2013

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The Harvard Law School Forum on Corporate Governance and Financial Regulation
SUPPORTED BY: CSC CORPORATION SERVICE COMPANY

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Posted by June Rhee, Co-editor, HLS Forum on Corporate Governance and Financial Regulation, on Thursday December 26, 2013

Editor's Note: The following post comes to us from Mark R. Patterson at Fordham University School of Law.

On December 4, the European Commission announced the imposition of €1.7 billion in fines on eight international banks for participation in cartels in euro- and yen-denominated interest-rate derivatives. The banks had conspired on submissions for euro and yen Libor rates, and the fines were imposed under European antitrust law. As EU Commissioner Joaquín Almunia said, "What is shocking about the LIBOR and EURIBOR scandals is not only the manipulation of benchmarks, which is being tackled by financial regulators worldwide, but also the collusion between banks who are supposed to be competing with each other."

Commissioner Almunia's comment might have been addressed specifically to U.S. antitrust enforcers. Although the Antitrust Division of the Department of Justice has been involved in some of the settlements that the department has reached with banks, to date none of those settlements has included antitrust liability. Instead, the banks have pled guilty or admitted liability only for fraud, even though the statements issued by the Justice Department when announcing the settlements describe just the sort of collusion to which Commissioner Almunia referred.

By now, the Libor story is well known. Libor rates (or "London interbank offered rates") are used as benchmarks for rate changes in variable-rate loan agreements and other financial instruments. Libor rates are determined—though this is changing as a result of the conspiracy—by the British Bankers' Association (BBA) through a survey of large banks. The BBA asks the banks to submit estimates of their costs of borrowing, and after excluding the highest and lowest estimates the responses are averaged to calculate Libor rates. But it is now established that for several years Libor rates were manipulated by the banks. On numerous occasions the banks agreed among themselves to submit false estimates with the goals both of profiting on instruments whose rates were tied to Libor and of improving the appearance of their own financial positions (because a bank that can borrow at a low rate looks healthy). Sometimes banks coordinated their rate estimates, which increased the likelihood that the ultimate Libor average would be affected.

At first glance, U.S. enforcement efforts in the Libor rate-fixing conspiracy look impressive. A previous post on this forum pointed out that enforcers have gone after some pretty big fish, getting guilty pleas and other admissions of liability from large banks like Barclays and subsidiaries of UBS and RBS and recovering billions of dollars in fines. Some have raised questions about U.S. enforcers' focus on foreign banks, but at least the agency has not just pursued low-level employees, which has been a complaint about prosecutions related to other aspects of the financial crisis.

However, the Libor conspiracy has been described by a Justice Department official as "epic in scale, involving people who have walked the halls of some of the most powerful banks in the world." The conspiracy appears to have involved not just big fish acting alone, but an entire school of big fish, acting together under the auspices of the British Bankers' Association. Where, then, is antitrust law? The absence of antitrust makes a dramatic difference, both with respect to the scope of liability and with respect to the compensatory and deterrent effects of private damages actions.

Rather than pursuing these cases under antitrust, the Department of Justice appears to be going to great lengths to avoid doing so. The statement of facts in the Barclays case makes no mention of antitrust or collusion, even while describing how Barclays traders would both make requests of traders at other banks for favorable rate estimates and respond to similar requests from traders at other banks. With UBS, the department issued a statement of facts that specifically referred to interbank collusion, and UBS traders were charged with price-fixing, but the case ended with a non-prosecution agreement in exchange for a guilty plea by UBS Securities Japan only on a fraud count. Finally, in the RBS case the Department of Justice filed a criminal information charging RBS with both fraud and price-fixing, but at the same time entered into a deferred prosecution agreement under which only RBS subsidiary RBS Securities Japan pled guilty, and only to fraud. Notably, Barclays, UBS, and RBS were all among the banks fined by the EU for collusion. The pattern continued in the late October settlement with Rabobank.

As the previous post here described, the Justice Department's approach may be an attempt "to have its cake and eat it, too." It is prosecuting corporations without risking collateral consequences on the market as a whole. But doing so creates other collateral consequences, of course, both in terms of perceived (and perhaps real) antitrust immunity and in actual hurdles to private antitrust suits that would compensate the parties injured by the banks' collusion. Successful government antitrust enforcement can make private follow-on actions for damages much easier, and private damages actions serve compensatory and deterrent purposes that are central components of antitrust law. Excluding an entire segment of an important market from antitrust law for fear of "collateral consequences" is questionable policy.

So far, and not surprisingly given the absence of government antitrust enforcement, private suits have not filled the void. In March, Judge Naomi Reice Buchwald dismissed antitrust claims in a private suit challenging Libor rate-fixing. Her rationale was that even if the banks' conduct violated antitrust laws, the plaintiffs had not suffered "antitrust injury" because "[t]he process by which banks submit LIBOR quotes to the BBA is not itself competitive." Court sometimes use the procedural "antitrust injury" doctrine to dispose of complex cases that are not easily dismissed on substantive grounds, and that appears to be what Judge Buchwald did here. Ironically, she closed her opinion with the statement that "[t]he broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement."

To be sure, Judge Buchwald was correct that surveys of interest-rate estimates do not look like competition. But there is another way to look at the Libor rate-fixing. The suit that Judge Buchwald dismissed, like the statements of fact in the Justice Department settlements, focused on individual interbank agreements to manipulate, rather than on the overall Libor system. Even if the BBA survey process is not itself competition, the BBA marketed and sold Libor in a commercial manner, so there is no reason not to view the BBA and Libor as parts of the competitive process. That suggests that a suit that challenged the system as a whole could have more success.

All of the banks that settled with the U.S. and the EU, along with many other banks, are members of the BBA. Indeed, a 2008 BBA statement on "LIBOR Governance and Scrutiny" states that the chair, deputy chairs, and other members of the BBA committee responsible for oversight of Libor were banks that contributed rate estimates to the Libor process. In other words, not only were individual BBA member banks parties to specific rate-fixing agreements, but collectively the banks created and monitored the mechanism through which the rate-fixing took place. And of course the banks were in the best position to judge whether the rate estimates submitted by their fellow banks were accurate. Some of the banks, including Barclays, even raised concerns with the BBA about the rates being submitted, yet the concerns produced little response. From this perspective, the Libor conspiracy does not involve a number of individual agreements to fix rates but a collectively created mechanism with few safeguards to protect it from manipulation.

Application of antitrust law to an organization like the BBA or its members would not be novel. Antitrust law has seen similar circumstances before, though in slightly different contexts. In several cases involving private standard-setting organizations, the Supreme Court has confronted circumstances in which the procedures of the organizations were exploited for the gain of individual organization members. Standards resemble Libor rates in that they are both forms of collectively created information that define the products offered on the market. And the standard-setting process resembles Libor rate-setting because both are collaborative information-gathering processes. The processes are not themselves competition in the usual sense, as Judge Buchwald points out, but they are part of collective processes that is intended to and does have competitive effects.

These standard-setting cases have established two relevant rules. First, an organization can be liable under antitrust law for fraud committed by its members, as the Supreme Court explained in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*: "When [an organization] cloaks its [agents] with the authority of its reputation, [the organization] permits those agents to affect the destinies of businesses, and thus gives them the power to frustrate competition in the marketplace." Second, there could be liability for BBA member banks, even ones that did not themselves engage in manipulation. More than just membership would be required, but a member with knowledge of anticompetitive conduct by an organization or its members can be liable for that conduct, particularly if the member can be viewed as participating in the conduct. Given the involvement of a number of the BBA member banks in the rate-fixing arrangements, and complaints by some of the banks regarding rates submitted by others, liability is quite possible. As one court has said, "the standard for knowing participation is not onerous."

In the hierarchy of responsibility for the Libor rate-fixing, this all makes sense. At the bottom are the traders and rate submitters that engaged in the actual collusion and above them are the banks that employed those traders and submitters, but above *them* are the BBA and the banks that created, governed, and monitored the Libor process. The culpability of the banks that inadequately monitored their employees is not obviously greater than the culpability of the banks that jointly but inadequately monitored their competitors' contributions to the overall Libor process. A school of big fish acting together is more powerful than big fish individually.

Several private parties, like Freddie Mac and the Principal Financial Group, have recently brought suits that, unlike earlier private suits, include the BBA among the defendants and appear to be focused on challenges to the overall Libor system, rather than on individual manipulations. U.S. enforcers, who continue to say "We're not done," could take the same approach. The U.S. settlements with individual banks on fraud claims leave the impression that the banks manipulated what was fundamentally a sound system. But the system was created and monitored in a way that made it easy to manipulate—that is why control of Libor has been removed from the BBA. If we are to allow interested private parties to join together to create organizations that control critical market information, those organizations should be subject to antitrust liability to ensure that they exercise their control in a responsible manner.