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Morgan Lewis

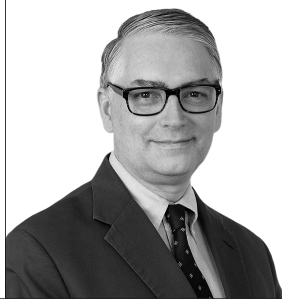
THE Brattle GROUP

INTESA SANPAOLO

WHITE & CASE

Irene de Angelis
Head of Antitrust Affairs
Intesa Sanpaolo
Milan

Mark Gidley
Partner
White & Case
Washington D.C.



Rosa Abrantes-Metz
Principal
The Brattle Group
New York

Moderator
Jon Roellke
Partner
Morgan Lewis
Washington D.C.

Antitrust in the Financial Sector

#3 Financial sector consortia and collaborations

Webinar - 20 April 2021*

“The challenge is to ensure that collaboration is focused on achieving procompetitive objectives and does not, either inadvertently or otherwise, create the appearance of unlawful collusion.”

Jon Roellke

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Jon Roellke began by highlighting that competitive relationships in the financial sector can be very complex, with firms that may compete in the context of some market segments while those same firms may also be counterparties, suppliers, or joint venturers in those same or other market segments. The purpose of this panel is to explore the circumstances in which market participants both compete and collaborate and how the lines can be properly drawn between lawful competition and collaboration, on the one hand, and more problematic coordination of competitive inputs, on the other. Some collaborations are conducted transparently and involve a broad array of market participants, while others occur in the context of trade association activities that can involve a more limited universe of members in a particular segment. But all such collaborative activities that involve competitors typically raise antitrust and competition considerations. The challenge is to ensure that collaboration is focused on achieving procompetitive objectives and does not, either inadvertently or otherwise, create the appearance of unlawful collusion. He then presented members of the panel, inviting Irene de Angelis to share examples of circumstances in which her counsel is needed to ensure that the lines are properly drawn between lawful competition and collaboration.

> Third panel of the 2021 « Antitrust in the Financial Sector » Webinar Series. See synthesis of other panels on the Conferences section of concurrences.com

* Tanguy Laurioz drafted the following synthesis for Concurrences. The views expressed in this presentation are those of the speakers and do not necessarily represent those of the institutions to which they are affiliated.

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Irene de Angelis

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Irene de Angelis stressed that the process of digital transformation is radically changing business models and strategies, bringing both opportunities and challenges. It also brings regulatory obligations such as the Payment Services Directive II, so-called PSD2, which requires banks to share their current accounts data and to allow the initialization of payments by third parties. Digital transformation also brings about several horizontal cooperation initiatives – these initiatives must comply with antitrust rules, including, in the EU, the Commission's Guidelines on the applicability of Article 101 of the Treaty to horizontal cooperation agreements.

One of the main features of PSD2 is Open Banking, aimed at simplifying the dialogue between banks and third parties. In particular, the concept of Open Banking realizes the opening of banking APIs to authorize third parties that can access the bank's data to develop new services and products in the payments field. The result is that banks do not compete only with banks anymore, but they compete will any operator providing such services. In this context, some banks in Italy decided to comply with PSD2 through a horizontal cooperation project governed by a consortium, the CBI, which has developed the so-called CBI Globe gateway, which simplifies telematic discussion for the exchange of payments information. This is a collaborative initiative between banks, through the consortium CBI and is worthy of consideration given the efficiencies it creates (overall savings are estimated at €185 million for the industry). CBI Globe can also be considered as a standardization agreement. In any case, it was designed to avoid exclusionary effects toward current or potential users of the platforms. CBI Globe also developed a "premium" service offering to Corporate clients the possibility of verifying online and real-time, in a secure environment, the correct association between the IBAN code and the Tax Code of their debtor, to reduce errors in the payment process: the so-called "Check IBAN Multi-Banca". Under antitrust law, the service constitutes of course cooperation between competitors in the form of a standard. It is aimed at defining technical or qualitative requirements for current and future services and processes, allowing for important efficiency gains as it provides support for corporate clients in preventing the sharing of incorrect payment information and reducing any attempt of fraud against companies. The third project example Irene de Angelis talked about was the ERPB API Access Scheme which is still a work in progress – it is very similar to the CBI Globe gateway but has a European Union dimension.

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What is a network effect? There is a network effect when the value of the network itself increases with the size of the network or the number of subscribers."

Rosa Abrantes-Metz

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Rosa Abrantes-Metz followed up by mentioning collaboration agreements such as prices indices, and all the new kinds of agreements made possible by the platform economy. Many of these collaborations are and should be welcome. From an economist's standpoint, the key notion is network effects. What is a network effect? There is a network effect when the value of the network itself increases with the size of the network or the number of subscribers. Strong or "convex" network occur in cases where the value of the platform grows faster than the size of the platform. Network effects carry risks in terms of potentially illegal conduct and market concentration, as synergies that can get accomplished by a large platform cannot sometimes be accomplished by a small platform. Taking the example of telecom networks, one can see that in breaking up a platform of subscribers into smaller ones with fewer communication options, a lot of output and value is lost. An example is provided by AT&T (Bell) break up into seven regional service companies. Loss of output, however, was prevented by "not cutting the wires" – everyone signed on to the large platform was still able to connect across all other smaller platforms.

Though platforms have significantly increased our quality of life, it is necessary to keep a dynamic outlook on procompetitive effects. They are often very case-specific. When a platform generates a lot of value, that may result in a larger barrier to entry because the critical mass (meaning the minimum size that an entrant needs to thrive in an industry where network effects are strong) is larger. Can this barrier be overcome? Multi-homing -meaning the possibility for users to connect to

several platforms- may prevent incumbent platforms from blocking entry and abusing their monopoly power. Tying and bundling of services across multiple sides should be scrutinized. Breaking up big platforms is also discussed as a remedy. But evidence over the last few decades suggests that in general platform leaders end up being displaced. Blackberry and Windows in smartphone and operating systems, AOL in messaging, and others have lost their leadership roles to others. This rotation in leadership is even more likely in a digital environment where financial entry costs are low. Among actors in dominant positions, we witness clear-cut abuses of market power (*e.g.,* financial benchmarks affected by conflicts of interest and lack of independent oversight). Some derive from long-established practices – such was the case in *LIBOR*.

In terms of regulation, drawing lessons from this precedent -that is to say, being proactive in setting safeguards- to monitor benchmark setting and market outcomes may prove useful. Ms. Abrantes-Metz stressed that one should be wary of a "one-size-fits-all" approach in cooperation assessment – pricing algorithms for instance do have a high chance of increasing competition, but it depends on their design that they do not make room for collusion. The question ultimately is: are we capable of distinguishing between what is an algorithm that is exclusively collusive versus one that is not? If we are not, Ms. Abrantes-Metz believes that their use should not be blocked or restricted. Rather, companies should be provided with guidance as to what type of concerns may arise from the use of these algorithms. To finalize, collaborations can be highly pro-competitive, but we need to have the safeguards in place to make sure that we enhance their robustness, to get the most out of the good side and the least out of the bad.

Mark Gidley

Mark Gidley wished to reflect on the seminal *LIBOR* case and more recent cases in the financial industry, especially *FX (United States v. Richard Usher, et al,* 2018). First, this case shed light on the world of counterparties which is not often touched upon in antitrust, and its concepts are usually unfamiliar to the competition community. In *FX*, financial institutions were trading spot FX in transactions that settled in two days with banks as market makers. The DOJ's Antitrust Division alleged that the traders had gotten into multibank chatrooms and having talks which, when looked at in the cold light of day with a magnifying glass by antitrust lawyers, looked to them collusive and suspicious. The index that was allegedly rigged was the WMR Fix, which occurred at 4, London time. In a nutshell, bank traders need to source liquidity from other banks, and they constantly do – for antitrust lawyers, it may seem as though they are competitors exchanging information, but they rather look at each other as sources of liquidity in a vertical buy/sell relationship. Ultimately, the trial demonstrated that the twenty or thirty episodes the Antitrust Division focused on all involved vertical buy/sell transactions or attempted buy/sell transactions. The regulatory response on *FX* was massive: first, it was the Antitrust Division looking into it, and then the European Union, the Commodity Futures Trading Commission, the Financial Conduct Authority in London, and the Fraud Section of the Criminal Division. This poses a challenge for antitrust lawyers who end up discussing with regulators that adopt antitrust paradigms but are not used to them. What is the compliance lesson from *FX*? It certainly is not "don't do price fixing" – traders buy and sell from each other every day and inherently disclose their position while pricing against each other. Antitrust compliance programs for banks will be complex, as are the industry processes.

Second, on benchmarks, the Antitrust Division unsuccessfully claimed in *FX* that by amassing large positions there was a way to move the Fix (which was, in fact, a randomly assembled sample of transactions) one way or the other. But these indexes or indices are very much going to be a focus of regulators in the aftermath of LIBOR and all the hyphenated "BORs" that came after LIBOR.

Third, about bad actors, Mr. Gidley wished to blow off the dust on a somehow forgotten decision: *Cement Manufacturers*. This involved a construction industry case where fraudulent actors lied to concrete sellers, had an excessive number of them show up at a job site carrying ready-to-use concrete, and ultimately forced them into cutting prices rather than completely wasting their time. The Supreme Court ruled that price-fixing was allowed to get rid

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of such behaviors. This ruling is helpful for banks and information exchange. Another example is the MARI/MIDEX initiative, an industry-wide “list of crooks”. Based on *Cement Manufacturers*, the Antitrust Division could be convinced that this was an appropriate and necessary kind of information exchange, to ensure that banks don’t stay sitting ducks for fraud.

Jon Roellke pointed out that some collaborations in the industry develop into productive collaborations with the regulators. For instance, regulators worked with private-sector market participants to develop the Foreign Exchange Global Code, a set of best practices endorsed by the Federal Reserve for foreign exchange markets. Similarly, central banks from jurisdictions around the world convened risk-free rate working groups to develop recommendations for transitioning financial markets to alternative interest rate benchmarks when LIBOR and other “IBOR” benchmarks stop being published. Because those rates will no longer be available, the financial markets had to figure out what is going to replace those benchmarks, requiring substantial collaboration among market participants to develop recommendations for affected financial markets. The principles that guided those collaborative efforts could be used for other significant types of industry collaborations. First, the objectives were clear: the goal of the collaboration is to ensure a successful transition to alternative rates without severe disruption to financial markets. Second, recommendations emerging from the collaborations are voluntary with every market participant left to decide for itself whether and to what extent to adopt or implement any recommendation. Third, working groups made extraordinary efforts to collect and consider the viewpoints and feedback from across the interest rate ecosystem and to involve financial market regulators and seek their guidance and input in nearly all the discussions. Fourth, work was conducted transparently: meeting minutes were publicly posted regularly, recommendation drafts were publicly posted for comment, and periodic updates and reports were routinely provided. Finally, the scope of any information exchanges in connection with the collaborative efforts has been limited to what is reasonably necessary to achieve the procompetitive collaborative objective. Such principles could be drawn upon in assessing how best to pursue other similar industry-wide collaborative efforts. ■