LMA

NOTICE ON THE APPLICATION OF COMPETITION LAW TO SYNDICATED LOAN ARRANGEMENTS

30 May 2014

In the light of recent changes to the UK competition law regime, it is timely to remind members of the need to ensure that they have adopted appropriate compliance measures governing contact between banks. There is a particular need for caution when banks are competing with each other for a role on a prospective multi-bank deal but care must also be taken generally to ensure that routine activities do not stray into a violation of the law.

The relevant law, as it relates to banks and other undertakings, is contained in Article 101(1) of the Treaty on the Functioning of the EU and its UK domestic equivalent, the Chapter I Prohibition under the UK Competition Act 1998. These provisions are broadly worded prohibitions on anticompetitive agreements and concerted practices between two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition. "Hard core" restrictions which fall within the provisions, and may attract significant fines of up to 10% of group worldwide turnover, include arrangements to:

- fix prices (including discounts, margins, credit terms etc);
- share markets or customers;
- fix or limit capacity;
- rig-bids (ie agreeing to manipulate a competitive tender process); or
- exchange non-public competitively sensitive information.

In the UK, it is a criminal offence for an individual to participate in an agreement involving one of the above categories of conduct (other than the exchange of information). As a result of the Enterprise and Regulatory Reform Act 2013, it is no longer a requirement that the individual behaved "dishonestly". Unless one of the statutory exclusions or defences apply, sanctions include imprisonment for up to 5 years and/or an unlimited fine.

Multi-bank dealings are not exempt from the above competition law provisions and are treated in the same way as other business activities. There is no express guidance issued by the relevant competition authorities tailored to the sector. However, risks inherent in the efficient operation of the syndicated loan sector can be mitigated if the right procedures are followed. Members are strongly encouraged to obtain their own legal advice and to adopt appropriate compliance measures. It is recommended that any advice and procedures should address at least the following areas where caution should be exercised:

- General market soundings

- Conduct during the bidding phase to ensure there is no inappropriate contact between competing origination desks that may raise the possibility of the unacceptable exchange of competitively sensitive information, price fixing or market manipulation etc

- Dealing with the receipt of any unsolicited competitively sensitive information

- Interaction between members of a syndicate related to the establishment or flexing of terms.

- Conduct between banks in the context of refinancing or distressed arrangements

As a general guiding principle whenever practicable, members should seek, and keep a record of, the prior consent of the borrower to any proposed contact with competitors whether in contemplation or following the appointment of the lead arranger / underwriter and formation of the banking group. Once obtained, members should be careful to act only within the terms of the consent. This will provide important protection and exclude UK criminal prosecution should the contact be questioned.

The above is illustrative of areas requiring careful consideration. It is not intended as an exhaustive list and should not be treated as guidance or a substitute for independent legal advice.