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Lessons for Multinational Companies from the LIBOR Investigations: Observations from an Antitrust Perspective

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I. INTRODUCTION

Hordes of enforcers across the world, including financial regulators, fraud investigators, and antitrust authorities, are looking into the alleged manipulation of LIBOR and other benchmark interest rates. Because a large number of well-known banks have been embroiled in the investigations, and because of the potential impact of manipulating indices used for trillions of dollars worth of derivative transactions and as a reference point for consumer lending products all over the world, the investigations have attracted enormous media and public interest.

So far little has been said of the antitrust issues. Recognizing that the full facts are yet to come to light, and so it would be premature to draw any conclusions, this article explores the lessons that might be learned from an antitrust perspective. These lessons apply far beyond banks and financial institutions and are relevant for any multinational company.

First, there is the phenomenon of "cascading cartels," described in detail below. Second, there are the technical challenges of coordinating applications for leniency and "leniency plus" in multiple jurisdictions with different rules and practices. Third, there is the warning that enforcers are cooperating and coordinating, not only across jurisdictions, but now across disciplines as well. Fourth, there is the reality that benchmarking and exchanging information with competitors can bear substantial antitrust risks if not carried out in compliance with applicable laws and monitored closely. Finally, there are the lessons that intent is objective and that working in concert with regulators provides no defense in cartel cases.

The article concludes with suggestions for multinational companies to improve their compliance efforts by improving risk assessment, targeting training at appropriate employees, and considering the use of screens to detect collusion.

II. BACKGROUND: INDIVIDUAL AND COORDINATED MANIPULATION?

The investigator's trail began with LIBOR, a benchmark derived from rates contributed by banks that are meant to be each bank's estimate of the rate they would pay for borrowing cash from each other. Investigations soon spread to cover other benchmarks (e.g. Euribor) and promptly fractured into discrete investigations according to the myriad currencies for which the benchmarks are generated.

Two types of activity seem to be emerging into focus. First, there is an allegation that individual banks decided to submit false rates as part of the LIBOR-setting process, to match their own trading positions or to address a media perception of financial ill-health. Since a bank's

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submitted estimate is a reflection of how much other banks are likely to trust it, a high estimate might imply liquidity problems.

The second category of allegations relates to collusion on rates through swaps traders making requests of counterparts at other banks. No antitrust agency has reached any type of conclusion on this yet, but a number of antitrust agencies across the world have received applications for immunity. Indeed, the European Commission has indicated that it has received an "impressive" number of leniency applications.[2]

III. ANTITRUST LESSONS FROM THE LIBOR INVESTIGATIONS

There are in these matters a number of takeaways with broad application for multinational companies. Companies should carefully examine their competition law compliance programs and should update them as necessary to reflect these risk areas.

A. Cascading Cartels

Antitrust investigations in respect of the benchmark rates are now ongoing in the United States, European Union, Switzerland, Japan, and Canada, while South Korea is looking into the alleged manipulation of national benchmark loan rates in a case that has drawn comparisons with LIBOR. The investigations cover various permutations of rate and type of currency.

The proliferation of investigations is an example of a modern antitrust phenomenon—"cascading cartels"—where an investigation into one product market in a particular region promptly leads to investigations of the same product in different regions, as well as investigations of related products in that region and elsewhere. The various auto parts investigations across the world have developed in a similar fashion.

The multiplicity of investigations into financial benchmarks is perhaps unsurprising given that the rates are set in similar ways by similar banks and are generated for different currencies. Agencies in different countries may therefore be opening separate investigations for each rate and currency combination. But even outside this particular fact pattern, there are many reasons for global cartel investigations to cascade, including globalization, repeat infringements by diversified companies, and Amnesty Plus, which provides a very strong extra incentive for a company already under investigation to reveal infringements in other markets. The U.S. Department of Justice ("DOJ") recently underlined Amnesty Plus as a key tool in building "cartel trees."[3] International cooperation between agencies also ensures that agencies are well-informed.

This is not an academic observation. When an investigation into a particular product is launched in a particular country, it is not sufficient for a company to reassure itself that there is no exposure in that particular product and country. Like the agencies investigating them, companies need to think laterally—to consider whether there is any issue in relation to the same product in other countries or in respect of related product markets (e.g. upstream/downstream/neighboring/complements) in other countries where those products are also sold and where the implicated individuals/business units are active. Wherever an employee

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[2] *See* Matthew Newman, MLEX, (Nov. 2, 2012).

[3] *See* Scott D. Hammond, *Cornerstones of an Effective Leniency Policy, Speech Before the ICN Workshop on Leniency Programs* (Nov. 22-23, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206611.htm.

is implicated in a cartel, it is essential to look at that individual, their employment history, the products for which they were responsible, the people for whom they worked, and the people they supervised. That personal "web" may uncover more cartels.

B. Solving the Global Leniency Puzzle

The objective may be simple—be first-in to self-report in every affected country—but the challenge in quickly identifying which products are covered by a cartel while the investigations cascade by product and country often results in different companies obtaining amnesty for different products in different countries. Companies face a dilemma: drafting a wide leniency application covering a large number of products will increase their exposure, but drafting an narrow application may mean that they miss out on leniency in respect of certain products in a number of places. Businesses and their advisers need to move swiftly to determine the facts and make difficult decisions about priorities. An understanding of the requirements (and day-to-day practices) of different leniency regimes around the world is key to minimizing financial exposure.

C. Agency Collaboration Across Legal Disciplines

Fraud and bribery violations are often connected to antitrust violations, and different agencies within one country are beginning to pass files between each other. The U.S. Financial Fraud Enforcement Task Force includes representatives from a broad range of federal agencies, including antitrust enforcers. And the recent joint prosecution of Bridgestone Corp. by the U.S. Department of Justice Antitrust and Criminal Divisions for antitrust and Foreign Corrupt Practices Act violations is one illustration of this development. In some European countries, there are formal information sharing/cooperation agreements between financial regulators and antirust authorities. Compliance functions for different corporate areas are increasingly being brought under one roof within companies. A degree of know-how sharing and coordination is essential, but holistic compliance must not come at the expense of blurring the compliance message for any particular legal areas.

D. Benchmarking

The focus on rate-setting is a reminder that benchmarking can be a high-risk area. Europe's highest court has, in the past, ruled that a one-off meeting where competitors discussed certain costs could be anticompetitive "by object"—making a fine extremely difficult to avoid in practice. In the U.K. banking sector, a one-way unsolicited "exchange" of competitively sensitive information has resulted in antitrust fines.

Of course, the transparency from engaging in benchmarking can remove uncertainties that allow for more efficient competition, but this area needs to be addressed very carefully. Critics of the current LIBOR setting system point to characteristics that might cause concern in the context of other competitor-competitor exchanges, principally transparency around competitively sensitive information arising from a low level of contributors or the fact that the information and identity of individual submitting banks were also made available (making deviation from a coordinated outcome more observable and therefore easier for cartel members to police and punish).

To manage the risks, companies wishing to undertake benchmarking activities should not only check their internal code of conduct, but also whether the organization carrying out the aggregating function has such a code. There will inevitably be compliance challenges where only a small number of people in a large organization are responsible for submitting large amounts of data to various benchmarking bodies. The issues may be compounded where that person's remuneration depends to a significant degree on the benchmarks generated. Finally, a trade association body should not be tasked with overseeing regulated activities if there is a conflict of interest. Sometimes, using an independent third party will be necessary.

E. Avoid Mistaken Impressions

Companies in regulated sectors may develop close relations with their regulators and governing institutions. But it would be unwise to draw reassurances about the antitrust compliance of a process or arrangement from the involvement or attitude of those players (e.g. national banks, financial regulators, etc.). There have been numerous enforcement actions involving companies that worked quite closely with regulators on regulated issues—only to discover that their conduct attracted the attention of antitrust agencies. (The *U.K. National Grid* and *EU Deutsche Telekom* cases come to mind.) Institutions dealing with rivals that are complaining about each other's conduct or commercial strategies must also guard against facilitating illegal collusion through confidence-building or exchanging sensitive information between those rivals.

F. Intention is an Objective Concept

Intentions that are benign in competition terms or even altruistic will not prevent a competitively restrictive arrangement from being characterized as a "hard-core" antitrust violation. Contacts between competitors that artificially affect competitive conditions are likely to be caught with little room for debate. Evidence that companies cooperated for reasons other than to harm customers may at some point translate into a lower fine in the event of a violation but will not be relevant when it comes to the issue of liability. It is key for a compliance program to be tailored to a company's industry and give examples of what will fall on the wrong side of the line and why.

IV. HOW SHOULD COMPANIES RESPOND TO THESE LESSONS?

A. Risk Assessment

Industries like the banking sector, where legitimate competitor contacts may be frequent, give rise to a need for tailored and targeted compliance efforts. Training should anticipate "spill-over effects" where legitimate contacts/objectives might be at risk of de-sensitizing employees to the antitrust risks such that they inadvertently stray into anticompetitive areas. Employees need to understand that permissible forms of collaboration between rivals will often be narrowly circumscribed. A high incidence of staff switching employment between competitors also increases the risk of information exchange. Conversations between traders and their former colleagues in other banks are likely to be scrutinized as part of the LIBOR antitrust investigations.

B. Consider Use of "Screens" for Antitrust Compliance

Antirust agencies (such as the U.S. Department of Justice, Brazil's CADE, and the Mexican CFC) are known to use screens—empirical methods used to flag unexpected financial patterns—to open cartel investigations. Arguably the LIBOR investigations stemmed from observations made after screens were used. Companies can also use empirical methods to detect possible issues before the agencies (and sometimes may have better data than the agencies to do this). Spotting an unusual pattern at an early stage will increase a company's chances of obtaining leniency and otherwise mitigating damage from cartel conduct.

V. CONCLUSION

The ongoing investigations into LIBOR and other rate-setting conduct contain many lessons for multinational companies, and companies should use this opportunity to improve their compliance efforts in order to avoid liability in the future.