AVIATION INSURANCE UNDER COMPETITION LAW SCRUTINY

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In late April, the Financial Conduct Authority ("FCA") launched a wide-ranging antitrust probe into whether Aon, Jardine Lloyd Thompson, Marsh, Willis Towers Watson and UIB improperly shared sensitive client information. This is the first major antitrust investigation to be made public since the City watchdog inherited competition powers in 2015 (1). It follows a speech by Deb Jones, the FCA's head of competition, in March 2016 in which she stated that the investigator was taking "active steps" towards opening its first antitrust probe (2).

The FCA dawn-raided the brokers, seizing computers and information in various other forms. While the FCA has declined to comment, all five insurance brokers confirmed their involvement in the investigation. Jardine Lloyd Thompson, for instance, released a statement on 21 April 2017 saying that it was "participating in this investigation and confirms that JLT Specialty is providing all appropriate assistance to the FCA" (3).

If the brokers are found to have breached competition rules, they could face a fine of as much as 10% of their group worldwide turnover in the affected market. The FCA also has the power to open investigations on both antitrust and regulatory grounds if the alleged conduct infringes both competition law and sector-specific regulations.

WHY THIS MATTERS FOR THE AIRLINE INDUSTRY

The worldwide airline industry is, and has always been, a low-margin business. In fact, despite incredible growth experienced by the aviation industry in the past 60 years, airlines' profit margins have been less than 1% on average. For instance, in 2012, airlines made profits of only US$4 for every passenger carried (4). Anything that increases airlines' costs – the aircraft, staff, ground-handling services, slots, fuel, airport charges or insurance – can significantly harm profits.

Aviation insurance is essential, but unlike other areas of insurance, in aviation there is a small premium base (few airlines) and potentially huge losses to be covered, such that the risk is shared. The risk that an insurer can prudently cover is determined by the sum of: funds from its capital providers; retained profits; and any reinsurance it has purchased. The principal insurance coverages are: hull (damage to the aircraft itself); passenger (liability for death or injury); third-party (liability for death and bodily injury and property damage external to the aircraft); and war risks coverages (war, hijacking and other perils including terrorism) (5).

Aircraft operators and owners rarely approach insurers directly. Instead, they use aviation brokers, which can help them to arrange optimum insurance solutions. The aviation insurance brokers perform a number of important roles, ranging from placing comprehensive insurance policies with leading insurance markets to managing claims. Insurance brokers play a key role in choosing an insurance policy for the insured, and how much it would cost (i.e. premium payable).

It is not known yet what the detailed allegations are against the companies under investigation, and the precise link with the airlines. This will emerge in due course.

COMPETITION LAW DAMAGES

Businesses in the EU have a right to full compensation for losses incurred as a result of competition law breaches by other companies. For instance, if an airline has overpaid for services, such as insurance broking, owing to an illegal agreement, it has a right to sue the insurance broker that sold the insurance policy and seek damages.

Damages actions can either be based on prior public competition enforcement decisions (known as 'follow-on' actions), or on an alleged breach of competition law, i.e. without a prior decision of a competition authority that an undertaking has infringed competition law (known as 'stand-alone' actions). Some actions may be partly stand-alone, and partly follow-on (6). Some actions are launched even in the early stages of an investigation before the allegations have been fully investigated.

The UK is now a popular and well-developed forum for litigating competition claims and many such cases have resulted in settlements for claimants.

NOW WHAT?

It is too early to say whether the FCA's investigation will result in an infringement decision against insurance brokers, which the airlines could use to bring a follow-on action. Airlines should, however, be alive to the possibility they have been overcharged and may have a right to compensation.

We are keeping a close eye on the investigation and we will keep clients updated as to any key future developments.

Jeremy Robinson, a former regulatory and public law partner in our London office, also contributed to this article.

1 Since 1 April 2015, the FCA has been able to use concurrent competition powers under the Enterprise Act 2002 and the Competition Act 1998 to promote competition.

2 "UK regulator investigates aviation insurance sector", Getting the Deal Through, 27 April 2017.

3 Press release of 21 April 2017.

4 "Why airlines make such meagre profits", *The Economist*, 23 February 2014.

5 International Union of Aerospace insurers, December 2012.

6 Section 18 of the Enterprise Act 2002 introduced changes to the Competition Act 1998 to give rights to individuals and businesses to initiate private damages actions. Originally under the Competition Act only follow-on actions could be brought). However, from 1 October 2015, the Consumer Rights Act, made it possible to bring a stand-alone claim for damages based on an alleged breach of competition law in the Competition Appeal Tribunal (as well as in the High Court).

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