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Antitrust update for the investment industry: Don't forget competition laws when structuring consortia

There has been a swathe of recent press touching on the possibility consortia bids may raise competition issues: from the leader in *The Economist* (10th February edition) to the Outlook column in *The Independent* of the same date. *The Financial Times* reported that one recent seller has included in its sale terms a stipulation that private equity bidders could not talk to each other about joining forces.

The possibility of a buy-out of J Sainsbury's has focused the minds of journalists on consortia private equity buy-outs. The US Department of Justice ("DoJ") opened an investigation late last year into "club" deals in the private equity industry; it was reported that Bank of America has struck a deal with the DoJ, seeking leniency over bidding practices in the investment banking industry (possibly in connection with an investigation into the municipal derivatives industry).

This is a timely reminder that antitrust/ competition laws apply to companies and individuals active in the investment industry, just as they do to industrial firms. Ensuring your company knows when it is at risk of entering into agreements or conduct which may infringe the competition rules enables it to take informed decisions about risk mitigation -- especially in the context of club deals which bring together potential competitors for the target.

So how might EC competition laws apply to a bidding process? The manner in which private equity firms, financial institutions and trade buyers compete with each other when bidding for companies can raise antitrust issues if the firms agree to modify their bidding behaviour in concert with each other. Article 81 of the EC Treaty prohibits agreements and concerted practices that prevent, restrict or distort competition, or are intended to do so. Both the

European Commission and national competition authorities (e.g. the UK Office of Fair Trading) can enforce Article 81. Specifically Article 81 may be breached if firms rig bids, allocate bids between firms, agree not to top another firm's bid, agree not to bid in return for some unrelated benefits from the winning company, or provide an incentive to a competing bidder to ensure it changes its bidding strategy. Exchange of competitively sensitive information alone between competitors can also raise issues.

The key element is that the firms come to an agreement or understanding to behave in a certain way, and act in reliance upon this agreement. If the same outcome is reached as the result of unilateral action by a firm, this does not raise these antitrust issues. Distance your firm from any anticompetitive proposals by fellow bidders and do not coerce the seller or other bidders to act in a particular way. If your bidding strategy may create competition issues, seek specific advice from your antitrust counsel before proceeding with the bid.

When joining a consortium bid, particularly if this occurs part way through an auction process and is instigated by another bidder rather than the seller, carefully consider your reasons for joining. For example, if it is to eliminate another bidder/potential bidder and/or to lower the ultimate bid price then this may create competition issues. If joining the

consortium means you can increase the price you would pay for the target or bid for a target that you would not be in a position to bid for individually, then this may be procompetitive. There is a continuum of situations between these two examples and in an investigation much will depend on your evidentiary record.

In brief, if you work in the same industry as your fellow bidder/potential bidder and are considering collaborating, or even just exchanging information about the bidding process and your approach, take a

clear-headed look at your practices and decide whether your conduct could affect the competitive process such that you should seek legal advice before proceeding.

This guide is not comprehensive, and it is not intended that it should be used as an alternative for seeking specific legal advice.

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