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INSIGHT: Blockchain and Antitrust: How Counsel Can Mitigate Risk

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Volatility in the cryptocurrency market may attract the attention of finance mavens, but it is blockchain technology's more business-focused applications that have caught the eye of mainstream companies. And as more businesses weight blockchain solutions, they should keep antitrust in mind.

At its core, blockchain is a shared ledger, allowing for consensus-based creation of an immutable record of transactions. Companies that adopt blockchain technology will inevitably face decisions about what information will be made available to third parties, including competitors. In the case of permissioned blockchains (where access is controlled by an administrator or set of participants), the implementers will also face decisions about which third parties to welcome and which to exclude. While blockchain may be novel, antitrust doctrine on information-sharing and exclusionary conduct is not.

In the vast majority of cases, antitrust need not be a showstopper. Blockchain holds immense promise for both unlocking new business models and turbocharging existing ones. Antitrust rules seek to encourage innovation that bolsters competition and efficiency, not squelch it.

However, in certain circumstances blockchain implementation can raise antitrust issues, and adopting blockchain with antitrust in mind can help mitigate risk and reduce the possibility of expensive investigations or lawsuits down the road.

Information Exchange

Blockchain implementers should pay attention to design features that allow competitors to observe one another's transactions.

Antitrust law condemns information exchanges when (a) they are judged to be indirect evidence of an agreement between competitors to fix price or output or to otherwise eliminate competition; or (b) their likely effect is to stabilize prices or otherwise restrain competition.

Antitrust agencies and federal courts have provided guidance on the circumstances most likely to lead to condemnation:

- ***Type of information.*** "[T]he sharing of information relating to price, output, costs, or strategic planning is more likely to raise competitive concern than the sharing of information relating to less competitively sensitive variables." (Federal Trade Comm'n & Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors 15-16 (Apr. 2000)).
- ***Timeframe.*** "[T]he sharing of information on current operating and future business plans is more likely to raise concerns than the sharing of historical information." (*Id.*)
- ***Granularity.*** "[T]he sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data." (*Id.*)
- ***Industry Characteristics.*** Information sharing carries higher risk in concentrated industries with few competitors, homogeneous products, and inelastic demand. (*United States v. Container Corp. of Am*., 393 U.S. 333, 337 (1969); *see also Todd v. Exxon Corp.,* 275 F.3d 191, 207-08 (2d Cir. 2001)).

A blockchain that allows competitors to view one another's transactions in (or close to) real time would potentially raise antitrust alarm, particularly in a highly concentrated industry.

Counsel should analyze whether competitors legitimately need to have access to one another's sensitive information, or whether blockchain's benefits can be realized without granting competitors access to all data. If information sharing is necessary to achieve a procompetitive benefit, counsel should document this fact clearly.

Courts and agencies are more likely to permit an information exchange if a procompetitive goal cannot be accomplished otherwise. Not only is such a weighing of competitive risks and benefits part of the standard “rule of reason” antitrust analysis, but the absence of procompetitive justification may raise an inference of price-fixing or some other anticompetitive conspiracy.

Smart Contracts

One of the most promising business innovations associated with blockchain is smart contracts—agreements that automatically execute when pre-specified conditions are met. Given the near infinite circumstances that might lend themselves to smart contracts, general antitrust guidance cannot obviate the need for careful case-by-case analysis.

Two situations, however, warrant particular caution.

- Any smart contract whose effect is to “reward” a competitor for raising price, cutting output, or otherwise decreasing competitive pressure on its rivals, or whose effect is to “punish” a competitor for lowering price, expanding output, or otherwise increasing competitive pressure, merits caution.
- Any smart contract that guarantees that the company will follow its rivals’ competitive initiatives may also draw antitrust scrutiny. Certainty over how rivals will respond to pricing or other competitive moves makes it easier for companies to tacitly coordinate on price or other sensitive variables. Contracts that create such certainty may be interpreted as facilitating coordination.

Blockchain Membership Decisions

When implementing a permissioned blockchain, a company must decide which other companies will be permitted to participate. A decision by a rival or set of rivals to exclude competitors may draw antitrust scrutiny.

The following factors affect the level of risk:

- The more indispensable access to the blockchain is to the rivals’ ability to compete, the higher the risk.
- Existence of a legitimate business reason for excluding certain competitors reduces risk.
- Independent action by a company carries far less risk than an agreement between competitors to exclude a common rival.
- For a company acting independently, risk rises if the company is a monopolist (or has a reasonable shot of becoming one) and the exclusion of a rival is a break from prior course of dealing.

As businesses look into implementing blockchain technology, they should consider consulting with antitrust counsel. In most situations, proper legal advice at the outset should allow companies to reap the immense promise of blockchain while mitigating the risks of facing costly antitrust problems.

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