

How Blockchain Use Can Block Competition

By **Daniel Fenske and Justin Steffen** (August 28, 2018, 1:20 PM EDT)

Blockchain technology can be used to make economic transactions more efficient by eliminating the intermediary between contracting parties. But with the proliferation of financial institutions, corporations and other industries investing in blockchain technology, anti-competition issues abound — issues that can be mitigated through early planning.

Blockchain Basics

First described in a 2008 whitepaper, bitcoin is the seminal cryptocurrency. Bitcoins are tracked on the blockchain, a large, decentralized ledger — like an Excel spreadsheet that is replicated on every user's system, which anyone can edit so long as the majority of other users (known as "nodes") agree. This system works without a central authority and all transactions are peer-to-peer. While the bitcoin blockchain is public, a number of companies have sought to capitalize on blockchain technology by deploying other private, permissioned distributed ledgers.

Blockchains or distributed ledgers offer a number of purported advantages — security, immutability, transparency and efficiency — and, as a result, companies have sought to deploy the technology in a variety of areas. Many companies not only invested in their own projects but also joined together in a number of consortia to collaborate on implementing distributed ledger solutions. The R3 consortium, for example, includes ABN AMRO, Bank of America Merrill Lynch, and a number of other companies. Likewise, the Enterprise Ethereum Alliance counts Thomson Reuters, BP and other Fortune 500 enterprises, startups, academics, and vendors as members.

In these consortia, competitors may become temporary allies. Using R3's Corda platform, for example, HSBC and ING Bank reported that they successfully executed a live trade finance transaction in spring 2018. In addition, thousands of individual credit unions partnered to form CULedger, which uses Hashgraph.

Anti-Competition Risks

Given that blockchain technology is still developing and new uses are popping up every day, it is impossible to conceive of every antitrust problem that could arise. This article addresses two antitrust



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issues that are readily apparent: (1) the risk that regulators will view any information sharing among competitors facilitated by the blockchain as collusion; and (2) risks that arise if access to a blockchain is important for market participants to compete.

Information Sharing

Blockchain technology involves the sharing of information on the chain itself, and to the extent the blockchain mediates transactions among competitors, it poses the same risks that any information exchanges among competitors pose. For example, a distributed ledger operated by a consortium of fictional pharmaceutical companies could include all sales between the companies and third parties and the prices for those transactions. If that information is available to any market participant, then a regulator could view the blockchain as facilitating price collusion. In a worst case scenario, a regulator could determine that the blockchain is being used to police a price-fixing agreement by detecting and deterring “cheating” among members.

There are some simple steps the architect of a blockchain can take to mitigate these risks. If the blockchain can function adequately without including pricing information, do not include it. If you have to include pricing information, limit access to that information. It is possible that only certain individuals need to see prices. If so, limit access to those people. Or, it is possible that pricing information is only necessary for participants to access at particular times. If so, keep pricing information generally obscured, and allow access only when really necessary.

For similar reasons, sharing information about quantity and location/territory of sales can pose a risk. To be sure, sharing that information alone is not a violation of the U.S. antitrust laws. But it could cause a regulator to determine that an investigation is necessary. Minimizing the information shared on the blockchain, and limiting access to information necessary for the chain to function, minimizes the risk that a regulator will determine that an inquiry is necessary.

Access to Blockchain

Blockchain technology can be used to facilitate economic transactions. One could imagine that banks could use blockchain-based smart contracts to facilitate lending. If use of blockchain proliferates in an industry and becomes the only practical way for transactions to occur, then access to the blockchain may be necessary to compete. That gives those that control the blockchain the ability to impede potential competitors’ access to the market by limiting their access to the blockchain. If, for example, a new credit union could not join the CULedger project, it could place them at a competitive disadvantage.

This could give rise to antitrust liability. For example, it is per se illegal under Section 1 of the Sherman Act to engage in a “group boycott” where competitors agree among themselves not to do business with a third party. If multiple entities that control a blockchain do not allow a competitor to conduct transactions on the chain, a court could construe that as unlawful group boycott.

To minimize these risks, those that operate the blockchain should establish uniform, nondiscriminatory rules governing access to the blockchain. That way, if a competitor is denied access to the chain pursuant to those rules, the operators of the chain will be in a strong position to argue to regulators and courts that they did not refuse to do business with a competitor. Rather, the competitor simply failed to meet the same neutral standards that the group applies to all participants.

As with any business venture, companies utilizing a blockchain should also adopt strict antitrust

compliance policies. Those policies should clearly prohibit any conduct in violation of the antitrust laws, including any agreements among those with access to the blockchain as to prices or other terms of the sale. The policy should also forbid participants from using any information gained from the blockchain for reasons unrelated to it. And the policy should have real enforcement mechanisms, such as a requirement that blockchain operators or participants report violations to the appropriate internal officers or external agencies, and that if necessary repeat offenders be suspended from the chain.

Conclusion

The antitrust risks of blockchain technology will be clarified as the technology develops and it is put to more uses. It is critical that you consult competent antitrust counsel when structuring blockchain technology and policies so as to best to mitigate antitrust risk.

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