Client Alert | Antitrust/Competition

Landmark decision suggests a tough approach by the FCA to information exchange and its enforcement of competition law in the UK

May 2019

Authors: Marc Israel, Sophie Sahlin, Will Spens

Summary

In a landmark decision on 21 February 2019 (the "Decision"), marking the first use of its enforcement powers under the Competition Act 1998 ("CA 1998"), the Financial Conduct Authority ("FCA") imposed fines on three asset managers in relation to findings of anti-competitive conduct during one initial public offering ("IPO") and one placing in 2015.

Hargreave Hale Limited ("Hargreave Hale"), Newton Investment Management Limited ("Newton") and River and Mercantile Asset Management LLP ("RAMAM") were found to have exchanged "strategic information" vis-à-vis their bidding intentions (in terms of both volume and price) during a placing by Market Tech Holdings Limited ("Market Tech") and the IPO of On the Beach Group plc ("OTB").[1] Hargreave Hale was fined £306,300 for its actions and RAMAM, along with its parent company RAM Group, £108,000 each. Newton, and its parent The Bank of New York Mellon Corporation, received full immunity from any financial penalty under the FCA"s Leniency Programme.

The Infringing Conduct

In both the Market Tech placing and the OTB IPO, the asset managers exchanged "strategic information" (i.e. information that allowed rival asset managers to ascertain the bidding intentions of each other) during the book-building process. Book-building is, inherently, a competitive process in which the issuing company invites bids from potential investors in relation to the price and volume of shares they would be willing to subscribe for. Based on the level of interest shown by investors, the issuing company's shares can then be priced and issued on the market. The process is generally conducted by a market intermediary (usually a brokerage firm), known as the "book-builder", who will usually be a member of an underwriting syndicate (i.e. part of the group of institutions who agree to purchase any remaining shares that are left unsubscribed).

Information exchange is a necessary and intrinsic part of the book-building stage, as the "book-builder" will need to ascertain from potential investors their level of interest in the issuing company's shares. In so doing, investors will obtain a certain amount of information on the book. The "book-builder" typically discloses details such as its expected general valuation level or the number of bids submitted so far. However, the FCA notes in the Decision that there should be no disclosures of individual bidding conduct or intentions between

[1] The IPO of Card Factory plc ("Card Factory") was also investigated. However, the FCA ultimately decided that the asset managers in question (Artemis Investment Management LLP and Newton) did not engage in any exchange of 'strategic information' in relation to this IPO.

potential investors. Indeed, the competitive outcome of the book-building process depends on there being strategic uncertainty among rival asset managers. That strategic uncertainty is eliminated, or at least substantially reduced, when one asset manager discloses strategic information to another during the book- building process.[2]

In the Market Tech placing, Newton disclosed its bidding intentions to both Hargreave Hale and RAMAM in relation to the price it was bidding for the shares. Newton made it known to both institutions that it had placed bids for shares valued at 223p each. Market Tech had been hoping to achieve a strike price of 230p per share. The disclosures took place on the morning of 9 July 2015, the day of the placing. Approximately twenty minutes before the books closed, RAMAM amended its order in Market Tech shares to 223p per share. Market Tech ultimately placed 90,000,000 shares into the market, raising £200.7 million of gross proceeds. The final share price was 223p per share.

In the OTB IPO, Newton liaised with both Hargreave Hale and RAMAM to coordinate their bidding levels such that OTB would likely achieve a market capitalisation of £260 million. In a concerted exchange of information, Newton told the two other asset managers on the final day of the book build that it had subscribed for such a volume and price of shares in OTB that would achieve this market capitalisation. In turn, Hargreave Hale and RAMAM both made bids for shares that reflected the same valuation of OTB"s shares.

In both the Market Tech placing and the OTB IPO, the FCA determined that the asset managers had committed a breach of Chapter I of the CA 1998 and Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The exchange of "strategic information" in both cases had adversely affected the competitive process of the share offerings and constituted a concerted practice among the group of undertakings which had the object (if not the effect) of distorting competition.

Key Learnings

As noted above, information exchange is an inevitable and, to some extents, necessary part of the book building process. The Decision is noteworthy for two reasons: (i) it identifies circumstances in which the FCA will consider an exchange of information to be "strategic" and hence a breach of CA98; and (ii) it indicates what, if an exchange of "strategic information" takes place, institutions can do to effectively demonstrate that they have not acted on it to the detriment of the competitive process.

On the first point, the Decision did not find that all forms of information sharing among asset managers during the book-building process constitute a competition law infringement. Indeed, in the course of its investigation the FCA scrutinised the IPO of Card Factory and specifically Artemis" role in an alleged exchange of "strategic information". The FCA ultimately concluded that, despite the fact that Artemis had disclosed to Newton the price range it intended to bid for, this was not enough to constitute an exchange of "strategic information". The fact that Artemis had indicated the price range at which it was willing to bid (which meant the company's valuation varied significantly, by £100 million in one case), and not the actual strike price, meant that the FCA concluded that no information had been exchanged which eliminated or substantially reduced the uncertainty as to Artemis" expected conduct on the market.[3]

Therefore, not all situations involving the exchange of price information (in the context of an IPO or placing) will give rise to liability under the CA 1998 or TFEU. In determining whether the information being exchanged is "strategic", the first issue to consider is that of timing, which is very important in the context of an IPO/placing. Interestingly, the FCA noted in respect of the Card Factory IPO that Artemis made the disclosures well before the conclusion of the book building process. As such, the FCA deemed that the parties concerned were less likely to have been able to rely on the information disclosed to the other, given that parties in a book building process can amend or withdraw their bids at any time.[4] Conversely, in the context of the Market Tech placing and OTB IPO, the disclosures of "strategic information" occurred on the very day the relevant book building process was to close, and so were likely to have an impact on the other party's conduct. Thus, the issue of timing in an IPO/placing, where the relevance of information is very time-sensitive

---

2 *Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector (2019)*. (Case CMP/01-2016/CA98) (at p.100, para 9.23)

3 *Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector (2019)*. (Case CMP/01-2016/CA98) (at p.170, para 15.7)

4 *Competition Act 1988: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management section (2019). (Case CMP/01-2016/CA98) (at p170, para 15.7)*

and there is a very short time-frame for the information to be useful, can be contrasted with other examples of corporate financing where the timeframe will be much longer. For example, information about the rate at which an institution might be willing to lend to, say, AAA-rated corporate customers is likely to be sensitive for a longer period. Therefore, the exchange of information outside an IPO/placing (which is no longer useful once the shares have been sold) may be useful to another party, and so influence its conduct, for a much longer period of time.

The other issue the FCA took into account when making a determination of anti-competitive conduct is whether *there has been "a mental element to request and/or accept*"[5] "strategic information" and a conscious element of practical cooperation to restrict the competitive process. This process works on a bilateral basis. With regard to the entity disclosing the information, the FCA will - unsurprisingly - deem the mental element to apply when the disclosure is deliberate rather than inadvertent. In the case of the recipient, the mental element can be found in the request for, or acceptance of, the information disclosed. The latter is a particularly salient point, as the FCA consider that the mere receipt of "strategic information" constitutes "acceptance", rejecting Hargreave Hale's submission in the course of the investigation that acceptance should be a positive act and should be differentiated from receipt.[6] The FCA will infer anti-competitive conduct in respect of an exchange of information even where the recipient has remained silent and subsequently not acted in any obvious way as a result of the information received. That being said, it should be noted that, in the specific infringements addressed by the Decision, the receipt of strategic information in both the Market Tech placing and OTB IPO were not simply passive, unsolicited actions. In the Market Tech placing, for instance, the fund manager from Hargreave Hale had attempted to contact Newton on the day the book closed before the latter's bidding intentions were disclosed.

This leads to the second key point arising from the Decision, which is what parties can do to demonstrate that they have not acted on, or changed their conduct as a result of, the receipt of "strategic information". The Decision held that, as long as the party concerned remains active in the market following an exchange of "strategic information", there is no need for the FCA to establish that there has been a subsequent change in the party's behaviour or subsequent course of action.[7] That is to say, anti-competitive conduct will be *presumed* on the part of an entity receiving "strategic information" if it remains active in the market.

The so-called "*Anic* presumption" provides that, subject to proof to the contrary, where a party is subject to an exchange of sensitive information and continues to remain active in the market, it will presumed that the party concerned makes use of the information and thus commits an anti-competitive infringement.[8] As the FCA noted, the "*Anic* presumption" has been followed by the Competition Appeal Tribunal ("CAT") in the UK, which has stated that, where sensitive information has been exchanged, the recipient of that information "*cannot fail*" to take that information into account when determining its own future conduct.[9]

Thus the question becomes what it means to remain "active in the market". It is clear that a party must demonstrate that it has ceased to be active in the market in order to satisfy a regulatory body that it has not acted on the exchange of "strategic information". In this regard, the FCA (slightly artificially, perhaps) draws on established EU case law which has established the need for parties to sufficiently distance themselves from the receipt of sensitive information. In other words, the FCA conflates the two concepts in the context of IPOs and placings, where the failure of a party to distance itself from the receipt of "strategic information" *is* to remain active in the market (when the "market" for any particular IPO or placing is very short-lived). The FCA cites the *Cimenteries* case, which established that, in the context of a meeting, the failure of a party to

---

5 *Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector (2019)*. (Case CMP/01-2016/CA98) (at p.86, para 8.30)

6 *UUID 65220012, Hargreave Hale Submission on Statement of Objections, e.g. paragraphs 1.19 and 3.24-3.36. Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector (2019)*. (Case CMP/01-2016/CA98) (at p. 87, para 8.32)

7 *Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector (2019). (Case CMP/01-2016/CA98) (at p91, para 8.55)*

8 *Commission v Anic Partecipazioni (1999)*. (Case C-49/92 P ECR I-4125) (at para 121)

9 *JJB Sports and Allsports v Office of Fair Trading (2004)*. CAT 17 (at para 873). *Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector* (2019). (Case CMP/01- 2016/CA98) (at p90, para 8.50)

distance itself from the "strategic information" received constitutes tacit acceptance of that information.[10] Remaining silent is not sufficient, even where the entity in question did nothing to alter its conduct in light of the information exchange. It is for the party in receipt of sensitive information to adduce evidence to establish it indicated its *opposition* to the anti-competitive conduct of its competitors.[11] Such reasoning has been followed in the UK: in the *Galvanised Steel Tanks* case where the CMA presumed anti-competitive conduct on the part of the entity which received sensitive information even when the entity argued that it continued to price independently subsequent to that exchange. Remaining active in the market after the information exchange was enough to infer anti-competitive conduct.[12]

In the context of a book-build for a placing or IPO, this would suggest that the entity in question should remove itself from the bidding process entirely as a result of the receipt of "strategic information" very shortly before the end of the book-building process in order to satisfy the requirement that it has ceased to remain active. This is the case even where the entity has already made a bid for shares, as the lack of subsequent conduct to distance itself from the information will be deemed to be acquiescence and complicity in the anti-competitive conduct engaged in by the disclosing entity.[13] It is arguable that the precedents cited by the FCA can be distinguished because the market in an IPO/placing is, by definition, very short-lived whereas information exchanged in the cases cited is likely to have been of value (i.e. "strategic") for a longer period of time. Whilst it should be possible to rebut the presumption of acquiescence on the facts of a particular case, the Decision indicates a tough approach to the enforcement of CA98 by the FCA, and is perhaps a trend that can be expected to continue.

10 *Cimenteries CBR and others v Commission (2000)*. (Case T-25/95-T-104/95, EU:T:2000:77) (at para 1849). *Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector (2019)*. (Case CMP/01-2016/CA98) (at p87, para 8.35

11 *Hüls v Commission (1999)*. (Case C-199/92 P, EU:C:1999:358) (at para 155). *Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector (2019)*. (Case CMP/01- 2016/CA98) (at p87, para 8.35)

12 *Galvanised steel tanks for water storage information exchange infringement (2016).* (Case CE/9691/12) (at paras 4.29 and 4.32-4.34)

13 *Competition Act 1998: Decisions of the Financial Conduct Authority: Anti-competitive conduct in the asset management sector (2019)*. (Case CMP/01-2016/CA98) (at p88, paras 8.47-8.48)

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000