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DOJ’s Top Antitrust Official Turns Spotlight on Broadened Scope of Bank Merger Enforcement

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In the wake of major bank failures in the US, the Department of Justice (DOJ) has signaled that it plans to step up antitrust enforcement of bank mergers. In June 2023, the DOJ’s Assistant Attorney General for Antitrust Jonathan Kanter delivered a speech at the Brookings Institution, providing listeners with insights into significant changes in the way the DOJ and bank regulators are reviewing proposed bank mergers. “[T]he division is modernizing its approach to investigating and reporting on the full range of competitive factors involved in a bank merger to ensure that we are taking into account today’s market realities and the many dimensions of competition in the modern banking sector,” stated Kanter.

While Kanter reported that the DOJ is working with federal bank regulators on new, formal guidance, he used the speech to provide informal, interim guidance on how the DOJ is currently evaluating bank deals. The DOJ’s new approach will subject banks proposing to merge to a wide-ranging review that is less easily resolved through branch divestitures, as has been common in the past.

With Secretary of the Treasury Janet Yellen predicting a wave of consolidation in the banking industry, and the Consumer Financial Protection Bureau’s continued focus on consumer protection risks arising from consolidation, banks looking to merge will find themselves navigating through new waters.

Background and procedure for bank merger review

The DOJ and the prudential bank regulators work closely together to investigate proposed bank mergers. By statute, the DOJ must evaluate whether the merger would violate antitrust laws and report its findings in a “competitive factors report” submitted to bank regulators. The bank regulators, for their part, may not approve any merger that violates antitrust laws, unless they conclude that any anticompetitive effects “are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.” If this criterion is not met, the DOJ may sue to block the merger in court under Section 7 of the Clayton Act – the same statute that governs mergers in other sectors.

Traditionally, in evaluating the competitive impact of a proposed bank merger, the DOJ has placed significant weight on local market shares and concentration statistics as measured by local deposits. Mergers that resulted in high concentration levels in local markets generally have been allowed to proceed, subject to divestitures of branches to other banks. Historically, the DOJ has negotiated branch divestiture settlements with the merging parties and appended these settlements to its competitive factors report submitted to bank regulators. The bank regulators have then incorporated the DOJ’s settlements into their orders approving these mergers.

The DOJ’s new approach

In the speech, Kanter shared his view that the DOJ’s historical approach – now three decades old – has not kept pace with developments in the banking sector. In particular, he noted that banks today “may compete in many more geographic areas, across many more business lines, and on many different dimensions than they did three decades ago.” He criticized the past approach as “disproportionally focus[ing] enforcement on transactions involving small local banks and understat[ing] network concerns relating to large national and multi-national banks.” He also noted that the DOJ’s past approach failed to account for the diverse set of customer financial needs in today’s economy.

To address these shortcomings, Kanter identified several significant changes in the DOJ’s approach to reviewing bank mergers.

The DOJ will apply a broader lens, use new metrics and consider additional dimensions of competition in evaluating the effects of a merger. The DOJ will consider how a proposed merger may affect competition in retail banking, small-business banking and large-to-midsize banking and will consider concentration levels using a wide range of metrics, beyond just bank overlaps and local deposits. While Kanter did not mention specific new metrics, he reported that the DOJ and federal bank regulators are working to augment their data sources. Kanter also noted that the DOJ's competitive factors report will go beyond a simple assessment of concentration levels to evaluate the likely impact of a proposed merger across a variety of dimensions on which banks compete – including "fees, interest rates, branch locations, product variety, network effects, interoperability, and customer service."

The impact on competition for different customer segments will be analyzed. Kanter also committed to evaluating the impact of proposed mergers on variety and choice, noting that customers' needs vary significantly in the modern banking system, and that "[t]o protect competition, antitrust enforcers must ensure that customers retain a meaningful choice as to the type of bank with which they do business by recognizing that different segments of customers have different needs and that substitution across different types of banks may be limited."

There will be increased scrutiny of all types of bank mergers and evaluation of a broader set of harm theories. Kanter cautioned that the DOJ will closely scrutinize mergers that increase the risk of anticompetitive coordination between banks, which has not been a major focus in banking in the past. Historically, the DOJ has instead focused on harm resulting from a reduction in head-to-head competition between the merging parties. Kanter also explained that, consistent with the DOJ's review in other sectors, DOJ staff will "examine the extent to which a transaction threatens to entrench power of the most dominant banks by excluding existing or potential disruptive threats or rivals." In short, no bank merger appears safe from DOJ scrutiny, with Kanter warning that the DOJ will "scrutinize any transaction that presents substantive legal concerns" – ranging from "small and local bank acquisitions" to those involving "the largest and most powerful actors."

The DOJ will step back from divestiture remedies. Kanter reminded the audience that the DOJ's job is "enforcing the law, not micromanaging or regulating the private sector," and thus, the DOJ's statutorily prescribed role in reviewing bank mergers is twofold: to provide federal banking agencies with an analysis of competitive factors and to enforce federal antitrust laws. Accordingly, Kanter stated that, going forward, the DOJ plans to focus on providing advisory opinions, as required by law, rather than on combining those opinions with divestiture agreements with merging parties, which has long been the norm. Kanter reasoned that "[w]e owe it to the public to maintain a high bar for the divestitures we will accept," and "[b]ranch divestitures may not always be adequate to address the broader range of competitive and antitrust concerns."

The bottom line

The DOJ's new approach creates significant uncertainty about how bank mergers will play out in the years ahead. Based on Kanter's speech, the DOJ appears more likely to find fault with specific bank mergers and less likely to sign on to proposed solutions in the form of branch divestitures. This will, in turn, create pressure on bank regulators who are prohibited from approving any merger that violates antitrust laws, unless they find that the merger's anticompetitive effects are outweighed by the public interest. Assuming bank regulators do not step in, we should expect the DOJ to bring more cases challenging bank mergers. This is particularly meaningful in a year where the industry has seen increased interest in such consolidation, particularly in the small-to-midsize bank sector, in no small part due to the recent, large-scale bank failures that continue to drive policy discussions in Washington, DC.

Banks proposing to merge may have a much higher hill to climb in convincing the DOJ and bank regulators that their proposed acquisitions will advance the public interest. We therefore recommend that banks considering transactions seek advice early in the process to help navigate the evolving regulatory landscape.

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