

Antitrust Issues: Implications for Blockchain Technology

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Howard M. Ullman



Overview – Types of Blockchain Antitrust Risk, Applicable Law, and Suggestions for Mitigation



- Types of Blockchain antitrust risk
 - Active collusion (price-fixing)
 - Information exchange
 - Exclusion of competitors
 - Standard-setting
- Applicable law
- Blockchains may be joint ventures
- Suggestions for mitigating each type of risk



Basics of Antitrust Rules (U.S. Federal Law)



- Sherman Act § 1: Agreements between two or more independent entities which unreasonably restrain trade
 - “*Per Se Rule*” v. “Rule of Reason”
 - Horizontal v. vertical agreements
- Sherman Act § 2: Monopolization & attempted monopolization by a single firm
 - “Rule of Reason”
 - Monopoly power / dominance, or dangerous probability of acquiring
 - Unnecessarily exclusionary conduct

Unilateral Pricing Is Lawful Under Sherman Act § 1*



- “Contract, Combination or Conspiracy” (or “Agreement” or “Concerted Practice”) is required
 - Express agreement; inference of conspiracy
 - “Plus factors”
 - Self-interest to act collectively; contrary to interest to act alone
 - Evidence of opportunities for collusion
 - Simultaneous (or near simultaneous) identical actions
- “Parallel pricing” and “follow the leader pricing”
- Difficult line to draw in litigation

** But may be unlawful under Sherman Act § 2*

Exchange of Price Information Among Competitors



- Can be a form of price fixing if results in agreement
- Not *per se* illegal (U.S. federal law)
 - DOJ/FTC Health Care Guidelines safe harbor
 - Proof of price impact required
 - Impact is likely under many market conditions
- Can be dangerous
- Can be seen as evidence of actual price agreement
- Exchange of confidential non-price information also can be seen as evidence of price collusion



Membership in Cooperative Associations



- A competitor excluded from a cooperative venture between or among other competitors may complain that the exclusion is unfair or unlawful
 - Typically a Section 1 issue; could also be framed as attempted monopolization or conspiracy to monopolize
- Exclusion from buying cooperative – Rule of Reason. *Northwest Wholesale Stationers v. Pacific Stationery & Printing*, 472 U.S. 284 (1985)
- Denial of access can nevertheless be condemned. *See, e.g., Realcomp II Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011)

Standard-Setting Organizations



- Standard-Setting Organizations (“SSOs”) are effectively joint ventures
- *Addamax Corp. v. Open Software Foundation*, 888 F. Supp. 274, 280-81 (D. Mass. 1995) (treating standard-setting organization as a joint venture for antitrust purposes)
- Rule of Reason analysis
 - *National Association of Review Appraisers v. Appraisal Foundation*, 64 F.3d 1130, 1133-34 (8th Cir. 1995); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 309 (3d Cir. 2007) (“private standard setting . . . need not, in fact, violate antitrust law” because of its procompetitive effects)
- Patent “hold-up” problem

Active Collusion: Risk and Mitigation



- Risk
 - Competitors will use Blockchain price, cost, or output data to enter into unlawful horizontal agreements
- Mitigation
 - Adopt appropriate antitrust compliance programs/policies, and make sure they expressly extend to Blockchain activities
 - Limit the opportunity for data to be misused by limiting access (*see infra*, information exchange)
 - To the extent possible, limit data on the Blockchain to historic (aggregated) price, cost, or output data

Information Exchange: Risk and Mitigation



- Risk
 - Price/cost/output information visible on the Blockchain
 - Could result in price impact, or could facilitate an agreement or be circumstantial evidence of an agreement; could also deter price-cutting
- Mitigation
 - Separate competitors from the Blockchain recordkeeping function
 - Use a third-party record-keeper who could/would provide aggregated reports or data (but: costs and trust issues)
 - Firewalls at each competitor (perhaps cryptographically based)
 - Record aged, aggregated data (where possible)

Exclusion of Competitors: Risk and Mitigation



- Risk
 - Exclusion or termination of a competitor that claims access to a private Blockchain is necessary (essential?) to compete
- Mitigation
 - Consider size/potential dominance of private Blockchain
 - Adopt clear and fair membership criteria
 - Adopt clear and fair rules for membership expulsion
 - Provide adequate due process for expulsion decisions

Standard-Setting: Risk and Mitigation



- Risks
 - Consensus mechanism as a standard
 - Might favor certain network members over others (*e.g.*, in connection with processing time or bandwidth), or might boycott the transactions of certain members
 - Patent hold-up
- Mitigation (especially for a Blockchain that dominates an industry or industry segment)
 - Adopt fair and non-discriminatory consensus rules
 - Adopt patent / IP disclosure rules and require FRAND commitments

Conclusion



- Blockchain is an exciting new technology that may lead to many pro-competitive benefits
- Joint ventures that utilize Blockchain technology will often pass antitrust muster
- However, competitors who form or participate in Blockchain ventures need to be mindful of the potential antitrust risks and take appropriate actions to mitigate them



Questions?



Howard M. Ullman
Orrick, Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105-2669
415-773-5652
hullman@orrick.com





orrick