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BLOG

Banks Beware: DOJ to Double Down on Antitrust Enforcement in The Financial Services Sector

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In recent remarks at the University of Michigan Law School, Deputy Assistant Attorney General Michael Murray announced that the Department of Justice is ramping up its focus on antitrust enforcement in the financial services sector.

DAAG Murray explained that technological innovation is changing how the financial services sector functions, and the growth of fintech "benefits consumers with innovative, low cost, and convenient products and services." But anticompetitive conduct that hinders innovation is a threat to American consumers. As such, the Antitrust Division now intends to "lean in" and play a more "muscular role" in the banking industry, fintech, and the financial markets going forward.[1]

The DOJ's plan to "lean in" on the financial services sector has three parts.

1. **Increased Antitrust Enforcement in Financial Services**

First, the DOJ plans to continue its "aggressive enforcement of the antitrust laws to police the financial markets." As DAAG Murray noted, the DOJ has already been actively pursuing antitrust cases in the financial markets since the financial crisis. During this time, the Antitrust Division has secured more than 40 criminal convictions and billions of dollars in criminal fines for cartel conduct such as bid rigging and market manipulation. Thus, according to Murray, the Division's heightened enforcement attention is more of an improvement in "degree," rather than in "kind."

It remains to be seen how much the DOJ's activity in the financial services sector will actually increase. However, DAAG Murray's emphasis on the importance of disruptive technology and innovation suggests that the DOJ may begin pursuing cases based on different theories of anticompetitive conduct beyond the types of bid rigging and market manipulation it has pursued historically.

2. **Revamping the DOJ's Expertise in Financial Markets**

The second part of the DOJ's plan is less speculative. The Antitrust Division is taking steps to improve its ability to analyze the financial services markets. As discussed in our recent post, this includes reorganizing the Division's subsections and redistributing responsibilities for various sectors.

Previously, responsibilities for reviewing conduct and mergers in the credit card, debit card, and banking spaces were spread across three separate Antitrust Division sections. DAAG Murray explained that the rise of innovative technology in the finance space has "blurred the lines between financial technology services, credit cards, and banking. These technologies compete amongst themselves in certain circumstances and also may compete with the traditional business models of credit card companies and banks."

To adapt to the changing times, the Antitrust Division has consolidated responsibility for banking, financial services, credit cards, and debit cards under a new "Financial Services, Fintech, and Banking" section.

Murray, the leader of this new section, feels that the consolidation is already paying off as the new section is purportedly reviewing a number of mergers involving fintech firms, new market entrants, and potentially disruptive emerging technologies. Indeed, Murray promised that the DOJ would "be vigilant to make sure that traditional business models are not using acquisitions to improperly frustrate innovation and harm consumers."

The DOJ is also currently accepting public comments on possible revisions to its 1995 Bank Merger Competitive Review guidelines, which have not seen a substantive update in nearly two decades. Of note, the DOJ is eyeing potential modifications to the Herfindahl-Hirschman Index (HHI) that applies to bank mergers, which were excluded from the HHI updates incorporated in the 2010 Horizontal Merger Guidelines.

The DOJ is also considering how the guidelines should account for the increasing role of technology in American banking. For example, one proposed change would be to include online lenders and other "nontraditional banks" when evaluating a proposed bank merger's effect on the market. As one commentator has noted, inclusion of online lenders could provide a more realistic picture of the competitive landscape, and encourage mergers among smaller financial institutions in rural areas.

3. **The DOJ Antitrust Division's Enhanced Relationship with the SEC**

The third facet of the DOJ's plan for the financial sector is a "robust partnership with the SEC." Murray said that "[t]his partnership is about being prepared to take proactive steps to protect competition in the financial markets."

As part of this revamped relationship, the DOJ has supported SEC efforts to improve competition and transparency in the securities markets. The DOJ and SEC have also signed a memorandum of understanding that empowers the two agencies to confer and share information regarding law enforcement and regulation of competition in the securities markets.

Predicting Future Roadblocks the DOJ May Face in the Finance Sector, Including the Supreme Court

Murray also recognized that the Antitrust Division's previous efforts in the industry have included navigating potential conflicts with securities regulation and the doctrine of implied preclusion or repeal. Courts apply an implied preclusion analysis in cases where the antitrust laws are being enforced in industries that have their own regulatory regimes. As Murray noted, the trend in Supreme Court case law has been to apply the doctrine as a bar to antitrust enforcement of conduct that is otherwise regulated by the securities laws. Suggesting that this may be part of the Court's broader skepticism of antitrust claims, Murray noted that "[o]ne common denominator of Supreme Court antitrust cases for the 2000s, however, is that the antitrust plaintiff loses."

Murray's commentary on the Supreme Court's treatment of antitrust cases was prescient. The same day, Supreme Court nominee Judge Amy Coney Barrett faced questions at her confirmation hearing about recent Court rulings that "have made enforcing the antitrust laws more difficult."[2]

Judge Barrett focused her responses on the broad nature of the Sherman Act's language. As the nominee put it, "The Sherman Act is broadly worded, insofar as it prevents contracts, combinations, and conspiracies in restraint of trade." This broad language, Judge Barrett said, "essentially permits the court to develop a common law" to enforce the goals of the statute. Given her lack of previous antitrust rulings, it remains unclear what long-term effects Judge Barrett's ascension to the Supreme Court would have on the antitrust landscape, or ultimately on the DOJ's ability to pursue antitrust cases in the financial services sector and other regulated industries.

Key Takeaways

- The DOJ's Antitrust Division has signaled that it is focusing on the financial markets and financial services sector.
- In particular, the DOJ appears to be concerned with anticompetitive conduct against fintech companies and other market entrants that seek to disrupt the status quo.
- The DOJ may also place greater scrutiny on vertical acquisitions that involve potentially disruptive fintech companies and market infrastructure providers.
- Financial services providers should exercise extreme caution in sharing information with competitors about new market entrants, and should also carefully consider the competitive ramifications of any potential acquisitions.

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[1] Deputy Assistant Attorney General Michael Murray, "The Muscular Role of Antitrust in Fintech, Financial Markets, and Banking: The Antitrust Division's Decision to Lean In," U.S. Dep't of Justice (Oct. 14, 2020), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-michael-murray-delivers-remarks-university-michigan-law

[2] Bryan Koenig, "Barrett Says Antitrust Law Mostly 'Controlled by Precedent,'" Law360 (Oct. 14, 2020), https://www.law360.com/articles/1319727.

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