The Applicability of the Federal Antitrust Laws to Bank Mergers

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To what extent should the antitrust laws apply to bank mergers? After extended committee hearings, Congress has found it desirable to legislate for the second time in six years an answer to this question. Public Law 89-356, amending the Bank Merger Act of 1960, was signed by the President on February 21, 1966. This article reviews briefly some of the pertinent background and sets forth the principal provisions of the new legislation. For brevity, the term "merger" will be used to include consolidations, acquisitions of assets, and assumptions of deposit liabilities as well as mergers.

PRE-1960 BACKGROUND

Prior to 1960, controls over bank mergers were incomplete, and ineffective with respect to the competitive aspects involved. There were gaps in the controls exercised under the banking statutes by the Federal banking agencies (the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation). Mergers in some cases could be effected without obtaining Federal approval, and even in those cases where approval was required the statutes prescribed no standards by which the appropriate Federal banking agency was to be guided in determining the significance to be attributed to the anticompetitive effects of a proposed merger.

Moreover, the antitrust laws had apparently provided no solution. There was little experience by which to judge the usefulness of the Sherman Act in dealing with bank mergers. Section 1 of that act prohibits unreasonable restraints of interstate trade or commerce,[1] and Section 2 prohibits monopolizing and attempts to monopolize any part of such trade or commerce.[2] No bank merger case under the Sherman Act had come before the United States Supreme Court, and the thrust of that act in the regulated field of banking had yet to be authoritatively determined. In addition to the apparent ineffectiveness of the Sherman Act, it was understood, by probably every responsible Government official who took a position on the question between 1950 and 1960, that Section 7 of the Clayton Act, as amended in 1950,[3] prohibiting specified corporate acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly", would not apply to the usual method of merging banks through asset acquisitions.[4]

The legislative history of the Bank Merger Act of 1960 leaves no doubt that the competitive effects or possible antitrust implications of bank mergers were the major reasons prompting adoption of that act. It was emphasized

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[1] Section 1 of the Sherman Act, 15 U.S.C. §1, provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

[2] Section 2 of the Sherman Act, 15 U.S.C. §2, provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

[3] Section 7 of the Clayton Act, as amended in 1950, 15 U.S.C. §18, provides in part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[4] This understanding was due, in part, to the terms of Section 7. As amended in 1950, Section 7, by its literal terms, reached acquisitions of corporate stock or share capital by any corporation engaged in commerce and acquisitions of corporate assets but only by corporations "subject to the jurisdiction of the Federal Trade Commission". Since bank mergers were not considered as being accomplished through stock acquisitions and since banks were not subject to the jurisdiction of the Federal Trade Commission, it was understood that Section 7 did not apply to the usual method of merging banks.

that competition is an indispensable element to a strong and progressive banking system. These considerations, as well as the important gaps that existed prior to 1960 in the Federal law governing bank mergers, were stressed as the reasons why legislation was necessary.

THE BANK MERGER ACT OF 1960

The Bank Merger Act, as enacted on May 13, 1960, required the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation—depending on whether the resulting, acquiring, or assuming bank was to be a national bank (or a District of Columbia bank), a state member bank, or a nonmember insured bank—to pass upon applications for mergers. In so doing, the following six so-called banking factors were to be considered: (1) the financial history and condition of the banks involved, (2) the adequacy of their capital structure, (3) their future earnings prospects, (4) the general character of their management, (5) the convenience and needs of the community to be served, and (6) whether the corporate powers of the banks were consistent with the purposes of the Federal Deposit Insurance Act. In addition, the responsible agency was required to take into consideration "the effect of the transaction on competition (including any tendency toward monopoly)". The Bank Merger Act provided that the responsible agency "shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest". The Bank Merger Act thus made the "public interest" the ultimate consideration with regard to bank mergers. Although the responsible agency "in the interests of uniform standards" was required, except in a case involving the probable failure of one of the banks, to request reports on the competitive factors from the other two banking agencies and from the Attorney General, these reports were merely advisory. The final decision as to whether the proposed merger was in the public interest was to be made by the responsible agency on the basis of a balancing of the competitive factors and the so-called banking factors. The Senate defeated a proposed amendment which would have made the competitive factors controlling.

Although the Bank Merger Act was silent as to the applicability of the antitrust laws to a merger approved by the responsible banking agency, it was generally understood that Congress intended that the banking agency's decision on a proposed bank merger would be determinative. A recent report of the Senate Banking and Currency Committee states that at the time the Bank Merger Act was passed "it was clearly expected that the decision of the responsible Federal banking authority . . . would be final and conclusive".

Accordingly, it seemed with the passage of the Bank Merger Act in 1960 that that act was to be the paramount statutory provision governing bank mergers. But then came the *Philadelphia* and *Lexington* cases.

In 1963, the United States Supreme Court held in *United States* v. *Philadelphia National Bank et al.*[5] that the proposed merger of The Philadelphia National Bank and the Girard Trust Corn Exchange Bank of Philadelphia, which had been approved by the Comptroller of the Currency under the Bank Merger Act, would violate Section 7 of the Clayton Act, as that section was amended in 1950. The understanding that such section did not apply to bank mergers accomplished through asset acquisitions was thereby laid to rest.[6] In the following year, the United States Supreme Court in *United States* v. *First National Bank & Trust Co. of Lexington et al.*[7] held that the consummated merger of First National Bank and Trust Company of Lexington, Kentucky, and Security Trust Company of Lexington, which had been approved by the Comptroller of the Currency under the Bank Merger Act, constituted a violation of Section 1 of the Sherman Act. In effect, these decisions meant that bank mergers approved by the appropriate Federal banking agencies under the Bank Merger Act were not rendered immune from challenge under the antitrust laws, and that in antitrust suits bank mergers would be measured solely by the standards of the antitrust laws unencumbered by the standards of the Bank Merger Act. In his *Philadelphia* dissent, Mr. Justice Harlan said, "The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy". Many Congressmen agreed with this position.

Thus, the Federal law applicable to bank mergers had turned out to be quite different from the law as it was generally thought to be upon the enactment of the Bank

[5] 374 U.S. 321 (1963).

[6] In his majority opinion, Mr. Justice Brennan concluded that Congress intended the 1950 amendment to give Section 7 of the Clayton Act a reach which would bring mergers within its scope. Although the literal terms of the section would appear to limit its coverage, as noted in n. 4, *supra*, the stock-acquisition and asset-acquisition provisions, *read together*, were viewed as reaching mergers which, Mr. Justice Brennan said, fit neither category perfectly but lie somewhere between the two ends of the spectrum. So construed, Section 7 was held to embrace bank mergers.

[7] 376 U.S. 665 (1964).

Merger Act. Moreover, since there was no applicable statute of limitations, mergers approved under the Bank Merger Act, and mergers consummated prior to its enactment, were potentially vulnerable to antitrust attack.

The *Lexington* case not only demonstrated the potential thrust of the Sherman Act in the merger area, but also involved the difficult problem of divestiture since in that case, unlike *Philadelphia*, the merger had been consummated prior to the United States Supreme Court decision. Following the *Lexington* decision, the United States District Court for the Eastern District of Kentucky ordered the consolidated bank to create a separate institution that would be the competitive equal of the former Security Trust Company. The divestiture problem gained wide recognition when the District Court for the Southern District of New York held in *United States* v. *Manufacturers Hanover Trust Company*[8] that the consummated merger of Manufacturers Trust Company and The Hanover Bank, approved by the Board of Governors of the Federal Reserve System under the Bank Merger Act, violated Section 1 of the Sherman Act and Section 7 of the Clayton Act.

THE NEW LEGISLATION

In an effort to clarify the applicability of the antitrust laws to bank mergers, the Senate, in the first session of the current Congress, passed S. 1698. This bill would have exempted past approved and consummated bank mergers from antitrust attack, including those as to which antitrust suits were then pending. The bill would have required that future bank mergers not be consummated until thirty days after the date of approval by the appropriate banking agency under the Bank Merger Act. If the Attorney General did not institute an antitrust suit during the thirty-day period, the merger could be consummated and thereafter would be exempt from attack under the antitrust laws. If an antitrust suit were instituted during the thirty-day period, however, the bill would not have changed the apparent rule of the *Philadelphia* case to the effect that, in an antitrust suit involving a merger approved under the Bank Merger Act, the merger would be measured solely by the standards of the antitrust laws.

In contrast, the legislation, as modified by the House Banking and Currency Committee and enacted this year, establishes identical standards to be applied by the Federal banking agencies in approving merger applications and by the courts in judging such proposed mergers in antitrust suits brought by the Attorney General (other than under Section 2 of the Sherman Act). This new legislation, in amending the Bank Merger Act of 1960, is designed to accomplish the following:

1. A proposed merger "which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States"[9] may not be approved by the responsible Federal banking agency. The responsible agency, however, may approve a proposed merger "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly,[10] or which in any other manner would be in restraint of trade",[11] but only where it finds that the "anticompetitive effects of the proposed transaction 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". In making its determination, the responsible agency is, "in every case", to consider "the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served"—this language revises the language of the six so-called banking factors of the Bank Merger Act of 1960.

2. The responsible banking agency, before acting upon a proposed merger, is required to request reports on the competitive factors from the other two agencies and the Attorney General, except that reports may be dispensed with where immediate action is necessary to prevent the probable failure of one of the banks involved. The reports must be furnished within thirty days of the request but, where an emergency exists requiring expeditious action, the reports must be furnished to the responsible agency within ten days. As under the Bank Merger Act of 1960, these reports are not binding upon the agency responsible for approving the merger.

3. An approved merger may not be consummated before the thirtieth day following the date of approval by the responsible banking agency, except that this period would be shortened to five days in those cases found by the responsible agency to be emergencies requiring expeditious action, and an approved merger could be consum-

[8] 240 F. Supp. 867 (S.D.N.Y. 1965).

[9] Compare Section 2 of the Sherman Act, *supra* n. 2.

[10] Compare Section 7 of the Clayton Act, as amended, *supra* n. 3.

[11] Compare Section 1 of the Sherman Act, *supra* n. 1.

mated immediately in order to prevent the probable failure of one of the banks involved. The Attorney General, who is to be immediately notified of approval by the responsible agency, can institute an action under the antitrust laws arising out of the merger, but only if he commences the action prior to the expiration of the prescribed waiting period. The House Banking and Currency Committee Report indicates that these prescribed time limitations do not relate to antitrust actions brought under Section 2 of the Sherman Act, and such actions may be brought at any time. In an antitrust action brought by the Attorney General within the prescribed period, the court would "review *de novo*" the issues presented, but would be required to apply standards "identical" with those to be applied under the new law by the responsible banking agency in approving the merger. The merger could not be consummated after such suit is commenced unless the court otherwise specifically orders. In such suit, the Federal banking agency concerned and the state bank supervisory agency having jurisdiction within the state involved may appear as a party and be represented by counsel. The House report indicates that this provision would even permit the appropriate state bank supervisory agency to present its views in a case involving the merger of two national banks.

4. The following bank mergers are, in effect, exempt from any attack under the provisions of the antitrust laws, other than under Section 2 of the Sherman Act:

(a) Future mergers approved under the new law as to which the Attorney General does not institute suit prior to the expiration of the prescribed waiting period.

(b) Past mergers consummated before June 17, 1963, the date of the *Philadelphia* decision, and not as yet unscrambled pursuant to final court order.

(c) Past mergers consummated on or after the date of the *Philadelphia* decision and before enactment of the new law, except those as to which suits have been brought before enactment.

These provisions exempt, except as to Section 2 of the Sherman Act, some 2,200 bank mergers consummated since 1950 (including over 700 approved under the Bank Merger Act of 1960) which might otherwise continue to be, at least potentially, vulnerable to antitrust attack. Among those so exempted are the three pre-*Philadelphia* mergers as to which antitrust suits were then pending in the courts, involving Continental Illinois National Bank and Trust Company of Chicago (Illinois), First Security National Bank and Trust Company of Lexington (Kentucky), and Manufacturers Hanover Trust Company (New York). The *Manufacturers Hanover* action was terminated on March 7, 1966, and the *Continental Illinois* action was terminated on March 11, 1966. With respect to the *Lexington* case, it has been reported that the Justice Department is considering pressing for a favorable decision under Section 2 of the Sherman Act. (The Government had alleged violations in that case under both Section 1 and Section 2 of the Sherman Act, but the United States Supreme Court decision was based solely on Section 1.) These provisions do not exempt the three post-*Philadelphia* cases pending in the courts, involving Crocker-Citizens National Bank (California), Mercantile Trust Company National Association (Missouri), and Third National Bank in Nashville (Tennessee); and, in these suits, the new bank merger standards are to be applied.

5. Pre-enactment merger applications, which were withdrawn or abandoned as a result of objection or suit brought by the Attorney General, may be reinstituted and are to be acted upon in accordance with the new law.

The standards imposed by the new law have been praised, on the one hand, as providing certainty, uniformity, and promptness in the resolution of antitrust questions involved in bank mergers, and condemned, on the other hand, as vague and uncertain.

It would seem that the new law is intended to modify the application by both the courts and the Federal banking agencies of the antitrust laws to future bank mergers. Ultimately, of course, it will be up to the courts to resolve the extent of this modification; some clarification should be forthcoming in the cases now pending in the Federal courts.