Introduction

In a rare move, in October 2017, the European Commission ("EC") reportedly took over an investigation initiated by the UK's Financial Conduct Authority ("FCA") into the exchange of competitively sensitive information amongst aviation insurance brokers.¹

All market players should now be on notice that this is a bigger case than initially anticipated, with likely effects across several EU Member States (rather than just the UK) and potentially involving more players than previously thought. The sharing of competitively sensitive information and cartel behaviour is a serious infringement of the competition rules which can result in heavy penalties.

The industry need to closely review their practices and ensure their 'houses are in order.' If they have concerns that they may be caught up in the investigation, they should consider self-reporting to the authorities. Either way, given this significant move, it is important market players have the right compliance processes in place and ensure all their employees understand the importance of competition law compliance.

Background

In April 2017, the UK's FCA opened an investigation into claims of potentially unlawful information exchange amongst aviation insurance brokers. The FCA reportedly carried out on-site inspections ("dawn raids") at the London offices of five leading insurance brokers, as part of an investigation into their aviation brokerage businesses. The allegations appeared to centre on concerns that competitively sensitive information was shared amongst Marsh, Willis Towers Watson, Aon, Jardine Lloyd Thompson and United Insurance Brokers. The investigation appeared to be the first such civil investigation under the FCA's 'concurrent' competition powers to lead to dawn raids, alongside the UK's main competition enforcement authority, the Competition & Markets Authority ("CMA"). The investigation showed how serious the FCA is about its role in enforcing UK competition law.

What has since happened?

Since then, several of the parties under investigation publicly confirmed in October 2017 that the EC has since taken over that investigation, now moving the focus from a UK investigation into an EU-wide one, using the full extent of the EC's civil enforcement powers (e.g. potential further dawn raids, information requests, interviews, etc.). Neither the FCA nor the EC have commented officially in public on this step. However, several of the parties under investigation have reported that the FCA has now closed its civil investigation under the UK's Competition Act. It appears though that the FCA may retain its jurisdiction over broking regulatory matters arising from the conduct being investigated.

¹ See Stephenson Harwood's briefing of May 2017 entitled “FCA’s first dawn raid investigation against aviation insurance brokers” at: https://f.datasrvr.com/fr1/1417/42618/05_17_FCA-investigation-briefing-aviation-insurance-brokers.PDF
What are the next steps?

The EC will now use its civil enforcement powers to take over the investigation. Such EC investigations do not operate according to a fixed timeline and the opening of an investigation may not prejudge its outcome. All of the parties under investigation will be able to make representations to the EC throughout its investigation. However, should the EC find the parties may have broken the rules on anti-competitive information exchanges, then it may fine them up to 10% of their global turnover in the last financial year. The parties may appeal any such findings to the European courts. The EC has no criminal enforcement powers. Should any infringement decision be issued, then third parties may try to use it to bring damages actions against the parties.

What is the significance of this step?

It is not clear why the EC has taken over the FCA's investigation or what evidence has been uncovered to justify this move. However, it would appear that the relevant conduct is broader than the UK's national jurisdiction, meaning that the EC is 'best placed' to handle a cross-border investigation, rather than the UK's FCA. It is unusual for the EC to take over a national competition authority's investigation in this way. The parties involved will now face the full resources of the EC's highly experienced investigatory team. Further, this puts the rest of the insurance industry on notice that the sharing of competitively sensitive information may be closely scrutinised by the competition authorities, and may result in heavy penalties. Now is the time for industry players to ensure their day to day business practices are compliant with competition laws and address any concerns swiftly.

How we can help

The Stephenson Harwood competition law team has significant experience carrying out investigations in the insurance and financial services sector. We can help market players 'get their house in order' by:

- Providing training and guidance on what market participants such as brokers, insurers and underwriters are permitted to do and not do in their day to day operations (especially in respect of "information exchange").
- Providing practical guidance as to how you and your staff should behave, by helping you develop and deliver your competition law compliance policy.
- Advising you if you have any concerns over past behaviour - even at the fringes - including on seeking 'immunity' from the EC's fining powers or reduced fines under the EC's 'leniency' programme.
- Advising you especially in a dawn raid scenario if the competition authorities call on you. It is imperative you have in place dawn raid guidelines and know who to call in the event of such an eventuality.
- Responding to any information requests in the event the EC does seek further information from other market participants as well as helping you understand the overall EC investigatory process as it unfolds in this case.

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