective in their processes.

"No coordination with competitors" applies equally to securities trading activities

In Australia, three banks as well as certain executives were charged with criminal cartel offences following an investigation by the Australian Competition and Consumer Commission ("**ACCC**") (the Australian competition authority) into alleged coordination between the banks on how they would dispose of shares which they acquired as underwriters in an undersubscribed capital raising by ANZ Bank ("**ANZ**"). Based on public reports, it appears that the allegations are centred around a conference call in which the banks discussed plans on how these shares would be offloaded in order to maintain a floor for ANZ's share price and minimise further negative impact on ANZ's share price. In particular, the timing and pricing of such sales are alleged to have been discussed. One of the banks involved (JP Morgan) was reportedly granted immunity for providing full disclosure of the relevant events to the ACCC.

While the proceedings in this case are still ongoing and it is not clear whether the ACCC's allegations will be upheld – it is important to note that any coordination in respect of the purchase or sale of securities can fall within the ambit of antitrust laws as well (in addition to raising potential market misconduct related issues). Another important takeaway here is that individuals within an organisation may themselves face criminal liability for antitrust offences in certain jurisdictions (e.g., Australia, the United States).

Do also note that an antitrust investigation would not preclude financial services regulatory authorities from taking parallel enforcement actions if any market misconduct laws are breached as well.

Impose and enforce strict rules on the use of communication channels involving interactions with competitors

Earlier this year, the European Commission ("**EC**") imposed fines totalling EUR371 million on three banks in Europe for participating in cartel activities in the primary and secondary markets for European Government Bonds ("**EGB**").

Investigations showed that traders of seven banks had been in regular contact *via* chatrooms on their Bloomberg terminals and exchanged commercially sensitive information on, among others, their respective prices and volumes offered in the run-up to EGB auctions and prices shown to their customers as well as trading parameters in the secondary EGB market. The existence of this cartel was revealed to the EC by one of the participating banks as part of a leniency application.

There have also been a number of other antitrust investigations involving improper communications on Bloomberg chatrooms (or other similar online chatrooms), e.g., the London Interbank Offered Rate (**LIBOR**) interest rate rigging case, as well as the Singapore Interbank Offered Rate (**SIBOR**) / Swap Offer Rate (**SOR**) case described below. These cases demonstrate the high risk of antitrust infringements arising from such unpoliced channels of communications which frequently involve contact with competitors.

Financial institutions should be mindful of, and implement strict policies relating to, their employees' communications with representatives of other competitors. It is also important to seek legal advice as soon as possible if any potentially problematic behaviour is detected – the ability to be the first in line to make a leniency application to competition authorities may lead to the grant of immunity from fines (the whistleblowing bank in the EGB cartel case above avoided a fine of around EUR260 million as it was granted immunity).

No communication of bidding intentions to other potential investors during book-building process

In another example of an antitrust infringement in the context of capital markets related activity, two asset management firms in the United Kingdom ("**UK**") (Hargreave Hale and River and Mercantile Asset Management) were fined more than GBP400,000 for sharing their bidding intentions during the book-building process for two separate initial public offerings. A third firm (Newton Investment Management) was granted immunity for revealing the conduct to the authorities.

The UK Financial Conduct Authority separately took enforcement action against a fund manager at one of these asset management firms for failing to observe proper standards of market conduct – he was fined GBP32,000.

While bid-rigging infringements are typically associated with tenders for goods/services, similar collusion on the buy-side during a book-building process raises the same substantive antitrust harm – and as this case has shown, can be prosecuted as such.

Further, while Singapore's competition law regime does not impose personal liability on employees of a corporate offender, officers/representatives of financial institutions in Singapore should also keep in mind that any adverse finding on their individual conduct as part of an antitrust investigation may have a knock-on impact on the assessment of their compliance with

MAS' fit and proper criteria, as well as MAS' assessment of any future key appointment holder / director approval application.

Potential exposure to civil actions from third parties even if sanctions are avoided

Following a lengthy investigation, the MAS found in 2013 that 133 traders from 20 banks had engaged in attempts to inappropriately influence the setting of Singapore dollar interest rate benchmarks (SIBOR and SOR) as well as various foreign exchange benchmarks used to settle non-deliverable forward Foreign Exchange (FX) contracts.

While the Competition and Consumer Commission of Singapore ("**CCCS**") did not separately take any formal enforcement action in that case, many of the banks subsequently faced civil litigation in the United States commenced by various investment funds, which sought damages from losses arising from the alleged rate rigging activity.

Even if no action is taken / no penalties are imposed by a competition authority, a financial institution may still face third party civil actions seeking to recover losses suffered. Further, Singapore's Competition Act accords third parties a statutory right to recover losses from any person who has been found to infringe the prohibition on anti-competitive agreements (even if the person is immune from fines by virtue of being a leniency applicant). Similar rights to recover such losses are also accorded to third parties under the laws of other major antitrust jurisdictions.

Participation in industry coordinated actions should be reviewed carefully for antitrust concerns

In the only infringement decision to date issued against a regulated financial institution, 10 financial advisers in Singapore were found to have infringed the Competition Act by engaging in an anti-competitive agreement to pressurise a competing platform to withdraw its offer of a 50% commission rebate on certain life insurance products (*Financial Advisers Penalised by CCS for Pressurising a Competitor to Withdraw Offer from the Life Insurance Market, CCS 500/003/13, decision dated 17 March 2016*).

The CCCS investigations revealed that the 10 financial advisers had various discussions shortly after the promotional rebate was launched by the competitor – in particular, some of the parties discussed this issue at a management committee meeting of an industry trade association of which they were members.

Based on the infringement decision, it appears that the financial advisers' main concern was that the promotional rebate could: (1) incentivise their clients to seek "free" financial advice from the advisers and subsequently purchase the products on the competing online platform (at a lower cost due to the rebate); and (2) generally impact commission arrangements across the financial advisory industry as clients develop expectations of receiving such rebates.

One of the financial advisory firms was subsequently appointed as a representative to contact and pressurise the competitor into withdrawing the promotion – these efforts were successful as the promotion was withdrawn a few days after it was launched. Fines totalling S$909,302 were ultimately imposed on the financial advisers involved.

Competitors who pursue any course of action collectively against another competitor (or even a supplier or customer) run the risk of infringing antitrust laws. In addition, participation in trade

associations may increase the risk of antitrust infringements without strict guidelines governing the parameters of such participation.

If you have questions on the matters discussed in this update or have questions on whether certain practices/conduct in your organisation may raise antitrust concerns, please do not hesitate to contact us. Keep in mind that early detection of potentially problematic conduct is always beneficial, particularly given the availability of leniency programmes in most jurisdictions.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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