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Co-operation between Competition Agencies and Regulators in the Financial Sector - Note by the United States

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More documents related to this discussion can be found at: www.oecd.org/daf/competition/cooperation-between-competition-agencies-and-regulators-in-the-financial-sector.htm.

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United States

Antitrust Case Cooperation in the Financial Sector Following the Financial Crisis

1. The first part of this paper discusses the role of the Department of Justice Antitrust Division ("the Division") in prosecuting cartel crimes in the financial industry in the aftermath of the financial crisis. It then outlines the Division's review of the competitive effects of bank mergers in the United States.[1] Finally, the paper highlights recent case cooperation between the Division and financial regulators in the financial services sector and provides lessons learned from those experiences.

1. Department of Justice Antitrust Division Activity in the Financial Services Sector

1.1. Role of the Division in Prosecuting Cartels in the Financial Services Sector

2. Over the last ten years, the Division has vigorously pursued criminal prosecution of collusive behavior in financial services markets. Collusion in the financial services industry undermines the integrity of financial markets. As former Acting Assistant Attorney General Snyder recently noted, collusion in the financial markets "is no different than collusion regarding traditional products and services that the Antitrust Division routinely prosecutes."[2] In protecting American markets and American consumers, the Division holds not only corporations responsible, but also individuals.

3. Following the financial crisis, the Financial Fraud Enforcement Task Force was established to wage an aggressive, coordinated and proactive effort to investigate and prosecute financial crimes. The interagency task force brought together representatives from a broad range of federal agencies, regulatory authorities, inspectors general, and state and local law enforcement.[3] The task force aimed to improve efforts across the federal executive branch, and with state and local partners, to investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, combat discrimination in the lending and financial markets, and recover proceeds for victims of financial crimes.

4. The Division has been a participant in the Task Force from its inception, and since 2009 has convicted 150 individuals and obtained approximately $5 billion in corporate fines, penalties, and settlements from the prosecution of collusion and fraud

[1] As between the Department and the United States Federal Trade Commission, the Department has exclusive jurisdiction to review bank mergers and acquisitions. See 12 U.S.C. §§ 1828(c), 1849.

[2] See Press Release, U.S. Dep't of Justice, Second Foreign Currency Exchange Dealer Pleads Guilty to Antitrust Conspiracy (January 12, 2017), available at: https://www.justice.gov/opa/pr/second-foreign-currency-exchange-dealer-pleads-guilty-antitrust-conspiracy.

[3] With over 20 federal agencies, 94 United States Attorney's Offices, and state and local partners, the Task Force is the broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to combat financial fraud.

affecting currency markets, municipal bond investment agreements, benchmark interest rates, and real estate and tax lien auctions. Several of these enforcement actions are highlighted further below.

1.2. Role of the Antitrust Division and Financial Regulators in Review of Bank Mergers

5. In the United States, the federal antitrust laws generally apply to financial institutions in the same way as to other economic sectors. Special procedures, however, apply to the competitive review of bank mergers. Instead of the Hart-Scott-Rodino (HSR) Act of 1976,[4] which governs the antitrust review process for most industries, bank mergers are subject to the review process set forth in various federal bank statutes. As explained below, this process involves the filing of applications for approval with the relevant bank regulatory agency that oversees the bank and a concurrent competitive review by the Department of Justice's Antitrust Division.

6. After the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in 2010,[5] which eliminated the Office of Thrift Supervision (OTS), three federal bank regulatory agencies are in charge of reviewing bank merger applications in the United States: Federal Reserve, Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency.

7. Antitrust review of bank holding company and bank mergers are governed, in part, by the banking statutes, including the Bank Holding Company Act (BHCA)[6] and the Bank Merger Act (BMA).[7] The BHCA governs the application process for bank holding company mergers, and the BMA governs the review process for mergers of national or state banks. Pursuant to these statutes, bank holding companies and banks file applications for approval with the appropriate bank regulatory agency, and the agency forwards the application to the Department to enable a concurrent competitive review. Both the BMA and the BHCA require the applicable bank regulatory agency to consider the probable competitive effects of proposed mergers and to deny approval to those that threaten competition, unless the probable anticompetitive effects of the transaction are clearly outweighed by the probable effects on the convenience and needs of the community to be served.[8]

8. Under the BMA, a bank regulatory agency responsible for the bank merger application is required to seek comments from the Department prior to approving the

[4] 15 U.S.C. § 18. Note that the procedures described here apply only to transactions involving bank depository institutions. The passage of the Gramm-Leach-Bliley Act in 1999 allowed bank holding companies to own nonbank financial subsidiaries. Mergers of holding companies with both bank subsidiaries and nonbank financial subsidiaries are considered "mixed transactions" under the HSR Act. The nonbank component may be subject to the reporting requirements of the HSR Act and its waiting periods. These HSR Act procedures also apply to acquisitions of financial companies (such as investment banks) that do not include a depository institution.

[5] Pub. L. 111-203, 124 Stat. 1376 (2010).

[6] 12 U.S.C. §§ 1842, 1849.

[7] 12 U.S.C. § 1828(c).

[8] See 12 U.S.C. §§ 1828(c), 1842(c).

application.[9] The Department has thirty days from receipt of an agency's request to review the competitive effects of a proposed merger and must comment formally on the application by issuing a report on the merger's competitive factors.[10] After agency approval, the merging banks must wait thirty days after the date of approval before consummating the merger.[11] Antitrust immunity from challenge under Section 7 of the Clayton Act attaches if the Department does not file a lawsuit to challenge the transaction within the 30-day post-approval waiting period.[12] If the Department files suit, consummation of the transaction is automatically stayed until a federal district court conducts a *de novo* review of the transaction.

9. The BHCA governs mergers or acquisitions involving bank holding companies. Bank holding companies seeking approval under the BHCA file applications with the Federal Reserve. The competitive review procedures under the BHCA are similar to those under the BMA, although the BHCA does not expressly require the Federal Reserve to give the Department prior notification of a pending application, but rather requires only that the Federal Reserve provide to the Department a copy of its approval of the merger transaction. Nevertheless, because antitrust immunity attaches to these transactions after the specified post-approval waiting period, according to a long-standing practice between the Department and the bank regulatory agencies, the Federal Reserve follows the same procedures for applications filed under the BHCA as those set forth in the BMA.

10. Because of the concurrent review of bank mergers by the Department and the bank regulatory agencies, a significant level of inter-agency staff cooperation occurs on an ongoing basis. Initial review of the large number of bank merger applications received annually by the Department[13] is done through a "screening process."[14] The purpose of the screening is to identify proposed mergers that clearly do not have significantly adverse effects on competition and to allow them to proceed quickly. To provide guidance and transparency as to how the bank regulatory agencies and the Department review bank mergers, the Federal Reserve and the Department recently published *Frequently Asked Questions* (FAQs).[15] The FAQs set forth the common factors that the Federal Reserve and

[9] The bank merger review process described here applies to regular merger transactions and does not address emergency transactions or transactions that may require immediate agency action to prevent the probable failure of a financial institution.

[10] 12 U.S.C. § 1828(c) (4). See also J. Robert Kramer II, Antitrust Review in Banking and Defense, 11 Geo. Mason L. Rev. 111, 115, n.23 (2002). The Department reviews each proposed transaction and sends one of four competitive factors reports in response: (1) a "not significantly adverse" competitive factors report; (2) a "significantly adverse" letter; (3) a "conditional letter"; or (4) an "advisory report." The most recent "significantly adverse" letter was sent in 1999.

[11] If the proposed transaction does not raise competitive concerns, the post-approval waiting period may be reduced to 15 days with the concurrence of the Department.

[12] 12 U.S.C. §§ 1828(c), 1842, 1849(b).

[13] In 2015, the Department conducted competitive screenings of 595 bank applications. The Department's Ten Year Workload Statistics, which provide information on the number of competitive screenings conducted each year, are available at:

https://www.justice.gov/atr/division-operations.

[14] To facilitate the review process, the Department, the Federal Reserve, and the OCC first issued the Bank Merger Competitive Review Screening Guidelines in 1995. https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995.

[15] See https://www.justice.gov/sites/default/files/atr/legacy/2014/10/09/308893.pdf.

the Department consider in reviewing competitive effects, but also identify the differences between the agencies, when applicable.

11. Although the Department conducts a separate and independent competitive review, Department staff routinely provides to the bank regulatory agencies updates on the Department's analysis and investigations, as well as its proposed resolution of any anticompetitive effects. The Department also may consult with the bank regulatory agencies on timing and invite the agencies to have a joint meeting with the merging parties to discuss a proposed merger.

12. All parties involved in the banking industry benefit from the transparency of the competitive review process, the availability of reliable public information, and the close working relationship between the Department and the bank regulatory agencies.

2. Examples of Criminal Case Cooperation Between the Division and Financial Regulators

2.1. Municipal Bonds Investigation

13. Working with the Federal Bureau of Investigation (FBI) and the Internal Revenue Service's Criminal Investigation Division, the Division uncovered and prosecuted conspiracies to defraud municipalities across the United States by manipulating the competitive bidding process for the investment of tax-exempt bond proceeds. These illegal schemes reduce the amount of money that cities and towns can spend on civic projects, such as hospitals and schools, road repair, and affordable housing. Seventeen individuals were convicted or pleaded guilty.[16] One corporation also pleaded guilty.[17] Resolutions with several financial institutions resulted in $745 million in restitution, penalties, and disgorgement to federal and state agencies.[18] During the course of the investigation, the Division coordinated with the U.S. Securities and Exchange Commission, the U.S. Treasury Department's Office of the Comptroller of the Currency, and the Federal Reserve Bank of New York.

2.2. Manipulation of the London Interbank Offered Rate (LIBOR)

14. The Division, with the FBI and the Department of Justice Criminal Division, investigated and prosecuted manipulation of the London Interbank Offered Rate ("LIBOR"). The coordinated effort exposed schemes to rig benchmark interest rates in order to improve the trading positions of certain financial institutions. This conduct was particularly pernicious as it undermined confidence in the financial markets as the United States worked to recover from the 2008 financial crisis.

[16] See, e.g., Press Release, U.S. Dep't of Justice, Three Former UBS Executives Sentenced to Serve Time in Prison for Frauds Involving Contracts Related to the Investment of Municipal Bond Proceeds (July 24, 2013), available at: http://www.justice.gov/atr/public /press_releases/2013/299604.htm.

[17] See Press Release, U.S. Dep't of Justice, CDR Financial Products and Its Owner Plead Guilty to Bid-Rigging and Fraud Conspiracies Related to Municipal Bond Investments (Dec. 30, 2011), available at: https://www.justice.gov/opa/pr/cdr-financial-products-and-its-owner-plead-guilty-bid-rigging-and-fraud-conspiracies-related.

[18] See Antitrust Division 2013 Criminal Enforcement Update, available at: https://www.justice.gov/atr/public-documents/division-update-spring-2013/criminal-program.

15. The broader investigation relating to LIBOR and other benchmark rates required, and greatly benefited from, a wide-ranging cooperative effort among various law enforcement and financial regulatory agencies both in the United States and abroad. The U.S. Securities and Exchange Commission, U.S. Commodity Futures Trading Commission, U.K. Financial Conduct Authority and Serious Fraud Office, Japanese Ministry of Justice, Japan Financial Services Agency, Swiss Financial Market Supervisory Authority, Dutch Public Prosecution Service, and Dutch Central Bank all played major roles in the LIBOR investigation.[19]

16. The Division's joint investigation into the manipulation of LIBOR with the Department of Justice Criminal Division has resulted in guilty pleas from a number of individual defendants, as well as parent-level guilty pleas from major financial institutions.[20] Prosecutions in this matter are ongoing.

2.3. Foreign Currency Exchanges Investigation

17. Over the last several years, the Division, the Department of Justice Criminal Division, and the FBI have been investigating possible collusive activity intended to manipulate the price of U.S. dollars and other currencies exchanged in the foreign currency exchange ("FX") spot market. The investigation has resulted in prosecutions of both financial institutions and their traders for participating in price-fixing conspiracies to manipulate Central and Eastern European, Middle Eastern, and African ("CEEMEA") currencies, and the price of the U.S. dollar and euro exchanged in the FX spot market.

18. The U.S. dollar-euro FX spot market is one of the world's largest financial markets. On a daily basis, there are approximately $500 billion worth of U.S. dollars and euros traded in this market. Trading on the U.S. dollar-euro FX spot market is five times larger than all U.S. stock exchanges combined. Since 2015, four major Wall Street banks—Citicorp, JPMorgan Chase & Co., Barclays PLC, and The Royal Bank of Scotland plc—were sentenced to pay criminal fines totaling more than $2.5 billion and three individuals have been indicted and await trial.[21] Two additional individuals pleaded guilty for conspiring to suppress and eliminate competition by fixing prices in CEEMEA currencies.[22]

19. The Division's investigation has been coordinated with numerous U.S. federal and state financial regulators, including the Commodity Futures Trading Commission, Office of the Comptroller of Currency, the Securities and Exchange Commission, New

[19] See Press Release, U.S. Dep't of Justice, Libor Investigation 2014, available at: http://www.justice.gov/atr/public/divisionupdate/2014/libor.html#press-releases.

[20] See Press Release, U.S. Dep't of Justice, Five Major Banks Agree to Parent-Level Guilty Pleas (May 20, 2015), available at: https://www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas.

[21] See Press Release, U.S. Dep't of Justice, Three Former Traders for Major Banks Indicted in Foreign Currency Exchange Antitrust Conspiracy (Jan. 10, 2017), available at: https://www.justice.gov/opa/pr/three-former-traders-major-banks-indicted-foreign-currency-exchange-antitrust-conspiracy.

[22] See Press Release, U.S. Dep't of Justice, Second Foreign Currency Exchange Dealer Pleads Guilty to Antitrust Conspiracy (Jan. 12, 2017), available at: https://www.justice.gov /opa/pr/second-foreign-currency-exchange-dealer-pleads-guilty-antitrust-conspiracy.

York State Department of Financial Services, and the Federal Reserve Board, as well as with foreign enforcers in more than ten jurisdictions.

3. Impact of Regulatory Environment on Criminal Enforcement: Lessons Learned

20. The Division's work in the financial services sector since the financial crisis has shown the importance of coordination between enforcers and regulators in protecting financial markets from collusive and fraudulent behavior. As described above, the Division's cases in the financial services sector frequently involve multiple financial regulators, both domestic and foreign. This multidimensional nature of investigations, where numerous regulators and enforcers are conducting separate investigations into the same conduct, can create complex issues.

21. Incorporating the financial regulatory agencies into settlement discussions with criminal defendants early on is one lesson learned from the Division's enforcement actions in the financial services industry. The goals of enforcement agencies and financial regulatory agencies are not always the same, and the impact an enforcement action will have on the integrity of the financial system is often a concern of regulators. This was particularly true in the wake of the financial crisis, as many financial institutions around the country were failing. Additionally, enforcement agencies and regulators often have different tools. For example, as an enforcement agency, the Division has the ability to levy fines against companies and individuals, and imprison individual defendants, but financial regulatory agencies may have the ability to seek other remedies for illegal conduct, such as debarment. Working together to craft global settlements, where law enforcement agencies and regulators are both at the table during negotiations, can help ensure that prosecutions of financial crimes serve as an effective deterrent to illegal cartels in the financial services industry, while also allowing regulators to protect market integrity.

22. Another important takeaway from the Division's enforcement actions in the financial services industry is the importance of early planning to coordinate parallel proceedings with regulatory agencies. While the Division prosecutes cartels criminally, most financial regulators in the United States are pursuing civil or administrative actions. These very different investigative processes can lead to conflicts and have a significant impact in litigation. This has become particularly important as the Division is increasingly interacting with foreign financial regulators, as highlighted by the LIBOR and foreign currency exchange cases noted above.

23. A recent example of the complexities that can arise in the context of financial regulators conducting administrative enforcement actions in parallel with a criminal prosecution is *U.S. v. Allen and Conti*, a prosecution in the LIBOR matter. In this case, a financial regulator in the United Kingdom civilly compelled the testimony of Allen and Conti in the course of the agency's administrative action. Allen and Conti were later prosecuted criminally in the United States by the Department of Justice Antitrust and Criminal Divisions. In a recent appeal of their conviction, the Circuit Court of Appeals for the Second Circuit held that the Fifth Amendment right against self-incrimination prohibits the use of compelled testimony in a U.S. criminal proceeding even when a foreign agency has compelled the testimony. The Appeals Court held in this case that one of the cooperating witnesses' testimony was tainted by his exposure to transcripts of the defendants' testimony that was compelled by the U.K. financial regulator in the course of a civil proceeding abroad. This situation demonstrates the challenges that can arise when

multiple foreign authorities are involved in investigating the same conduct, and highlights that enforcers and regulators stand to benefit from enhanced communication, coordination and planning with their counterpart agencies.[23]

24. As there continues to be a focus on ensuring the competitiveness and viability of the world's financial markets, it is crucial for enforcement agencies and regulators to improve communication, coordination, and planning to achieve effective enforcement.

[23] See Press Release, U.S. Dep't of Justice, Acting Assistant Attorney General Andrew Finch Delivers Keynote Address At Annual Conference On International Antitrust Law And Policy (September 14, 2017), available at: https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-keynote-address-annual-conference