UK Financial Conduct Authority's First Antitrust Penalty: Sharing Pricing Intentions on IPOs or Share Placements With Rival Asset Managers Is Illegal

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The U.K. Financial Conduct Authority (FCA) has issued its first antitrust decision since obtaining competition law powers four years ago. The decision is a controversial one. It sets the FCA up as a strict enforcer on the type of information that competing investors can share when making recommendations about the correct price of a share placement or initial public offering (IPO) allocation. Asset managers can lawfully judge appetite for the shares by talking to their client base, the book runner or from independent research. But sharing information on price- or volume-bidding intentions with competing investors for a forthcoming share placement or IPO is strictly illegal.

Background

On February 21, 2019, the FCA found three asset management firms — Hargreave Hale Ltd, Newton Investment Management Limited (Newton), and River and Mercantile Asset Management LLP (River and Mercantile) — infringed competition law by sharing information on the pricing of a forthcoming IPO and share placing. Newton self-reported the violation, gaining immunity from fines under the FCA's leniency program. The FCA fined Hargreave Hale £306,300 and River and Mercantile £108,600. The FCA also fined Newton's portfolio fund manager, Paul Stephany, £32,200 for misconduct.[1]

In July and September 2015, book runners for the share placement of Market Tech Holdings Limited (Market Tech) and the IPO of On the Beach Group plc sought to create demand for the shares among asset managers. According to the FCA, Stephany allegedly thought the proposed pricing for the shares was too high and contacted rival asset managers to share his views on pricing.

Regarding the On the Beach Group IPO, Stephany blind-copied 11 competing asset managers on an email titled "Urgent-on the beach IPO." The email stated: "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." It further stated: "Please have a think and mention to any colleagues or have put orders in."[2]

Ahead of the Market Tech placing, Stephany called a competitor about the book runner's proposed pricing of the shares, stating: "I think push them [the book runner] for it to kind of 220 price rather than 230 plus they're talking about." He also stated: "[I] will be submitting a chunky order at that 220 level," and "I've spoken to one other person so far who intends to join me in that ... strategy. So yes, you have a think about it."[3]

Before engaging in these communications, Stephany conducted some rudimentary online research about whether the communications were legal. But he did not raise the matter with his manager or compliance department, nor did he consult the firm's competition policy guidelines.

Several rival asset managers responded to Stephany's email, and some shared commercially sensitive information on a bilateral basis. The FCA found that those asset managers disclosed and/or accepted otherwise confidential bidding intentions, in the form of the price they were willing to pay and in some instances the volume they wished to acquire. Although only a few exchanges took place, the FCA determined that they allowed one

[1] FCA Final Notice to Paul Stephany, February 4, 2019 (PMS01181) (failing to observe proper standards of conduct and acting without skill, care and diligence contrary to principles 2 and 3 of the Statements of Principle and Code of Practice for Approved Persons adopted under s.64 Financial Services and Markets Act 2000.)

[2] FCA Final Notice to Paul Stephany, February 4, 2019 (PMS01181), para. 4.18.

[3] FCA Final Notice to Paul Stephany, February 4, 2019 (PMS01181), para. 4.41.

firm to know another's plans during the IPO or share placement when they should have been competing for shares. The FCA noted that because firms rely on equity capital as a way of financing investments, unlawful information sharing could increase the cost of related investments or even make them unviable.

Takeaways

This case shows the FCA's hard stance on information exchange around share placements, despite the many circumstances in which rival investors may seek information or share views on potential opportunities.[4] It underlines the importance of communicating a strict compliance message to business colleagues on the risks of contacts with competing investors. In light of the FCA's decision, asset managers should keep the following in mind:

- **Exercise Great Caution in Contacts With Potentially Competing Investors.** Generally, asset managers regard any intelligence as to the pricing of a share as good intelligence to help them define the correct market price or, at most, to help lower the selling price of a share rather than increasing it. Part of Stephany's defense was that information is common currency among investors: "The price formation process in IPOs and placings is much more complex than how the Authority tries to depict it. There is a whole range of interactions between the market participants. Those interactions take many forms, from press articles through road shows to private gatherings among fund managers." The FCA disagreed. Whether bids are made public or not, the FCA considered it improper for competing investors to seek to undermine the proper price formation process by sharing information on proposed bid pricing or allocations. Such behavior "threatens the proper functioning of the market, where pricing should be determined by the operation of natural market forces."[5] But symptomatic of the fine distinctions involved, the FCA declined to rule on a particular standard of lawful and unlawful sharing of market information. It found that by any measure, Stephany's conduct was improper.[6]
- **Lack of Impact or Quick Restorative Action Are Not Adequate Defenses.** One or two communications alone were enough to incur liability. This was the case even when there was no evidence that rivals had altered their investment or pricing decision as a result. Most rival managers did nothing on receipt of the email and some, indeed, responded that it raised compliance concerns.
- **There Is No Defense in Collective Buying Activity.** This case is another example of the increased scrutiny by the European Union and U.K. competition authorities of information exchanges between purchasers, or "buyer cartels," that typically result in a price decrease (as opposed to collusion between sellers to increase prices). The FCA decision is consistent with the European Commission's strict line of arguments in the Spanish and Italian raw tobacco cartel cases[7] and in the car battery recycling cartel case[8] in arguing that buyer information sharing is illegal where it seeks to influence price setting and distorts market forces.
- **Ensure Availability of Compliance Resources.** The case illustrates the importance of raising business colleagues' awareness of the compliance resources available to them and reiterating that they should seek advice from the legal and compliance team when in doubt. Self-diagnosing via the internet without turning to the company's own compliance resources puts both

[4] FCA Final Notice to Paul Stephany, February 4, 2019 (PMS01181), p. 24-26.

[5] FCA Final Notice to Paul Stephany, February 4, 2019 (PMS01181), p. 25.

[6] FCA Final Notice to Paul Stephany, February 4, 2019 (PMS01181), p. 26. ("There is a distinction between discussing valuations and disclosing certain information about bids on the one hand, and seeking to influence potential investors to bid at the same price limit, in an attempt to use their collective power and thereby undermine the proper price formation process, on the other hand. The boundaries of what is legitimate in respect of the former do not need to be considered, because Mr Stephany's conduct fell into the latter category.")

[7] European Commission's October 20, 2004 (Case COMP/C.38.238/B.2) and October 20, 2005 (Case COMP/C.38.281/B.2) decisions.

[8] European Commission's February 8, 2017 (Case COMP/AT.40018) decision.

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