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Moderator:
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Concurrences Antitrust in the Financial Sector: Hot Issues & Global Perspective Webinars Series

Private Enforcement in the Financial Services: Risks & Opportunities of Financial Antitrust Litigation

Webinar - 22 September 2020*

Webinar organized as part of the #AntitrusInTheFinancialSector Webinars Series by Concurrences.

Panel Discussion

Jon Roellke (Morgan, Lewis & Bockius), the moderator, introduced the panelists and provided notable issues in private antitrust actions in the financial services sector, including the use of statistical evidence in financial benchmark cases; allegations of group boycott in new types of trading platforms; information exchanges between competitors; and challenges of class certification determinations. Each panelist took turns to discuss issues in their expertise.

> **"Economics is not a process of just data mining and just throwing a whole bunch of things in a computer and having it spit out some answers. It is understanding people are making decisions under constraints and working together to come up with a particular outcome."**
> **ALAN GRANT**

Alan Grant (NERA) spoke about the use of statistical evidence in the pleading stage. He highlighted the importance of recognizing the limitations of regressions. In the classification phase or the pleading stage, economists consider four main items to evaluate whether a regression measure is some sort of anomalous pricing or benchmark. The first is the number of regressions that were run to find that one anomalous regression. Mr. Grant noted that this is often difficult to discern during the pleading stage because pleadings, complaints, expert reports, and published papers do not address how many models and regressions were run outside of those documents. There may also be specification and comparison problems when an economist rejects a model without detailing the reasons for rejecting it. Mr. Grant stressed that the key question to keep in mind is whether a model shows the effect or whether there are other plausible specifications. Another challenge is that financial economists are frequently examining a fairly short time series — looking at price formation process, different

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sets of benchmarks, aggregate transaction levels, or something where there may be one fixing per day — and they cannot parse out every single group they deal with. While there may be many transactions that have some relationship with an end result, at the end of the day, economists have a relatively short time series to measure things. Conclusions drawn from the data must be grounded on some economic theory and connect to the facts from the case to understand how those prices work and how they relate to each other.

> **"Economists are at the end of the day social scientists. We are managing and we are thinking about complex relationships that we can capture through data and quantify through data regressions, but really we have to think about how we apply the regression tool."**
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> **ALAN GRANT**

This leads to the third issue — having a model that contains a benchmark outside the time period or some other financial instrument, would assume that there is a stable relationship and that that benchmark actually captures something relevant for the time period at issue. However, some of the benchmark cases and some of the group boycotts happened in the midst of the financial crisis in 2009. Today, those benchmarks may no longer be relevant and there may be other unaccounted factors affecting the data. Economics is about understanding that people are making decisions under constraints, and accounting for them. Understanding what goes into those models and making sure it ties to economic fundamentals is an important piece that economists bring to the puzzle.

Finally, when thinking about classification, Mr. Grant suggested that ultimately, the question boils down to: "Does the model specified by the plaintiff make any sense?" An economist's role consists of identifying the mechanism, determining how it would work in practice, and figuring out how the outcome came about in a complex price-formation process.

Mark Gidley (White & Case) discussed his recent trial experience of the Foreign Exchange (FX) case against the Justice Department in the Southern District of New York. The case involved three chat room participants who had a running dialogue while trading euro-U.S. dollar foreign exchange currency in London. The DOJ argued that the traders' communications, particularly in the runup to the two benchmark fixes each day, the daily European Central Bank-issued euro FX and the WM/Reuters FX, were rigged by the traders' practices and coordinated through their chatroom. Ultimately, the jury acquitted the three traders.

Mr. Gidley described the process of explaining the interbank market to the jury, analogizing it to individuals buying and selling cars: "If I buy and sell a car, if I come to your driveway and buy your car, we have to agree on a price." He explained that this kind of vertical agreement does not raise antitrust concerns because they are necessary transactions in a private economy. Antitrust regulators are worried more about two car sellers, and even two car sellers, like two dealers of used cars, can buy and sell cars amongst each other.

The DOJ pointed to portions of the chat where the traders expressed agreement as evidence of collusion. Mr. Gidley explained that sometimes after some benchmarks would clear, the traders would message each other on the chat, "Wow, I made so much money today thanks to you guys," or "Wow, we did it!" At trial, Mr. Gidley told the jury that the traders on the Foreign Exchange are similar to fans cheering for a football team playing the Super Bowl. If one fan yells to another fan, "We did it," they didn't play the football game — they were just on the sidelines screaming and yelling, which is what the traders did.

To conceptualize the product to the jury, Mr. Gidley said that the FX is like "buying and selling euros." To prove that it was a vertical, not a horizontal transaction, he argued that the position of the traders in the chat were constantly changing: At any moment, the FX trader could get handed a ticket where Chevron wants to buy 400 million euros, so all of a sudden, the trader is now a buyer of euros, while thirty seconds ago the trader was a net seller of euros. Therefore, a trader's position in the market vis-à-vis the other traders in the chatroom is constantly shifting. The defendants were able to establish that all forty episodes involved an offer to make a vertical buy/sell, a sort of used-car transaction.

As for the alleged agreements, defendants raised an Archer-Daniels-Midland defense and proved that they were lying to each other, similar to a bridge or poker game. They demonstrated that in the chat, a trader would say, "I'm long 70" — when he was really long 250, to see what the other banks were doing. Mr. Gidley explained that the fact that they behaved that way meant that the chat transcripts did not adequately represent the realities of the exchanges.

> **"If you call your chat room "the cartel," you are already behind the eight ball. So we cannot rely on my training on complex economic theory, complex legal strategy; we have to be a little more straightforward and scare people — and we are not scaring them without reason."**
>
> JORDAN WOODS

For the issue of whether the benchmark could be rigged, the defense attorneys were able to interview a woman who runs the WM/Reuters FX, who stated that the WM/R FX could not be rigged given that it samples the market sixty-one seconds in a random way that no one knows, and it is not weighted. For example, if a trader in the chatroom tells others that he has $2 billion and that he wants to buy or sell euros, in a $5 trillion market, when it is not weighted, the chance that that transaction would even be sampled as one of the sixty-one-second intervals is like nil. This evidence played in favor of the defendants at trial.

Jordan Woods (Morgan Stanley) provided an in-house perspective on compliance for markets with constant exchanges of information between potential competitors. Mr. Woods stated that compliance comes down to effective training of financial services providers, by reinforcing careful and smart communications habits.

For group boycott cases, where the company reviews new technology offerings that are being pitched constantly, Mr. Woods suggested in-house counsel to speak with employees looking at code and reviewing the offerings, and to caution against becoming friendly with their competitors. He stressed the importance of preserving the appearance of unilateral decision-making by a firm. For example, if a corporate and social responsibility team from one bank wants to work with other banks on corporate and social responsibility issues, then each company should make its own decision about what they are going to do, because there may be real antitrust risks if they come to a collective industry view.

Mr. Woods pointed out that another problem in group boycott cases is that the platforms require network effects, creating a real need to know who is on and who is not. He advised employees to make the vendor call potential competitors instead of doing so themselves.

A potential issue may arise with technologists who get recruited by one bank to another. Mr. Woods suggested that a company should be suspicious if a new recruit from another bank comes bearing gifts with a data stick or a folder of paperwork. There could be antitrust implications if everybody's code looks the same in the pricing algorithm.

Lastly, Mr. Woods suggested broadening one's network of informants in the business to be informed of potential problems ahead of time and ensure compliance.

Professor Justin McCrary discussed the trends and challenges of class certification in private enforcement. First, he spoke about the set of challenges in defining the class. In a typical finance antitrust case, there are market participants who are both buyers and sellers. If a case involves price manipulation, plaintiffs have an uphill battle in explaining why participants would have a uniform interest engaging in that conduct. For example, if the agreement was to increase price, plaintiffs would have to explain why that would benefit a seller but also a buyer, which is a hard threshold for plaintiffs to meet. He observed that at times, there is an attempt to look at one side of the market. If the class consists of only sellers, then a price manipulation story is more consistent with that class definition.

At the same time, the professor pointed out that there are also cases that involve manipulation, not of price itself, but instead the gap in between the bid and the ask — the spread. He stated that the spread itself is a price. Conceptually, it is possible that market participants coordinate with each other to widen the spread. If so, that collusion would harm those who are looking to transact in that marketplace. Market-makers in general, pocket the spread and actually get that spread from their counterparties. This may seem to raise antitrust concerns, but it is also true that this may be inconsistent with the facts. When calculating damages for these cases, Professor McCrary stated that the calculation should account for the fact that someone who bought at an elevated price may have also sold at that elevated price.

The professor continued, advising attorneys to bear in mind standards for class certification including, predominance, superiority, and class conflict. For example, an issue of class conflict arises, if both sellers and buyers are part of the class. Some of them would have benefitted from the alleged conduct, while others might have been harmed. If the plaintiffs do not have the same interest, then defining a class a certain way may become difficult.

Another issue is that there may be multiple notions of what the class might be — some might pertain to transactions, some might pertain to participants, some might pertain to time periods. Whatever that class definition is, there may be

transactions or participants or time periods associated with the proposed class definition where one is confident that there is no connection that is possible between that particular transaction or entity or time period and the allegations. If so, the professor advised avoiding overly capacious notions of class definition.

"But in general I think it is right that if you think through the standards that we see today for class certification in antitrust cases, it is essentially more complicated than it is in a standard one-set story just simply by virtue of their buying and selling point. Everything kind of flows from that in terms of the complexity."

JUSTIN MCCRARY

However, Professor McCrary observed that the more fundamental challenges lie in aligning the actual evidence with the facts and theory plaintiffs claim. For example, if an attorney looks at the chat-type of evidence from the Foreign Exchange case and stacks it up against actual transactions or positions in a marketplace, the attorney may run into other challenges, such as timestamps. It may be difficult to figure out what happened depending upon the different sources of information, and unless the attorney can actually do that work carefully, there may be ambiguity about just what the position is at the time of a given chat. There may also be problems identifying where comments in a chat or database are coming from. Someone might be identified by the name of an umbrella organization, but the person asking the question may actually be in a completely different country, which may not be accurately recorded and maintained in the databases. Those kinds of issues may also be relevant in defining the class if plaintiffs' attorneys have a particular type of transaction that they want to focus on, but the conversation occurring may actually be something that is relevant to that as well.

Finally, the professor added that in general, the standards for class certification in antitrust cases, are more complicated than the standard in a one-set story, simply by virtue of the buying and selling point.

Final Remarks & Observations

Before Mr. Roellke opened the floor for questions, Mr. Gidley remarked on Mr. Wood's brief comment on possible issues of algorithmic collusion in the future. Harking off of Mr. Roellke's observation that the past is prologue, Mr. Gidley recalled the United States v. Airline Tariff Publishing Co. (ATP) case in 1992, where the defendants had a difficult time explaining airline codes to enforcers. Mr. Gidley observed that in today's world of digital exchange of information, part of the challenge for compliance lawyers is spotting the issue. It might be so complex and baked into some software code that it would be extremely challenging to explain.

Mr. Roellke also commented on some of the potential impact that the outcome of the November elections may have on private enforcement in the financial services sector. He observed that if the Senate becomes majority-controlled by the Democrats, Senator Amy Klobuchar, who has already introduced legislation that would significantly amend the Clayton Act, will become the Chair of the Antitrust Subcommittee of the Judiciary Committee. With respect to the financial sector, Mr. Roellke added that the senator's proposed legislation would limit the courts' ability to imply antitrust immunity based on regulated conduct.

Questions & Answers

One attendee asked for the panelists' thoughts on the possibility of DG COMP imposing divestitures without findings of infringement by the companies in the absence of a dominant position or any sort of cartel behavior under the New Competition Tool. Mr. Gidley expressed concern about whether legislation that would find liability without consumer injury or without a real rigorous finding of a violation of law, would change companies' behavior. He expressed skepticism of ex ante regulation, and as a former enforcer, he would always ask, "Is this not only the just result for this case, but what is the principle that comes out of it?" He believes that proving a competition violation, punishing it, or dealing with it, or having a conduct remedy, is a far better solution.

Another attendee asked to what extent financial services has had its day in the antitrust spotlight, and whether the focus has shifted to big tech and pharma? Mr. Woods replied that although Big Tech seems to be in the spotlight now, he did not think that the financial services industry is completely out of the spotlight and that it is always a target for

private litigants and the government. Mr. Roellke agreed with Mr. Woods, and commented that the notion that the financial sector is falling out of focus from an antitrust enforcement or private litigation perspective is not really well grounded. He believes it will continue to be a sector that is the subject of intense antitrust scrutiny for years to come. ■

"I think the problem is that banks are an easy target because they generally will not go to trial; enforcers can demand whatever they want and then the class action guys come in and pile on afterwards."

MARK GIDLEY