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Syndicated Lending and Antitrust

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Abstract

Discussion on whether syndicated loan structures may give rise to anticompetitive risks has been increasing thus the European Commission is performing a study on the impact syndicated lending structures have on competition in the credit markets. This thesis will cover the main aspects of syndicated loan structures and then examine Article 101 TFEU and anticompetitive conduct.

Syndicated lending has been an evolving form of corporate finance for the past decades and the market now amounts to one third of leveraged finance in the Euro Area. The structure of the syndicated loan agreements offers economic benefits for both lenders and the borrowers. This thesis aims to cover comprehensive discussion on syndicated lending, a form of multibank loan contracts where lenders provide shares of the loan to the borrower on the same terms.

This thesis will explore the main features of syndicated lending and potential anticompetitive risks that may occur between the participants in a syndicated loan agreement.

Preface

This thesis marks the end of my studies of LL.M in European Business Law at Lund University. I have enjoyed the past year at the Faculty of Law in Lund and added deeply to my knowledge on European Law.

I want to thank my supervisor, Anna Tzanaki, for her support and guidance and last but not least her interest in the subject which gave the writing so much more energy and motivation.

To my family, Villi and our three musketeers; Gabríel Ísarr, Mikael Ísarr and Rafael Ísarr. Thank you for your endless support and positive motivation, you are the coolest boys I know. No better words than Buzz Lightyears; I love you *'to the infinity and beyond'* – Ég elska ykkur '*út fyrir endimörk alheimsins'* Bósi Ljósár.

Tinna Ósk Óskarsdóttir

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Table of Abbreviations

BIS	Bank of International Settlements
CHIRD	Financial product used in over the Counter trade
EC	Treaty establishing the European Community
EEC Treaty	Treaty establishing the European Economic Community
EEA	European Economic Area
EMEA	Europe, Middle East and Africa
LMA	Loan Market Association
TFEU	Treaty on the Functioning of the European Union
The Court	European Court of Justice and General Court

Introduction

Background

In the European Commission action plan for 2017 it was set forth that a study would be performed regarding the European syndication market and its association with anticompetitive practices, in particular regarding the close cooperation between the participants of a syndicate[1]. On 30 March 2017 the Commission published a call for a tender to the study of the 'EU loan syndication and its impact on competition in credit markets'.[2] The European syndicated loan market consist of lenders, mostly banks and other institutional investors, who together are able to offer extensive funding through a syndicate which is performed by one or many lead arrangers.[3] Funding through syndicated lending is an important factor in the offering of credit to large investments: apart from being more efficient than other credit facilities they are also less costly.[4]

Research Question and Structure

In order to assess the potential antitrust risks of the syndicated lending practice I will look into competition policy and financial sector regulation. Additionally, the relationship between regulated financial institutions and competition rules will be studied. Then I will examine the anticompetitive behavior that falls under the scope of Article 101(1) TFEU and also the conditions for Article 101(3) TFEU to be applicable.

The question I will try to answer is what anticompetitive risks derive from multibank financing, such as syndicated lending and whether the practice might fall under the scope of Article 101(1) TFEU.

In this thesis I will examine the theory and practice of syndicated lending , from when the practice began and how it has developed in the financial market. In addition, the definition of

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[1] *European Commission Management Plan 2017* DG Competition, p. 11. Available at: <https://ec.europa.eu/info/publications/management-plan-2017-competition_en> Last accessed 20 May 2018.
[2] European Commission, COMP/2017/008, Invitation To Tender*, EU loan syndication and its impact on competition in credit markets* Available at: <https://etendering.ted.europa.eu/cft/cft-document.html?docId=24626> Last accessed 20 May 2018.
[3] Tender specification COMP/2017/008, *EU loan syndication and its impact on competition in credit markets.* p. 3. Available at: <http://ted.europa.eu/udl?uri=TED:NOTICE:376355-2017:TEXT:EN:HTML&tabId=4> Last accessed 16 May 2018 p. 3.
[4] Ibid.

the syndicated lending will be addressed as well as the process of assembling a syndicated loan agreement. Furthermore, the participants in the syndicated loan agreement will be studied as well as syndicated lending will be analyzed from a contractual and legal perspective.

Delimitation

The analysis is limited to the traditional syndicated loan agreement, the promotion of such funding, assembling a group of the participating lenders as well as their relationship to the lead bank and borrower. The underwriting of syndicated loans in the secondary market and changes within the lending group, price flexing, sub-lending will not me examined in detail.

The focus in the European Commission Study

In March 2017 the European Commission issued a tender offer for a study of the syndicated market within the European Union, with the objective to assess the European loan syndication impact in credit markets.[5] This will be the first time the Commission will be assessing the European syndicated market.[6] The study will include an assessment on the competition issues arising when a relationship is established between the lenders and the borrower, and what anti-competitive risks their cooperation might have, from the negotiation phase of a loan until the loan has been formed and completed.[7]

The Notice from Loan Market Association

In 2014 the Loan Market Association issued a notice addressing the importance of compliance measures on communication between banks.[8] It especially emphasized on the caution that needs to be taken when banks are competing for participation in feasible multibank agreements.[9] It is vital for banks to be aware of their actions and ensure that multibank agreement procedures do not result in infringing domestic competition law[10] as well as the law laid down in Article 101(1) TFEU.[11]

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[5] Ibid., p. 4.
[6] Ibid.
[7] Ibid., p. 3.
[8] Loan Market Association *Notice on the application of competition law to syndicated loan agreements, 30 May 2014,* P. 1. Available at: <http://www.lma.eu.com/application/files/1514/6695/7414/Notice_on_the_Application_of_Competition_Law_to_Syndicated_Loan_Arrangements.pdf>Last accessed 17 May 2018.
[9] Ibid.
[10] *LMA notice referring to UK Competition law equivalent to Article 101(1) TFEU.*
[11] LMA Notice, *(n. 8).* p. 1.

The competition rules at issue according to Article 101(1) TFEU, which prohibits anticompetitive agreements or practices that have their 'object or effect' to restrict or harm competition. Furthermore, the notice addresses severe fines for 'hard core' restrictions, such as price fixing, market sharing and information exchange.[12]

The notice emphasized that multibank practices are not relieved from competition rules and should not get a different treatment from other sectors.[13] Although the sector has no specific guidelines or rules from the competition authorities it can still be operated in a compliant manner, if the anticompetitive risks are handled with good compliance structures, including guidelines on behavior and communication between competitors during promotion of the loan to avoid exchange of sensitive information, price coordination and market abuse, how sensitive information shall be dealt with, communications in event of price flexing and behavior of participants in the occurrence of refinancing.[14]

In addition, the LMA recommends that all written documents are kept showing the agreement and consent given from the borrower to the leading bank on how the contact with the other competitors shall be accelerated given its importance that members of the syndicated agreement act only within the agreed consent.[15]

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[12] Ibid.
[13] Ibid.
[14] Ibid., p. 2.
[15] Ibid.

Syndicated lending

History

The practice of syndicated funding originates from London, England.[16] It is not clear when the first syndicated loan was implemented, nonetheless it is held to be in 1968 and from that time the syndicated loan market has been constantly developing.[17] During this time there were only a few merchant banks penetrating the market in London, they did not have enough capital to offer their important clients their desired funding.[18] Thus the London merchant banks started inquiring other banks to join in on loan agreements where they were on the same terms and conditions as the merchant bank, who served as an arranger of the loan in return for a fee from the participating banks.[19]

Development of the syndicated market

The syndicated loan market which started as a means of sovereign funding practice in the 1970's has developed into the main source of corporate funding.[20] The syndicated loan market brings the opportunity for senior loan lenders to profit from their funding expertise and also for senior financial institutions to spread risk by managing their lending exposures through syndicated lending structures.[21] Nevertheless, the syndicated lending practice also has its advantages for junior lenders, as this funding structure gives them the opportunity to take part in corporate funding without having to acquire formal permission or suffer inspection costs in diverse countries to participate in the syndicate.[22] The growth of the European loan market caused in the opening of subsidiaries from Japanese and American banking institutions because the European syndicated market gave international banks access to borrowers in Europe.[23]

[16] Andrew, Fight, *Syndicated Lending Essential Capital Markets*, Butterworth Heinman 2004, p. 2.
[17] LMA, Loan Market Association, *Guide to Syndicated Loans and Leveraged Finance Transactions*, p. 10. Available at: <http://www.lma.eu.com/application/files/1614/7749/3386/LMA_Guide_to_Syndicated_Loans.pdf> Accessed 30 April 2018.
[18] Fight, (*n. 16*) p. 2-3.
[19] Ibid. p. 2.
[20] Blaise, Gadanecz, Bank of International Settlements, BIS, *The syndicated Loan Market, structure implications and development*, BIS quarterly review 2004, p. 88. Available at: <https://www.bis.org/publ/qtrpdf/r_qt0412g.pdf> Last Accessed 23 May 2018.
[21] Ibid.
[22] Ibid.
[23] Fight, (*n. 16),* p. 3.

With its constant development and growth through the last decades the syndicated loan market now symbolizes one third of the total debt and equity financing in the 'Euro area'.[24]

What is syndicated lending?

According to the Oxford dictionary of economics a syndicated loan is;

> *["A loan provided by a syndicate of banks or other lending institutions. Such loans, often to less developed countries, are usually arranged by one bank or a small group of leading banks negotiating the terms and persuading a large number of other lenders to take up small parts of the loan. Participating in a number of syndicated loans gives lenders a less risky portfolio than negotiating loans for themselves with particular borrowers; borrowers can negotiate terms with a single body which they can trust to be able to raise the money by recruiting other lenders to join a syndicate."]*[25]

Syndicated lending is an important option in the financing market allowing the financing of projects of very large scale, which sometimes need to be funded by several banks in the same syndicate.[26] Thus syndicated funding involves that several banks across the world are able to take part in the same loan agreement.[27]

A structure of a syndicated loan

The definition for a traditional syndicated loan procedure is a loan agreement issued to a borrower jointly by participating lenders to the syndicate.[28] A lead bank mandates the loan agreement for the borrower and promotes the loan to lenders that are interested in adding capital risk, lending to certain corporate borrowers.[29] The lead bank then issues a memorandum with information on the borrower, while the participating banks fund their share of the loan for which they are also responsible.[30] The loan agreement for all participants in the syndicate is on

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[24] Yener Altunbas, Alper Kara, David Marqués-Ibáñez, European Central Bank, Working Paper Series No 1028 March 2009*, 'Large debt financing, syndicated loans versus corparate bonds'*, p. 27. Available at <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1028.pdf?2ea2476aec952dbf33b6a070fe38683c> Last accessed 23 May 2018.

[25] John Black, Nigar Hashimzade and Gareth Myles, *A dictionary of economics 5ed,* Oxford University Press 2017 p. 398.

[26] Fight, (*n. 16)*, p. 1.

[27] Ibid. p. 1.

[28] Yener, Alper, Marqués-Ibáñez, *(n. 24)*.p. 10.

[29] Ibid, p. 10.

[30] Ibid. p. 10.

identical terms and the participating lenders bear no legal responsibilities for the shares of the other lenders.[31]

Figure 1 illustrates the syndicated loan arrangement.[32]

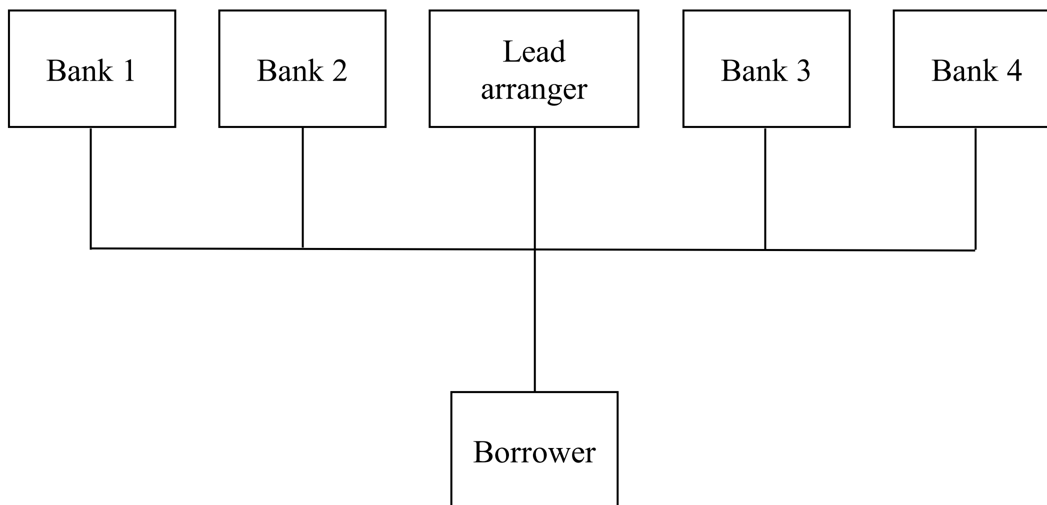

Figure 1 - Syndicated loan agreement

[31] Ibid, p. 10.
[32] Agasha, Mugasha, *The Law on Multibank Financing, Syndicated Loans and the Secondary Loan Market*, Oxford University Press, New York 2007 p. 23.

The procedures of a syndicated loan

There is not a single principle on how the structure of a syndicated loan ought to be.[33] A traditional structure would include the bank, which would be the lead arranger that receives instructions for the syndicated loan to be organized from the potential borrower.[34] The bank who receives the authorization from the borrower then starts to assemble a syndicated loan by locating other banks and promoting the syndicate to lenders who have the capacity of capital and are willing to lend to the borrower.[35] Typically, the most discrete manner for the arranging bank to promote the loan agreement is sending term sheets to potential participating banks, the term sheets include important information on the potential loan, information regarding the borrower and related fees of the lending facility.[36]

The banks that show interest in the syndicate will then receive a memorandum, which includes further information on the matters previously illustrated in the term sheets.[37] Information drawn up in the memorandum is basically an extended term sheet document, which includes the financial status of the borrower and his ability to reimburse the loan.[38]

[33] Mugasha, *(n. 32,),* p. 100.
[34] Ibid.
[35] Ibid.
[36] Ibid., p. 101.
[37] Ibid.
[38] Ibid.

Figure 2 illustrates a syndicated loan procedure as well as the relevant documents.[39]

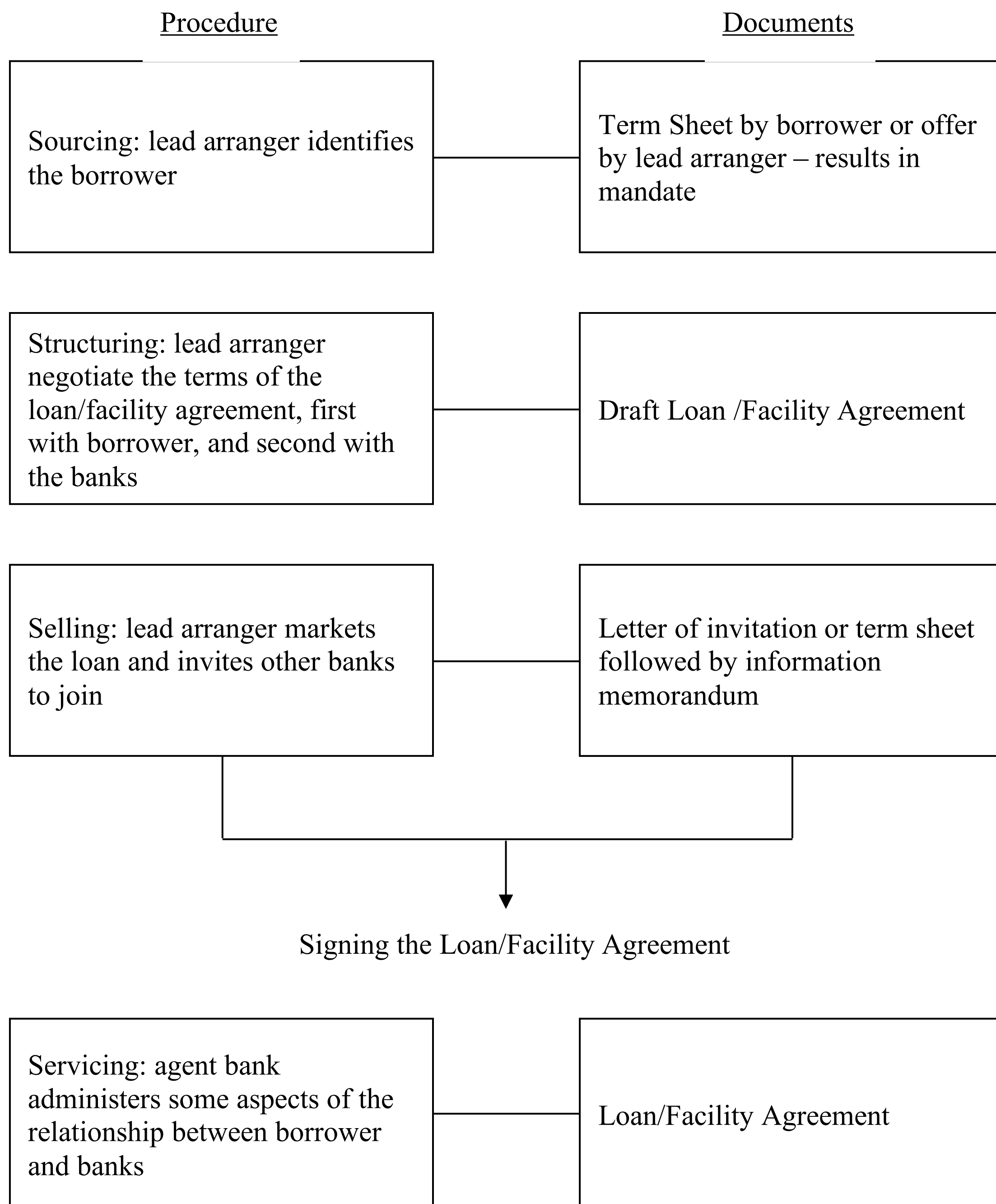

Figure 2 Syndicated Loan procedure

[39] Mugasha, *(n. 32),* p. 105.

Legal and contractual issues of syndicated lending

Multibank financing

The practice of multi-bank financing entails that several banks act in concert for the purpose of extending credit to a borrower.[40] The cooperation[41] amongst the participating banks can normally be coordinated in many ways although in other occasions their only mutual practice is the extension of credit to a borrower. [42]

The participants of a syndicated loan agreement

As previously stated, syndication of a loan agreement involves several lenders who join forces in order to being able to offer a loan to the borrower in cooperation with each other.[43]

The borrower

The majority of borrowers using syndicated loans for credit are mostly private and public corporations as well as borrowers from the public sector, such as government agencies or supranational institutions, for example the World Bank.[44]

Borrowers that make use of this type of corporate lending are the financial sector including banks as well as the "big 4" infrastructure categories, i.e. the power, telecommunication, oil and gas, and transport sectors.[45] The purpose of the lending is diverse, and can be used for new projects while other reasons can be for refinancing, mergers and acquisitions or project finance, depending on the requirements of the borrower.[46]

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[40] Mugasha, *(n. 32,)* p. 2.
[41] Empahis added by author.
[42] Mugasha, *(n. 32*,) p. 2.
[43] Gabriel, Peter, *Legal Aspects Of Syndicated Loands*, Butterworths, 1986, p. 2.
[44] Mugasha, (*n. 32*) p. 62.
[45] Ibid. p. 62. See also Fight, *Syndicated Lending, Capital Markets*, *(n. 16)*, p. 59 *see Figure 2 for further information on borrowers by industry 2017.*
[46] Ibid. p. 62.

Figure 3 illustrates the division of EMEA[47] syndicated loans by industry.[48]

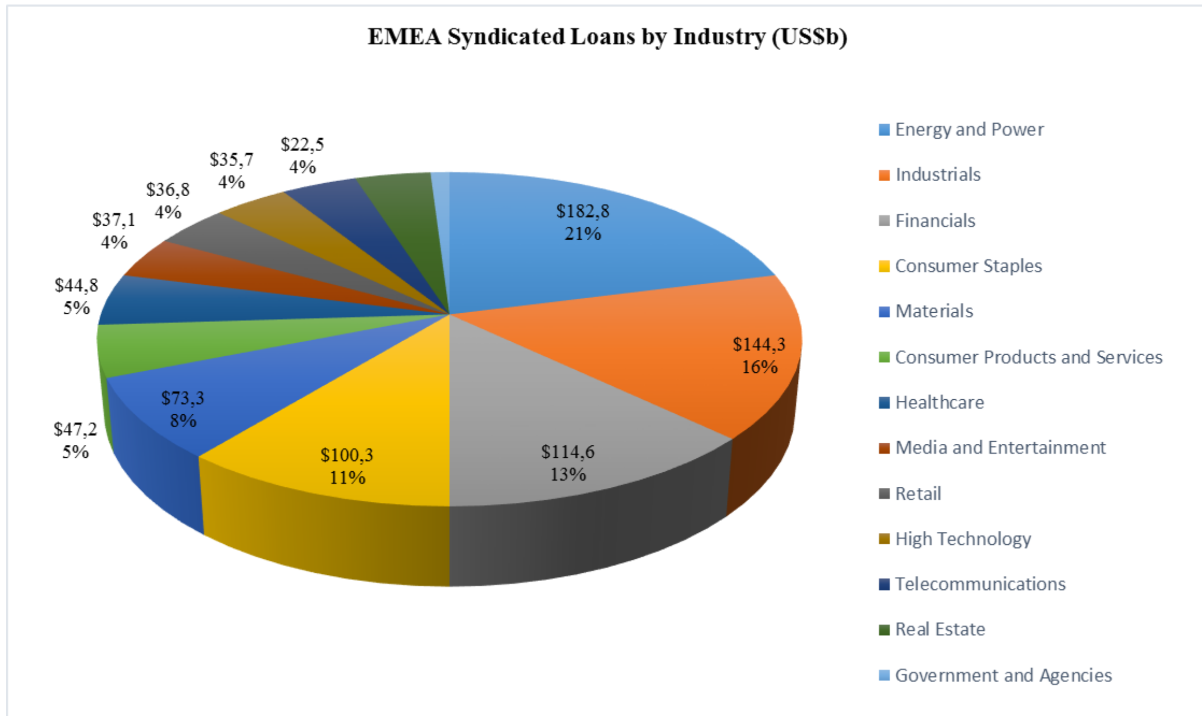

Figure 3 EMEA syndicated Loans by industry

The lender

Normally the lenders to syndicated loans are financial institutions, which have as their purpose to invest in or purchase loans as well as securities and additional financial properties.[49] Of all financial institutions, banks are often in majority when it comes to syndicated loan agreements, although other financial institutions may in some cases offer part of the funding.[50] As addressed in the Commission's Tender offer, other institutions are entering the market for syndicated lending, such as pension, insurance and credit funds.[51]

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[47] *EMEA syndicated Loans;* Europe, Middle East and Africa.
[48] Thomson Reuters, *Global Syndicated Loan Review* 2017, p. 7. Available at: <https://www.thomsonreuters.co.jp/content/dam/openweb/documents/pdf/japan/market-review/2017/loan-4q-2017-e.pdf> Accessed 1 May 2018.
[49] Mugasha, *(n. 32*), p. 67.
[50] Ibid. p. 67.
[51] European Commission, Tender specification COMP/2017/008, *EU loan syndication and its impact on competition in credit markets, (n. 3),* p. 3.

The leading bank

The leading bank, also called the arranging bank, negotiates the conditions of the loan agreement with the borrower and then arranges the syndication amongst the other participating lenders.[52]

The agent and the arranger

The arranger has the object of structuring the loan as well as organizing the fundamental structure of the agreement.[53] In addition, the arranger is in charge of the information memorandum, responsible of arranging the loan agreement to be prepared, offering legal guidance regarding the validation of the loan agreement and lastly the arranger is in duty of having all participants of the syndicate sign the loan document.[54]

Amongst the tasks of the agent[55] is the arrangement for payments to be made and keeping track of all payments exercised or received as well as following up on any changes that can occur in the participation of the syndicate in the secondary market.[56] The agent is responsible for delivering information on the financial matters of the loan to the participants during the loan's maturity.[57] Furthermore, the agent is responsible to inform the participants of the syndicate of all information that it receives, this is especially important if the information regards anything that could cause the event of default according to the terms and conditions of the syndicated loan agreement.[58]

Contractual relationship between Lead Bank and participants

The participation agreements have some variations although they have become more or less standardized.[59] It depends on the terms negotiated by the participants.[60] Thus participation agreements include the terms settled by the participants and therefore fall under the definition of a contract.[61] The provisions address important legal aspects of the relationship between the

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[52] Fight, *(n. 16)* , p. 169.
[53] Ibid.
[54] Ibid.
[55] *On the issue of agency; in most cases participation agreements do not require the lead bank or participants to act as an agent for one another, see Mugasha, (n. 32), p. 291.*
[56] Fight, *(n. 16)*, p. 37.
[57] Ibid., p. 37.
[58] Ibid., p. 38.
[59] Mugasha, *(n. 32),* p. 274.
[60] Ibid.
[61] Ibid.

parties of the syndicate, the lead bank, participant lenders and the borrower as well as the legal concerns arising if one of the parties becomes insolvent.[62] The latter part of the agreement includes provisions on how the communication between the lead bank and participators in the loan agreement shall be carried out.[63] The legal characteristics of the participation agreement are very important when considering governing of the ownership, collateral and earnings from the loan.[64]

Regulated Financial Institutions

In the European Union a regulated bank falls under the definition of a credit institution, which is defined *'as an undertaking who's business is to receive deposits or other repayable funds from the public and to grant credit for its own account'*.[65] In Europe and the UK credit institutions are required to attain a license to be allowed to participate in the deposit and credit industry of the financial market.[66] When a financial institution has obtained a license from the UK Financial Service Authority, it constitutes a regulated financial institution and thereby falls under the regulatory regime of the FSA as well as European directives that impose several requirements on credit institutions including the application of a careful approach to the practice of lending.[67]

[62] Ibid., p. 275.
[63] Ibid.
[64] Ibid.
[65] Mugasha, *(n.32),* p. 70.
[66] Ibid., p. 70.
[67] Ibid., p. 70.

Economic benefits and Competition Policy

In this chapter benefits from participating in the syndicated loan structure will be discussed, both from the lenders and the borrowers perspective. The benefits coming from the syndicated loan structure can be of economic scale as well as in form of efficiencies considering risk management and compliance with regulations.

Economic benefits of a syndicated loan agreement

[“Multibank financing also benefits the economy of the country where it takes place. Because it diversifies the risk associated with lending among the various participants, it fosters the lending of funds at the lowest cost to borrowers while enhancing return to savers and investors. It thus promotes the survival of healthy growth of the economy”].[68]

Benefits for the lender

Taking part in a syndicated loan agreement can have many economic benefits for its participants, the lead bank, the agent and others, as it gives the lender the possibility to increase its ability to lend by large amounts and thereby being able to serve the borrower’s requirements.[69]

Less credit risk

The principal economic and regulatory benefits a lender achieves from participating in a syndicated loan agreement is the avoidance of taking too much credit risk, which it would do if lending large loans to a borrower alone.[70] By spreading the risk via lending parts of a larger loan, the lender decreases the harm that it would otherwise be affected by in the event of the borrower’s default.[71]

Participation in a syndicate also supports the lender’s ability to be compliant with regulations concerning large exposures, capital adequacy and concentration of risk. The joint object of

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[68] Ibid., p. 86: *Referenced to the Canadian case of Re Canadian Deposit Insurance Corp and Canadian Commecial Bank (1986) 27 DLR (4th) 229 at 233 (Alberta QB*).
[69] Mugasha, *(n.32),* p. 88.
[70] Ibid. p. 88.
[71] Ibid.

these regulations are to support safe lending practices, however the regulations all have a different approach on what safer lending practices involve.[72]

Therefore, if a bank is at risk of being in breach of regulations concerning, large exposures, capital adequacy and concentration risk, it should consider to syndicate the credit facility to be compliant.[73] However, the participants also have other options in lowering risk or being compliant with capital requirements. Firstly, a lender in a syndicated loan has the possibility to sell its participation or share of the loan on to the secondary market when the loan has been closed and assigned for;[74] secondly, a lender might choose this next alternative due to risk management, when a loan with a certain maturity, lender or industry takes too much capacity of the lender's portfolio, the lender is able to sell the loan and thereby increases diversity to its loan portfolio.[75] On the other hand, in cases of capital requirements, a lender is obliged to preserve a percentage of its capital to insure the loan obligation he has signed for on order to be compliant with capital requirement regulations.[76]

Other advantages of syndicated loan lending, are that they have lower risk than other project finance[77] alternatives and repayment of the loans are not linked to a project's performance, and in the event of default the lenders are in charge of the rearrangement of the credit facility.[78] Nevertheless, because the creditors are known in a syndicated loan facility the rearrangement of the loan is less costly and takes less time.[79] Also, in syndicated lending, good monitoring of the borrowers produces more transparency therefore lenders have better information on the financial status of the borrowers, which makes liquidation processes more efficient.[80]

[72] Ibid.
[73] Ibid. p. 88-89.
[74] LMA, Loan Market Association, *Guide to Syndicated Loans and Leveraged Finance Transactions*, *(n. 17),* p. 10.
[75] Ibid. p. 10.
[76] Ibid.
[77] *Project Finance; ‚The financing of a specific project, the revenue from which will provide the lenders with repayment of their investment'* Sue Wright, *International Loan Documentation',* Palgrave 2006, p. 301.
[78] OECD, *Infrastructure, Financing instruments and Incentives*, p. 22 Available at <http://www.oecd.org/g20/topics/financing-for-investment/Infrastructure-Financing-Instruments-and-Incentives.pdf> Accessed 27 April 2018.
[79] Ibid. p. 22.
[80] Yener, Alper, Marqués-Ibáñez, *(n. 24),* p. 10.

Benefits for the borrower

Primarily, syndicated loans allow the borrower to attain a large loan with only one loan agreement with an amount a single lender might not have capacity to lend on its own.[81] A borrower's funding often relies on the availability of a syndicated loan for the reason that parts of the needed funding would not serve the borrower's requirements.[82] An example of a very large syndicated loan agreement, where hundreds of credit institutions participated in the funding, was the Eurotunnel's loan facility, which formed a syndicate of funding of 700m British pounds through a syndicate of 220 banks.[83]

Furthermore, by participating in a syndicated loan agreement, the borrower gets the opportunity to establish business relationships with numerous banks which can be an important factor for the borrower's future financing needs and also the syndicated loan makes the borrower's existence and establishment on the market easier.[84] Nevertheless it is important for borrowers that the potential arrangers of the loan have good knowledge of the borrowers sector of business as well as the participants to the syndicated loan.[85]
Additionally, a syndicated loan has its advantages when it comes to the paperwork, as the loan includes only one set of loan documentation, the lender's simply has to agree on one uniform set of terms and conditions compared to if the borrower had to negotiate for many separate loans.[86] The borrower also receives the security from unreasonable repayment demands from one of the lenders separately as long as the borrower fulfills the terms and conditions of the loan.[87] In addition, it is more convenient for a borrower having to communicate with only one bank, while the lending fees will become much lower than if a borrower had to sign several loans to reach the same amount.[88] Thus, the process is both time and cost efficient, the course of lending is simpler both for the borrower and other participants of the loan agreement as well as it is less expensive to lend to the borrower.[89]

[81] Mugasha, *(n. 32)*, p. 86.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Fight, *(n. 16),* p. 32.
[86]Mugasha, *(n. 32),* p. 86.
[87] Ibid.
[88] Ibid., p. 86 – 87.
[89] Ibid., p. 87.

Economic effects and Competition Policy

Economic Costs and Risks in Syndicated Lending

Participants to a syndicated loan receive an income from the differential of the borrowed amount and interests of the loan. Additionally the arranging bank and/ or the lead bank might earn a fee for setting up the loan structure.[90] Other member of the syndicate, earn a commitment fee in line with their share of the loan, for the cost they bear reserving regulatory capital for the commitment they have signed up for.[91] Then the agent bank is compensated for the cost it covers for administrating the loan over its maturity.[92]

The borrower might have to pay a fee for the part of the loan that has been drawn, thus the fee is paid annually and only applies to the part of the loan that has been borrowed each year.[93] In addition, occasionally 'penalty clauses' are added to the loan agreements addressing that if the borrower repays the loan before the agreed date, the borrower shall pay a 'prepayment fee' or compensate the lenders in the event of early repayment.[94]

Although the lender has good information about the borrowers credit ability,[95] syndicated lending is a form of risk spreading lending technique which allows lenders to share credit risk with other credit institutions.[96] There is however difference in the levels of fees and cost between markets. In industrial markets the total amount of fees from the overall cost of a syndicated loan is higher for the borrowers compared to the fees in overall costs in the emerging markets.[97] The reason could be connected to the layout of borrowers in different sectors of these markets. Nevertheless in emerging markets, the total cost of loans issued is higher than in the industrialized markets. Thus, in markets with more credit risk, the level of cost of compensation tends to be set higher by the lenders.[98]

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[90] Gadanecz, *(n. 20),* p. 81.
[91] Ibid., p. 80.
[92] Ibid,. p. 81.
[93] Ibid.
[94] Ibid.
[95] *See n. 88.*
[96] Gadanecz, *(n. 20),* p. 75- 76.
[97] Ibid. p. 81. *Emerging markets; Argentina, Brazil, China, India, Indonesia, Mexico, Poland, South Africa, South Korea, Turkey as well as Egypt, Iran, Nigeria, Pakistan, Russia, Sauidi Arabia, Taiwan and Thailand.*
[98] Gadanecz*, (n. 20),* p. 82.

Asymmetric Information in a concentrated market

The availability of asymmetric information[99]can develop intense competition.[100] Thus, banks that have access to asymmetric information as well as experience from lending seem to be more motivated to offer lower interest rates in competition to achieve more new borrowers.[101]

Economic benefits from information exchange

Information exchange may be beneficial when competitors have the information according to best practices in their sector and can adapt their structure to become more efficient.[102] In sectors were asymmetric data on consumers is important, the exchange of such information between competitors can limit consumers 'risk exposure', and previous information on their credit history and defaults motivates borrowers to take less risk.[103] Nevertheless, consumers taking less risk should be rewarded with lower costs.[104] In addition, having the benefit to lower risk and cost, the exchange of asymmetric information, especially in the banking sector, makes it easier for consumer to establish a relationship with other banks, as the benefit from their former information relationship will not be lost, moreover it will promote stronger competition as 'switching cost' will not be a hindrance to the strengthening competition.[105]

Competition Policy and Sector Regulation

The banking sector has often been held to be exempted from competition rules, since it was considered that competition policy has harmful influence on stability.[106] With the liberalization of the banking market the banking sector in several countries has been subject to special legislation rather than competition policy applied by a national competition authority.[107] With

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[99] '*Economic theory on information asymmetries deals with the study of decisions in transactions where one party has more information than the other*', referenced in Commission, '*Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements*', [2011] OJ C 11/1, para. 57.

[100] Giovanni Dell'Ariccia, *Asymmetric information and the structure of the banking industry,* European Economic Review, Vol. 44, I. December 2001, P. 1959 Available at: <https://www.sciencedirect.com/science/article/pii/S0014292100000854> Accessed 6 May 2018.

[101] Ibid.

[102] *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreeements, (n. 99),* para. 95.

[103] Ibid.

[104] Ibid., para. 97.

[105] Ibid.

[106] Elsa Carletti and Xavier Vives, *Regulation and Competition Policy in the Banking Sector,* p. 2. Available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.486.9659&rep=rep1&type=pdf> Last accessed 23 May 2018.

[107] Ibid.

the First Banking Directive[108], financial markets became even more liberalized enacting free establishment for banks across Europe in the process to harmonize the European banking sector.[109] Through the implementation of the Capital Requirement Directive the objective was to establish an effective payment market for credit institutions in terms of competition supporting the financial stability of the market participants.[110] The idea that competition rules should not be applied to the banking sector is an economic view, because of the financial markets' importance and comprehensively regulated status.[111] Apart from the regulations governing the banking market, there is governmental control, influence and support in the event of crisis or in merger and acquisitions that might call for political interference.[112] Because of this control and influence, strengthens the view that the banking sector does not fall within the application of competition law.[113] The intervening regulations applied in banking sector, such as restrictions on who can enter the market, pricing restrictions and restrictions on the conduct of business the sector are examples why the banking sector is incompatible with antitrust law.[114] It is nevertheless evident that sector specific regulation can have major impact on competition.[115] For example, setting a criteria that make barriers to entry high, and thus developing a market with very few players, or controversially if barriers are low, the entrance of new players might provoke established undertakings to exercise their market power by increasing the number of mergers and acquisition on the market.[116]

[108] *Currently Banks are to comply with the Basel III framework, issued by the Basel Committee on Banking Supervision, which includes Capital Requirement Regulation (CRR), Capital Requirement Directive IV (CRD IV) . The objective of the Basel III is to improve the regulatory environment in banking by strengthening supervision and risk management, European Banking Authority; <http://www.eba.europa.eu/regulation-and-policy/implementing-basel-iii-europe>.*
[109] Andrea Lista, *EU Competition Law and the Financial Service Sector,* By Informa Law from Routledge 2013, p. 131.
[110] Ibid., p. 132.
[111] Ibid.
[112] Ibid.
[113] Ibid. 132-33.
[114] Ibid.
[115] Ibid., p. 133.
[116] Ibid.

Competition Law and Article 101 TFEU

EU competition policy objectives

The aim of Competition law is to enhance consumer welfare by securing the procedures of competition.[117] Therefore, systems of competition rules apply to certain market behavior, which has the ability to restrict competition.[118] Under these practices fall anticompetitive agreements; *"agreements that have as their object or effect the restriction of competition are unlawful, unless they have some redeeming virtue such as the enhancement of economic efficiency"*[119]

However, through the years competition policy objectives have been diverse, although consumer welfare is currently the principal standard, it has not always been the case.[120] Therefore, there has been no single competition policy behind European competition law over time.[121]

> *["Competition policy does not exist in a vacuum: it is an expression of current values and aims of society and is as susceptible to change as political thinking generally."]*[122]

Since opinions change over time, consequently competition law is under constant pressure, which also entails that the concerns are not the same in all competition law systems.[123]

Are Banks subject to European Union Competition Rules?

It is evident that competition policy has been applied with great caution to the banking sector over the years. In 1981, in the *Züchner v. Bayerische Vereinbank AG* case[124] the European Commission applied the former Article 85 and 86[125] of Treaty to the banking sector for the first time.[126]

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117 Whish, Richard, Bailey, David, *Competition Law*, eight edition, Oxford University Press 2015, p. 1.
118 Ibid.
119 Ibid., p. 3.
120 Ibid., p. 20.
121 Ibid.
122 Ibid.
123 Ibid.
124 Case C-172/80 Züchner v. Bayerische Vereinbank AG, [1981] ECR 02021.
125 Equivalent to Article 101 and 102 TFEU.
126 OECD Competition Committee, *Competition and the Financial Crisis,* 2009, p. 7. Available at <https://www.oecd.org/competition/sectors/42538399.pdf> Accessed 12 May 2018.

The Zuchner Case

In the *Züchner v. Bayerische Vereinbank AG*[127], the Amtsgerict Rosenheim (Local Court) referred a question to the European Court of Justice, on whether the service fee charged by a German bank, for the transfer of money between Member States fell under the scope of Article 85 and 86[128] of the EEC Treaty.[129] Mr. Z*ü*chner considered the application of the charge as part of a concerted practice between all banks in Germany and other EU Member States, therefore the charge was in breach of Article 85 and 86 of the Treaty.[130] It was argued by the bank that the referral by the national court was unnecessary as the debated practice did not fall under the Treaty provisions on competition, as they did not apply to the banking sector because of its special class and importance. In addition, the sector should have been *'…entrusted with the operation of services of general economic interest'* according to Article 90(2) of the Treaty and therefore did not fall under the scope of Article 85 and 86 of the Treaty.[131] In conclusion, the court found that this common practice in the area of transferring fees charged between banks is considered to amount to concerted practice according to Article 85(1) of the Treaty.[132] However, it was for the national court to establish the level and practice of coordination and cooperation and its possible effect on competition.[133]

The Austrian Banks – "Lombard Club"

The Austrian Banks "Lombard Club"[134] is a vital case for the relationship between the banking sector and competition law and addresses that price fixing is as harmful for the banking industry as it for any other sector.[135]

In the proceedings, the participating banks in the cartel, argued for a different application of the rules to the banking sector compared to their application in other sectors, despite the fact that agreements on price fixing were a serious infringement according to Article 81 EC.[136]

[127] Case C-172/80 *Züchner v. Bayerische Vereinbank AG*, (*n. 124)*
[128] *Articles 85 and 86 equivalents to Articles 101 and 102 TFEU.*
[129] Ibid., para. 2.
[130] Ibid., para. 4.
[131] Ibid., para. 6.
[132] Ibid., para. 22.
[133] Ibid., para. 21.
[134] European Commission decision, 'Austrian Banks Lombard Club', C(2002) 2091) (2004/138/EC) OJ L 56/1, Case AT. 36571.
[135] Carletti, Vives, *(n. 106),* p. 29.
[136] *Austrian Banks "Lombard Club' (n. 134),* para. 392. *Article 81 EC is equivalent to Article 101 TFEU.*

Their behavior could arguably not fall under the 'terms of normal market-economy criteria' because of the importance of their existence on the economic market compared to undertakings from other economic sectors.[137]

As Commissioner Monti stated in the press release on 11 June 2002 after the European Commission decision in the "Lombard Club", competition rules are as important in the financial sector as in others:

> *["…the institutionalized set-up of this cartel and its comprehensiveness, both in terms of banking services covered and geographical scope, makes it one of the most shocking cartels ever discovered by the Commission. Banks should be in no doubt that they are subject to European Union competition rules just like any other sector. In fact, maintaining competition in the banking sector is particularly crucial, considering the importance of the banking sector for consumer business and the efficient allocation of resources in the economy as a whole."]*[138]

Article 101 TFEU: Scope and application

The first paragraph of Article 101 TFEU prohibits the following behavior by undertakings[139]:

> *1. The following shall be prohibited as incompatible with the internal market: <u>all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:</u>*
>
> *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
>
> *(b) limit or control production, markets, technical development, or investment;*
>
> *(c) share markets or sources of supply;*
>
> *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
>
> *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according*

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[137] Ibid., para. 393.

[138] European Commission Press Release „*Commission Fines Eight Austrian Banks in „Lombard Club" Case*, Brussels 11 June 2002 available at <http://europa.eu/rapid/press-release_IP-02-844_en.htm?locale=en> Accessed 10 May 2018.

[139] As The Court of Justice addressed in *Höfner and Elser v. Macrotorn GmbH:* „The concept of an undertaking encompasses every entity engaged in an economic activity regardsless of the legal status of the entity and the way in which it is financed" Case C-41/90 (1991) ECR I-1979, para. 21.

to commercial usage, have no connection with the subject of such contracts.[140]

According to Article 101 (1) TFEU, any agreement that has restrictive effect on competition between Member States is prohibited.[141] Agreements between competitors that are competing on the same level of a competitive market, i.e. horizontal (cooperation) agreements, fall under the scope of Article 101 (1) TFEU.[142] However, an agreement falling under Article 101(1) TFEU may be exempted if it fulfills the criteria set out in Article 101(3) TFEU[143].

The Scope and application of Article 101 is not only bound to 'formal contracts' and thus the provision also applies to the cooperation between undertakings without the presence of formal agreements, the decisions of associations as well as concerted practices.[144]

Agreements, Concerted Practice and decisions of Associations

To fall under the scope of Article 101(1) TFEU the practice needs to be part of an agreement or concerted practice between undertakings. According to case law in *Bayer AG. v. Commission*[145]: *"It follows that the concept of an agreement within the meaning of Article 85(1) EC*[146]*, as interpreted by the case-law, centers around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intentions".*[147]

An agreement that does not have the object to restrict competition can be assessed whether it has the effect to restrict competition and thereby be in breach of Article101(1) TFEU[148] as it may develop coordination amongst competitors or create barriers for competitors to enter the

[140] Underlining added by the author.
[141] Schutze, Robert, *An Introduction to European Law*, Cambrigde University Press 2012, p. 260-261.
[142] Ibid., p. 261.
[143] Whish, Bailey, (*n. 117),* p. 84.
[144] Ibid., p. 103.
[145] Case T-41/96, *Bayer AG v Commission* [2000] ECR II-338, para. 69.
[146] Equivalent to Article 101(1) TFEU.
[147] Ibid., para. 69 Underlining by the author.
[148] Xavier Vives, *Information sharing: economics and antitrust,* Pros and Cons of Infomation Sharing, Konurrensverket, Swedish Competiton Authority, 2006. p. 96. Provisions 81(1) and 81(3) TFEU edited and updated by the author. Available at: <http://www.konkurrensverket.se/globalassets/english/research/the-pros-and-cons-of-information-sharing.pdf> Accessed 23 May 2018.

relevant market.[149] In such cases an agreement needs to be analyzed and established whether the agreement has harmful effect. Still Article 101(3) TFEU can be applicable.[150]

Concerted practice might not regarded being an agreement but may nevertheless fall under the scope of Article 101(1) TFEU. Coordinated behavior which is part of mutual and informal understanding can be difficult to define as well as apply the law, but must be prevented just as agreements that restrict competition.[151]

According to the case law in *Suiker Unie v. Commission* on establishing the existence of concerted practice, it does not have to be demonstrated with an 'actual plan' on how the coordination or cooperation is being performed, rather it needs to be looked at in light of the objective of competition rules, thus, the importance of independence of market participants and their autonomous operation in the market.[152]

A legal test has been developed from the case law on concerted practice for Article 101 TFEU to be applicable; 'there must be mental consensus whereby practical cooperation is knowingly substituted for competition; however consensus need not be achieved verbally, and can come about by direct or indirect contact between parties'.[153]

When infringements have been ongoing for an extensive period of time, the Commission, according to settled case law, is not bound to define the form of the breach as either agreement or concerted practice as both types of infringements fall under Article 81(1) EC[154]. This assessment can be seen in the *Austrian Bank 'Lombard Club'*, looking at the banks' actions from a legal perspective, trying to reach a joint consensus which might not fall under the definition of an agreement according to article 81(1) EC[155]. However a practice that includes several actions having a joint anti-competitive objective falls under the definition of an agreement and concerted practice and is considered as a definite breach of Article 81(1) EC.[156]

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[149] Bellamy and Child, *European Union Law of Competition,* 7th edition, Oxford Competition Law 2013*,* p. 351-352.

[150] Vives*, (n. 148),* p. 96.

[151] Whish, Bailey, (n. 177), p. 117.

[152] *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communitie,* [1975] ECR 01663.p. 1942.

[153] Whish, Bailey, (*n. 117)* p. 118.

[154] *'Austrian Banks Lombard Club' (n. 134)*, para 417. *Article 81(1) EC is equivalent to Article 101(1) TFEU.*

[155] Equivalent to Article 101(1) TFEU.

[156] *'Austrian Banks Lombard Club' (n. 134*), para. 422.

Decisions made by associations of undertakings to coordinate their behavior by means of a trade association falls under the application of Article 101(1) TFEU.[157] According to the Commission's decision on *Swiss Franc Interest Rate Derivatives*[158], decisions by associations are prohibited According to Article 101 (1) TFEU.[159] Then an agreement is said to be established when a common plan exists amongst the parties which has the ability to limit their independence in competition by establishing their ways of jointly action.[160]

In cases of a 'complex infringement' the exact form of illegal behavior committed by the market players does not have to be determined since 'the concept of agreement and concerted practice are fluid and may overlap'.[161] According to the Commission, the behavior at issue involved several actions that could fall under the definition of concerted practice and/ or agreement, where competitors exchanged information in cooperation on purpose, with the aim to restrict competition.[162] This kind of collusive behavior falls under complex infringement under Article 101 TFEU.[163] In the Commission's analysis of the case, it was considered that the behavior of the undertakings had the 'object of prevention, restriction, and/or distortion of competition in the CHIRD sector in the EEA within the meaning of Article 101(1) of the Treaty and Article 53 of the EEA Agreement'.[164]

Information Exchange and Coordination

Information exchange can be the substance of an operational cartel as well as being part of a horizontal-cooperation agreement.[165] There are several variations on how information can be exchanged between competitors, it can be exchanged through an association, through a market agency, directly between competitors or through cooperative parties that are for example suppliers or retailers.[166] There are different motivations for information exchange as well and the circumstance for the information exchange may vary.[167]

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[157] Whish, Bailey, *(n 117.)* p. 116.
[158] *Swiss Franc Interest Rate Derivatives* C(2014) 7602) OJ C 72/14, Case AT. 39924, para. 8.
[159] Ibid., para. 29.
[160] Ibid., para. 30.
[161] Ibid., para. 31.
[162] Ibid., para. 32.
[163] Ibid.
[164] Ibid., para. 38.
[165] Bellamy and Child, (n. 149), p. 345.
[166] '*Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements*', *(n. 99),* para. 55.
[167] Ibid. para. 56.

Information exchange can increase efficiencies and thus be an important part of competition.[168] It can produce improvements in the use of asymmetric information, making the market more efficient when more players have access to information, and information exchange can develop improvements in market practice as information on best practices may then be accessible through information exchange.[169]

Information exchange - having the object or effect to restrict competition

Although information exchange can develop efficiency gains the practice is also capable of distorting competition when the information provides knowledge about competitors' methods and practices.[170] In *John Deere*[171] a case concerning information registration systems on vehicles, the Court of Justice presented to the following argument on the effect information exchange can have in the competitive market:

[" … in reaching the conclusion that a reduced degree of uncertainty as to the operation of the market restricts undertakings' decision-making autonomy and is consequently liable to restrict competition within the meaning of Article 85(1)[172]*, […] in principle, where there is a truly competitive market, transparency between traders is likely to lead to intensification of competition between suppliers, since the fact that in such a situation a trader takes into account information on the operation of the market, made available to him under the information exchange system, in order to adjust his conduct on the market, is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders all uncertainty about the foreseeable nature of his competitors' conduct. The Court of First Instance considered, however, that on a highly concentrated oligopolistic market, such as the market in question, the exchange of information on the market was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders"].*[173]

[168] Ibid.
[169] Ibid. para. 57.
[170] Ibid. para. 58.
[171] Case C-7/95 P, *John Deere.* [1998] ECR I-03111.
[172] *Equivalent to Article 101(1) TFEU.*
[173] *John Deere, Para. 88.(n. 171),* Underlining and textual amendments by the author.

The effect information exchange has on competition depends on the markets' conditions in general and on the particular market.[174] The influence information exchange has depends on factors such as whether the concentration is high or low, the level of transparency, how stable the market is or how complex or symmetric it is.[175] Nevertheless, it is important to assess what kind of information is being exchanged, and if it has the impact of making competition on the relevant market coordinated.[176]

Information exchange may however not solely be evidence for anticompetitive practices as the exchange of information can appear in several occurrences of competition and moreover increase efficiency.[177] In concentrated markets where the entry barriers are high it is more likely for information exchange to have a collusive effect.[178] It is however debatable whether the exchange of information in concentrated markets, concerning aggregate data, such as prices or quantities shall be presumed as to have the object to restrict competition and be in breach of Article 101(1) TFEU.[179] It all depends on the form of agreement.[180] Nevertheless if enough efficiencies can be found coming from the information exchange agreement, although its form indicates that there is a breach of Article 101(1) TFEU, the agreement can be exempted according to Article. 101(3).[181]

Object restrictions in the Financial sector

When assessing whether coordination between undertakings on its purpose restricts competition by object, can often be seen from the harm such behavior exposes to competition.[182] According to Article 101 TFEU the meaning of 'object' is when an agreement has the aim or purpose of restricting and harming competition.[183]

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[174] *Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements'*, *(n. 99),* para. 58.
[175] Ibid.
[176] Ibid.
[177] Vives, *(n. 148)*,. p. 95-96.
[178] Ibid., p. 96.
[179] Ibid.
[180] Ibid.
[181] Ibid.
[182] Whish, Bailey, *(n. 117),* p. 124.
[183] Ibid.

The Austrian banks – 'Lombard Club'

In the European Commission decision *Austrian Banks – 'Lombard Club'*[184], eight Austrian banks were found guilty of participating in a collusive cartel, which took place across Austria. It is one of the most important cartels analyzed by the European Commission.[185] The cartel included a very structural price fixing program, including price fixing from interest rates on loans, household savings, fees for retail banking services and corporate banking.[186] The aim of the cartel was to persuade the banks to uphold a common price policy as well as preventing unsupervised pricing competition between them.[187]

The cartel was very well planned and included over 300 monthly meetings attended by the CEOs of the major banks in Austria, calling themselves the 'Lombard Club'.[188] Additionally, there were meetings on lower administration levels, where special committees, with each committee specializing in certain financial products, and all representatives exchanged information on each other's market approaches.[189]

The purpose of the collusive cooperation was well explained in the opening of one of the committee meetings in Vienna in 1995[190]:

> ["*The exchange of experience between banks in relation to interest rates has repeatedly proved to be a useful means of avoiding uncontrolled price competition. In this vein, today's meeting […] should likewise ensure a focused and reasonable approach of all banks with regard to pricing. The way in which interest rates are currently being set shows very clearly that it is again necessary for us to sit down together and counteract problematic price developments […]. [I] hope, in the interests of your institutions, that constructive solutions will be found."]*[191]

[184] European Commission 'Austrian Banks Lombard Club' (*n. 134*).
[185] Carletti, Vives, *(n. 106),* p. 28.
[186] Ibid.
[187] Ibid.
[188] Ibid., p. 29.
[189] Denis, Johannes, Nicolas, „*Managing antitrust risk in the banking industry"* p. 117- 119.
[190] European Commission Press Release „Commission Fines Eight Austrian Banks in „Lombard Club" Case, Brussels 11 June 2002. Available at <http://europa.eu/rapid/press-release_IP-14-1190_en.htm> Last accessed 10 May 2018.
[191] '*Austrian Banks Lombard Club' (n. 134*). para. 75.

The information expressed in the aforementioned Committee meeting shows that the banks participating in the cartel were all aware of the anticompetitive conduct being committed.[192] Thus the banks participating in the cartel were seeking to demolish competition between each other, by setting up 'useful' and 'constructive' agreements on how their behavior on the market ought to be. The objective of their practices was to fix prices by acting in concert or through agreements.[193]

For the applicability of Article 81(1) EC[194], according to settled case law, it is not necessary to assess the effect of an anti-competitive act if it is clear that its object was to 'prevent, restrict or distort competition within the common market'.[195]

Swiss Franc Interest Rate Derivatives

In this case four international banks, RBS, UBS, JP Morgan and Crédit Suisse, took part in an information exchange cartel regarding bid ask spreads of Swiss interest rate derivatives.[196]

After the decision of fines the Commission's Vice-President in charge of competition policy, Joaguín Almunia issued the following statement: *"Unlike in previous cartels we found in the financial sector, this one did not involve any collusion on a benchmark. Rather, the four banks agreed on an element of the price of certain financial derivatives. This way, the banks involved could flout the market at their competitors' expense. Cartels in the financial sector, whatever form they take, will not be tolerated."*[197]

The information exchange involved communication between a trader at JP Morgan who discussed forthcoming CFH Libor submissions with a trader at RBS on the grounds that it could be advantageous to the CHRID[198] trading position of at least one of the traders

[192] European Commission Press Release *„Commission Fines Eight Austrian Banks in „Lombard Club" Case*, Brussels 11 June 2002 Availible at <http://europa.eu/rapid/press-release_IP-02-844_en.htm?locale=en> Accessed 10 May 2018.
[193] *Austrian Banks Lombard Club', (n. 134),* para. 426.
[194] *Equivalent to Article 101(1) TFEU.*
[195] *Austrian Banks Lombard Club', (n. 134),* para. 428.
[196] *Swiss Franc Interest Rate Derivatives (n. 158),* p. 8.
[197] *Commission Fines Eight Austrian Banks in „Lombard Club", (n. 192).*
[198] "The most common CHIRDs are: (i) forward rate agreements, (ii) interest rate swaps, (iii) interest rate options and (iv) interest rate futures. CHIRDs are traded across the EEA and may be traded over the counter (OTC) or, in the case of interest rate futures, exchange traded." Referenced in the European Commisson decision *see n. 155*, *Swiss Franc Interest Rate Derivatives,* p. 6.

participating in the relevant information exchange.[199] The communication between the trader at RBS and the trader at JP Morgan included information about upcoming and existing trading positions and proposed prices.[200] The communications between the trader at RBS and JP Morgan as well as the submitter was in form of using Bloomberg's or Reuters online messenger program and communication by email or telephone.[201]

According to the Commission, Article 101(3) TFEU was inapplicable to the case due to the fact that the object of the cooperation was to manipulate competition of the relevant market and thus the breach is not relevant for an 101(3) assessment.[202] However in the EU system, although agreements have their object to restrict competition, any type of agreement can be assessed according to Article 101(3) TFEU.[203] As no agreements restricting competition, that 'as a matter of law' could not fall under the scope of Article 101(3) TFEU and fulfill the provisions criteria's.[204]

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[199] Ibid., p. 8.
[200] Ibid.
[201] Ibid.
[202] Ibid., para. 42-43.
[203] Whish, Bailey, *(n. 112)* p. 161-162.
[204] Ibid.

Article 101(3) TFEU

Falling under the scope of Article 101(1) TFEU does not mean that the agreement or concerted practice is illegal if it fulfills the criteria set out in the 'legal exception' of Article 101(3) TFEU[205]. The provision can be applied to all agreements, even if they have the object to restrict competition, if they fulfill the conditions for the exemption.[206] Four conditions must be fulfilled for the agreement to be exempted; in the case that one condition is missing the exemption cannot apply to the agreement:

a) it contributes to improving the production or distribution of goods or to promoting technical or economic progress;
b) it allows consumers a fair share of the resulting benefit;
c) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
d) it does not afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[207]

Assessment

When assessing whether an agreement fulfills the criteria's set out in Article 101(3) TFEU, consumers must receive part of the benefits coming from the information exchange and those benefits must be balanced against the restrictive measures caused by the restrictive behavior.[208] Moreover, when information exchange is part of a horizontal cooperation agreement and does not exceed what is necessary to be able to reach the economic gains of the agreement, the conditions of Article 101(3) TFEU will likely be fulfilled.[209]

Asnef-Equifaf v Ausbank

In *Asnef-Equifaf v Ausbank*[210] the information exchange concerned the establishment of a credit register, which had the object to offer credit and solvency information on costumers for

[205] Ibid. p. 159.
[206] Scutze, (*n. 141)*, p. 277.
[207] Bellamy and Child, *(n*. 149), para. 3.013.
[208] *Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Cooperation Agreeements*. *(n. 99)*, para. 103.
[209]Ibid.,para. 102.
[210] C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito SL v Asociación de Usuarios de Servicos Bancarrios (Ausbanc)* [2006] ECR I-11125.

organizations offering lending and credit, to calculate the risk of their lending activity.[211] As noted in the Court's ruling, the credit register did not have the object to harm competition in the common market in the sense of Article 81(1) EC.[212] The Court stated that an information system as the credit register could not be evaluated intellectually, thus the state of the relevant market had to be taken into account as well as its economic status, the availability of access to the credit register and its purpose.[213] Furthermore the Court held that all agreements regarding the exchange of information are in contradiction to competition rules if they in any way had the ability to decrease or erase the ambiguity on how the market is operated and thereby limiting competition between undertakings.[214] Moreover, the Court addressed the criterion of independence and affirmed that it would not take away competitors' right to 'adapt themselves intelligently to the existing or anticipated conduct of their competition'.[215] Additionally, the Court indicated that access to the information available in the credit register would not by itself lead to coordinated or anticompetitive behavior by excluding 'certain potential borrowers'.[216]

Establishing whether the credit register was a restriction of competition, the object of the credit register at issue had to be assessed. The register offered information for financial institutions offering loans, to access information on current and possible borrowers for their credit history, history of payments as well as defaults.[217] This form of registers may ease credit institutions assessment of borrowers repayment or on the contrary the likelihood of default.[218] The Court found that the credit register at issue did not to have its object to restrict or distort competition according to Article 81(1) EC. However they left it to the national court to assess the effect of the register.[219]

Application of Article 81(3) EC

The condition from Article 81(3)[220] that was questioned by the referring court in this case was whether the agreement allowed consumers a 'fair share of the resulting benefit'.[221] According to the Court, credit registers are capable of enhancing the access to credit as well as having

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[211] Ibid., para. 7.
[212] Ibid., para. 48 *Article 81(1) EC equivalent to Article 101(1) TFEU.*
[213] Ibid., para. 49.
[214] Ibid., para. 51.
[215] Ibid., para. 53.
[216] Ibid., para. 53.
[217] Ibid., para. 46
[218] Ibid., para. 47.
[219] Ibid., para. 48.
[220] Equivalent to Article 101(3) TFEU.
[221] C-238/05, *Asnef-Equifax*, *(n. 210,*) para. 65. Underlining by the author.

positive effect on the offered interest rate because of the access to information on borrowers' credit history for lenders.[222] The Court affirmed that it was for the national court to assess whether the four conditions laid down in Article 81(3) EC had been met. Furthermore, when assessing the benefit gains by consumers it was not necessary for each consumer individually to 'derive benefit from the agreement, a decision or a concerted practice'; on the other hand, the 'overall effect' must be advantageous to all consumers in the relevant market.[223]

To conclude, the Court held that the restrictions on competition due to the exchange of information on consumers could be exempted according to Article 81(3) EC, because it would hinder consumers from taking too much debt as well as it would advance the access to credit.[224]

MasterCard

On another note, the Court of Justice has established that in the event that efficiencies develop from an agreement, it does not have to be the market restricted by the agreement where the benefits arise, but it can be in a market where the harm did not appear.[225] Therefore a possible argument for exemption could be that an increase in prices, not for the benefit of the consumers, would be balanced with efficiencies for the wider society in the longer-term.[226] Furthermore, in *MasterCard Inc v Commission*[227] the Commission found MasterCard to be in breach of Article 101(1) TFEU for charging multilateral interchange fees (MIFSs).[228] The Court held that the General Court should have done an assessment of the benefits deriving from the MIFs system, not only on the relevant market but also on other connected markets.[229] Moreover, the Court held that if benefits from the system at issue are found in more than one market, the advantages from the system on each market where the MasterCard is being pursued, should be taken into account in the assessment.[230] Conversely, the Court also addressed that it was not

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[222] Ibid., para. 71.
[223] Ibid., para. 72.
[224] Giorgio Monti and Jotte Mulder, *Escaping the Clutches of EU Competition Law – Pathways to Assess Private Sustainability Initiatives,* European Law Review Issue 5 2017, p. 649. Available at: <https://awards.concurrences.com/IMG/pdf/monti_mulder_2017_42_elrev_issue_5_offprint.pdf> Accessed 13 May 2018.
[225] Ibid.
[226] Ibid.
[227] Case 382/12 P *MasterCard Inc v Commission,* ECLI:EU:C:2014:2201
[228] Ibid., para. 11.
[229] Ibid., para. 240.
[230] Ibid., para. 237-241.

sufficient that consumers on the relevant market, which had been harmed by the restrictive effect, would be compensated with benefits enjoyed by consumers on another market.[231]

Anticompetitive Risks in Loan syndication

The idea of syndicated lending and how the loan agreement are structured does not have the purpose of restricting competition.[232] Its aim is to keep the capital market liquid and provide funding to borrowers allowing lenders to spread risk.[233]

Nevertheless problems can occur in the event of default giving rise to anticompetitive risk.[234] The principle is that there cannot be any conversation and/ or assumptions between the participating lenders on the refinancing of the loan before an event of default actually takes place.[235]

In the event of default, the agent gives its guidance to the participants of the syndicated loan agreement as well as performing the tasks according to instructions coming from the participating lenders.[236] Thus, if the event of default is pending, it is important that the participating banks only act according to a specific structure that they are in agreement on.[237] After the event of default has taken place it is necessary for the participating lenders to discuss the potential refinancing of the loan.[238]

It is possible that the lenders from the original syndicated agreement have a level of market power if they are the only ones that can offer refinancing.[239] If that is the case their conduct needs to be 'objectively justifiable' or of strict necessity.[240] Acts to be avoided in this occurrence is making refinancing conditional on the borrower to buy other services to get the funding. It is important that decisions to refinance are taken independently and not on any

[231] Ibid., para. 242.
[232] Oliver Bretz, *Competition law and syndicated loan: identifying the regulatory risks,* p. 1 Availible at <http://docplayer.net/29258314-Competition-law-and-syndicated-loans-identifying-the-regulatory-risks.html> Last accessed 17 May 2018.
[233] Ibid.
[234] Ibid., p. 5.
[235] Ibid.
[236] Fight, *(n. 16)*, p. 37.
[237] Oliver Bretz, *(n. 231),* p. 5.
[238] Ibid.
[239] Ibid.
[240] Ibid., p. 5.

conditions and if refinancing is not accepted it is important to be able provide evidence, like documents that show that no ‘collective boycott’[241] has taken place.[242]

[241] *When competitors agree not to supply the consumer or only if the consumer agrees upon certain terms and conditions.*
[242] Oliver Bretz, (*n. 231),* p. 5.

Conclusion

From an economic perspective, syndicated lending is an important source of funding for the economic market. With the option of syndicated lending, borrowers from industries that are vital for the society - the energy, financial, industrial and health sectors - are given access to their desired funding and thus being able to function on the market. For borrowers to have access to capital through efficient and less costly credit facilities, as syndicated loans, is very beneficial.

Syndicated lending structures gives more banks the opportunity to participate in the capital market as they do not have to fund large loans on their own as well as bearing all the risk. In addition it allows lenders with less capital to participate in loan agreements where they can fund parts of the loan and thereby establish themselves and participate on the market.

In syndicated lending, lenders are decreasing their risk and lowering their share of lending excessive amounts of capital which means that financial institutions are limiting the harm that can be caused in the event of the borrower's default. That are some of the economic benefits the fall on the lenders side with this form of capital funding. In addition, syndicated lending facilitates the lenders ability to be compliant to sector regulations such as capital requirements and large exposures.

The purpose and idea of a syndicated loan must be kept in mind when assessing whether such agreement falls under Article 101 TFEU. Whether the parties to a syndicated loan agreement may be considered to engage in anticompetitive behavior according to Article 101 TFEU needs to be assessed on the terms of their relationship and consent given from the borrower in the loan agreement in each individual case. According to the syndicated structure, participants in a syndicated loan agreement are to act only according to the consent given by the borrower. If the syndicated procedure is according to the terms set out in the agreement, participants act accordingly and are compliant to competition rules consequently the practice may not give rise to anticompetitive risks.

Nevertheless the risks syndicated lending might have in competition were highlighted in the LMA Notice[243]. The risk is more when participants act outside of their scope or borrowers consent. Therefore it is important to keep all documents on all interactions and communications within a syndicated loan agreement.

As the purpose of syndicated lending is procompetitive and has its aim to keep the market liquid, it is important to the market and lenders to stay compliant and keep the purpose of the syndicated structure in mind in their practices. Although there are factors in the lending structure that can give rise to anticompetitive risks, for example in the case of refinancing. Then it is mostly important that participants act independently, within the agreement and do not manipulate their status due to their market power.

It will be interesting to see the result of the Commissions study on the impact of loan syndications on the European credit markets. Furthermore, whether its conclusion suggests a need to set guidelines or regulation for financial institutions participating in syndicated lending aiming to indicate them how to be compliant with competition rules in multibank financing.

[243] LMA Notice *(n. 8)*.

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