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Of lending rates, information exchange agreements and competition-the Libor scandal and Article 101 TFEU

Posted on July 12, 2012 by admin

Banks are, once again, topping the news sheets, if they had ever stopped... And now it is for allegations of rigging the Libor exchange rate. It is already rather disconcerting that such an important element in the determination of banking rates-whose value affects the lives of so many people-is, at least in its face, set up relatively informally (the Beeb have a good piece on it: <http://www.bbc.co.uk/news/business-18613988>). What is even more worrying is that, it is alleged, a number of traders have used this mechanism to manipulate these offer rates, in other words, to artificially alter their value.

Determining artificially the value of Libor by declaring , however, is not a victimless crime, as the US authorities who have exacted an admission of liability from Barclays and other major banks, including the taxpayer owned RBS, have pointed out. Libor is the benchmarks for rates throughout the banking industry, affecting anything from mortgage to personal loan rates.

Apart from these considerations, the way in which these rates is set raises a number of potentially significant competition law questions: every day at 11am GMT, the "panel banks" communicate their offer rates to Thomson Reuters which collect these data on behalf of the BBA, for the purpose of setting an average rate of reference, which is then made public at 11:45am GMT (For an agile and easy to understand explanation of how the rate is determined see <http://www.global-rates.com/interest-rates/libor/libor-information.aspx>). So, nothing particularly "scientific", right? However, what is problematic is that this is a mechanism through which sensitive, "fresh" and commercially significant information are pooled: while the identity of each of the bank giving details of their interchange rate is only known to ThomsonReuters, who the "panel banks" actually are is openly known. It is therefore undeniable that the LIBOR calculation mechanism is the outcome of an information exchange arrangement among competitors, leading to the determination of a "reference rate" affecting a widespread variety and number of financial transactions and, therefore, impacting considerably on the trading conditions applied by key players on the banking market.

The legality of information exchange agreements is a vexed issue in competition law, which has been examined by the EU courts in a number of cases. In the banking market a parallel can be drawn with the credit rating information register at issue in the Asnef Equifax preliminary ruling (case C238/05, [2006] ECR I-11125), for instance. As is well known, in that case the Court of Justice took the view that an agreement for the exchange among banks of information relating to the "creditworthiness" of their clients, for the purpose of facilitating future decisions on whether to, inter alia, granting loans or other banking services to them, would not infringe Article 101 TFEU if a number of conditions were satisfied-in light of the domestic court's appreciation of each scheme (para. 54-56). Access to the register had to be granted in a non-discriminatory fashion, in the sense of being open to any bank of financial institution that may be interested in obtaining these services; the information concerned customers and not the members of the scheme-in other words, lenders should not be identified or identifiable; and perhaps most importantly, the market must not be excessively concentrated, for, if that was the case, enhancing its transparency could allow the existing competitors to reciprocally align their behaviour, thus distorting any remaining competition (see para. 57-60).

It is acknowledged that the LIBOR mechanism presents several distinguishing features from those of a "credit

rating register", such as the one in issue in *Asnef*: it concerns a "hypothetical" offer rate for borrowing from which banks can derogate. Also, the circumstance that, at least in its face, the identity of each bank is unknown to the others, thus not allowing them to "match" rates to institutions, should prevent tacit coordination from arising. However, it is undeniable that there are a number of significant similarities: just as with credit registers the identity of those to which the data refers (i.e. the "panel banks") is openly known; also, the final figure is the result of an average calculation that takes into account each of the rates submitted to the data pooling organisation. Perhaps most importantly, LIBOR is a "key reference rate"-a bit of a peg on which pretty much any other "significant" rate hangs. On this point, it should be reiterated that according to the Court of Justice in *Asnef*, information exchange arrangements do not, at least in principle, infringe Article 101 TFEU by reason of their 'object' and that regard should be had to their actual context. Thus, this analysis could well reveal that these agreements may escape being caught by Article 101 TFEU on the ground that they are likely to facilitate the provision of banking and financial system and therefore represent a "reasonable" restraint on the freedom of trade of the parties (see *Ausbanc*, *mutatis mutandis*, para. 47-49).

However, two further aspects merit consideration: the first concerns the state of the banking market. According to the *Asnef* preliminary ruling, one of the conditions for the lawfulness of the credit rating register arrangement was that the market not be "excessively concentrated", for, if that was the case, any further exchange of "sensitive information" could make coordination among competitors more likely and thereby render the agreement capable of appreciably distorting any remaining competition. On this point, it is accepted that the banking and financial markets are regarded as being worldwide: however, when regard is had to the state of the industry in the UK, one cannot deny that the British "domestic" segment of this market is characterised (for one reason or another) by the presence of a relatively small number of big players vis-a-vis which smaller banks can only represent a relatively limited countervailing factor when it comes to exerting competitive pressure. Against this background, it could be questioned whether reducing the uncertainty as to the fixing of key rates via the Libor mechanism could further limit the "space of manoeuvre" left to rivals on this market to the point that the arrangement may no longer represent a "reasonable" restraint on competition for the purpose of securing "meritorious" objectives of stability and good management in the provision of credit and other services.

The second consideration relates more closely to the alleged "rigging" of Libor rates, i.e. to the uncovered evidence that some banks had released artificial rates, i.e. rates that did not reflect the reality of their practices. In a recent post, my colleague Andreas Stephan expressed doubts that this practice could amount to, and should therefore be treated as a cartel, with all the consequences (especially criminal) that this carries (see:

<http://competitionpolicy.wordpress.com/2012/07/11/should-libor-rigging-be-treated-like-price-fixing/>): he emphasised among other features the fact that these figures "(...) are taken collectively as an indicator of how healthy those banks are individually and as a group. (...)" It may be agreed with Andreas that "(...) in this setting, some level of manipulation and tacit collusion seem inevitable (...)" due to the nature of the arrangement; nonetheless, it may be wondered whether, given the centrality of Libor within the banking industry and, perhaps most importantly, the artificial nature of the Libor value determined as a result of the alleged "rigging", the implementation of the scheme could have led to conditions of competition on the credit market that did not correspond to the actual nature and to the features of the market itself.

Against this background, the "big" question is whether, despite being in principle a "reasonable" restraint on the freedom to trade of banks and financial institution, the Libor arrangement may represent, due to the manner in which it was implemented, a unlawful restriction on competition 'by effect'. While it is acknowledged that (as Andreas does in the blog post I previously referred to) the "criminal response" may not be appropriate, due to the regulated nature of the industry and to the "systemic" concerns characterising its functioning, this is a central question in respect to the "civil" responses to the Libor scandal: could bank customers for instance seek compensation for damages allegedly suffered as a result of an "artificially high" interest rate, by reason of their bank having taken Libor as its "benchmark"? This is admittedly a scenario that is taking shape in the US; however,

as the BIS Consultation document seems to harbour a "new age" for standalone competition claims, it may not be excluded that the Libor scandal could lead to litigation in the UK courts as well.

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It is however beyond doubt that the most concerning aspect of the Libor scandal lies in the perceived inability of regulators to constrain and discipline the behaviour of a relatively small and supposedly "well-educated" group of undertakings that act in a prima facie tightly surveilled market: it is acknowledged that "rough traders" are to blame for many of these practices. However, it is equally clear that whoever was supposed to did not "see" or "hear" what was happening on the trading floor, thus revealing quite significant gaps in the internal governance as well as in the regulatory structure of an industry which should support the economy at this critical moment, just as the taxpayer did to it when banks really needed help.

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