

The logo for K&L GATES is displayed in white, uppercase letters within a dark red rectangular box. The background of the slide features a stylized financial chart with teal bars and a red line graph, overlaid on a blue background with binary code (0s and 1s) and horizontal light streaks.

13 December 2017

Competition & Trade Regulation Risks to Active Fund Managers

Neil Baylis, Partner, K&L Gates LLP - London

*Raminta Dereskeviciute, Special Counsel, K&L Gates LLP –
London*



#KLGIMConf
@KLGates



INTRODUCTION TO COMPETITION LAW



AN INTRODUCTION...

UK Competition Act 1998

- Chapter I – Anti-competitive agreements
- Chapter II – Abuse of dominance

Enterprise Act 2002 and Enterprise and Regulatory Reform Act 2013

- Cartel offence
- Market investigations
- Merger control

EU law

- Chapter I & II = Articles 101 & 102 TFEU
- Differences – effect on trade UK focused, legal privilege, director disqualification





COMPETITION ACT

Anti-Competitive Agreements (incl. cartels)

an agreement, decision or concerted practice between two or more undertakings...



which may affect trade within the UK...



which has as its object or effect, the prevention, restriction or distortion of competition within the UK.

Abuse of a Dominant Position

Dominance

- A position of economic strength
- Depends on how the market is defined
- Market shares (40%+ presumed dominant), position of competitors, barriers to entry – all relevant

Abuse

- Any conduct that enhances/exploits market position to detriment of competitor/consumer



ENTERPRISE ACT & ERRA



Cartels

- A criminal offence under the Enterprise Act.
- Arrangement between 2+ persons for undertakings to engage in:
 - Price-fixing;
 - Limiting supply/production;
 - Market-sharing; or
 - Bid-rigging



Market investigations

- Grounds for a market investigation: CMA suspects that a feature of a market in the UK prevents, restricts or distorts competition in the UK.
- This can relate to the structure of or a participant in that market.
- Various other regulators (incl. FCA) can refer an investigation to the CMA.
- Investigation can go on for a maximum of 18 months.



Voluntary notification to the CMA

Qualify for review where: (1) T.O. of enterprise being acquired is £70m+ or (2) post-acquisition, combined entity would have supply/purchase 25%+ of goods/services

CMA can block an acquisition if deemed anti-competitive





ENFORCEMENT

Anti-competitive agreements and abuse of dominant position

- Fine up to 10% worldwide turnover e.g. BA fined £58.5 million for price fixing
- Director disqualification up to 15 years

Criminal cartels

- Unlimited fine
- 5 years imprisonment

Market investigations

- Mandatory divestment of businesses e.g. BAA with Gatwick, Stansted & Edinburgh
- Implementation of compulsory industry standards
- Behavioural remedies i.e. directing companies to act in a certain way
- Ongoing monitoring

Other consequences of breaching competition law

- Third party actions for damages
- Reputational damage



COMPETITION LAW AND INVESTMENT MANAGEMENT





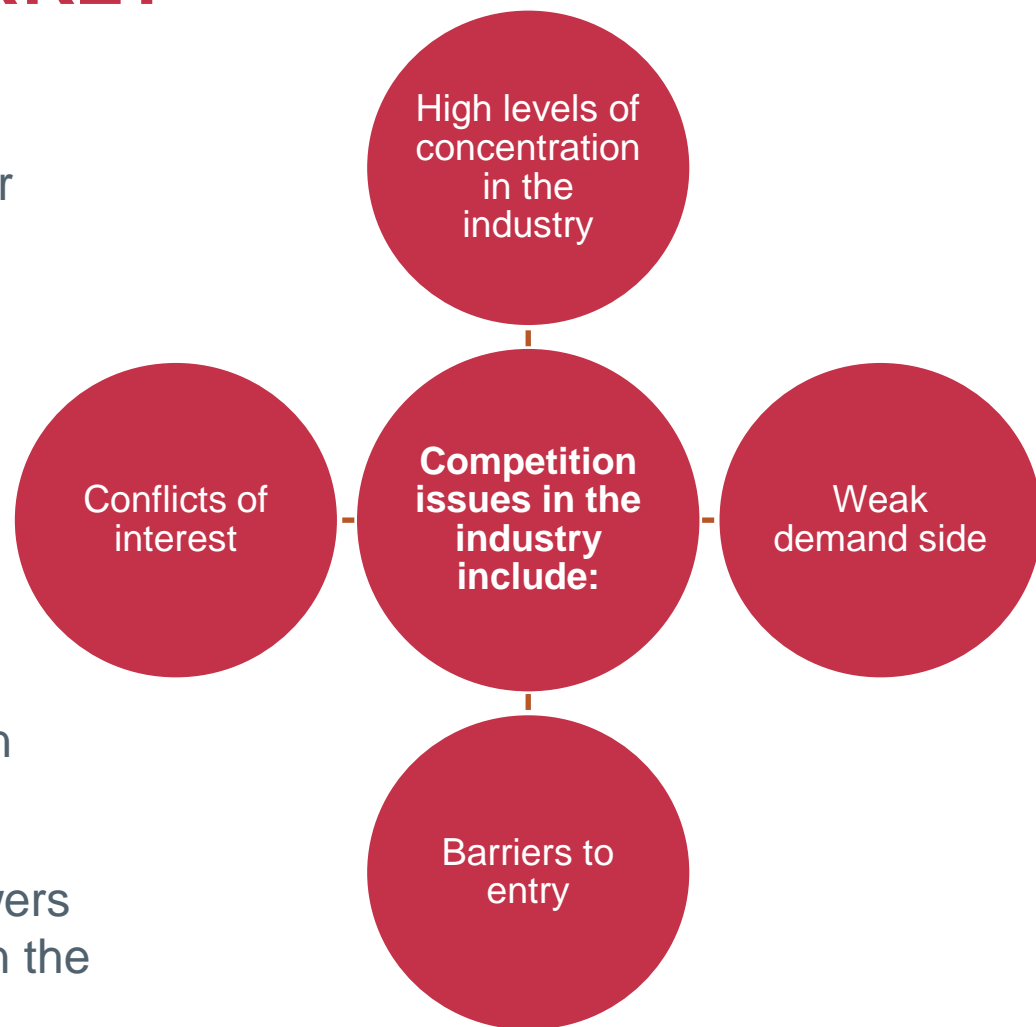
COMPETITION ENFORCEMENT BODIES FOR INVESTMENT MANAGEMENT FIRMS

- The Competition and Markets Authority (“CMA”) is the main enforcement body for competition law
- However, the Financial Conduct Authority can:
 - enforce against infringements of competition law within the financial sector;
 - conduct its own market studies; and
 - refer markets to the CMA for a more in-depth investigation



CMA INVESTIGATION INTO INVESTMENT CONSULTANTS MARKET

- FCA referred investment consultancy and fiduciary management sector to CMA for investigation on 14 September 2017.
- *“no single answer to remedy competition problems in the industry”*
- Investigation to continue until **March 2019**.
- Official requests for information now sent.
- CMA may use the array of powers it has to improve competition in the market.





COMPETITION UPDATES IN THE INDUSTRY

FCA - Statement of Objection to Asset Management Firms

- FCA issued its first statement of objection to four asset management firms, alleging they have breached competition law.

LIBOR & EURIBOR cases

- ICAP cartel case – *“Libor fine quashed”*
- €700 million damages claim against RBS over EURIBOR manipulation
- RBS and others face antitrust damages claim over LIBOR manipulation

Increased scrutiny on competition from regulators

- CMA market investigation of investment consultancy and fiduciary management sector
- FCA has stated that *“UK active fund managers need to tighten governance rules and disclose single all-in fee for services”*
- FCA investigation into investment-platform sector

Merger control

- ICE & Trayport merger – ICE ordered to sell Trayport
- LSE and Deutsche Börse merger blocked





BREXIT

What will continue...

- Agreements with effect in the EU? – EU competition laws will continue to apply
- Significant UK case law comes from EU law – EU legal principles will still be influential

What will change...

- CMA will no longer apply EU competition law
- No one-stop shop: CMA may conduct its own investigations / merger control assessments in tandem with those conducted by EU Commission
- More active CMA
- More burdensome for business



SANCTIONS





AN INTRODUCTION...

Sanctions - what are they?

- Restrictive measures against countries, individuals or entities
- UK sanctions are EU/UN led

Financial sanctions

- Prohibition on carrying out transactions with specified persons/entities
- This can include freezing assets or a ban on directly/indirectly making funds available to sanctioned persons/entities

EU sanctions

- Applies to EU nationals/entities and any person/entity doing any business in the EU.

US sanctions

- Extra-territorial and aggressive enforcement
- Applies to “US persons” - US citizen, resident, US company, company with US presence
- Offence to “cause” a US person to breach – transactions in \$



EXAMPLES OF SANCTIONS

Russia



- Financial sanctions – 5 largest banks, 3 major energy and 3 major defence cos.
- Asset freezes on wide range of Russian entities/persons
- Restriction on providing investment services to/dealing in certain financial instruments in relation to certain Russian entities

What financial instruments?

- Shares
- Bonds / any other form of securitised debt
- Derivatives
- Treasury bills, commercial papers and certificates of deposit



Iran

- JCPOA – Iran nuclear deal
- Trump’s refusal to certify but UK, EU, Russia, China back it
- New US sanctions on Iranian ballistic missiles – sign of things to come?



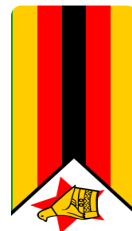
Syria

- Financial sanctions & export/import restrictions
- Restrictions on admission to listed individuals



Venezuela

- Financial sanctions and restrictions on trade of telecoms equipment
- Arms and dual-use goods embargos



Zimbabwe

- Financial sanctions
- Arms embargos
- Restrictions on admission





ENFORCEMENT

OFSI

- Regulates and enforces UK financial sanctions
- Reporting requirements – financial institutions must report suspicions of sanctions breaches / if someone is a sanctions person. Failure to do so is a criminal offence

SFO

- Carries out criminal prosecutions for breaches of sanctions
- Mabey & Johnson - £3.5 million penalty
- Weir Group - £16.9 million penalty

FCA

- Regulated entities – require systems and controls to mitigate risk of sanctions breaches
- RBS - £5.6 million fine for UK sanctions controls failings

OFAC

- US regulator - part of US treasury - year to date issued fines totalling **\$118,307,445** for sanctions breaches
- Largest penalty (fine and confiscation) was against BNP Paribas for **\$8.9 billion** – breaching US sanctions on Sudan, Iran and Cuba



CONSEQUENCES OF BREACH

Potential UK penalties

- **Unlimited** fine
- **10 years** imprisonment
- Financial sanctions breach – OFSI issues civil fines up to **£1 million / 50% for a breach of serious financial sanctions**

Potential U.S. penalties

- **\$250,000** fine **per instance of breach**
- Secondary sanctions regime

Reputation

- OFSI publication of infringement “to deter future non-compliance”
- FT has commented that the biggest threat to BNP Paribas could be the damage to its reputation



SANCTIONS AND INVESTMENT MANAGEMENT





SANCTIONS RISK IN FINANCE INDUSTRY

Capital Markets Transactions

- Sanctioned investor
- Securities in sanctioned entity

Corporate Financing

- Financial assistance to sanctioned entities/industries

Global Money markets

- Asset freezes
- Restricted use of liquid assets

Trade Financing

- Underlying transaction undermines financial products



HOW TO MANAGE RISK EXTERNALLY

Due diligence

- Conduct due diligence on **third parties** and **clients**
- Don't rely on standard AML checks or name searches
- Check sanctions policies of third parties
- Ensure you know whether a licence is required
- Assess on a case-by-case basis – risk based approach

Contractual provisions

- Include warranties to be given by third parties to certify compliance with sanctions laws
- Tailor clauses to reflect due diligence findings
- Include provisions requiring evidence of licences when required
- Certificates of conformity
- Ensure risks are appropriately assessed when entering into contracts



HOW TO MANAGE RISK INTERNALLY

Corporate Governance

- Ensure sanctions training throughout business
- Individual responsibility
- Don't silo sanctions compliance to legal departments!
- Drive culture of compliance from top down
- Dialogue with authorities for clarification

Ongoing Monitoring

- Sanctions are complex and ever-changing
- Often transactions can be caught by extra-territorial nature of EU and US sanctions
- Importance of the currency you transact in



FINANCIAL SANCTIONS - LICENCES

- Must obtain a licence from OFSI where a transaction involves someone (directly/indirectly) who is subject to financial sanctions
- Cannot engage in activities until licence is granted
- Four week turnaround once application made – plan ahead

Licences may only be granted on the following grounds:

- Proposed transaction from contract prior to sanctions
- Covering payment of fees/service charges for holding/maintenance of frozen funds
- Reimbursements of legal services expenses; or
- Other purposes i.e. humanitarian/covering basic expenses



BREXIT

- UK Sanctions & AML Bill – recently had second reading in HoL
- Significant powers given to ministers – HoL has stated it is “constitutionally inappropriate”
- Boris Johnson – currently “no Government position” on sanctions relationship with EU
- New mechanisms / agreements to determine sanctions required?





QUESTIONS

