Antitrust risks for associations and consortia

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Due to launch in 2020, the Facebook-associated Libra cryptocurrency, blockchain and smart contract offering has courted scrutiny, particularly around public trust; this week the European Central Bank added to its list of heavyweight opponents, with one top official likening Libra's ecosystem to that of a cartel.

Amid a speech that widely questioned **Libra**'s ability to withstand a liquidity crisis, the associated legal and regulatory complexities, as well as other concerns related to **Facebook**'s integrity after the *Cambridge Analytica* scandal, **European Central Bank** (ECB) executive board member Yves Mersch has likened Libra's ecosystem to that of a cartel.

Facebook, in a recent white paper published by the Libra Association (a non-profit organisation created to steer the development and roll-out of Libra, whose members include the social media giant alongside global players such as **Vodafone**, **Mastercard**, **PayPal**, **Coinbase** and **Visa**, venture capitalists and other multilateral organisations), has attempted to disassociate itself as the controlling force behind Libra.

The white paper said that while Facebook's teams played a key role in the development of the Libra Association and Libra blockchain, and they would continue to do so for the remainder of 2019, "final decision-making authority rests with the association", before pointing to **Calibra**, a regulated subsidiary of Facebook, that will "ensure separation between social and financial data and to build and operate services on its behalf on top of the Libra network".

Mersch, speaking in an official capacity for the ECB, was unconvinced, alleging: "Libra's ecosystem is not only complex, it is actually cartel-like," adding that certain members of the Libra Association, like any other corporate entity, "are only accountable to their shareholders and members" and have "privileged access to private data that they can abusively monetise".

Specifically, Mersch pointed to Libra's coins being issued by the Libra Association, which will "control the Libra blockchain and collect the digital money equivalent of seigniorage income on Libra".

He went on to criticise the arrangement that a Libra Association Council would make decisions on the Libra network's governance, as well as on the Libra Reserve, while payment services will be managed by Calibra and coins would exclusively be distributed "through a network of authorised resellers, centralising control over public access to Libra".

IN IT TOGETHER

More formally, Libra's set-up has already attracted scrutiny from the **European Commission** which, according to *Bloomberg*, last month sent out questionnaires to those tied to Libra, saying it is "currently investigating potential anti-competitive behaviour" relating to its proposed payment system that could have the power to alienate its rivals.

Libra aside, the nascence of blockchain-related technology in general – and its proposed usage – has led to a number of industry rivals, such as banks, teaming up via consortia to develop platforms that can fulfil certain requirements and functions within their specific sector.

Moreover, consortia can in some cases be found to compete with others in the same sector, such is the case in the shipping world which has 'TradeLens', an effort spearheaded by **Mærsk** and **IBM**, and the 'Global Shipping Business Network' that includes carriers **CMA CGM** and **Cosco**.

As has been witnessed in the automotive industry in Germany, market actions taken by groups of rivals in a sector can carry the risk of violating competition laws.

While industry collaboration to improve on standards is acceptable as long as it maintains competition, **David McCluskey**, a partner in **Taylor Wessing**'s corporate crime and fraud unit in London, says the fundamental question is "does the agreement (the collaboration) have as its object or effect, the prevention, restriction or distortion of competition within the European Union?"

Needless to say joint ventures, such as Libra, "do not generally start out with such an object. However as they grow in size and therefore influence in a market, it may eventually lead to having such an effect", he adds.

Kate Pollock, head of competition at **Stewarts**, echoes his sentiment that it all comes down to the intention of the participants.

She explains: "Cooperation between companies with the aim of improving innovation and increasing consumer welfare does not necessarily frustrate EU competition law, which is distinguishable from actionable cartel behaviour aimed at, or with the effect of, restricting innovation to the detriment of one's customers and/or consumers."

By way of example, Pollock points to the European Commission's current investigation into German car manufacturers **BMW**, **Daimler** and **VW** (Volkswagen, Audi, Porsche), who are being investigated for allegedly restricting competition on the development of technology to clean the emissions of petrol and diesel passenger cars and adds that “even with altruistic intentions companies still face a risk, as collusion between competitors could inadvertently lead to anticompetitive behaviour”.

As such, to mitigate against the risk of breaching competition laws, McCluskey suggests that companies should be very careful to avoid any behaviour that might be said to be evidence of a “prohibitive agreement”.

“In particular, discussions or communications around price, production, source of supply or the application of different conditions to equivalent transactions,” he notes, adding that companies or consortia that are particularly large in a given market (generally over 40% market share) should pay close attention to Article 102 Treaty on the Functioning of the European Union which prohibits abuse of a dominant position in the market; something the Commission has strongly focused its enforcement efforts on in recent times, particularly so in the technology sphere.

For **Lucy Rigby**, a senior associate at **Hausfeld** in London, Mersch’s comments on Libra make for interesting reading.

They “reflect the fact that Facebook’s new cryptocurrency raises a host of regulatory challenges – not simply from the point of view of the stability of the financial system and monetary supply”, but also in relation to competition law, she says, adding, “it’s not difficult to see why… the power that it appears will be wielded by the Libra Association has seemingly caught the eye of the Commission”.

“This is also of course all in the context of Facebook’s very significant market power with billions of users worldwide,” Rigby concludes.

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