The National Competition and Markets Commission (CNMC) issues its Decision on price-fixing of financial derivatives negotiated in connection with syndicated loans.

The CNMC has just issued its Decision on financial derivatives (**Decision**), fining the accused banks (Santander, Sabadell, Caixa, BBVA) €91 million. The Decision refers, in particular, to the derivative products ancillary to syndicated loans, which goal is to insure borrowers against fluctuations of the interest rate to which the cost of the syndicated loan is indexed. The Decision considers that the accused banks have fixed such cost of the derivative products in a manner and at a level which breaches Articles 101 of the Treaty on Functioning of the European Union (**TFEU**) and the national equivalent (Article 1 Competition Act).

The Decision is over a hundred pages long, much of it dealing with factual explanations. This note provides an initial reading of the legal grounds of the Decision.

A possible starting point from an antitrust analysis perspective is that:

(i) The Decision does not question the rationale of the syndicated lending (it does not question the need for competing banks getting together to offer a loan). Nor does it question the fact that pricing of the derivative product insuring against fluctuations in the interest rates must be a single, common price.

(ii) The Decision acknowledges that the methodology of calculation of the derivative "market" price varies from bank to bank and is not easily identifiable. The price cannot be known by the customer, who may (if the customer had specialised advice) estimate it, although not with absolute accuracy.

On first reading, the assessment of the CNMC seems somewhat unusual from an antitrust standpoint. The Decision, as indicated, does not contain any analysis of the merits of the joint selling. Failing that, the Decision scrutinizes the manner in which the joint selling is taking place and, particularly, the pricing level at which the joint selling is taking place. One is left with a feeling that the analysis process might have been the reverse: focus on the legality of the joint selling as such (in this case, the legality of the joint offering of the derivative product by the members of the syndicate of banks); if the joint selling is legal (the typical rationale under antitrust law would be because without joint selling the banks would not be able to offer the product at all), then price-fixing would be justified; conversely, price-fixing would be illegal if joint selling is not justified. It seems the CNMC wished to avoid the "hot potato" of having to decide on whether syndicated loans and their ancillary derivative products are justified as a form of joint selling. The point was raised by one of the banks in the proceedings (stating that because credit syndication –and joint pricing of the ancillary derivative product– is legitimate, the pricing level is not an antitrust issue). However, the Decision does not really tackle the argument, ignoring any analysis of whether or not the joint selling should be allowed and focusing instead, as already indicated, on the *manner* of the joint selling, which according to the Decision takes place in an illicit way, by exploiting an information asymmetry which results in a price for the customer above the market price.

The Decision relies on a recent Judgment of the European Court of Justice of 23 January 2018, *Hoffmann la Roche v. Autorità Garante della Concorrenza*, case C-179/16, which refers to deceptive conduct infringing Article 101 TFEU in the context of pharmaceutical marketing authorizations. In that matter, Roche and Novartis agreed to disseminate deceptive information that the therapeutical use of Avastin for eye care would not be entirely safe. Roche and Novartis were, respectively, licensees for Avastin and the competing product –Lucentis– (the licensor of both products being another company – Genentech), so that by virtue of the licensing system both Roche and Novartis could have bound themselves not to compete in Italy. The CNMC Decision relies on point 71 of the ECJ Judgment, which states that the focus of restraints ancillary to a main restraint (a licence) must be whether the main restraint (in that precedent, the license) would be *possible* without the ancillary restraint (the joint dissemination of the information). If the response to that question is that the main restraint would be possible (even if less profitable or less convenient), then the ancillary restraint would not be justified. On that basis, the CNMC reaches the conclusion that although the joint selling and pricing by the banks of the derivatives is not questioned, pricing above the market price is not an allowed ancillary restraint, as it is not strictly necessary for the main restraint, but merely makes it

more profitable (*even accepting that a single price for the derivative product were required, it would be required that the price offered is the best of the possible prices, i.e., the price in market conditions that ensures fulfilment of the condition that no cost for the client is implied and to achieve that the process of determination of the price must be clear, and transparent for the client*).

The Decision quotes point 71 of the commented *Roche* Judgment but it does not, however, quote points 72 and 73 of that Judgment, which state that the dissemination of deceiving information had effects beyond the parties to the main restraint, *i.e.*, it sought to influence third parties, particularly medics; and that the dissemination of deceptive information could not be considered as objectively necessary for the licence. It may be questioned whether borrowers in syndicated loans (same entities that take the price of the derivative at stake in the Decision) are or not third parties; and it appears debatable that the joint pricing system chosen is not objectively justified (at least from a purely antitrust standpoint).

No doubt the CNMC considers it appropriate to intervene in a bargaining process that takes place between buyer and seller (lender and borrower, even if in this case the lender is a syndicate of banks, the validity of whose syndication is not being scrutinized). To achieve that end, the Decision seems to dissociate the price calculation mechanism as something distinct from the joint selling. In that context, the CNMC seeks to ensure that the pricing level is fair or oriented to market price. This seems novel, as antitrust (assuming that there is no illegal joint pricing) would generally not be expected to intervene in the price level (other than in situations of predatory, discriminatory, exclusionary, excessive pricing by dominant companies, which is not the case here). Furthermore, when setting prices, any seller plays with the information available to that seller with the goal of pricing optimally. Naturally, the (civil, consumer protection, prudential) laws require that some key information is disclosed in the framework of a transaction (on matters such as known product defects, legal or economic charges, etc.). But, generally speaking, the information on price elaboration, costs, etc. is not required to be disclosed and is generally accepted as a natural part of the bargaining process (and indeed, would seem to be a key factor of product differentiation and profit maximization, which is the quintessential ultimate goal of companies in free markets). One potential policy risk behind the Decision is that competition authorities may start to question pricing levels as "unfair" in various instances hitherto outside the scope of antitrust.

The Decision relies on the fact that an information asymmetry has been (illicitly) exploited, though the doubt arises as to whether civil law or financial regulation would not be better suited to address the concerns.

Unsurprisingly, the matter has received ample coverage from the press nationally and internationally. Beyond the immediate repercussions of the case on syndicated loans in the project finance transactions investigated, the legal principles relied upon by the Decision could arguably be applied to other project finance transactions in Spain, to the same banks as those accused, but also to other banks operating similarly. Likewise, those legal principles may apply to transactions relying on comparable mechanisms, even beyond Spain. The Decision itself states that the conduct has had economic effects (as the price of the derivatives is above the "market" price). Under Spanish law arguably the starting point for statute of limitations period accounting is the Decision (moment when the harmed party knows the basic factors causing harm), which means that syndicated loans subject to this type of ancillary derivative transaction may potentially be at the core of damages claims even if the transactions go well back in time for years or decades.

Competition agencies' interest in syndicated lending seems recent, but not entirely new. In its 2017 Management Plan, the European Commission signalled its concern with close cooperation in the credit derivatives market following action against the International Swaps and Derivatives Association (ISDA). The European Commission also signalled at the time that it would commission an independent study on potential competition issues of loan syndication.[1]

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[1] Tender issued in November 2017: http://ec.europa.eu/competition/calls/tenders_open.html