SciTech Focus on Blockchain: Antitrust Regulation and Blockchain Technology

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SciTech Focus on Blockchain: Antitrust Regulation and Blockchain Technology
PANELISTS

• Jeane Thomas (Crowell & Moring), Moderator

• Gabrielle Kohlmeier (Verizon)
• Ryan Thomas (Jones Day)
• Tom York (Jones Day)
AGENDA

1. Blockchain Basics
2. Relevant Antitrust Framework
3. Blockchain Under the Microscope
4. Key Antitrust Issues
5. Q&A
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WHAT IS A BLOCKCHAIN?
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• Form of distributed ledger technology that stores blocks of information across a secure, validated, decentralized peer-to-peer network

• Practical applications include payments (including using digital currencies like Bitcoin), financial transactions, supply chain management, and electronic medical records

• Smart contracts are self-executing agreements with terms embedded directly into the code stored in a blockchain
HOW BLOCKCHAINS WORK

• Two types of blockchains:

**Open**
- Anyone can join
- Anonymous, fully decentralized system
- Full ability for any two participants to deal with each other
- Transactions normally visible to others on the ledger

**Permissioned**
- Authorized access only
- Participants are known/pre-approved
- Pre-selected, trusted validators
- May put limits on ability of parties to deal with each other
- Confidential transactions
Blockchain technology has potential applications across many sectors, including:

- Healthcare
- Finance
- Logistics/supply chain
- Securities
- Telecommunications
- Real estate
In 2018, UnitedHealth Group (Optum), Humana, Quest Diagnostics and MultiPlan announced a pilot program to use blockchain technology for health plan provider directories.

“The use of blockchain technology will hopefully avoid the all too common problem that occurs when a claim comes through from the provider and it mismatches with the information the insurance company has in its provider directory.”

• In 2017, IBM, Walmart and Chinese retailer JD.com partnered with Tsinghua University to use blockchain to improve food tracking and safety in China.

• “For its part, IBM will provide its Blockchain Platform and expertise, while Tsinghua University will act as a technical advisor sharing its expertise in the key technologies and the China food safety ecosystem. IBM and Tsinghua will collaborate with Walmart and JD to develop, optimize and roll out the technology to suppliers and retailers who join the alliance.”

• In 2017, AXA launched a flight delay insurance product named “Fizzy” that utilizes smart contracts and stores policy information on the Ethereum blockchain.

• Smart contracts tied to global air traffic databases.

• Once a flight delay of two or more hours is detected, compensation for the insurance holder is triggered automatically without the need to report a claim.

NEW TECHNOLOGY, SAME ANTITRUST LAWS
U.S. ANTITRUST LAWS

- Antitrust laws seek to prevent:
  1. Agreements that restrict competition
     » “Horizontal” agreements between competitors
     » “Vertical” agreements between a supplier and customer
  2. Monopolization / abuse of dominance
  3. Mergers, acquisitions, and joint ventures that substantially lessen competition
**Federal:** Federal Trade Commission; Department of Justice Antitrust Division

**State:** Attorneys General

**Ex US:** Dozens of competition authorities worldwide (EC, SAMR, CCB, JFTC, CADE, etc.)

**Private litigation** and treble damages
NOTE ON FOREIGN ENFORCEMENT

- Decentralized nature of blockchain technology makes it capable of reaching across the globe
  - Example: Cryptocurrencies such as Bitcoin are accessible and used by computers worldwide

- Depending on the scope of a blockchain initiative, it may be subject to antitrust laws of multiple jurisdictions

- Also consider issues concerning jurisdiction, discovery, and privacy
BLOCKCHAIN UNDER THE MICROSCOPE
WORLDWIDE FOCUS ON BLOCKCHAIN

• Antitrust enforcers worldwide are monitoring blockchain developments, including:
  – **U.S. FTC** hosted a public forum on blockchain technology in March 2017
  – **European Commission** launched a study on the legal and regulatory issues of blockchain in December 2018, including competition implications
  – **Japan FTC** indicated interest in antitrust issues related to cryptocurrencies in early 2018
  – **Swedish Competition Authority** expected to publish a paper on blockchain and antitrust in April 2019
  – **OECD** published a paper on blockchain and antitrust law in April 2018
• “If governments and industry work together, we can ensure that Europe emerges as a trusted leader in blockchain innovation. This will transform digital services and is a major opportunity to increase user confidence.”
  » Mariya Gabriel, European Commissioner for Digital Economy and Society

• “The collection and efficient use of data are recognized as more and more important in business activities…if such situation restricts competition and harms the interests of the consumers, a prompt response would be required under the [Antimonopoly Act].”
  » Kazuyki Sugimoto, Chairman, Japan Fair Trade Commission
KEY ANTITRUST ISSUES FOR BLOCKCHAIN
• Consider the following:
  – Firm A controls access to a permissioned blockchain
  – Firm A opens access to the blockchain to its competitors (Firms B and C), suppliers and customers
  – Firms A, B, and C operate in a concentrated market
KEY ANTITRUST ISSUES FOR BLOCKCHAIN

- Collusion
- Improper information exchanges
- Monopolization
- Group boycott
COLLUSION

- Information on a blockchain could be used to facilitate collusion to engage in price fixing, bid rigging, or market allocation

- Firms using a blockchain have access to competitively sensitive information—e.g., price, quantity, and customer data

- Blockchain may change incentives to collude
HYPOTHETICAL: COLLUSION

• If Firms A, B, and C used the blockchain to enforce an agreement to fix prices, it would be per se unlawful and enforced *criminally* in the U.S.

• Firms A, B, and C could use the competitively sensitive data and/or smart contracts to fix prices or allocate markets or customers

• The blockchain may facilitate the conspiracy by allowing members (more easily) to monitor compliance and detect cheating
EXAMPLE: COLLUSION THROUGH SOFTWARE

• Analogue: In 2016, an e-commerce retailer pleaded guilty for conspiring to fix prices of posters sold on Amazon Marketplace

• The individuals involved used a commercially available algorithm-based pricing software

• DOJ concluded that, although the members of the conspiracy programmed their pricing algorithms differently, the algorithms were coordinated to prevent prices from dropping
IMPROPER INFORMATION EXCHANGES

• Antitrust liability is possible even without a “naked” agreement to fix prices

• Information exchanges may result in antitrust scrutiny as part of an otherwise legitimate competitor collaboration
  – Evidence of unlawful agreement?

• Conduct is evaluated under a “rule of reason” analysis
  – Anticompetitive effects?
  – Procompetitive benefits?
In the normal course of business, Firms A, B, and C share information through the blockchain, including competitively sensitive data, with no procedural safeguards.

Not unlawful *per se*, but instead examined under a “rule of reason” analysis:
- What is the competitive effect of the information exchange?
- What are the procompetitive benefits of the exchange?
MONOPOLIZATION

• A firm with monopoly power using a blockchain to maintain its power through exclusionary conduct could form the basis for a monopolization claim.

• Many types of exclusionary conduct, including refusal to deal with rivals, exclusive supply or purchase agreements, and denial of an essential facility to competitors.
HYPOTHETICAL: MONOPOLIZATION

• Assume Firm A, a strong competitor, offered access to a leading blockchain to rivals Firms B and C

• Firm B recently began an aggressive campaign to take business from Firm A. In response, Firm A cuts off Firm B from the blockchain, knowing that doing so would likely cause substantial harm to Firm B

• Also potentially subject to a rule of reason analysis:
  – Competitive impact?
  – Procompetitive benefit of the refusal to deal?
GROUP BOYCOTTS

• A group boycott occurs when competitors agree not to do business with a third party, such as a supplier, customer, or competitor.

• In the blockchain context, a group boycott could occur if, for example:
  – Owners of a blockchain (e.g., a JV) refuse to provide access to the blockchain to a competitor, customer, or supplier.
  – Members of a blockchain agree to not do business with a supplier that no longer wants to use the blockchain.
• Assume Supplier A complained that it no longer wanted to use Firm A’s blockchain, causing significant business disruption to Firms A, B, and C.

• As a result, Firms A, B, and C agreed not to do business with Supplier A unless it was part of the blockchain; otherwise, the three downstream companies would incur significant costs.

• This would be analyzed as a group boycott and could be deemed either *per se* unlawful or subject to the rule of reason balancing analysis.
MANAGING ANTITRUST RISK

• Companies should consult with counsel during formation and operation of a blockchain to mitigate antitrust risks

• Issue spotting:
  – Market definition—power of blockchain / one or more members
  – Competitors and competitive dynamics
  – Competitively sensitive information; procedural safeguards
  – Access rights; membership criteria
  – Legitimate business purpose
Recent litigation involving blockchain and cryptocurrency across a number of legal areas, including antitrust, contracts, intellectual property, securities laws, privacy, and cyber and data security.
FINAL THOUGHTS/
Q&A
FINAL THOUGHTS

- New technology, same antitrust rules, but consider how blockchain changes incentives, especially among competing firms that participate in a blockchain.

- Cross border blockchain = cross border antitrust risk.

- Competition agencies worldwide are monitoring the space.

- Blockchain owners and members should carefully consider antitrust risks and institute measures to eliminate or mitigate that risk (e.g., governance, membership criteria, information sharing protocols).
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Questions
SciTech Focus on Blockchain

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- Buy the entire series, get 20% off the list price for the individual webinars.
  - Monthly from November to May
  - Discounts for Science & Technology Law Section members
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- Based on the popular new book *Blockchain for Business Lawyers* (2018)
- Next month: Tuesday, 5 March 2019
  “Disputes, Liability, and Jurisdiction in the Blockchain Era”
ABA SECTION OF SCIENCE & TECHNOLOGY LAW (SCITECH) WEBINAR SERIES: “SCITECH FOCUS ON BLOCKCHAIN”

ambar.org/focusonblockchain
Additional Resources

- Jones Day’s Blockchain for Business White Paper

- Speakers
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• **SciTech Committees, in 3 Divisions, at ambar.org/scitechcommittees**
  – Interdisciplinary
  – Life Sciences
  – Privacy, Security, and Emerging Technology
• Privacy and Computer Crime Committee
Additional Resources

- Identifies the principal challenges of blockchain (distributed ledger technology) in 7 separate fields of law, reviews legal developments, and suggests possible resolutions in light of these developments.
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