Linklaters

Antitrust threats for investment managers – Risks from across the Atlantic

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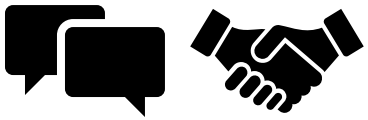
Agenda

1. Why care about what's happening to UK investment managers?
2. US and UK cooperation/contagion
3. The UK FCA – A new kind of financial regulator?
4. The UK's first collusion case against investment managers
5. An EU focus on common ownership?
6. Key areas giving rise to competition risks for investment managers
7. The Brexit effect

Why should US investment managers be concerned about competition scrutiny of UK investment managers?



Increasing international cooperation amongst antitrust authorities on both:
(i) exchange of confidential material, and
(ii) convergence on economic analysis and theories of harm.

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The targeting of investment managers in the UK with new approaches to the application of competition law to industry practices.

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Likely closer examination by US authorities of investment management practices domestically, to test whether the UK's analytical framework and theories of harm yield concerns within the US.

International cooperation isn't new, but it is increasing

1999

As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and, thus, have led antitrust authorities in the affected jurisdictions to ***communicate, cooperate, and coordinate their efforts to achieve compatible enforcement results****.*

John J. Parisi, Commissioner, US FTC, 19 May 1999

2014

In the cartel context, the interaction between U.S. antitrust enforcers and their international counterparts ***continues to increase*** *… such that international cartels are* ***likely to be pursued and prosecuted by more than one antitrust authority****.*

…

[There is] ongoing bilateral and multilateral engagement [with international counterparts] to promote ***international convergence*** *around economics-based antitrust principles and procedural fairness.*

Leslie C. Overton,
Deputy Assistant AG, Antitrust Division, US DoJ, 2014

2017

AND INCLUDES A NEW FOCUS ON FINANCIAL SERVICES:

In 2017 The Antitrust Division of the US DoJ offered its first ever secondment to a member of the **UK FCA's competition team**, stating that the program aimed to strengthen the Division's relationship with the FCA, and flagged that **financial services were a key area of criminal enforcement**.

What's happening in the UK?

Growing competition focus on investment managers

*"We haven't shied away from putting public interest at the centre of our regulation … it does mean we take a particular interest in corners of the industry that most affect wider society – **which puts asset management squarely into the bracket of 'sectors that we care deeply about"**.*

M. Butler, Executive Director,
FCA: Address to FT Investment Management Summit Europe 2017

*"We have considerable experience of dealing with these markets and their participants but we **have not previously approached them from a competition perspective**. We are therefore conducting a review of competition in the wholesale sector to identify any areas that might merit further investigation through an in-depth market study."*

UK FCA, Call for Inputs, Wholesale Sector Competition Review, July 2014

*"Our engagement process during the market study has indicated a **possible lack of awareness of competition law in some areas of the sector**, in particular as to how the law applies to commercial relationships and interactions with one another. We remind firms of the importance of ensuring their business activities are undertaken in compliance with competition law."*

UK FCA, Final Report, Asset Management Market Study, 2017

Globally unique: FCA as competition enforcer

From 1 April 2015 the UK FCA gained **concurrent competition powers** with the UK Competition and Markets Authority in relation to financial services.

Raises the possibility of Dual Penalties: the FCA can take enforcement action in relation to the same conduct under both its competition and its financial markets supervisory jurisdictions.

- For example regulated firms may be held to be in contravention of **both**
  - competition prohibitions; **and**
  - Principle 11 of the Principles for Businesses and rules in the FCA's Supervision manual for failing to bring that same contravention to the FCA's attention.

Uniquely, globally, reporting "substantial" competition violations to FCA is **mandatory**.

First shots fired: FCA launches competition case

The FCA alleges that :

- in 2015, Newton Investment Management, Hargreave Hale and River & Mercantile Asset Management **disclosed and/or accepted information** about the price they intended to pay for shares in relation to one IPO and a placing;
- in 2014 Artemis Investment Management and Newton **shared information** about the price they intended or were willing to pay for shares in relation to another IPO.

The FCA has also addressed its SO to The Bank of New York Mellon Corporation (as Newton's ultimate parent) and River and Mercantile Group PLC (as River & Mercantile Asset Management's ultimate parent)

- Regulators have a strong incentive to pursue parents - ***maximum potential fines are a function of worldwide parent group revenue; headlines; recidivism; deterrence uplifts.***
- Parents with <100% shareholding can still be caught, but it must be shown that they actually exercised decisive influence over the subsidiary's commercial policy – ***relevantly, the FCA hasn't named Affiliated Managers Group, Artemis' major shareholder.***

A new focus on common ownership?

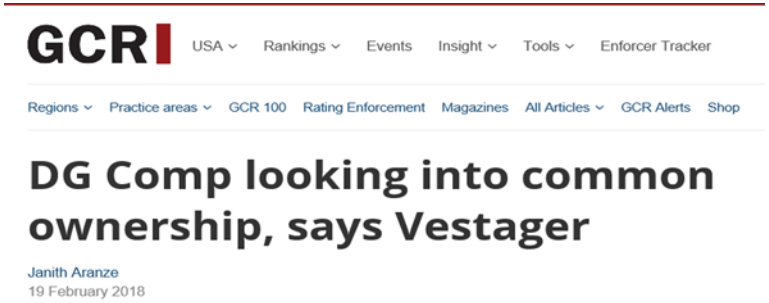
> Academic literature in the US has recently argued that a network of **common ownership** by institutional investors across an industry can **distort competition**

> The theory of harm is that:
  - Institutional investors collectively own shares in multiple competitors in various industries
  - Funds have the incentive to increase profits in the industry **as a whole**
  - This goal is achieved by pressuring management to avoid "wasteful competition"
  - "Passive" shareholders have more influence than formal stake suggests

> EC examined the issue in detail in the Dow / DuPont merger and noted public statements from investment managers that they exercise "**active ownership**" with an "**industry wide perspective**"

Possible EU regulatory action

> EC Commissioner for Competition has announced that the EC is looking ***"carefully"*** into the issue of common ownership, and has begun the ***"complex task"*** of finding out if it is frequent in Europe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DG Comp looking into common ownership, says Vestager

Janith Aranze
19 February 2018

> At this stage no clear aim nor timeline for Commission to take concrete action or in what form that action would be, e.g.:

- Sector Inquiry or "softer" informal queries (most likely – see syndicated lending)
- Specific targeted action under Art. 101 (but challenging to bring – see Aer Lingus/Ryanair obstacles and Commission notes these obstacles itself in its green paper on minority shareholdings)
- Changes to EUMR (previously rejected) or framework for merger analysis? (but prospective – doesn't address issues currently in sector).

> European markets have different characteristics to US – e.g. divergent national regulation, significant state ownership stakes and smaller institutional stakes

What's next?

- The FCA now has a large dedicated Competition Division exclusively focused on financial services, with a stated intention to look particularly closely at investment managers. There is no equivalent around the world.
- Just as the first specialist healthcare teams within the US FTC influenced how antitrust authorities around the world approach healthcare markets, the theories of harm and analytical approaches developed by the FCA's competition team are likely to be closely studied by global antitrust authorities.
- In addition, the European Commission is taking an active lead internationally in considering how antitrust authorities should approach the issue of common ownership.
- Compliance teams in global investment managers should ensure they monitor:
  - **The FCA's proposed theories of harm** and pre-emptively identify areas of risk in their own businesses that the US and other global authorities may focus on when considering how, or whether, to apply those theories of harm domestically; and
  - **The EC's characterisation of common ownership concerns**, including considering submissions and other interactions with regulators where appropriate to mitigate concerns and pre-empt more onerous regulatory investigations.

Recapping the antitrust high risk areas common to both sides of the Atlantic

- **Using competitors' information**
  - Collection and use of competitors' information (pricing, strategies, investment product changes) from non-public sources carries substantial risk if not performed with an eye to competition compliance – e.g. by using third party providers, aggregating sensitive data, etc.
- **Participating in trade associations and industry fora**
  - It is permissible to discuss industry changes, new regulations, etc as an industry collective, but any exchange of information regarding individual responses to these changes must be carefully vetted first.
- **Responding to significant industry changes**
  - For example, in the context of MiFID II, competitors cannot exchange information on willingness to pay for research, the framing of target markets, timing of price changes or key messaging to downstream clients.

Lastly, a quick look at the Brexit effect

Short term

- Likely loss of 'one stop shop' for mergers – international M&A may well have to deal with an additional merger control jurisdiction
- Potential for multiple investigations into the same conduct to commence by the UK and EC in parallel.
- Uncertainty over where mergers and conduct cases will most appropriately be dealt with during transition period; how to deal with pre-Brexit conduct discovered after Brexit; the extent of jurisdiction of ECJ over UK matters determined prior to Brexit but appealed after.

Medium to longer term

- Likely reduced ability for CMA to freely exchange confidential information and cooperate on cases with the EC and other European member state authorities
- Question of whether private antitrust 'follow on' damages claims arising from EU breaches will continue to be able to be as easily litigated in the UK
- Possible divergence in case law and legal approach to issues
- Potential for the UK authorities to move closer to US antitrust authorities

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