Concurrences
Antitrust Publications & Events

Morgan Lewis

FORDHAM UNIVERSITY
THE SCHOOL OF LAW

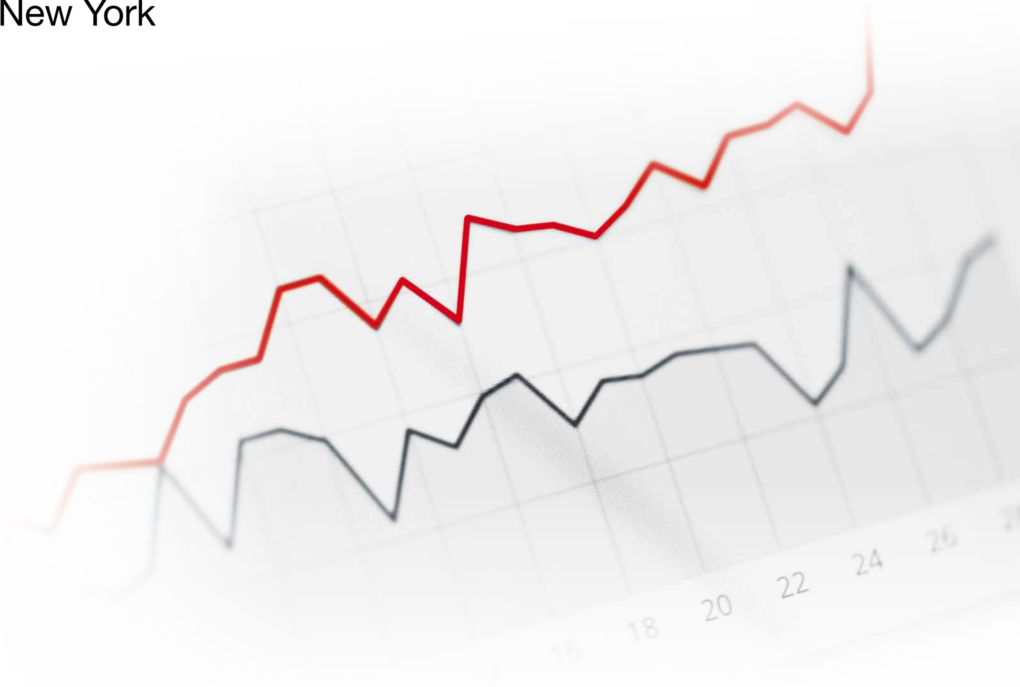
CORNERSTONE RESEARCH

THE Brattle GROUP

Linklaters

Antitrust in the Financial Sector: Hot Issues & Global Perspectives

Wednesday, May 1, 2019 - New York



Program

2:20 pm **WELCOME REMARKS**

Richard TAFFET | Partner, Morgan, Lewis & Bockius, New York

James KEYTE | Director, Fordham Competition Law Institute, New York

2:30 pm **OPENING REMARKS**

Makan DELRAHIM | Assistant Attorney General, US Department of Justice, Washington, DC

3:00 pm **LENDING SYNDICATES COORDINATION: WHAT IS THE ANTITRUST RISK?**

Rainer SCHWABE | Senior Manager, Cornerstone Research, New York

Nicole KAR | Partner, Linklaters, London

Elai KATZ | Partner, Cahill Gordon & Reindel, New York

Graeme BROOKS | Global Head of Competition, Barclays, London

MODERATOR: James KEYTE | Director, Fordham Competition Law Institute, New York

4:00 pm COFFEE BREAK

4:15 pm **FUNDS AND EXCHANGES COLLABORATION: WHAT ARE THE LIMITS?**

Scott HEMPHILL | Professor, NYU School of Law, New York

Phillip GILLESPIE | Former Executive VP, General Counsel, State Street Global Advisors, Salem

Michael CRAGG | Chairman, The Brattle Group, Washington, DC

MODERATOR: Richard TAFFET | Partner, Morgan, Lewis & Bockius, New York

5:15 pm **THE COUNSEL'S PERSPECTIVE: HOW TO ENSURE ANTITRUST COMPLIANCE?**

Dean HOFFMAN | Head of Antitrust, JP Morgan Chase, New York

Jon LUTINSKI | VP and Senior Antitrust Counsel, American Express, New York

Scott TUCKER | Managing Director Global Head of Litigation, Morgan Stanley, New York

MODERATOR: Jon ROELLKE | Partner, Morgan, Lewis & Bockius, New York

6:15 pm RECEPTION

Contents

Conference Summary 02

Videos 12

Press reports 13

Foreword

Financial markets are the lifeblood of the real economy, giving businesses and consumers access to financial products. The better and more competitively they function, the better the economy will perform. In recent years, interesting developments can be observed in the antitrust arena: on one hand, the increased scrutiny by antitrust authorities in the US, Europe and Asia; on the other hand, the increase in coordination and exchange of information between parties who are otherwise competitors, in situations like syndicated loans, funds communicating with exchanges, large institutional investors having common ownership in competitors, etc. This three-panel event aims at analyzing and discussing these critical issues with some key antitrust enforcers, lawyers, in-house counsel, and economists.

Concurrences and Morgan Lewis are the co-organizers of this event at Fordham University School of Law, supported by Cornerstone Research, Linklaters, and The Brattle Group.

Richard Taffet
Partner,
Morgan, Lewis & Bockius, New York

James Keyte
Director, Fordham Competition
Law Institute, New York

Nicolas Charbit
The Editor
Concurrences Review

Welcome Remarks

RICHARD TAFFET

Richard Taffet (Partner, Morgan, Lewis & Bockius), who has been one of the organizers for the past three years, started by welcoming the audience to the third annual Concurrences and Morgan Lewis program on antitrust in the financial sector and emphasized the diversity within the attendees, noting that a growing number of attendees are involved in the financial sector in roles other than lawyers or economists. Mr. Taffet introduced the three panels, the first dealing with antitrust issues in relation to syndicated loans, the second with issues relating to collaboration amongst funds and exchanges, and the third with compliance issues.

JAMES KEYTE

James Keyte (Director, Fordham Competition Law Institute) thanked the organizers, and especially Concurrences and Nicolas Charbit, mentioning his role in opening up and fostering dialogue on antitrust policy from different perspectives. Mr. Keyte also expressed gratefulness for Makan Delrahim's participation. Mr. Keyte briefly framed, for further discussion, some topical antitrust issues in the financial services industry as well as related challenges, such as that of defining unilateral conduct and identifying the relevant analytical framework in economics.

Opening Keynote Speech

MAKAN DELRAHIM

Assistant Attorney General, U.S. Department of Justice Antitrust Division, Washington DC

Makan Delrahim started by emphasizing the long history of applying antitrust laws to the financial sector.

Mr. Delrahim stressed that, because the financial sector's actors operate at the core of the economy, the Antitrust Division prioritizes ensuring that competition in financial markets is not distorted, through both enforcement and advocacy.

Mr. Delrahim noted that the topical issues on the conference's agenda relate to the limits of fund and exchange collaboration, syndicate coordination, and antitrust compliance, thus concluding that the issues at stake in relation to competition in the financial sector changed over time.

Regarding the limits of funds and exchanges collaboration, together with the spectrum of antitrust issues with regard to common ownership by institutional investors, Mr. Delrahim reminded that in the United States and beyond, a debate has been rising on the role of institutional investors in the economy, revolving around the question as to whether common ownership of competing firms has an impact on competition. Mr. Delrahim noted that much of the scholarship and literature on this topic has attempted to measure the impact of common ownership by institutional investors on competition, using both existing quantitative methods and new approaches, and may have identified conditions under which common ownership adversely affects competition. Mr. Delrahim mentioned another challenge consisting in defining appropriate remedies to address potential adverse effects on competition resulting from common ownership of competing firms, as well as identifying the knock-on effects of the proposed remedy mechanisms to ensure, for example, that measures do not chill innovation.

Enforcers aim at framing common ownership in theories of harm that can be used in court. Mr. Delrahim specified that, while encouraging to think creatively about the topical issues raised by common ownership, the Antitrust Division focuses on the actions whose impact on competition can be proven.

Mr. Delrahim stressed another top-of-mind objective of the Antitrust Division, namely accountability in corporate structures by applying the law governing interlocking directorates as a

tool to address the concern that officers and directors involved simultaneously in competing firms could exchange sensitive business information and coordinate strategic decisions. The Clayton Act Section 8, which prohibits any person from simultaneously serving as an officer or a director of competing corporations that meet specific thresholds unless *de minimis* exceptions apply, is coupled with a one-year period to resign from positions. Mr. Delrahim stated that the Antitrust Division carefully investigates potential Section 8 violations when reviewing transactions that involve interlocking directorates, including transactions with limited liability companies. Mr. Delrahim also emphasized that institutional investors with ownership interests in competing firms risk liability under Sherman Act Section 1 if they collude.

As to criminal investigation in respect to unlawful coordination in the financial sector, prosecutors have been very active over the last decade to preserve competition in the financial services industry. Investigations have focused on collusion among real estate investors and bidders at foreclosure and tax lien auctions, but also unlawful conduct on markets for municipal bond derivatives, interest rate benchmarks, and foreign currency exchange. Mr. Delrahim reported that investigations resulted in thirty-nine convictions, including the conviction of twenty-seven individuals some of which were obtained at trial, as well as criminal corporate fines of over $3.9 billion.

Mr. Delrahim concluded with thoughts on corporate compliance, noting that commitment to a culture of compliance as a result of investigations is apparent in some firms. He emphasized the benefits of investing in compliance; if violations occur, compliance programs should lead to prompt detection, which minimizes the harm to consumers but also offers firms a chance of winning the race for self-reporting leniency or the opportunity to receive penalty reduction for timely, useful cooperation. The Antitrust Division's resolutions in some recent financial markets (e.g. the FX spot market) investigations should incentivize robust compliance programs to minimize the risk of corporate liability for employee-misconduct, and extraordinary prospective compliance measures to aim for fine reduction in the context of plea agreements. Finally, after applauding the efforts to invest in compliance following investigations and the work of other agencies, Mr.Delrahim stressed that the Antitrust Division's commitment to vigilant enforcement is unwavering and expressed hope that future policy changes with regards to compliance programs will further improve the integrity and efficiency of the financial sector.

Panel 1

LENDING SYNDICATES COORDINATION: WHAT IS THE ANTITRUST RISK?

James Keyte (Director, Fordham Competition Law Institute) opened the discussion on lending syndicates by mentioning that it has raised topical antitrust issues in different jurisdictions, such as the European Union, the United States, and Australia. Syndication requires some coordination; in this context, assessing antitrust risks and complying with the law may be complex. Mr. Keyte introduced the panelists invited to address some of these issues, noting Rainer Schwabe's expertise in the antitrust economics of financial markets, Nicole Kar's experience with cartels and knowledge of the financial services industry, the variety of financial services-related antitrust cases which Elai Katz has been involved on, as well as the diversity of Graeme Brooks' practice.

Elai Katz (Partner, Cahill, Gordon & Reindel) first drew a parallel between lending syndicates and equity syndicates, such as IPO underwriting syndicates, noting important similarities between both. Collaboration in relation to syndication is driven by two main purposes: pooling capital and sharing risk. U.S. law has recognized the benefits of equity syndicates. Mr. Katz reminded that those are some of the more procompetitive and efficiency-enhancing forms of collaborations for pooling capital and sharing risk in a valuable manner, and suggested to think about them as joint ventures limited in scope and in time. Mr. Katz thus impugned summary condemnation of syndication-related collaboration. Mr. Katz then gave an insight into the U.S. perspective on syndication and antitrust, mentioning the two main theoretical paradigms: the joint-venture analysis (i.e. a rule-of-reason analysis of collaboration considered as legitimate) and the implied preclusion analysis (i.e. the notion that regulatory statutes implicitly preclude the application of antitrust laws). Finally, Mr. Katz called for including a time factor in the analysis, by distinguishing the pre-syndication period from the syndication period and from the post-syndication period, and prompted to carry out analyses with regard to both issuers and investors. Mr. Katz emphasized the complexity of post-syndication due to market interruptions or further collaboration.

Nicole Kar (Partner, Linklaters) offered a global perspective on syndicated lending-related antitrust issues. Ms. Kar started by reminding the audience that syndication is on many competition agencies' radars and commended the European Commission's approach of procuring an exploratory report and understanding the dynamics of syndicated lending better rather than immediately implementing enforcement action. Ms. Kar then delved into the background for antitrust concerns in this area, explaining that syndicated lending offers scope for collusion given the inherent need for competing institutions to work together. After mentioning the procompetitive liquidity-driven rationale for such collaboration, Ms. Kar elaborated that, through the different stages, the individual members of the syndicate go from being competitors (at the stage of competing for mandates and conducting market soundings) to collaborating for the benefit of the client (after mandates are awarded). Ms. Kar also outlined some of the

recent enforcement action, noting the UK Financial Conduct Authority has issued «on notice» letters warning banks that have been going too far in terms of information exchange, and so that the Turkish and Spanish competition authorities had both fined lenders for alleged misconduct. In light of this regulatory scrutiny, Ms. Kar highlighted the importance of compliance teams in the banking sector being aware of the issues which have arisen to date and implementing guidance and training.

Rainer Schwabe (Senior Manager, Cornerstone Research) focused on some of the many aspects of loan syndication that can be looked at from the perspective of antitrust economics. First, collusion could occur at the stage of bidding for the lead arranger role, when the main terms of the loan (e.g. interest rates and fees) are negotiated. However, communication among potential lead arrangers has been found to be very restricted at this stage. Second, the arranger may condition the underwriting of the loan on the purchase of ancillary services, such as interest rate derivatives, which would qualify as tying and raise the question as to whether the conditions for anti-competitive effects are met, especially the finding that tying causes harm to competition in the tied market. Such tying has been found to be uncommon given the size of the market for interest rate derivatives. Third, Mr. Schwabe pointed out that although loan syndication may offer opportunities for conduct that could have anti-competitive effects, other aspects of the loan syndication process reduce the risk of harm.

Graeme Brooks (Global Head of Competition, Barclays) briefly explained his role as an in-house competition lawyer, including on the recurring need for training. Then, Mr. Brooks noted that, although the spotlight has shifted from one wholesale market to another in recent years and that syndicated lending currently is on the radar (eg with the recent report to the EC), no major enforcement activity has occurred to date and the market's underlying fundamentals have not been challenged.

Asked about immunity due to securities regulation, Mr. Katz clarified that for the *Billing* implied immunity to apply, narrow conditions must be met: a conduct that is "squarely within the heartland of securities" (and the question as to what "heartland" means remains); clear and adequate Securities and Exchange Commission authority to regulate; active and ongoing agency regulation; and a serious conflict between antitrust and regulatory regimes. He noted regulation is lighter for syndicated lending as opposed to equity or debt. Mr. Katz also explained that exemptions are disfavored by enforcement agencies and judges, reminding that US Supreme Court Justice Stevens argued that agreements among underwriters on how to market IPOs, including agreements on price and other terms of sale to initial investors, should be treated as pro-competitive joint ventures for purposes of antitrust analysis.

A discussion followed among the panelists. Ms. Kar reminded the audience about the framework for analysis in the European Union - (1) does the arrangement have the object, the purpose, or the effect of preventing, restricting, or distorting competition; (2) if so, is there any basis for an Article 101(3) exemption (efficiency, indispensability, passing-on defense, etc.) or otherwise qualify as «ancillary» i.e directly related and necessary to the main syndicated lending - and then showed that enforcers have missed a few opportunities to meaningfully consider the extent to which certain types of conduct in the syndicated lending context can really amount to «by object» infringements.

Mr. Schwabe then reviewed two recent papers. The first, titled "Collusion in Markets with Syndication" and authored by Hatfield et al., claiming that collusion may increase as market concentration decreases (and Mr. Schwabe emphasized that organizational aspects that were not considered in the analysis lead to a different reality); the second, titled "Loan Syndication Structures and Price Collusion" and authored by Cal et al., showing that concentrated syndicates collude on loan pricing (and Mr. Schwabe expressed skepticism over the methodology and related findings).

Finally, Mr. Brooks, asked about foreseeable changes with respect to in-house practice as well as transparency and disclosure, speculated if a shift upwards in recordkeeping was to be expected, including with respect to recording client consent. Reflecting on his experience, Mr. Brooks also noted some lack of consistency among the national regulatory approaches. ■

1

2

3

1 **James KEYTE**

2 **Elal KATZ**

3 **Nicole KAR**

4 **Rainer SCHWABE**

5 **Graeme BROOKS**

4

5

1

2

3

Panel 2

FUNDS AND EXCHANGES COLLABORATION: WHAT ARE THE LIMITS?

Richard Taffet (Partner, Morgan Lewis & Bockius) started by broadening the scope of the discussion to be held by inviting the panelists to express their views not only on issues of collaboration but also on issues of common ownership in relation to funds and exchanges. Mr. Taffet then raised the specific question as to whether antitrust laws are properly positioned to address these issues, together with that of the consequences of over-enforcement, from both a legal standpoint and an economic standpoint, suggesting that it may impede the ability of firms to engage in (pro)competitive conduct. Mr. Taffet introduced the speakers, stressing their diversity including Phil Gillespie's active involvement with respect to collaborative activities of asset managers, Scott Hemphill's numerous and varied academic publications on the issues at stake, and Mike Cragg's expertise as an economist.

Phillip Gillespie (Former Executive VP and General Counsel, State Street Global Advisors) first focused on the duality of competition and collaboration in the asset management industry. Mr. Gillespie emphasized that asset management firms compete fiercely for performance on investment strategies and price, mentioning the race to the bottom led by low-cost exchange-traded funds; simultaneously, asset managers collaborate on issues of common interest, e.g. liquidity, transparency, market structure, and the operation of exchanges. According to Mr. Gillespie, collaboration is always ultimately driven by asset managers' fiduciary obligations to clients, which, for example, require interfacing with regulators in a way that furthers the interests of the clients, i.e. which promotes the ability to manage money efficiently in their interests. Regarding the alleged "issues" of common ownership, Mr. Gillespie was skeptical, mentioning populist appeals fueled by the fear that some large asset management firms would control voting power across the entire economic spectrum and misbehave. Mr. Gillespie confessed being worried observing that European regulators appear increasingly willing to consider the arguments of unknown causative effects of common ownership on competition.

Scott Hemphill (Professor, New York University School of Law) reminded that, on the issue of common ownership, for a long time the theoretical argument that institutional investors and common owners aim at maximizing portfolio value instead of firm value has prevailed. This has been revived over the last few years due to new empirical findings, which have induced policy proposals, such as measures to restrict the size and power of institutional investors. Prof. Hemphill mentioned that, as a consequence, regulators have started expressing concerns. The Department of Justice has reportedly engaged in an investigation in the airline industry, requiring institutional investors to explain themselves on common ownership-related issues, but, to Prof. Hemphill's understanding, the Department of Justice has not been proceeding with this investigation. These issues are also being considered by the European Commission in merger reviews, such as in the *Dow/Dupont* case. For its part, the Federal Trade Commission held a hearing about common ownership at NYU last December. Prof. Hemphill specified the methodology followed by Marcel Kahan and himself in their paper "The Strategies of Anticompetitive Common Ownership" to evaluate the hypothesis that common owners maximize portfolio value as opposed to firm value. The basic question to be addressed is that of whether a particular institutional investor is in a position to induce the firm(s) in which it has invested to maximize portfolio value rather than firm value, and, if it is, how. If common ownership might result, through some identified mechanism(s), in higher prices, then two questions must be raised: (1) has the mechanism actually been tested empirically; (2) does the institutional investor effectively have the ability to trigger the mechanism, i.e. is the mechanism plausible? Prof. Hemphill's research leads him to conclude that most of the mechanisms which have been tested are not the most plausible mechanisms for common ownership problems to occur. Prof.

4

1 **Richard Taffet**

2 **Phillip Gillespie**

3 **Scott Hemphill**

4 **Michael Cragg**

Hemphill noted that the empirical literature has focused on mechanisms based on conflicts of interests between common owners and other investors, rather than on strategies consisting in explaining enlightened self-interest, thus identifying a disconnect between theory and empirical findings.

Michael Cragg (Chairman, The Brattle Group) discussed the common ownership framework which has been endorsed by a particular set of advocates. Mr. Cragg reminded that the correlation between a higher Herfindahl-Hirschman Index and higher prices is too weak a rationale for any antitrust policy, and explained that another Herfindahl-Hirschman Index variable has recently been put forward to measure the concentration of share ownership amongst investors, which has also been found to be positively correlated with price. However, Mr. Cragg insisted that the question of causality remains. He also warned against the pitfalls of generalization; concluding a systematic relationship based on the existing, nascent and underdeveloped, literature would be an overstatement. Such concern has policy implications. According to Mr. Cragg, the policy consisting in diluting the power of shareholders to benefit consumers should not be implemented in all industries indistinctly, at least given the current state of evidence. On the question of whether common ownership raises antitrust issues, Mr. Cragg reminded that portfolio managers could engage in coordinated activities. However, he put forward the hypothesis that common ownership may also result in governance inefficiency, the idea being that large passive investors may undermine the incentives of managers to compete aggressively.

Mr. Taffet then directed a question to the panel, asking the speakers to consider the issue of common ownership within the framework of U.S. antitrust law, and specifically of Section 1 of the Sherman Act. Mr. Taffet explained that, in a submission to the Federal Trade Commission dated January 15, 2019, Mr. Gillespie explained the structural reasons why common ownership by asset managers would not support findings of anticompetitive effects because to make such a finding would require misconstruing the role of asset managers in corporate governance and overstating the influence of asset managers in the corporate decision-making process, failing to show any anticompetitive effect. According to Mr. Gillespie, there is no structural means, in some industries at least, by which anti-competitive collusion would take place, mainly due to the lack of expertise amongst passive asset managers, the relationships between variables of portfolio value, and the negligible effect of any kind of portfolio value maximization on profits, especially compared to reputational effects of misconduct. Mr. Gillespie also stated that it is factually wrong that asset managers vote the proxies of companies to maximize their portfolio value as opposed to the long-term value of the companies, emphasizing that the proxy voting policies of asset managers that have mutual funds are transparent, complied with, and reported on, as well as aligned across the industry on corporate governance matters.

Mr. Taffet then asked Prof. Hemphill to explain how internal communications could qualify as a Section 1 violation. Prof. Hemphill explained that only communications with another firm, especially an invested-in firm, so that it act according to the strategy devised internally, would qualify as a Section 1 violation.

Mr. Cragg also warned that communications driven by asset managers could result in hub and spoke situations and raise challenges with respect to assessing market power. After pointing out that current policy proposals aim at diluting ownership since that will limit the mechanisms for concerted activity and the incentives for collusion, Mr. Cragg emphasized that this policy approach runs against the corporate governance literature, which has identified a challenge with having powerful shareholder interests represented in the context of diffused ownership; board members who represent diffused owners may lack incentives to effectively act in the shareholders' interests.

Panel 3

THE COUNSEL'S PERSPECTIVE: HOW TO ENSURE ANTITRUST COMPLIANCE?

Jon Roellke (Partner, Morgan Lewis & Bockius) introduced the third panel on the counsel's perspective on antitrust compliance and framed the topics for discussion, i.e. the unique challenges faced by financial institutions in relation to antitrust compliance; culture as a fundamental aspect of any compliance program; the "nuts and bolts" of an effective compliance program; and the issues arising in conjunction with various industry collaborative initiatives that are essential to well-functioning markets. Mr. Roellke stressed that few sectors in the economy present more complexity when it comes to antitrust compliance than the financial sector. The financial sector is characterized by a high degree of necessary and procompetitive collaboration and frequently involves information exchanges among competitors (who routinely do business with each other as counterparties) about price, contract standardization, portfolio valuation issues, capital requirements, and market rules and protocols. The sector is made even more complex by reason of pervasive, constantly changing industry-specific regulations that can conflict with what may otherwise be expected of market participants through the prism of antitrust doctrine. And such perpetual regulatory changes frequently require further collaboration to operationalize timely and effective regulatory reform. Mr. Roellke also observed that, atop all of this complexity, the sector – like all others in the economy today -- is characterized by rapid technological change which, itself, can give rise to antitrust issues associated with disruptive technologies. Finally, Mr. Roellke observed that antitrust doctrine frequently lacks the clarity of bright line prescriptive rules compliance with which can be readily discerned, mentioning as an example recent court cases suggesting that a plausible inference of conspiracy in violation of the antitrust laws could be based on conduct that is otherwise consistent with lawful independent and unilateral action.

Scott Tucker (Managing Director and Global Head of Litigation, Morgan Stanley) first emphasized the need for legal experts in-house, embedded in business units, for better antitrust risk management, since business units tend to focus on market risk. On culture, after defining success as avoiding systemic issues, Mr. Tucker specified that to be achievable, the goals must be to avoid issues that involve multiple stakeholders, that persist for an extended period of time, and that result in outsized losses. Many tools are available to achieve the goals thus defined. Beyond the choice of tools, Mr. Tucker insisted on the importance of how the message is delivered, stressing that what resonates with employees is direct communication with senior management on the institution's culture. Business models also derive from culture. Mr. Tucker mentioned that two paradigms are still competing on Wall Street regarding how to make profits, the win-or-lose mindset or the approach consisting in endeavoring

1

2

3

5

1 **Jon Roellke**
2 **Scott Tucker**
3 **Jon Lutinski**
4 **Dean Hoffman**

to provide clients with high quality services at low cost, although the latter is definitely ascendant. According to Mr. Tucker, compliance programs should target and address the win-or-lose aspects of business models, which are fueled by the mindset prevailing in principle-based trading businesses. Mr. Tucker also mentioned another challenge in furthering compliance and promoting culture, professional turnover and the new-joiner risk management. Mr. Tucker explained that the Federal Reserve Board, the Federal Conduct Authority, the Prudential Regulation Authority, and the Office of the Comptroller of the Currency have played a prominent role in the sector's later structural changes, soliciting assistance of legal and compliance departments in helping them think through the issues at stake and encouraging specific conduct.

Jon Lutinski (VP and Senior Antitrust Counsel, American Express) identified policies and procedures as well as education and awareness as the most important nuts and bolts of effective compliance programs. First, regarding policies and procedures, Mr. Lutinskl gave a few tips for drafting antitrust compliance policies: they should be written in plain English using business-friendly terms and include examples; prohibited behaviors (e.g. price fixing, bid rigging, market allocation, etc.) should be clearly distinguished from behaviors associated with antitrust risk under some circumstances only and which require legal counselling (e.g. exclusivity or most-favored-nation provisions); they should specify who the policies apply to (employees, contractors, third parties acting on the firm's behalf, etc.); they should be updated periodically, even in absence of substantive changes in antitrust law; they should provide a mechanism to report suspected violations; they should be effectively referred to in the practice of counseling. Other tools include one-page guidelines for interacting with competitors, pre-merger guidelines on information sharing, due diligence and gun-jumping. Second, with regard to education and awareness, company-wide online training should be comprehensive and incorporate test questions to ensure that employees are comprehending and applying what they learn. Live risk-based training for particular business units has proved effective in opening up dialogue and enhancing cohesiveness within those business units.

Dean Hoffman (Head of Antitrust Compliance, JPMorgan Chase) then dealt with the challenge of confronting technological and regulatory change. Mr. Hoffman pointed out that, in the financial sector, technological change requires interaction among competitors to operationalize innovation, and thus results in a high degree of collaboration. He explained that transformation and disruption driven by technology (e.g. blockchain) make competition within the financial sector more complex, as the degree of collaboration required for the market to function increases. In this context, assessing to what extent collaboration should be restricted is not an easy task. Mr. Hoffman also mentioned that it is not uncommon for a regulator to encourage collaboration in relation to self-regulatory initiatives. He elaborated on how to manage participation in self-regulatory initiatives, stressing the importance of having an agenda, guidelines and monitoring mechanisms as well as figuring out the point of maturity at which firms should be competing rather than collaborating. Answering to a question asked by a member of the audience, Mr. Hoffman identified understanding the complexity of the markets, of the products, of the actors, and of the interactions with one another as the main challenge faced by antitrust practitioners in maintaining efficient compliance programs in the financial sector.

Videos

During the Conference some of the speakers summarized some of their ideas in short videos. These can be watched at Concurrences.com website (Conferences > Antitrust in the Financial Sector: Hot Issues & Global Perspectives).

Elai KATZ
Partner, Cahill Gordon & Reindel, New York

Nicole KAR
Partner, Linklaters, London

Jon ROELLKE
Partner, Morgan, Lewis & Bockius, New York

Rainer SCHWABE
Senior Manager, Cornerstone Research, New York

Richard TAFFET
Partner, Morgan, Lewis & Bockius, New York

Press reports

DOJ TO APPLY ANTITRUST LAW ON 'INTERLOCKED' BOARD MEMBERS TO LLC

BY VICTORIA GRAHAM > Reports by Bloomberg Law ©

A federal antitrust law banning certain concurrent board memberships should apply to limited liability companies and other modern corporate entities, the Justice Department's antitrust chief said.

Corporate board members can serve on other boards, known as interlocking directorate.

But Section 8 of the Clayton Antitrust Act prohibits board members from serving on other competitor companies' boards, lest the boards may coordinate business decisions or share proprietary information.Section 8 currently only applies to traditional corporations, but modern entities, such as… (...). ■

To read the full text, visit Bloomberg Law's website.

DOJ'S DELRAHIM EXEMPLIES CROSS-OWNERSHIP LEGAL RISK

BY JONATHAN GUILFORD AND YIZHU WANG > Reports by PaRR ©

Institutional investors with ownership interests in competing firms could hypothetically act in ways that potentially violate antitrust laws, Assistant Attorney General for Antitrust Makan Delrahim said.

Speaking at the Antitrust in the Financial Sector: Hot Issues & Global Perspectives conference in New York City today, Delrahim addressed the ongoing debate over whether institutional investors' cross-ownership of competing firms raises antitrust issues.

...

Speaking on the sidelines to this news service, Delrahim declined to say whether the Department of Justice (DoJ) had identified any actually existing examples of harm arising from common ownership. Instead, he said that the DoJ can see potential situations in which harm could arise.

The DoJ has reportedly pressed some institutional investors to explain themselves regarding how they address the issue of common ownership for their investment in the airline industry, but any investigation cases haven't "gone anywhere," Scott Hemphill, professor at NYU Law school, said on a panel at the conference.

In a Q&A session following his remarks, Delrahim responded to a question about a shareholder that owned various companies in an industry discouraging one of those companies competing against the others in a bidding war.

With the caveat that "this is highly fact-specific," Delrahim said that "corrupting a bidding process and corrupting the free market for bids could very well be a violation of the antitrust laws."

...

Speaking on the sidelines, Delrahim said that the DoJ was still investigating potential remedies for any antitrust violations resulting from common ownership. However, he added that potential changes to how the Department handles corporate compliance issues may be relevant emphasizing his prepared remarks on the matter. There, he said that the DoJ has "spent the past year considering" how to "credit effective compliance, particularly at the charging stage" of an investigation, Delrahim announced that "there are a range of options" that he is considering "to further encourage the adoption of robust compliance programs.". ■

To read the full text, visit PaRR's website.

SPRINT/T-MOBILE EFFICIENCIES CLAIMS WEIGHED BY DOJ

BY DIANE ALTER > Reports by CTFN©

Speaking on the sidelines of the May 1 Concurrences antitrust event at Fordham University, assistant attorney general Makan Delrahim, head of the U.S. Department of Justice's antitrust division, responded to queries from CTFN whether efficiencies in one market could outweigh anticompetitive harms in another, by saying "that is one thing being investigated." In asking the question, CTFN was seeking clarity from Delrahim on prior public comments in relation to the Sprint/T-Mobile merger review, wherein the AAG stated that the DOJ was evaluating efficiencies attributable to the merger in the home broadband market, notwithstanding that the merger is between wireless carriers not presently competing in home broadband. A former deputy assistant attorney general, now in private practice, said as a matter of prosecutorial discretion the DOJ can consider efficiencies in one market when deciding whether to commence an action alleging anticompetitive effects in another market. Still, this attorney noted, "In horizontal transactions, the supreme court has ruled to the Contrary." The former official suggested such "cross-market" efficiency measurements were likely appropriate when the anticompetitive harms were small and the efficiency gains correspondingly substantial. "Moreover," this person added, "since this is a question of the exercise of prosecutorial discretion, what the DOJ thinks will have little if any influence on the states." . ■

To read the full text, visit CTFN's website.

Interview

Nicole Kar (Partner, Linklaters) has been interviewed by Rainer Schwabe (Senior Manager, Cornerstone Research) in view of their panel «Lending Syndicates Coordination: What is the Antitrust Risk?»

INTERVIEW WITH
NICOLE KAR BY **RAINER SCHWABE**
> Concurrences Review, April, 2019

"... AUTHORITIES WILL NOT ONLY CONSIDER WHETHER THERE ARE COMPETITION CONCERNS WITH SYNDICATED LENDING IN RELATION TO THE PRIMARY DEBT INSTRUMENT, BUT ALSO WITH ANY ASSOCIATED HEDGING AND OTHER ANCILLARY PRODUCTS."

A report on loan syndication and its impact on competition in credit markets commissioned by the European Commission was recently published. Has this report changed the way you perceive antitrust risks in loan syndication? If so, in what way?

This report is certainly attracting a significant amount of interest from the antitrust community. It identifies a number of different features of the market and syndication process which may give rise to increased competition law risk, including the use of market soundings by mandated lead arrangers, the tying of ancillary services to the syndicate, and the potential for tacit reciprocity where book runners are dealing with the competing lender. That being said, the report does not include evidence of specific competition law infringements, and does not identify the relevant market segments as being highly concentrated. I would therefore say this report has not fundamentally changed the way I perceive antitrust risks in loan syndication, but rather has prompted a renewed focus on

ensuring clients have adequate safeguards in place. To put it another way, I am alert, but not alarmed. Helpfully, the report itself highlights what it describes as "critical safeguards", which it suggests will ensure competitive outcomes in the loan syndication process. These include banks' duty of care to clients, enforceable protocols to limit inappropriate information exchange, and limits on the cross-selling of ancillary services. More generally, I expect the European Commission will carefully consider the findings set out in the report, and of course it may potentially lead to further regulatory scrutiny and/or related enforcement action.

In Australia, criminal charges have been brought against a number of (current and former) senior executives, as well as their respective financial institutions, for alleged cartel conduct in connection with an AUD 2.5 billion institutional placement in 2015. Does this case have ramifications beyond Australia, particularly in light of the decision to pursue criminal charges?

I would say this case may well have wider international ramifications, yes. It is one that I am watching closely.

To recap, criminal proceedings have been brought in Australia against Australia and New Zealand Banking Group ("ANZ") and two of its underwriters (Citigroup and Deutsche Bank), as well as current and former employees of those companies. The proceedings relate to a placement of ANZ shares in 2015. There is very little known about the proceedings publicly yet, but based on press reports, it appears that following the placement, the underwriters were left with A$789 million in ANZ shares. The press reports state that it is alleged the underwriters then agreed to restrict the supply of those ANZ shares in order to maintain the price of ANZ shares. The proceedings are still at a very early stage, however, and I expect we will learn more over the coming year. It is also true that many of the legal arguments may have limited application outside the Australian statutory context. Moreover, if the proceedings continue to the trial, this will take place before a jury and not a judge. There will consequently not be a reasoned judgment to support the verdict, unless and until the matter is appealed on a point of law, which may take many years.

Nonetheless, there are a couple of immediate implications that should be carefully considered by competition lawyers working in and with the financial services sector around the world. The first is that competition authorities, including but certainly not limited to the Australian authority, have the desire and ability to pursue criminal charges (where available) against institutions and individuals at the highest levels. These are typically highly sophisticated agencies, and they have learnt a great deal about the intricacies of financial services in the decade since the Global Financial Crisis. In this case, JPMorgan, who underwrote the capital raising along with Citigroup and Deutsche Bank, has not been charged. It has been reported that JPMorgan is an immunity applicant to the Australian authority, which means they will have handed over a significant volume of evidence, and will be under a continuing duty to cooperate. This will have made the evidence-gathering process easier. The second implication is that even widely-accepted practices in financial services may, under certain circumstances, give rise to allegations of contraventions of competition law. The Australian proceedings have at the very least, for instance, muddied the waters in terms of what is and isn't acceptable when it comes to coordination between underwriters in dealing with a «stick» following an issuance. Those advising issuers (of both equity and debt) and underwriters in any jurisdiction will therefore need to consider whether existing practices and compliance policies in this area should be reassessed. There are also strong parallels to the type of concerns competition authorities have voiced in the context of loan syndication.

UK and EU competition authorities have recently demonstrated a healthy appetite to pursue competition law infringements in the financial services sector. For instance: in February this year, the UK Financial Conduct Authority ("FCA") issued its first penalties since it gained competition law enforcement powers; in January this year, the European Commission brought charges against eight banks for allegedly operating a cartel in trading euro zone government bonds; and last year, the Spanish competition authority levied a EUR 91 million fine against four financial institutions for manipulating interest-rate derivatives as part of project finance transactions. What lessons can we learn from this spate of enforcement activity?

There has indeed been a strong recent focus on enforcement activity in financial services by UK and EU competition authorities. I am confident we will have a tremendous amount to discuss at this year's conference.

Although I will be participating in a panel on antitrust risk in the context of lending syndicates at the conference, one obvious lesson from the recent enforcement actions we have witnessed is that antitrust risks are present in an increasing number of contexts in the financial services sector. Each of the examples you gave involve quite distinct circumstances.

For instance, in the Spanish case, the national authority concluded that the four financial institutions had colluded to fix the price of interest-rate derivatives ("IRDs") attached to syndicated loans above the market price, under conditions other than those agreed with customers. The Spanish regulator considered this to be a restriction of competition by object. IRDs (including caps, floors, collars and swaps) are attached to syndicated loans to protect group lending facilities and loan recipients, in case they are unable to meet repayments because of fluctuating interest rates. The investigation focused on so-called "zero-cost" or "costless" collars, which are a type of IRD established by buying a put and selling a call in a way that the premium received from the call sale offsets the premium paid to purchase the put. This detail is worth mentioning because it shows that authorities will not only consider whether there are competition concerns with syndicated lending in relation to the primary debt instrument, but also with any associated hedging and other ancillary products. The same lesson can be taken from the European Commission's recent report on syndicated lending.

In the UK, where I am based, the FCA recently imposed its first-ever financial penalties on competing asset management firms which it found had unlawfully shared strategic information during an initial public offering and placing, shortly before the share prices were set.

By contrast, in the European Commission's most recent government bond cartel case, it is alleged that traders at the relevant banks exchanged commercially sensitive information and coordinated on trading strategies, predominantly through online chatrooms.

The breadth of this enforcement activity shows that whether you are in equity or debt, or primary or secondary markets, there is no stone, so to speak, that competition authorities will leave unturned.

Another lesson is that financial services players must be cognisant of the scope for UK and EU competition authorities to build a strong case around the unwarranted exchange of commercially sensitive or strategic information. This type of conduct is typically assessed as a "concerted practice", which is a form of coordination that does not require the establishment of a binding agreement. Competing financial institutions often have legitimate commercial reasons to collaborate and share information, but it is vital that they put in place adequate training programmes and other safeguards, to ensure that these legitimate interactions do not segue into unlawful anti-competitive conduct. ■

Testimonials

"I found the conference excellent in length, the panels were well organized with excellent speakers, and the conference was quite useful and informative for me as in in-house antitrust practitioner."

JACK LERNER

Corporate Counsel & Vice President, Prudential

"Antitrust is such a gray area that communication from different industry experts is vital to help discover ways of mitigating the risks of bad antitrust conduct."

JORDAN ABISROR

Associate Vice President, Deutsche Bank

"I flew in from Toronto for the afternoon program and thought it was well worth it. The panelists from the financial sector, academia, law firms or senior levels of government were all first rate and shared helpful insights on antitrust issues arising in the financial sector. Kudos!"

SANDY WALKER

Partner, Dentons

"I enjoyed the Antitrust in the Financial Sector conference tremendously. I have not seen this great caliber and international depth of speakers at other conferences. The insight and compliance protocols discussed by in-house counsel are invaluable."

TIMUR SLONIM

Partner, Slonim Legal

Attendees

Absa Bank
Acuris
ACX
AGM Global Group
ALJ
Allen & Overy
Alliant Cooperative Data Solutions
American Express
Analysis Group
Anchin, Block & Anchin
Ankura
Antares Capital
Argos
Arthur W. Page Society
Ashler Capital
Australian Consulate-General New York
AXA Advisors
Axinn
Baker McKenzie
Bank of America
Bank of New York Mellon
Barbara H. Rand
Barclays
Berkeley Research Group
Birch Hill Chambers
Black Swan
Bloomberg
Bloomberg Law
BMO Financial Group
Cahill Gordon & Reindel
China Construction Bank
Cians Analytics
Cleary Gottlieb
Clifford Chance
Columbia
Columbia Law School
Comisión Federal de Competencia Económica
Constantine Cannon
Cornerstone Research
Credit Agricole
CTFN News
CUNY Law
CUNY Baruch College
CUNY John Jay College
D.E. Shaw
Deloitte
Dentons
Deutsche Bank
DI Iorio
Dorsey & Whitney
Duke Law School
E Conte Consulting
EClerx Markets
Elite Associates
eXp Realty
Farallon Capital Management
Fiduciary Automation
Finliance
Fordham Competition Law Institute
Fordham Law School
Fordham University
Forte Securities
Freitas & Weinberg
Freshfields Bruckhaus Deringer
FTI Consulting
Fujitsu
Garantice Su Futuro
GlassRatner Capital & Advisory Group
Global Competition Review
Goldman Sachs
Goodwin Procter
Gregoro
Guggenheim Partners
GWU Law School
Harvard Investors Group
Hausfeld
Hughes Hubbard
IBM
IWRCF Advogados
John Deere Rus
Jones Day
JPMorgan Chase
K&L Gates
Katten Muchin Rosenman
King's College London
Kirby McInerney
Kobre & Kim
Labaton Sucharow
LFCI
Linklaters
Louis F. Burke PC
Lovely Professional University
M20 Associates
Make The Road New York
Manikay Partners
Marat Legal
Mattos Filho
Mergermarket
Millennium Management
MLex
Morgan Lewis
Morgan Stanley
Motley Rice
National Institute of Technical Teachers Training and Research
NERA Economic Consulting
New York Life Insurance Company
New York University
Neztec Solutions
Northern Star Maritime
NY State Office of Attorney General
NYU School of Law
Paean H
PaRR
Paul Weiss
Phinx Consulting
Proskauer
Prudential Financial
PwC
Quad Group
Robins Kaplan
Romanian Competition Council
Scott + Scott
Siemens
Sirikit Noronha
Slonim Legal
Sol Tactus
Sports Technology
Spring Soft Solutions
Stanislav Sukhorukov Attorney-At-Law
State Street Global Advisors
Stockholm University
Surveyor Capital
The Brattle Group
TIG Advisors
TLFO
United First Partners
University of Pennsylvania Law School
US Department of Justice
US Department of the Treasury
US Federal Reserve Bank of NY
WBS
WFG
WGC
White & Case
Winston & Strawn
Yale University

Concurrences
Antitrust Publications & Events

Concurrences Paris
19 Avenue Jean Aicard
75 011 - Paris

Concurrences New York
106 W 32nd St - Suite 144
10001 - New York

Concurrences London
61 - 63 Rochester Place
NW1 9JU - London