Antitrust in the Financial Sector: Hot Issues & Global Perspectives

Interview with Jon R. Roellke

Jon R. Roellke (Partner, Morgan, Lewis & Bockius) has been interviewed by **John Asker (Professor of Economics, University of California | Senior Advisor, Cornerstone Research, Los Angeles)** on the global perspectives on antitrust issues. They joined the **Antitrust in the Financial Sector** workshop that took place in New York on May 23, 2017 at the Morgan Lewis office.

Court opinions by Judge Buchwald and by the Second Circuit in the LIBOR case have taught us much about antitrust litigation. What do you consider to be the main lesson learned from these opinions for complex litigation? What about for the use of antitrust economics in matters like these?

The main lesson taught by the decisions to date in the USD LIBOR cases is that market participants involved in collaborative activities, such as participation in the setting of financial benchmarks, should recognize that such collaborations must not only be structured with their procompetitive and efficiency-enhancing goals in mind but also must be implemented in ways that account for and mitigate the potential for ancillary conduct that could be viewed as inimical to those procompetitive ends. The financial services industry, perhaps more so than any other, requires a broad degree of market participant collaboration on a wide range of activities that are necessary for fair and efficient markets to operate. The USD LIBOR cases reflect the types of concerns that can arise when such well-intended initiatives and necessary collaborations are implemented – emphasizing the need for collaborative structures that mitigate against even the perception of some type of anticompetitive restraint. Antitrust economics plays an important role in that process. Applying antitrust economic principles helps zero in on the procompetitive objectives of collaboration and in assessing the potential for antitrust risk by analyzing whether or to what extent collaborative activity is narrowly tailored to meet its procompetitive objectives or is broader than necessary – that is, does the collaborative activity have the potential to diminish either the ability or incentive of market participants to compete on important competitive inputs and variables?

Much of our discussion at today's workshop will focus on aspects of antitrust litigation in the financial sector that require special consideration beyond the antitrust principles employed in more traditional settings, such as consumer goods markets. For example, in financial markets, communication between market participants often facilitates price discovery, market efficiency, and liquidity. In consumer goods markets, similar kinds of communication may be viewed as leading to collusion and/or market manipulation. What are some of your thoughts on how that distinction affects economic and legal analysis of antitrust cases involving financial products?

This is a critically important question. In the financial services space, this requires a thorough analysis of the competitive relationships among market participants which – more often than not – are complex and variable. On the very same day that a trader competes with another trader, those two traders could be counterparties who must, by necessity, exchange views on pricing and supply. In other contexts, competitors can also be in a supplier and customer relationship and, further, could also be joint venture partners with respect to other initiatives in the relevant market. This complexity requires a more rigorous analysis of the relationships that could have an impact on competition and the extent to which information exchanges among them should be properly viewed as facilitating, rather than inhibiting, competition. I would posit that this complexity does not exist in the paradigmatic consumer goods context.

The various antitrust matters with respect to financial products (LIBOR, FX, CDS, ISDAfix, Treasuries, etc.) have intriguing commonalities, but have progressed somewhat differently. For example, the Judge Buchwald and Judge Schofield, among others, have debated the similarities and differences between the FX and LIBOR matters. What do you see as some of the key differences between these cases?

I agree there are commonalities among these cases, most notably they present some of the core legal issues that arise in antitrust cases, such as the extent to which the alleged facts can support a cognizable inference of conspiracy, demonstrate antitrust injury, or are sufficient to establish that the plaintiffs have standing as efficient enforcers of the antitrust laws. But these legal issues as addressed in each of the cases arise in different contexts. In the benchmark cases, the differences arise most prominently in how the benchmarks at issue are set as well as the degree to which participants involved in those processes communicate with respect to the process at issue. Other notable differences involve the nature of the alleged conduct – some involve allegations about coordination on the rate setting process itself, others involve allegations concerning the type of trading that occurs around the rate setting process, and others involve allegations about coordination on the types of platforms on which such trading occurs. And, of course, the cases all arise in the context of different products and, accordingly, the nature of competition and the extent to which there are multiple market variables that independently discipline that competition and render implausible allegations of a conspiracy involve not insignificant differences among the cases.