

## LIBOR MANIPULATION: BREACH OF COMPETITION LAW?

Can the victims of LIBOR manipulation sue the banks for breach of competition law?

### The Facts

The LIBOR scandal is moving from allegations that banks manipulated the rate for their own ends, to allegations that (at least from 2008) they acted in collusion, encouraged by the Bank of England.

Last week, Paul Tucker of the Bank of England denied before Parliament that he encouraged Barclays to submit lower rates. He said, if Barclays thought otherwise, there must have been a misunderstanding.

However, this week, a May 2008 email from Tucker to Barclays emerged. It was entitled "LIBOR", and in it Tucker said:

*Have spoken to HSBC and RBS ... Sense similar across all three of you.  
I encouraged contact amongst Mark Dearlove peer group.*

Mark Dearlove was a member of Barclays' staff responsible for submitting LIBOR rates. The email is no smoking gun. It makes no request to reduce the rates. However, if it was shown to have encouraged collusion between Dearlove and his peers in HSBC and RBS, it could be an important piece of the jigsaw if banks other than Barclays are also found to have rigged LIBOR. Barclays' ex-CEO, Bob Diamond believes his bank's name is only the first in the frame because of its cooperation in the FSA probe.

### The Law

If the competition regulators find the banks have acted together in violation of the prohibition of anticompetitive agreement, that decision will be binding in private actions for damages by those who have suffered as a result. So, what is the prospect of such a finding? These are early days in a breaking story, so any analysis must be tentative, but here is ours.

#### **(a) The prohibition:**

Competition law prohibits agreements or concerted practices between businesses which have

- the **object** or **effect** of
- **preventing, restricting** or **distorting** competition.

#### *OBJECT OR EFFECT:*

The prevailing belief is that, if LIBOR was rigged downwards from 2008, the objective was to make the banks appear stronger at a time when their survival was in question, not to restrict competition *per se*. Therefore, any violation of the law would probably be one of effect, not object.

*PREVENTING, RESTRICTING OR DISTORTING:*

The FSA says LIBOR is a benchmark, fundamental to UK and international financial markets. According to the British Bankers' Association, swap worth £225tn and loans worth £6.4tn are indexed to LIBOR. Banking aside, the rate is used in private transactions, governing interest payments between counterparties in countless contracts, where one party's gain is the other's loss. Therefore it is hard to assess all the possible knock-on consequences of manipulation, and this article does not seek to do so. However, given the sheer volume of consequences, it seems unlikely that such a bomb could be detonated – enriching some and impoverishing others – without distorting competition.

In her paper <sup>(1)</sup>, Dr Arianna Andreangeli of Edinburgh University discusses how, even without manipulation, LIBOR is potentially anticompetitive insofar as it is a mechanism through which competitors pool sensitive, “fresh” and commercially significant information. Whilst LIBOR's legality has never been tested, Dr Andreangeli cites the European Court of Justice ruling in the Equifax case, that banks exchanging credit rating information was not necessarily unlawful. She draws parallels with the LIBOR example; but also distinctions, indicating that, even without manipulation, LIBOR does not have a 100% solid foundation of lawfulness.

**(b) Exemption:**

If there was no intention to act anticompetitively, and the unlawfulness was rather one of anticompetitive effect, the conduct could potentially be rendered lawful through exemption if there was a benefit to the public. The arguable benefit in this case would not be the usual one of efficiency savings in competitors' collaboration; but an extremely novel one that, in seeking to make the banks look stronger, the economy as a whole was shored up and a potentially catastrophic collapse was made less likely.

If the Bank of England was involved in manipulation, it is easy to see how it may have been motivated by the public interest. However, the test is one of actual benefit, not best intentions. Any benefit to the public would not have been in the anticompetitive effects themselves, but a countervailing benefit against which those ill effects would have to be weighed. Besides, it is not even clear whether rigging would have done more harm than good as, for example, if the true extent of the crisis was hidden, it may be that the bank bailouts, when they finally did come, were larger than would otherwise have been necessary.

This week, Joaquin Almunia, EU Competition Commissioner set out his stall, saying “a crisis is not at all an excuse” for failing to comply with competition law. That said, he would agree that, if rendered exempt in the public interest, the conduct would not be unlawful. However, whilst detailed analysis of the grounds for exemption is outside the scope of this article, it is ambitious to suppose it would be granted.

**(c) The prospects of a finding and “follow-on” damages claims:**

The EU's Competition Commission (as opposed to the UK's OFT) has jurisdiction over suspected infringements with a cross-border aspect, and it is investigating the alleged manipulation.

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<sup>1</sup> <http://www.law.ed.ac.uk/clie/blogentry.aspx?blogentryref=8983>

If the Commission finds that competition law has been infringed, victims would have the potential to sue for damages in the High Court or the Competition Appeals Tribunal without the need to establish liability. The Commission's findings would directly bind the Court or Tribunal, so the case could move directly to the question of what damages were caused by the infringement ... which may itself be a knotty issue.

The liability of those participating in cartels is "joint and several" so, unless there were novelties in the findings against the different participants, victims would largely be able to choose who they sued.

This week, Commissioner Almunia said he was increasing the allocation of resources to the investigation to deal with the case as quickly as possible, but he cautioned that "cartel investigations take time ... so I cannot anticipate a deadline", so the message is: Watch This Space. We will give updates on the progress of this enquiry.

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