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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Mergers in Financial Services, which was held by the Committee on Competition Law and Policy in June 2000.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of several published in a series entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les fusions dans le secteur des services financiers, qui s'est tenue en juin 2000 dans le cadre de la réunion du Comité du droit et de la politique de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegate submissions, and the background paper, the following key points emerge:

- *In many OECD countries, the last few years have witnessed a substantial increase in the frequency and significance of bank mergers. The increased activity is driven by four interactive forces: regulatory reform; ongoing globalisation in both financial and non-financial markets; excess capacity/financial distress; and technological change including the development of electronic banking.*

So far, most of the bank mergers have taken place among banks based in the same national market, but there is an increasing incidence of cross-border deals. Among OECD countries, there are few remaining regulatory barriers standing in the way of such take-overs. There may, however, be a number of political obstacles.

As the following points illustrate, consideration of bank mergers in OECD countries normally involves the application of economy-wide merger guidelines and practices, tailored to the specifics of the banking industry.

- *Typically the first stage of analysis involves a preliminary assessment based on concentration ratios as to whether or not a proposed bank merger is likely to harm competition. This, in turn, requires attention to the definition of the relevant markets. Banks offer a large number of products and services to a number of different classes of customer. The size of the relevant geographic market differs among products and among different customers, and so might the identity of firms serving the different markets.*

As reflected in various country submissions, market definition is a highly empirical issue that should be addressed by examining consumers' actual willingness to substitute in response to changes in relative prices. The nature of the relevant market will differ from product to product, customer to customer and country to country.

Important differences in geographic markets would be missed if competition agencies insisted on identifying a single product market such as one grouping together all the services traditionally offered by commercial banks. In addition, such a grouping could lead to errors in assigning market shares. The competition provided by firms specialising in mortgages would be ignored, for example, if the market were defined to be a commercial banking cluster.

In the case of business lending, loans to small and medium sized enterprises (SMEs) should be distinguished from loans to large businesses. This is due first and foremost to differences in the average size of loans made to the two groups of firms. Enterprises with large financial requirements are much more able to bear the substantial fixed costs associated with borrowing directly from national or even

international capital markets as opposed to proceeding through a financial intermediary. It follows that loans to larger businesses may have a wider set of product substitutes than do loans to SMEs.

Not only are SMEs more dependent than larger businesses on bank loans, this is also true as regards dependence on local banks. There are three reasons for this. First, larger businesses tend to take out larger loans, hence are more willing to incur the fixed transactions and information costs required to search for and borrow from more distant banks offering more favourable terms. Second, SMEs generally have a greater need for a local depository for cash and cheques. This point acquires greater significance when it is noted that compared with a larger business, an SME's ability to obtain bank credit on reasonable terms is more likely to be improved by locating its transactions accounts in the same bank it borrows from. Third, again as regards establishing creditworthiness, SMEs find it relatively more important to develop and maintain good personal relationships with bank managers/loan officers. This is arguably easier to do when the SME and bank are located close together.

- *Low post-merger concentration ratios in appropriately defined antitrust markets usually indicate an absence of significant competition problems, but high concentration levels are inconclusive unless barriers to entry are also high. In considering barriers to entry in banking, particular attention should be paid to the extent to which electronic banking developments have reduced the need for extensive, expensive branch networks and lowered the cost of monitoring.*

Before the advent of automated teller machines (ATMs), electronic funds transfer at point of sale (EFTPOS), and Internet banking, it was widely believed that barriers to entry in some banking markets were reasonably high because of the need for a network of branch offices. Some commentators hold that electronic banking has greatly reduced the need for branches and simultaneously considerably widened geographic markets. Others maintain that many customers consider electronic access to their accounts and to nearby branches to be complement rather than substitute.

If it turns out that electronic banking is more a complement than a substitute for traditional branch banking, electronic banking may not only fail to lower barriers to entry, it may actually raise them. This is because new entrants will be under competitive pressure to provide the same geographic access to ATM and EFTPOS networks as larger incumbent banks offer. That will either require significant investments in creating new networks or obtaining access on reasonable terms to existing networks. The latter option would seem to be more cost effective, but it may be difficult to negotiate. Larger banks may be in a position to charge higher access fees to smaller new entrants than the fees they charge each other.

Since SMEs are particularly prone to suffer from anti-competitive bank mergers, it is worth noting that the impact of electronic banking on such clients is not yet clear or uniform. On the one hand, electronic banking should lower the costs of screening potential borrowers and monitoring at a distance, thereby increasing the number of potential lenders to SMEs. Indeed, there is a growing use of computerised credit scoring models in making some types of loans to SMEs. On the other hand, SME's may find that certain kinds of loans continue to be cheaper and easier to arrange with local as opposed to distant banks. These are the loans for which a lending bank's credit assessment depends heavily on having the borrower's transactions account business, and on developing a close personal relationship with the borrower.

In the long run, the effect of electronic banking on barriers to entry will depend on more than how such developments impact on the need for local branches. It will also be linked with how standards are developed and with whether banks are permitted to merge or enter joint ventures with significant telecommunications companies and/or Internet players. Both issues are being closely watched in areas where electronic banking is currently most developed.

- *Any examination of barriers to entry must include a look at switching costs. These could be quite significant in certain banking markets, especially for households and SMEs.*

At least three countries presented evidence that many customers are reluctant to switch all or part of their business across different banks. This could be due to the administrative difficulties encountered in altering direct electronic payment arrangements and/or costs of establishing a reputation for creditworthiness. The second point is likely to be much more important for households and SMEs than for larger businesses.

In the extreme case where consumers are highly reluctant to switch, bank competition focuses only on new customers or newly established businesses.

- *Where banks hold considerable equity positions in non-financial companies, some bank mergers can lead to a post-merger bank having considerable influence over competing enterprises. This may call for appropriate divestments in bank holdings to be made prior to a merger being approved*

The most radical form of this problem arises when a bank merger directly implies a merger among non-financial companies. Traditional merger review would apply in such cases. Less extreme situations include those in which bank shareholdings confer the power to influence rather than control the managements of downstream competing enterprises. Ideally, such problems should be addressed through divestments. A second best solution would be restrictions concerning representation on the governing bodies of affected enterprises.

- *As in other sectors, bank mergers might create important efficiencies as well as potential anti-competitive effects. Such efficiency claims should carry little if any weight in a merger review unless they are specific to the merger, and there is good reason to believe the efficiencies will be realised post-merger.*

Bank mergers posing risks for competition are often justified on the basis of certain efficiency benefits such as economies of scale and scope and/or reductions in risk obtained through loan diversification. Existing research underlines the need for caution in assessing such claims, including in determining whether savings in back office costs may be obtainable through other arrangements less anti-competitive than a proposed merger.

Experience has shown that bank mergers are more likely to deliver on claimed efficiencies if the more efficient of the merging banks will be in firm control post-merger, and that enterprise has already been involved in a successful bank acquisition.

- *Branch divestiture and behavioural constraints are both used to attenuate the anti-competitive effects associated with some bank mergers. Competition agencies have good reasons for generally preferring divestitures, but these must be carefully executed to ensure that clients rather than merely bricks and mortar are passed on to the purchaser.*

Behavioural remedies, such as requiring certain terms and conditions to be applied to loans post-merger or obtaining commitments that the management of an acquired bank will enjoy some continued autonomy are notoriously difficult to monitor and enforce. As a result competition authorities typically prefer some form of divestiture, i.e. a "structural" solution. In banking mergers, however, even the structural approach typically calls for a considerable investment in time and effort by the competition agency.

Branch divestitures seek to create new or stronger competition for a merging bank. To achieve that result, a competition agency must be closely involved in choosing exactly which branches are divested and who is permitted to buy them. It should also devote attention to constraining for some transitional period what the merging bank is permitted to do in terms of trying to retain or win back staff or clients associated with the divested branches. Such constraints are particularly relevant in the typical case of divestments being made with the intention of reducing competition problems in local markets. In such situations, customers of the surviving bank may have the option of remaining with that institution by switching to another nearby branch.

When the post-merger bank will carry the name of a pre-existing bank, it would be helpful to concentrate any necessary divestment on branches bearing name(s) that will be eliminated by the merger.

- *In most countries, bank mergers are subject to review by prudential regulators as well as competition offices. To the extent both agencies act proscriptively rather than prescriptively, there should be little conflict between them. Formal co-operation accords exist in many countries and have played a constructive role in reducing uncertainties associated with multiple agency review.*

Competition policy and prudential regulation, to the extent that both seek to prohibit undesirable behaviour, are mutually compatible. In particular, as long as both prudential and competition authorities confine themselves to blocking undesired (rather than forcing or requiring) mergers, banks will have no difficulty abiding by both agencies' merger decisions.

As regards certain mergers, prudential regulation and competition policy can be complementary. A prominent example is mergers creating "too big to fail" banks, i.e. banks that are so large that market participants assume the government would take whatever steps might be necessary to preserve their solvency in a crisis. Such banks might be inclined to take what regulators regard as excessive risks. Banks seen by consumers as too big to fail could also give rise to competitive distortions since they may have an artificial advantage in raising funds, especially in markets where deposit insurance is inadequate.

There is a limited potential for conflict between prudential and competition policy goals when it comes to mergers designed to shore up a failing or weakened bank. Even in such cases, however, it will normally be possible to avoid competition problems by choosing the right partner, or by structuring the merger so as to minimise its effects on local market concentration. In any case, conflict between prudential and competition policy goals can be reduced by close co-operation, including prior consultation between the pertinent agencies.

SYNTHÈSE

par le Secrétariat

Les points ci-après ressortent des débats de la table ronde, des communications des délégués et de la note d'information :

- *Dans beaucoup de pays de l'OCDE, les fusions entre banques sont devenues de plus en plus nombreuses et importantes ces dernières années. Cette activité s'est développée sous l'impulsion de quatre facteurs et de leur interaction : la réforme de la réglementation, la mondialisation des marchés financiers et des autres marchés, l'apparition de capacités excédentaires ou de problèmes financiers, et le changement technologique, notamment le développement des services bancaires électroniques.*

Jusqu'à présent, la plupart des regroupements de banques ont eu lieu entre des établissements faisant partie du même marché national, mais les opérations internationales sont de plus en plus nombreuses. Dans les pays de l'OCDE, il n'y a plus guère d'obstacles réglementaires à la réalisation de ces opérations. En revanche, un certain nombre d'obstacles politiques peuvent s'y opposer.

Comme on le verra ci-après, les fusions entre banques dans les pays de l'OCDE sont normalement assujetties à des pratiques et principes généraux en matière de fusion, adaptés aux spécificités du secteur bancaire.

- *En règle générale, la première phase de l'analyse consiste à effectuer une évaluation préliminaire sur la base de ratios de concentration, afin de déterminer si une fusion entre banques risque de nuire à la concurrence. A cette fin, il convient de définir les marchés pertinents. Les banques offrent un grand nombre de produits et de services à de multiples catégories de clients. La taille du marché géographique pertinent est variable suivant les produits et les clients, et l'identité des entreprises qui desservent ces différents marchés peut aussi varier.*

Comme le révèlent plusieurs communications nationales, la définition du marché est un travail très empirique qui suppose que l'on examine dans quelle mesure les consommateurs sont effectivement prêts à changer de fournisseur en cas de modification des prix relatifs. La nature du marché pertinent varie d'un produit à un autre, d'un client à un autre et d'un pays à un autre.

Des différences importantes dans les marchés géographiques risquent de ne pas être prises en compte si les organismes responsables de la concurrence veulent absolument identifier un seul marché de produits regroupant tous les services traditionnellement offerts par les banques commerciales. En outre, un tel regroupement risque d'entraîner des erreurs dans la répartition des parts de marché. Par exemple, la concurrence représentée par les entreprises spécialisées dans le crédit hypothécaire ne sera pas prise en compte si le marché est défini comme un groupement de services bancaires commerciaux.

Dans le cas du crédit aux entreprises, il convient d'établir une distinction entre les prêts aux petites et moyennes entreprises (PME) et les prêts aux grandes entreprises. Cela tient principalement aux différences dans le montant moyen des prêts consentis aux deux catégories d'entreprises. Les entreprises

qui ont d'importants besoins financiers sont mieux à même de supporter les coûts financiers élevés liés aux emprunts directs sur les marchés de capitaux nationaux ou même internationaux, sans passer par un intermédiaire financier. Il en résulte que les prêts aux grandes entreprises peuvent être remplacés par un plus grand nombre de produits que les prêts aux PME.

Non seulement les PME sont plus tributaires que les grandes entreprises du crédit bancaire, mais elles sont aussi plus tributaires des banques locales. Il y a trois raisons à cela. Premièrement, les grandes entreprises contractent généralement des emprunts plus importants, et elles sont donc plus disposées à assumer les coûts fixes de transaction et d'information qu'implique la recherche de banques géographiquement plus éloignées leur offrant des conditions de crédit plus favorables. Deuxièmement, les PME ont en général plus besoin de disposer de facilités de dépôt locales pour leur trésorerie et leurs chèques. Ce point est particulièrement important si l'on considère que, par comparaison avec une grande entreprise, une PME pourra vraisemblablement obtenir un crédit bancaire à des conditions raisonnables plus facilement si elle effectue ses transactions par l'intermédiaire de la banque auprès de laquelle elle emprunte. Troisièmement, du point de vue de la solvabilité, les PME accordent relativement plus d'importance à l'établissement et au maintien de bonnes relations personnelles avec les dirigeants des banques et les responsables des services de prêts. Or, cela est sans doute plus facile lorsque la PME et la banque sont à proximité l'une de l'autre.

- *De faibles taux de concentration après fusion sur des marchés concurrentiels définis de façon appropriée témoignent de l'absence de véritables problèmes de concurrence, mais de hauts niveaux de concentration ne permettent pas de se prononcer, à moins que les obstacles à l'entrée soient eux aussi élevés. Pour déterminer les obstacles à l'entrée dans le secteur bancaire, il convient d'accorder toute l'attention voulue au fait que l'évolution des services bancaires électroniques a rendu moins nécessaire le maintien de réseaux de succursales étendus et donc coûteux, et a réduit le coût de la surveillance.*

Avant l'arrivée des guichets automatiques de banque (GAB), du transfert électronique de fonds au point de vente (TEF/TPV) et des services bancaires par l'Internet, il était largement admis que les obstacles à l'entrée sur certains marchés de services bancaires étaient raisonnablement élevés, étant donné la nécessité de disposer d'un réseau de succursales. Certains commentateurs estiment que les services bancaires électroniques ont considérablement réduit l'utilité des succursales et ont simultanément élargi de façon très sensible les marchés géographiques. D'autres pensent que de nombreux clients considèrent l'accès électronique à leur compte et l'existence d'une succursale à proximité comme complémentaires, l'un ne pouvant se substituer à l'autre.

S'il apparaît que les services bancaires électroniques complètent les succursales bancaires traditionnelles plutôt qu'ils ne s'y substituent, le développement de ces services pourrait non seulement de ne pas faire baisser les obstacles à l'entrée, mais les accroître. En effet, les nouveaux venus se verront obligés, pour des raisons de concurrence, d'assurer le même accès géographique aux réseaux de GAB et de TEF/TPV que les grandes banques en place. Ceci exigera soit des investissements significatifs par la création de nouveaux réseaux, soit l'obtention d'un accès dans des termes raisonnables aux réseaux existants. La deuxième option semblerait être la plus avantageuse, mais ce pourrait être difficile à négocier. Celles-ci seront sans doute en mesure d'imposer aux nouveaux venus des redevances d'accès plus élevées que celles qu'elles s'imposent mutuellement

Étant donné que les PME risquent d'être particulièrement défavorisées par les fusions anticoncurrentielles entre banques, il convient de noter que l'impact des services bancaires électroniques sur cette clientèle est encore difficile à déterminer et est loin d'être uniforme. D'un côté, les services bancaires électroniques devraient réduire le coût de filtrage des emprunteurs potentiels et de contrôle, accroissant ainsi le nombre de créanciers potentiels pour les PME. De fait, des modèles informatiques de calcul des cotes de crédit sont de plus en plus utilisés pour l'octroi de certaines catégories de prêts aux

PME. D'un autre côté, les PME obtiendront peut-être à moindre coût et plus facilement certaines catégories de prêts auprès de banques locales. Il s'agit des prêts pour lesquels l'évaluation de la cote de crédit par la banque créancière est grandement facilitée si cette dernière est chargée des transactions commerciales de l'entreprise et s'il existe une relation personnelle étroite avec l'emprunteur.

A terme, l'incidence des services bancaires électroniques sur les obstacles à l'entrée dépendra davantage de leurs effets sur l'utilité des succursales locales que sur la manière dont cet effet s'exercera. Elle dépendra aussi de la manière dont les normes seront établies et de la possibilité pour les banques de se regrouper ou de créer des entreprises conjointes avec de grandes entreprises de télécommunications et/ou des acteurs importants de l'Internet. Ces deux questions sont examinées de façon approfondie dans les domaines où les services bancaires électroniques sont actuellement les plus développés.

- *Tout examen des obstacles à l'entrée devra tenir compte du coût du changement de fournisseur. Ce coût peut être relativement important sur certains marchés de services bancaires, en particulier pour les ménages et les PME.*

Trois pays au moins ont indiqué que de nombreux clients hésitent à changer de banque pour tout ou partie de leurs opérations. Cela tient sans doute aux difficultés administratives soulevées par toute modification des dispositifs de paiement électronique direct et/ou au coût que représente l'établissement de la cote de crédit. Le second point est sans doute beaucoup plus important pour les ménages et les PME que pour les grandes entreprises.

Dans le cas extrême où les consommateurs ne sont pas du tout prêts à changer de fournisseur, la concurrence entre banques se concentre exclusivement sur les nouveaux clients ou les nouvelles entreprises.

- *Lorsque les banques détiennent des participations importantes dans des sociétés non financières, certaines fusions peuvent conduire à la constitution d'une banque ayant une influence considérable sur des entreprises concurrentes. Dans ce cas, un certain désengagement des banques peut se révéler nécessaire avant l'autorisation de la fusion.*

Ce problème se pose de façon particulièrement aiguë lorsqu'une fusion entre banques entraîne directement une fusion entre sociétés non financières. Le contrôle traditionnel des fusions jouera alors son rôle. La situation est moins tranchée lorsque les participations des banques leur confèrent le pouvoir d'influencer les dirigeants des entreprises concurrentes en aval, sans pour autant les contrôler. Face à ces problèmes, la solution optimale est la cession d'activités. Si celle-ci n'est pas possible, des restrictions peuvent être imposées en ce qui concerne la représentation des banques dans les conseils d'administration des entreprises.

- *Comme dans d'autres secteurs, les fusions entre établissements bancaires peuvent renforcer notablement l'efficience mais aussi avoir des effets anticoncurrentiels. Les gains d'efficience ne doivent pratiquement pas entrer en ligne de compte dans le contrôle d'une fusion, à moins qu'ils soient spécifiques de la fusion considérée et qu'il y ait de bonnes raisons de penser qu'ils se réaliseront effectivement après celle-ci.*

Les fusions entre établissements bancaires qui font peser des risques sur la concurrence sont souvent justifiées par des gains d'efficience, comme des économies d'échelle et d'envergure et/ou une diminution des risques grâce à la diversification des prêts. Les recherches en cours donnent à penser qu'il convient de faire preuve de prudence dans la prise en compte de ces arguments, et notamment de déterminer si des économies de tâches administratives peuvent être réalisées par d'autres moyens qui seraient moins anticoncurrentiels que la fusion proposée.

L'expérience révèle qu'une fusion entre banques permet d'autant plus d'améliorer l'efficience que la plus efficace des banques parties à la fusion joue un rôle important après celle-ci et que l'entreprise a déjà participé à une acquisition de banque.

- *La cession de succursales et les contraintes de comportement sont utilisées pour atténuer les effets anticoncurrentiels de certaines fusions entre banques. Les organismes responsables de la concurrence ont de bonnes raisons de préférer généralement la cession de succursales, mais celle-ci doit se dérouler de façon appropriée, de sorte que ce soit bien la clientèle, et non simplement les installations, qui soit transférée à l'acheteur.*

Les mesures comportementales, telles que l'obligation d'appliquer certaines conditions aux emprunts après une fusion ou d'obtenir la garantie que les dirigeants d'une banque qui a été acquise bénéficieront encore d'une certaine autonomie, sont notoirement difficiles à contrôler. Par conséquent, les autorités chargées de la concurrence préfèrent généralement certaines formes de cessions, c'est-à-dire une solution "structurelle". Dans les fusions entre banques, cependant, même l'approche structurelle exige généralement des investissements considérables en temps et en énergie de la part de l'autorité de la concurrence.

Les cessions de succursales visent à créer une concurrence nouvelle ou plus intense pour la banque issue de la fusion. Dans cette optique, l'autorité de la concurrence doit participer étroitement au choix des succursales à céder et à celui des entreprises qui pourront les acquérir. Elle doit aussi s'efforcer de limiter, pendant une période de transition, la marge de manœuvre de la banque issue de la fusion en ce qui concerne la préservation ou la reprise de salariés ou de clients des succursales cédées. Ce point est particulièrement important dans le cas courant où la cession a pour objet d'atténuer des problèmes de concurrence sur un marché local. Dans ce cas, les clients de la banque issue de la fusion auront la possibilité de le rester en devenant clients d'une autre succursale voisine.

Lorsque la banque issue de la fusion porte le même nom que l'une des banques parties au regroupement, il est souhaitable de faire en sorte que les cessions concernent des succursales portant un nom qui disparaîtra à l'issue de la fusion.

- *Dans la plupart des pays, les fusions entre banques sont contrôlées par des organismes de régulation prudentielle ainsi que par les autorités de la concurrence. Dans la mesure où ces deux catégories d'organismes ont une attitude prospective et non normative, les risques de conflit sont peu importants. Des accords de coopération formelle existent dans de nombreux pays et ont joué un rôle constructif dans la réduction des incertitudes liées à l'exercice d'une surveillance par de multiples organismes.*

La politique de la concurrence et la réglementation prudentielle sont mutuellement compatibles, dans la mesure où elles visent toutes deux à interdire les comportements indésirables. En particulier, tant que les autorités de réglementation prudentielle et de concurrence se limitent à interdire les fusions non souhaitables (au lieu d'imposer ou d'exiger des fusions), les banques n'ont pas de difficulté à respecter les décisions de ces autorités.

Dans certains cas de fusion, la réglementation prudentielle et la politique de la concurrence peuvent être complémentaires. Il en est ainsi, notamment, des fusions qui donnent naissance à des banques "trop grandes pour faire faillite", c'est-à-dire des banques qui sont si importantes que les marchés pensent que l'Etat prendra toutes les mesures nécessaires pour préserver leur solvabilité en cas de crise. De telles banques peuvent être incitées à prendre des risques que les régulateurs considèrent comme excessifs. Si les consommateurs pensent que certaines banques sont trop grandes pour faire faillite, cela peut aussi entraîner des distorsions de la concurrence, puisque ces banques peuvent bénéficier d'avantages artificiels pour lever des fonds, en particulier sur des marchés où l'assurance des dépôts est insuffisante.

Il existe des possibilités limitées de conflit entre les objectifs de la réglementation prudentielle et ceux de la politique de la concurrence lorsqu'une fusion vise à renflouer une banque en difficulté ou affaiblie. Cependant, même dans ce cas, il sera normalement possible d'éviter les problèmes de concurrence en choisissant un partenaire approprié ou en structurant le regroupement de manière à réduire au minimum ses effets sur la concentration au niveau du marché local. En tout état de cause, les conflits entre objectifs de réglementation prudentielle et objectifs de politique de concurrence peuvent être réduits par une étroite coopération, et notamment par des consultations préalables entre les organismes compétents.

BACKGROUND NOTE

1. Introduction

Even a periodic reading of the financial press is sufficient to reveal that bank mergers, especially involving very large banks, have become more frequent in the past few years both in and outside the OECD. [1] The headlines frequently announce merger plans between companies already ranking among the top five or ten of their countries' banks, and many such announcements are accompanied with new global scorecards of the world's largest banks. While they do not receive the same prominence, bank mergers involving small and medium sized banks are also continuing at a rapid pace, especially in the United States, Germany and Switzerland.

At the time this paper was written, it could still be said that the bulk of the ongoing bank consolidation was occurring within single nations, but there have already been some prominent exceptions, e.g. Deutsche Bank's take-over of Banker's Trust, BBV's (Spain) merger with Bancomer (which created Mexico's largest bank), and the HSBC take-over of CCF (France).

As with most worldwide phenomena, there appear to be global causes for the bank merger wave. Four basic interactive forces are at work: regulatory reform; international consolidation of markets [i.e. globalisation]; excess capacity/financial distress; and technological change.[2]

As noted in connection with a February 1998 OECD roundtable examining the role of competition in the regulation of banks: "... there has been a substantial relaxation in certain regulations such as direct controls on interest rates, fees and commissions, as well as restrictions on lines of business, ownership and portfolios." [OECD/CLP (1998a, 7)] The ownership related changes include steps to facilitate foreign direct investment in the banking sector. Taken together, the regulatory reforms have tended to promote more open, competitive markets. The resulting competitive pressures have been augmented by some globalisation of banking, and by a trend to disintermediation. Banks have been losing part of their traditional business as more and more large enterprises go directly to capital markets. [3] That trend is good news for investment banking (providing advice and finance related to major restructuring), but tends to create over-capacity in traditional bank lending. Excess capacity and financial distress has been particularly problematic in Korea and Japan where many banks have suffered major financial reversals in the last few years.

All these changes have been linked in various ways to technological developments significantly affecting the banking sector. Changes in information technologies, data processing and telecommunications are clearly linked to growth in the use of credit and debit cards, automated teller machines (ATM's), and on-line banking. They have also facilitated the creation of new financial products and could lead to the customisation of many existing ones.[4]

The fourfold developments we have alluded to probably go a long way to explaining why so many banks are opting to merge. What, however, are the effects of such mergers on efficiency and market power? In seeking to answer that question in specific cases, competition agencies are faced with a number of difficult issues. The purpose of this paper is to examine those issues, and to explore as well the inter-relationship between competition and other public policies of significance in bank mergers.

2. Developments in electronic banking - are branches becoming significantly less important to banks, or are they merely changing roles?

We begin by discussing electronic banking developments (i.e. ATMs and Internet banking), because they have a significant impact on issues discussed later. By dramatically reducing information and transaction costs, electronic banking could change the group of services that clients wish to bundle together and therefore affect product market definitions. It could also significantly widen geographic markets for some products. In addition, electronic banking could decrease barriers to entry by reducing the need to set up extensive branch networks, hence affect whether a merger will indeed be anti-competitive.

Electronic banking began in earnest when ATMs were widely deployed and began to produce considerable cost savings for banks. Some commentators expected that ATMs would significantly reduce the need for branches, but this has not apparently happened. Writing about barriers to entry in banking, one expert has stated:

> ...electronic retail banking may someday substantially break down barriers to entry by banks into local banking markets. However, at this time, as available data show and numerous commentators have observed, very few people are doing electronic banking in a way that leads them to obtain basic banking services from banks located anywhere in the country. Electronic banking, to date, is generally used simply as an added convenience for dealing with one's local bank, such as using ATMs primarily as cash dispensers or using telephones to check account balances.... [Rhoades (1997, 1004)]

This was also the conclusion of the Australian Competition and Consumer Commission (ACCC) which, in the course of reviewing a 1997 bank merger, determined that despite developments in electronic banking, branches were still necessary, particularly for deposits, transaction accounts, credit cards and small business banking.[5] A year later, Canada's Competition Commissioner took a similar position concerning the impact of ATMs and debit cards as well as telephone, personal computer and Internet banking [see von Finckenstein (1998a, 15-16)]. His somewhat sceptical view of electronic banking was nuanced, though, by noting that potential competition is not decisively important in Canadian merger review practice, unless it can be counted on to neutralise *in less than two years* any increased market power associated with a merger.

The European Commission seems more optimistic than Australia and Canada concerning the potential positive impact of electronic banking. After noting that the 1998 Forties/G-Bank merger would create the strongest market network in Belgium (e.g. the merged entity would account for 35 to 39 percent of the branches in the Nainaut and Namur/Walloon Brabant areas) the European Commission observed:

> ...this will not confer on it a dominant position since consumers will have sufficient competitors' banking outlets at hand. Furthermore, the existence of cash-dispensers, electronic banking and telephone banking minimise the effect of any strong position in this respect. [European Commission (1998, para. 22)]

This view gain some support from a recent OECD publication where it is stated that:

> ...retail customers are making increased use of electronic trading platforms. Accordingly, many innovations in the design and delivery of financial services are based on the use of the Internet as a means of reaching customers. In the minds of some observers, the Internet represents a phenomenal change in network distribution capacity, providing institutions with a means of delivering a variety of services and products to consumers at a decided cost advantage in local, national and global markets, all with a great degree of immediacy.[6]

That opinion is rendered more credible by various announcements concerning electronic banking by major banks in a number of countries. Deutsche Bank is a particularly prominent example.[7] One of the main motives behind its attempted merger with Dresdner Bank was to facilitate a move out of retail branch banking. The significance of this may, however, be more apparent than real since the merging banks' branches appeared to have been heading not for closure but rather for re-focusing by a new owner.[8] It seems clear that retail bank branches will have to diversify into a wider range of products in order to survive. In the previously mentioned Canadian bank merger case, the Competition Commissioner noted that:

> Personal contact, including advice and problem solving, remains key for sales of many financial products. All of the major banks are in the process of reconfiguring their branches to improve their sales capability, and have underlined the continuing importance of branch banking to build and maintain the relationships between bankers and their personal and business customers. [von Finckenstein (1998a, 15)]

Because of a surplus of bank branches in Germany and the competition of well-entrenched state supported banks, such a diversification may not have been attractive to Deutsche Bank.[9] From its perspective, greater profits apparently could be made by focusing on investment banking, asset management for wealthy individuals, and a number of other increasingly globalised markets [see Tony Barber (2000)]. Interestingly, the same article reporting that Deutsche Bank's Chairman had a preference for electronic banking over traditional branches, also noted that at least one large US bank found branches to be quite important in generating new Internet business.[10]

Our brief look at electronic banking produces only two reasonably firm conclusions. First, its significance for merger review probably varies a great deal from country to country and perhaps even from case to case. Second, whatever its current level of significance, competition officials will have to pay more attention to electronic banking in future.[11]

3. Market definition

Market definition is typically the first stage in making a preliminary estimate of post-merger market power based on market shares. In order to be reasonably acceptable indicators of market power, market shares should be calculated bearing in mind consumer and supplier willingness to substitute.[12] To simplify presentation, this paper will assume that markets are defined by considering consumer responses to relative price changes. Estimated supplier responses to such price changes are assumed to be accounted for by assigning hypothetical market shares when concentration indices are calculated.

One possible product market definition results from application of the "cluster" approach. It was prominently featured in a 1963 court decision, United States v. Philadelphia National Bank, where the United States Supreme Court held that: "[T]he cluster of products (various kinds of credit) and services (such as checking accounts and trust administration denoted by the term 'commercial bank'...composes a distinct line of commerce."[13] That particular cluster, evolving somewhat through a series of court decisions in the 1960's and 1970's, included, "...consumer loans and consumer banking services as well as business loans and products." [Rozanski and Rubinfeld (1997, 256)] The 1963 Supreme Court decision also decided that the geographic market was local in nature.

The cluster approach to market definition may be consistent with defining markets in terms of consumer willingness to substitute in response to changes in relative prices. This requires, however, that the cluster can be justified on the basis of "transactional complementarities", rather than demand

complementarities.[14] The appropriateness of any cluster of products is first and foremost an empirical question, well summed up as follows:

> For a cluster market to exist it would appear that a number of conditions must be satisfied. If consumers (*a*) face substantial transaction costs in having more than one banking relation; (*b*) these unbundling costs are large in relation to the cost of the cluster; and (*c*) the demand for one component of the cluster depends on the price of the "whole cluster of products" and not necessarily on its own price, then products are likely to form a cluster market. Similarly, if banks offer and sell their services on the basis of an overall price, examining the market in terms of product cluster should be pursued. [Case Associates (1999, 1)]

While the United States Federal Reserve Board (USFRB) has generally applied the cluster approach to bank mergers, the Antitrust Division of the United States Department of Justice (USDOJ), which has the power to bring court challenges to Federal Reserve Board approved mergers, rejects the cluster approach. Rozanski and Rubinfeld (1997, 256-257) state:

> In the case of the "commercial banking cluster", some firms in fact compete very effectively in supplying some, but not all, products in the cluster. In addition, although consumers and businesses do tend to purchase multiple services from their primary financial institution...they... unbundled purchases today, and would likely unbundled to a greater extent if their current bank increased prices of some products in the cluster. The cluster market approach appears to understate competition in the market by ignoring the role of specialised providers of some services.
>
> The cluster market approach may [also] overstate competition in the market by wrongly inferring from the existence of abundant competition to supply one product in the cluster that competition in other product markets is sufficient. For example, the Federal Reserve defines geographic markets in the US for the cluster based in part on commuting patterns. This is sensible in the case of consumer banking products, for which consumers consider services from banks located near their home or near their work to be good substitutes. But the resulting geographic markets are sometimes far larger than is appropriate to analyse competition for many small business bank products, for which proximity of the bank to the place of business is key. In cases in which the structure of competition is not homogeneous throughout the broad geographic market, the cluster market approach may miss adverse effects of the merger on local competition.

The USDOJ's view appears to enjoy general support among the competition policy community.[15] It is also interesting that the USFRB may be moving away from its traditional cluster approach. [16]

Before taking a closer look at geographical market definition, the matter of loans to small and medium sized businesses merits further consideration, as does the issue of differentiating between depository and non-depository institutions plus banks and near banks.

A number of competition offices have blocked or modified mergers because of perceived adverse effects on small and medium sized businesses.[17] Such enterprises may not have good alternatives to bank supplied lines of credit for which interest accrues only on the amount actually borrowed. That flexibility is particularly important to small and medium sized businesses which may be unable to predict their credit needs with any great certainty. In addition:

> A second factor that accounts for the relative success of local banks in providing lines of credit is that their knowledge of local business conditions tends to make them better informed about the risks associated with a young firm or new business start-up, and their proximity to local

> businesses tends to lower costs of monitoring performance and updating information about credit risk. Local banks are therefore likely to be able to identify small businesses that are better credit risks and compete successfully for their business by offering relatively favourable terms.... In the case of lines of credit, distant suppliers lacking a branch network or significant presence in a local market are likely to regard all but the most well established small businesses as relatively high risks. Distant suppliers may compete successfully to make loans that the better informed, local lenders also identify as high risk, but they may not be competitive in the case of borrowers that local lenders identify as relatively good risks. *It is competition to supply services to these relatively low risk borrowers that is at issue from a merger of banks in a given geographic area.*[18]

The *United States v. Philadelphia National Bank* 's commercial bank cluster market definition implicitly separates banks from non-depository institutions. There is evidence supporting the appropriateness of this distinction from the antitrust point of view. It is not overly persuasive, however, because it does not consistently apply a substitutability approach to market definition and rests heavily on data from a single country and a single set of economists, i.e. those affiliated with the USFRB.[19] It should be conceded, however, that the United States has one of the best-developed sets of alternative savings vehicles and arguably the most sophisticated capital market in the world. If United States commercial banks are indeed in a separate antitrust market from non-depository institutions, this distinction probably holds as well for many other countries.

Although it may make sense to differentiate between depository and non-depository institutions, at least as regards small business loans and personal banking, "commercial banks" are not necessarily in a separate market from various near banks. With regard to Australia, Avkiran (1999, 993) reports:

> Major trading banks are facing more competition from local banks, building societies, credit unions and mortgage originators. Particularly in the last few years, there has been a blurring of lines separating the domain of major banks and others. Taking advantage of legislative and technological changes, the so-called state banks and building societies are competing head-on with larger banks both across geographical boundaries and product range. Effectively, the Australian banking sector is experiencing a convergence. For example, major trading banks that traditionally relied on their deposit base to lend are increasingly financing their home loans through securitisation. This has come about as a direct result of mortgage originators' success in providing low-cost home loans. Similarly, non-bank institutions are increasingly packaging their services with products traditionally offered by banks. In the next few years, major banks in particular are expected to undergo further restructuring with emphasis on generating revenue from fees rather than the interest spread.

The forces for convergence in other countries' bank markets are likely just as strong as in Australia and may be having a similar effect in terms of changing what constitutes an appropriate product market in bank merger cases.

As Rozanski and Rubinfeld noted (see above), the main practical difference between the cluster approach and the more selective approach followed by the USDOJ and many other competition agencies shows up in geographic market definition, i.e. different products lumped together in a particular cluster could have very different geographical markets.[20] The ACCC provided a good example of this in its review of the merger between the Westpac Banking Corporation and the Bank of Melbourne (BML) in 1997. The ACCC defined two basic product groups: "large corporate banking"; and "retail banking". The former did not require much analysis because BML had not operated in that market. As for retail banking, the ACCC delineated six product markets - see Box - and found important differences in their geographic

extent. This particular delineation would not necessarily apply to all bank mergers in all countries. It has similarities, however, to product lists developed in other jurisdictions.[21]

Product and Geographic Market Delineation in the ACCC's Review of the Westpac/Bank of Melbourne Merger[22]	
Product Market	**Geographic Market**
Deposits (term deposits and longer term 'investment' type deposits)	State wide markets
Home loans (residential mortgages)	National market
Personal loans	Regional markets[23]
Small business banking (a cluster composed of: transaction facilities; physical depository facilities; loans; and processing for credit card and electronic funds transfer at point of sale transactions)	Local markets - at most state wide
Credit card services	State wide markets
Transaction accounts	State wide markets

The variations in geographic markets found by the ACCC are generally supported by findings in other bank merger cases in various countries.[24] Such variations are fully in keeping with what one would predict based on transactions and information costs, i.e. the greater the interaction (including monitoring) required, the more local a market will tend to be. In addition, since transactions and information costs are basically fixed, the geographic market should grow along with the size of the transaction at stake.[25]

It is worth recalling that electronic banking could dramatically lower transactions and information costs. It might therefore widen geographic markets for services not requiring much in the way of on-going negotiation and monitoring. Over four years ago, one expert mused that:

> Depending on the facts the [US competition] agencies could find that specific new technologies (e.g., home banking) are alternatives to traditional means of delivering banking services. Alternatively, and more likely in the near term, is the possibility that the costs associated with advertising products, reaching customers, and establishing banking relationships may be reduced substantially by the introduction of new electronic means of communication. The result could be a far greater number of current suppliers of banking services in a local area than branch presence may indicate. [Guerin-Calvert (1996, 296)]

As noted in the introduction, most of the recent banking consolidation has occurred within nations rather than across borders. This may largely be due to regulations and a general government policy stance in many countries discouraging foreign ownership of domestic banks.[26] In any case there is an apparent trend to lower visible and hidden barriers to the international provision of banking services including through foreign take-overs of domestic banks [see OECD/CLP (1998a, 7) and OECD (2000b, 131-132)]. This should eventually increase the breadth of geographic markets at least for certain services such as asset management and large loans and perhaps, within the Euro zone, for home purchase loans.

Returning to the product side of market definition, two points should be highlighted with regard to personal loans and loans to small business. First, these categories overlap somewhat since many small businesses, especially newer ones, make extensive use of essentially personal credit (i.e. general credit

cards and residential mortgages). Second, it might be wise to differentiate between loans based on easy to evaluate collateral and those not similarly secured. Local banks probably face greater competition from specialised non-banks and more distant banks as regards the first category than as concerns the second [see Rozanski and Rubinfeld (1997, 255)].

The "credit card services market" might, in some mergers, merit a detailed breakdown. Again with the caveat that things could be quite different in other jurisdictions, we show below the classifications recently employed by the Canadian Competition Bureau in recently reviewing two mergers among four of Canada's largest banks:[27]

1. general purpose credit card issuing to business customers - the provision of the plastic credit card to consumers;

2. general purpose credit card issuing to individuals - as above;

3. primary merchant acquiring - the services provided to merchants by the credit card companies or consortia of financial institutions to enable merchants to accept credit card payment from their customers and to receive payment for credit card purchases. "Financial institutions providing only the processing and payment settlements of credit card purchases are referred to as Visa or MasterCard Merchant Acquirers. Financial institutions that also provide the computer terminal and software along with the processing and payment settlements services are referred to as Primary Merchant Acquirers;"

4. "Visa" merchant acquiring - see above;

5. "MasterCard" merchant acquiring - see above;

6. credit card network services - the system enabling individual cardholders to have their cards widely accepted for the purchase of goods and services.

Although the topic lies beyond this paper's scope, it seems clear that when banks with securities and/or insurance businesses merge, these services would need to be analysed as additional separate product markets. These supplemental product and geographic markets would presumably be very similar to those identified in analysing a simple merger of two independent securities or insurance firms.[28] The same may or may not apply to the factoring or leasing businesses of merging banks.[29]

4. Assessing anti-competitive impact

Mergers potentially produce two kinds of anti-competitive impacts: "unilateral effects" arising because the merged firm may exercise significantly more single firm market power than its components each possessed pre-merger; and "co-ordinated effects" occurring if a merger enhances the ability of firms to engage in various forms of anti-competitive parallel behaviour. The risks of co-ordinated effects are especially significant in oligopolistic markets.[30]

Some banking markets in OECD countries are oligopolistic, i.e. a handful of banks account for the lion's share of the business. In addition to fewness, there are a number of other aspects tending to increase the risk that certain bank mergers may produce co-ordinated effects. These include: a history of regulation (i.e. price and quantity controls); high barriers to entry; inelastic demand for some products such as transaction accounts; homogeneous products; reasonably transparent and easy to monitor prices; a high degree of predictability of demand and costs; a high level of industry co-operation (e.g. in associations,

joint ventures, alliances, networks and loan syndicates); stable and relatively similar market shares; and multi-market contacts.[31] Some of these will be returned to below.

Competition agencies typically perform very little detailed investigation of markets affected by a merger if those markets are sufficiently non-concentrated. In other words, concentration levels are commonly employed as a kind of screening device for possible anti-competitive effects.[32] Deposit data has most frequently been used to calculate the concentration ratios, but at least one major jurisdiction has moved away from that in favour of using revenue data.[33]

Employing concentration ratios as a rough indicator of market power in reviewing bank mergers has recently come under attack. It has been argued that some direct approach might be better. This could be done by considering how firms actually react to one another's price changes, taking account of the influence of changes in demand and costs, and of different levels of elasticity in market demand [see Cetorelli (1999)].

Although past empirical work using US data supported a link between concentrated local markets and the exercise of market power, recent empirical work casts doubt on that relationship.[34]

It should not be surprising that this link has weakened in the US market. Substantial regulatory changes have recently removed the last barriers standing in the way of nation-wide banking in the US, indeed this is one of the main causes of the 1990s bank merger wave in that country. The regulatory changes have therefore simultaneously widened markets, reduced barriers to entry and contributed to a higher incidence of multi-market contacts among US banks. All those developments tend to weaken the link between local concentration levels and the market power prevailing in such areas.

Multi-market contacts plus regulatory and non-regulatory barriers to entry deserve close scrutiny in any bank markets where initial screening raises suspicions of anti-competitive effects, i.e. most commonly, at least in the US, in "...certain products provided to small and medium sized businesses." [Rozanski and Rubinfeld (1997, 253] There are also a number of other factors that, although they will not be developed further in this paper, could be important in certain merger cases. They are: market size and growth; the particular features of a competitor being eliminated by a merger (i.e. was it a "maverick" competitor?); the strength and nature of competitors left in the market; countervailing power (households and small businesses probably do not have much); and various vertical relationship issues.[35]

In some countries, larger banks may tend to devote less of their assets to lending in general, and to loans to small business in particular. Where that is in fact true, it could be deduced that bank mergers may reduce lending to small business and, in that sense, be anti-competitive. Such a deduction could prove false because any apparent reduction in small business lending by the merging banks might be more than compensated for by an expansion of such lending by non-merging banks.[36] Moreover, even if the deduction proved well founded, to the extent it is rooted in various economies of scale in the newly favoured activities, the phenomenon may be better viewed as an efficiency gain rather than as a loss in competition in the small business loan market.

4.1 Multi-market contacts

Pilloff (1999a, 163-164) has recently reviewed the theory and empirical effects of multi-market contacts in US banking markets. He describes the theory as follows:

> According to linked oligopoly theory, the anticipated effect of multi-market contact is reduced competition. Banks that compete in several markets recognise the incentive associated with their mutual interdependence. Each bank independently determines that aggressive action in any

> single market may be met with rival retaliation in all or some common markets. In cases where the combined effect of rival retaliation and aggressive action is expected to lower overall profitability, banks avoid aggressive action, and competition takes place at a less intense level than in the absence of multi-market contact. The predicted influence of multi-market contact on competition, however, is not unambiguous. Frequent encounters among banks may increase the intensity of competition among rivals that meet each other in many common markets.[37]

Given that multi-market contacts could, in theory, both weaken and enhance competition, it is unsurprising that Pilloff's own regression results are somewhat weak:

> ...the effect of multi-market contact in the banking industry is consistent with linked oligopoly theory. Contact is positively related to bank profitability. However, profitability is raised by an economically meaningful amount only when the potential influence of contact is extremely great. For most banks, which are exposed to little or no contact, multi-market linkages exert an inconsequential influence on profitability. (164)

Pilloff predicts the significance of multi-market contact in U.S. bank markets will rise as consolidation in the sector continues. That future is already the present in most OECD countries where national branching has been permitted for some time with the result that multi-market contacts are already at a very high level.

4.2 Barriers to entry

It is widely accepted that sufficiently low barriers to entry could cause markets to be adequately competitive despite high levels of concentration. In the limit, if hit and run entry is possible and if incumbents cannot immediately lower their prices following new entry, supra-competitive profits will simply not exist, even if there is currently just one actual supplier in a market. Bank markets may be far removed from such high levels of contestability [see Rozanski and Rubinfeld (1997, 255)]. This is not to say that high profits will not attract new entry, just that such entry may not be sufficient in size or timeliness to eliminate a merger's potential to significantly harm consumers.[38] It is clear, however, that competition agency decisions in specific mergers have been influenced by the apparent height of barriers to entry [see Guerin-Calvert (1996, 303), and European Commission (1998, para. 24)].

We turn now to some barriers to entry of special importance to banking.

a. Regulatory barriers, "too big to fail" and various forms of state aid

All OECD countries apply prudential regulation to their banking sectors. In addition to subjecting banks to close ongoing supervision, prudential regulation predominantly consists of various minimum capital requirements (including the Basel Committee on Banking Supervision's risk based capital guidelines) and restraints on lines of business.[39] Such regulation is designed to protect depositors and/or government runs deposits insurance plans against losses through single or multiple bank insolvencies. A closely related objective is to lower the risks of systemic failure.

Risks of bankruptcy with possible losses to creditors also arise in other sectors of the economy, yet prudential regulation is not applied to all of them. Why then is banking treated as special in this regard? One plausible answer is found in the special role that banks play in the payments system, and another is that:

> Bank regulation, like other forms of regulation, is justified as necessary to correct a "market failure". In the case of banks, the market failure arises from the difficulty for banks to credibly demonstrate their level of risk to depositors and other lenders. It is argued that, as a result, in the absence of regulatory intervention, banks would take on more risk than is prudent, bank failures would be more common than is necessary and the financial system would be unstable. [OECD/ (1998a, 8)][40]

Provided prudential regulation (including its supervisory aspect) is focused on eliminating market failures, avoids unnecessarily high capital requirements or unnecessarily restrictive constraints on lines of business, and is applied in a fair and objective manner, there is little reason to view it as a barrier to entry into banking markets. It might even have the effect of lowering barriers to entry in banking, at least for institutions subject to the regulation. This could happen if depositors believe the regulation ensures that the risk of insolvency is roughly equal across all banks. A similar but weaker levelling effect should also result from regulation designed to reduce the risk of fraud in banking.

At least one OECD country has employed regulation to help increase funds available for local lending. The latter regulation, at least in the US, tended in the past to preserve non-competitive local bank markets [see Hanweck and Shull (1999)]. It must also be noted that the resulting negative effects may well have been constrained by regulation, now quite rare in OECD countries, controlling rates charged and paid (on deposits) by banks.[41]

The general trend, especially in the US, European Union and Japan, is to reduce governmental restrictions on lines of business that banks may engage in. This has necessitated some tightening in prudential regulation but as earlier noted, this should not mean a net increase in the height of barriers to entry.

One of the most important government related barriers to entry is also one of the most difficult to analyse. This is the so-called "too big to fail" factor, referring to a widespread belief that one or more, usually domestically owned, banks are so big that the government could not tolerate any of them failing. Protected by such a perception, a too big to fail institution has greater freedom to undertake certain risks than smaller institutions. This tends both to distort competition and to raise barriers to entry against smaller institutions [see OECD/CLP (1998a, 8-9)].[42]

Another somewhat subtle but apparently effective barrier to entry is governmental preference for domestic ownership of financial institutions.[43] This could take the form of having a substantial number of banks under state ownership. Such a preference means that banks will not be able to enter a foreign market by simply buying an existing domestic bank. To the extent that branches and accumulated knowledge of local market conditions are necessary for effective entry, such ownership constraints constitute a very important barrier to entry against foreign banks.

Anything but subtle are the effects on entry of various state subsidies to certain incumbent banks.[44] In some countries, government run deposit insurance plans amount to subsidies because the premiums are insufficiently related to risks incurred and/or banks are not asked to bear the full costs of prudential regulation enacted as a necessary supplement to the insurance plans. However, at least as regards the financial institutions covered, deposit insurance programs may actually reduce barriers to entry since, even more than prudential regulation, they have the effect of levelling risk as seen from the depositor point of view.

b. Access to competitors' ATM's and to competitor run or dominated credit card networks and cheque clearance systems

In most if not all OECD countries, the major banks have established proprietary ATM networks and have subscribed to or themselves set up infrastructure permitting easy accessibility of accounts from any bank's ATMs. In addition, most incumbent banks have access to credit/debit card and cheque clearing systems they may or may not own. Competition agencies have sometimes found barriers to entry as regards such networks. For example, according to the ACCC:

> The increasing use of new technologies would tend to heighten the importance of electronic networks as a barrier to entry. A new entrant without an ATM network or [electronic funds transfer at point of sale - EFTPOS] access would need to set up its own ATM network to effectively penetrate the market, but the sunk costs of doing so may well be prohibitive. Alternatively, a new entrant would need to establish arrangements with other suppliers for ATM access....
>
> Access to electronic payments systems on fair and reasonable terms is...of central importance in facilitating new entry and expansion by smaller financial institutions in the Victorian transaction accounts market. However, the need for would-be users of ATM and EFTPOS systems to reach bilateral agreement with incumbent operators on technical and commercial terms has emerged as a potential hindrance and a barrier to competitive entry by new entrants.[45]

It is far from certain that incumbent banks will be willing to allow new entrants access to ATMs and EFTPOS systems they control. Although incumbents are aware that their customers will value extension of the networks that new entrants provide, those benefits could be quite small compared with the opportunity costs to incumbents resulting from facilitating the development of new competitors.

c. Economies of scale and the need for extensive branch networks

Economies of scale play a dual role in merger review. Where they are significant and linked to sunk costs they tend to discourage new entry. At the same time, as will be seen below, merging banks can sometimes properly argue that economies of scale achieved through a merger are more than sufficient to counter-balance the transaction's anti-competitive effects.

Economies of scale in banking appear to be especially important in back-office functions (i.e. mostly data processing) and, on the demand side, in furnishing the extensive branch network seemingly still required to deliver conveniently located service. The significance of the first set of economies appears to be eroding because of a growing ability to out-source data processing work. The importance of an extensive branch network may prove more resilient, especially as regards lending to small business. As for households, freestanding ATMs may be attractive as a means to withdraw cash, but they have not yet gained wide acceptance for paying bills or making deposits. Both those functions are, however, becoming less necessary as direct transfers are more and more used for regular receipts and disbursements. In any case, to the extent an extensive branch network is still important, incumbent banks likely have an advantage over new entrants if they have tied up the best locations. It also takes considerable time to build up local business around a new branch. More will be said about economies of scale in the section of the paper dealing with efficiencies.

Economies of scale are not the only branch-related barrier to entry deserving mention. There may also be some important economies of scope. Branches are increasingly being used to sell securities, insurance, and asset management services. Banks offering all such services through extensive branch

networks may have a considerable cost advantage over banks with a narrower focus or fewer offices. This means that the anti-competitive effects of a merger, for example on lending to small businesses, will not be neutralised easily by a new entrant offering just loans. Such a new entrant would probably have to simultaneously enter a number of other businesses at the same time. That fact could considerably raise the cost and risk of new entry.

d. Switching costs and asymmetric information

The most straightforward switching cost acting as a barrier to new entry concerns ways in which business borrowers may be tied to their current banks. Such ties can be very strong if businesses and banks are involved in a web of cross-ownership. Firm ties could also exist in "keiretsu" style relationships in which businesses are encouraged to finance fixed as well as current assets through bank loans that theoretically could be called for repayment in a very short time. Considerably weaker but non-negligible ties could result from the fact that many banks charge a non-refundable "compensation fee" for setting up a line of credit.[46]

Even where there are no obvious ties between businesses and their bankers, there may still be reason to believe that switching costs could be significant. This is because banks are apparently much more willing to lend to small and medium-sized businesses if the borrowers maintain their transactions accounts at the same bank. Such a clustering of service gives banks more information about prospective borrowers and facilitates risk monitoring. The problem is that businesses may find it very time consuming and perhaps expensive to transfer a host of direct banking arrangements covering regular receipts and disbursements. This appears to be an instance where electronic banking developments, defined to include such direct banking arrangements, may have raised rather than lowered barriers to entry. It could also take considerable time for a good relationship to be developed with a new bank, and such a relationship is apparently important for small business lending. Tending to off-set all this, including the need to cluster transactions accounts and borrowing, there is evidence that non-local banks are increasingly willing to lend based on the use of credit-scoring models.[47] To the extent such lending is or becomes significant, the economies of scope in supplying both transaction account services and lines of credit may be breaking down, thus reducing the importance of switching costs as a barrier to entry.

Closely related to the switching cost issue is the fact that incumbent banks have important reputational and informational advantages over new entrants. Small businesses in particular may put a high value on reputational factors, because they know that in unusual, temporary circumstances their continued existence may depend on a banker having faith in them. It takes time and experience to build such trust. The information advantage arises because incumbent banks have experience in lending to many households and businesses located near to existing branches. Incumbents have no incentive to share information about credit risks directly with new competitors. This is not so much a problem for poor as for reasonably good credit risks. The poor risks would presumably be willing to pay more for bank loans, but the better risks will not, hence will stay with banks who appreciate their credit worthiness.

5. Efficiencies

Most OECD countries' merger review includes some examination of claims that a merger will generate economic efficiencies. This is usually done as a kind of defence receiving detailed consideration only in cases where proposed mergers appear to be anti-competitive, which is the context that will be assumed in this section of the paper.

Competition agencies typically ignore efficiency claims which are in fact mere transfers from one group to another, e.g. tax savings, or lower prices for inputs not occasioned by reductions in the cost of supplying those inputs. They also normally set aside efficiencies they consider could be achieved in a less anti-competitive fashion. In addition, efficiency claims are typically subject to some "discounting" to account for the probability they may never actually be realised.

The most common efficiency claim in bank merger cases appears to be savings realised through closing redundant bank branches.[48] The degree to which such closures represent real gains depends on the costs imposed by requiring clients to travel further to do their banking. This is no small point. The evidence shows that banks are generally willing to operate branches having substantial excess capacities, presumably because of strong client preferences for easy access.[49] In any case, efficiencies realised through consolidating branch networks may not be achievable without a merger, since agreements among banks to reduce excess capacity by engaging in reciprocal branch closures would be prohibited under at least some countries' competition laws. There also appears to be a high probability that mergers between banks operating in the same geographic market will indeed close branches post-merger.

While geographic overlap tends to increase prospective efficiencies from branch consolidation, such an overlap tends to reduce the significance of another efficiency sometimes claimed for bank mergers. We are referring to reductions in risks borne by depositors, chiefly achieved by increasing a bank's geographical scope of operation, but sometimes deriving as well from greater diversification in the types of assets found on a bank's balance sheet. Geographical risk diversification could be a significant factor in larger countries where different regions are subject to different business cycles. This efficiency effect may be open to attack, in some jurisdictions, on the grounds that depositors are already protected by government run deposit insurance plans.[50] More importantly, there may be other, less anti-competitive ways than mergers to obtain the benefits of risk diversification. With regard to US experience it has been noted that:

> Over the last several decades, banks have been able to diversify extensively through loan production offices, bank networks for loan sales and syndication, through correspondent banking arrangements, deposit brokers, and secondary securities markets in asset-backed, municipal and US government securities. Further, continued developments in capital markets not only provide banks with expanded opportunities for diversification, but with substitutes for diversification in reducing risk exposure.... Perhaps smaller banks may still benefit from the potential diversification provided by some mergers. But there is no compelling evidence that the same is true for large banks. [Hanweck and Shull (1999, 264 - footnotes omitted)]

Another source of efficiencies in bank mergers is various economies of scale. Prominent among these are savings often claimed to result from consolidating administration or back office functions (i.e. data processing).[51] Although such claims are made even for mergers involving very large banks,[52] a recent study of cost structures in US banks casts doubt on whether significant economies of scale exist beyond $one billion in assets. The same study noted that banks may suffer from some scale diseconomies when approaching very large sizes [see Hanweck and Shull (1999, 262)]. Curiously, however, Hanweck and Shull also speculated (at 259) that scale economies may have become more important since the late 1980s.

One way that bank mergers may facilitate a more efficient use of resources may be quite important yet difficult to quantify. Bank mergers may be associated with a change in the proportion of the resulting bank's assets devoted to certain activities. For example, a study focused on US bank mergers taking place between 1981 and 1989, in which both parties had more than $one billion in assets, found that the concentrations produced a shift of assets from securities to loans [see Akhavein, Berger and Humphrey (1997, 133)]. In several recent actual and proposed large European bank mergers, the parties stated an intention to shift their combined resources in favour of more profitable fields such as investment banking

or asset management. To the extent that such portfolio shifts are ultimately due to realising certain economies of scale, they might be unachievable without a merger.

Competition agencies sometimes hear arguments that banks must be very large to compete internationally. There may be some truth in such claims when it comes to markets such as investment banking, especially in deals involving multinational enterprises. Size, however, may not be the only necessary ingredient for international competitiveness. Global coverage and experience are probably just as critical. Moreover, competition agencies should ask for evidence that global mergers can achieve things that alliances or correspondent relationships among banks in different markets cannot.[53]

It is also sometimes argued that because foreign banks are growing larger through mergers, domestic banks must be permitted to do likewise in order to achieve the size necessary to compete with the foreign giants. Competition agencies are, justifiably, sceptical of such arguments.[54] It seems just as likely that a strongly competitive domestic market will help foster the efficiency needed to compete abroad.[55]

Not only is there some doubt about the source and significance of economies of scale in banking, there is also the issue of whether they can be realised in a less anti-competitive way. Rozanski and Rubinfeld (1998, 10-11) point out that administrative and back office savings could be achieved by merging with a bank in a different rather than the same geographic market. In addition, joint ventures can be arranged to realise ATM and credit card efficiencies. It should be added that credit-scoring models based on data pooled from a number of lenders and sold by various service providers might offer smaller banks roughly the same information they would obtain by merging with a larger bank having a credit-scoring model based entirely on its own lending experience.

There is a general factor tending to reduce the significance of efficiencies in considering whether to pass what might otherwise be regarded as anti-competitive bank mergers. By definition, such mergers will tend to reduce post-merger incentives to be efficient. This could be more of a problem in banking than in other sectors because corporate governance may be relatively weak in banking.[56] That might be one of the main reasons why a large number of studies investigating the effects of bank mergers cast grave doubts on their efficiency enhancing effects.[57]

Berger, Demsetz and Strahan (1999, 135) summarised 250 empirical studies concerning the results of bank mergers (predominantly but not exclusively in the US) as follows:

> The evidence is consistent with increases in market power from some types of consolidation; improvements in profit efficiency and diversification of risks, *but little or no cost efficiency improvement on average*; relatively little effect on the availability of services to small customers; potential improvements in payments system efficiency; and potential costs on the financial system from increases in systemic risk or expansion of the financial safety net. (emphasis added)

A study of twenty Spanish savings banks mergers occurring from 1986 to 1998 is even worse for the hypothesis that bank mergers produce cost efficiencies. Humphrey and Valverde (1999, 34) found that: "The actual effect of Spanish savings bank mergers (relative to what was occurring in the rest of the industry) was to raise, not lower, average banking costs."

Given the existing empirical evidence, competition agencies should block anti-competitive mergers despite efficiency claims, *unless* the parties present compelling clear evidence that such mergers will realise very significant offsetting economies. In making judgement calls about prospective efficiencies, it is well to bear in mind that the odds of these actually being realised are greater if: one of the banks will clearly be in control post-merger, thus able to impose unpopular rationalisation; the bank in

control post-merger is the relatively more efficient of the merging parties;[58] and the bank in control has recently completed a successful merger.[59]

6. Remedies

Bank mergers which might initially be prohibited might ultimately be permitted because the parties agree to abide by certain conditions or agree to restructure the proposed merger. The role-played by a competition agency in arranging such "remedies" can vary, but the objective and the types of remedies used are roughly similar across OECD countries. The objective is to ensure that the merger will not produce anti-competitive effects. Competition agencies try to achieve this result in a timely fashion while avoiding measures which are poorly targeted or disproportionate to the underlying problem. They also seek to minimise the need for any ongoing monitoring of the merged entity.[60] We proceed now to discuss three types of remedies that have been used in bank mergers and give examples of each. It should be noted that sometimes elements of all three are applied to the same merger.

6.1 Obtain commitments to restrain the exercise of market power

In theory, a merger induced increase in market power poses no problem if the parties can make an easily monitored, enforceable commitment not to exercise any increased market power, e.g. not to raise prices post-merger. In practice this is nearly impossible to arrange, because the merged entity will have a continuing incentive to circumvent the commitment, and will enjoy an enduring information advantage over the competition agency. Notwithstanding those awkward realities, competition agencies have on occasion accepted such commitments in the course of approving a bank merger. An example arose in the course of the Swiss Competition Commission approving the April 1998 merger creating the United Bank of Switzerland (UBS). Among other things, UBS committed itself not to alter until December 31, 2004 the terms and conditions applying to existing corporate lines of credit falling below a CHF four million threshold.[61] Australia's ACCC also resorted to a behavioural constraint when it required the Westpac Banking Corporation, for a period of three years, to permit an autonomous management to continue at its newly acquired Bank of Melbourne subsidiary [see Rodrigues (1999, 9-10)].

6.2 Obtain commitments to indirectly facilitate new entry or strengthen existing competitors

One way to reduce the need for ongoing monitoring while at the same time allowing greater freedom of action to market forces is to tailor conditions to facilitate rather than directly achieve a desired outcome. A good example is commitments to lower barriers to entry for new competitors or barriers to expansion for incumbent firms. For instance, in the UBS merger, the new bank undertook to continue for several years its participation in several joint ventures relating to clearinghouse and fund raising functions [see Gugler (2000, 16)]. As another example, the Westpac/BML merger included an undertaking to provide the customers of competing financial institutions (in the State of Victoria) access, on reasonable commercial terms, to Westpac's EFTPOS and ATM networks. The need for ongoing monitoring and enforcement by the ACCC was reduced by Westpac agreeing to submit any disputes over the terms of conditions to be resolved by an independent expert appointed by the ACCC [see Rodrigues (1999, 10-11)].

Another example of this type of behavioural remedy occurred in the context of the Toronto-Dominion Bank/Canada Trust merger. The Toronto-Dominion Bank belonged to the Visa credit card network, while Canada Trust was an important member of the MasterCard network. Under existing network rules, the merged entity would have to choose to belong either to the Visa or MasterCard networks. The Canadian Competition Commissioner was concerned that Toronto-Dominion would convert the Canada Trust MasterCard portfolio to Visa and that this would jeopardise the continued viability of

MasterCard in Canada. The parties therefore agreed either to convert Toronto-Dominion's Visa portfolio to MasterCard or divest Canada Trust's MasterCard business [see von Finckenstein (2000, 11-12)].

Another example of imposing conditions intended to enhance the development of competitors arose when the Bank of Italy, which enforces Italy's competition law in the banking sector, restricted a newly merged Sardinian bank from opening new branches for a certain period of time in an area expected to be negatively affected by the merger [see Bruzzone and Polo (1998, 37)]. This condition had the drawback, however, of seeking to advantage competitors by reducing the efficiency of the merging bank.

The USDOJ has apparently used entry facilitating behavioural remedies in bank mergers where competition problems do not rise to the level requiring branch divestments. For example in the Washington Mutual/Home Savings (H.F. Ahmanson) merger, the USDOJ required restraints on the parties' use of non-compete clauses in employment contracts with branch managers and loan officers [see Kramer (1999, 3)].

6.3 Require steps intended to directly transfer market share, i.e. divest parts of business - usually branches or lines of activities

All behavioural commitments share, to one degree or another, the drawback of necessitating ongoing oversight. Some of them also require the competition agency to obtain information from an enterprise with a self-interest in restricting or distorting that information. This is why competition agencies generally prefer so-called "structural" solutions designed to directly eliminate rather than reduce the effects of any merger induced increase in market power. Structural measures are easy to describe but extremely hard to administer. They basically require divestments of certain business units and/or branches. Such divestments are designed to reduce, at least initially, the merged bank's share of negatively affected markets.

Competition problems in bank mergers most frequently arise in loans to small and medium sized enterprises and certain household services. As earlier noted, such markets appear to be local or at most regional in scope and difficult to enter without having branch offices located in the relevant area.[62] Competition agencies have therefore been willing to approve some otherwise anti-competitive bank mergers on condition that certain branches are divested. The objective of such divestitures has been well described as:

> ...to create a new competitor, or to enhance the effectiveness of an existing competitor, by transferring a group of well-situated, profitable branches that will provide a network for gathering deposits and making loans, as well as a solid base of commercial loan relationships. [Rozanski (1999, 9)]

One can hardly expect merging banks to support the above objective. Left to their own devices, merging banks proposing divestment remedies will probably choose to sell only branches located in areas where the bank will enjoy little market power. They can also be expected to take measures to maximise "seepage", i.e. the transfer of customers from sold to retained branches. Pre-emptied branches would not be worth much, but what is lost in the selling price would be more than balanced by supra-competitive profits at retained branches. To minimise seepage and otherwise ensure that branch divestments achieve the intended result, competition agencies are well advised to reserve powers to:

1. choose specific branches for divestiture and to require the merging parties to provide all the information needed to determine local competitive effects;

2. approve the purchaser(s);[63]

3. prevent the merging parties putting obstacles in the way of the purchaser(s) hiring staff currently working in the divested branches;

4. restrict what the merging parties can do to persuade clients to transfer their business to retained branches; and

5. impose severe penalties, such as obligations to sell certain "crown jewels", if the divestments are not completed by a certain time.

The fourth of these measures may have to be continued for some time after the divestment has been made, but not indefinitely. The objective is not to forever bias the competitive struggle against the merged bank. It is instead to restore the level of competition that prevailed pre-merger. There was no guarantee that such a level would have persisted given the cut and thrust of competition, and the efficiency promoting effects of that dynamic should not forever be weakened merely because a merger has occurred.

It is beyond the scope of this paper to give detailed guidance concerning the five measures listed above. Interested readers are referred to Baillie (2000a, and 2000b) for actual examples of legally binding clauses accepted in branch and credit card business divestitures.

A US study indicates that, measured in terms of the survival rate of divested bank branches, this remedy is generally successful.[64] On a less sanguine note, another US study found that US bank mergers occurring between January 1, 1992 and June 30, 1994, which increased local market concentration by at least 200 points to a post-merger HHI of at least 1800, appear to have resulted in reduced rates of interest paid on deposits. All such mergers apparently survived anti-trust scrutiny, but the study's authors do not report whether branch divestitures were required in any of them [see Prager and Hannan(1998)].

7. The interface between prudential and competition policy concerns in bank mergers

In practically all OECD jurisdictions, bank mergers are reviewed by both prudential regulators and competition agencies. That creates a need for co-operation between the two agencies to avoid inefficient overlap. It also makes it advisable to adopt clear procedures to ensure the joint review is as transparent and predictable as possible, hence does not unnecessarily interfere with private sector decision making. Several OECD countries, including Australia, Canada, Norway and the United States, have taken formal steps to promote such co-ordination.[65]

It is important to realise that if a prudential regulator ever found it necessary to block a pro-competitive merger, competition law would not thereby be abrogated. This is because competition law regarding mergers is proscriptive rather than prescriptive in nature, i.e. competition law can be used to block but not to require mergers. To the extent that prudential regulation is also proscriptive rather than prescriptive, anti-competitive mergers blocked by competition agencies should produce no direct conflict with prudential regulators.

It may happen that a merger is proposed or imposed in a situation where one or more of the merging banks is failing. A merger may sometimes be the best way to deal with this circumstance. If the competition concerns in such cases are to be properly taken into account, timely collaboration between the prudential regulator and the competition agency is necessary. This would substantially reduce the risk of the merger later being blocked on competition grounds. Some jurisdictions have a "failing firm defence" which might be applicable in such a situation. Such a defence might require consideration of whether

another merger partner would be a better match from the competition point of view. [66] In other jurisdictions, a "regulated conduct defence" could be relied on to insulate mergers lawfully mandated by a prudential regulator from being blocked by the competition agency.[67]

8. Including non-prudential, non-competition policy concerns in bank merger review

There may arguably be a need to make tradeoffs between competition and public policy goals not involving prudential concerns. Such public policy objectives tend to present themselves in two basic forms. The first is a reaction against bank mergers expected to produce increased unemployment especially if this will be concentrated in depressed areas.[68] The second type of concern is a desire to build national champion banks ostensibly for reasons of high level job generation, a desire to ensure better access to funds, or even simply national prestige. These two concerns may work at cross-purposes. The first usually mitigates against allowing mergers, while the second is commonly cited as a reason to promote the creation of ever-larger banks.

Few if any OECD countries strictly confine bank merger review too prudential and competition matters. That generalisation masks, however, some significant differences in the degree to which other, non-prudentially related, public policy goals enter the decision making process, and in who has the final say as regards whether anti-competitive bank mergers should be blocked. In some jurisdictions, such as the European Union, Italy, Japan, Korea and the United States, anti-competitive bank mergers will always, at least in theory, be blocked. In others, including Australia, Canada, France, Germany, Switzerland and the United Kingdom, it is possible that anti-competitive bank mergers could sometimes be permitted. There may well be other OECD countries where the same is true, but the systems used in the six countries cited are sufficient to get an idea of how non-prudential, non-competition matters may be included in bank merger review - see this paper's Appendix for details.

Regardless of the degree to which strict competition criteria are exclusively considered in deciding whether to block a bank merger, the process can only be improved by ensuring that any competition concerns are thoroughly reviewed and the findings published, preferably before the final decision is taken.

9. Special regimes for considering and dealing with the competition aspects of bank mergers

Among the ten jurisdictions cited in the previous section, Canada, France, Italy and Switzerland stand out as having made various exceptions concerning bank mergers being reviewed under economy-wide competition law applied by the general competition authority - see Box. This list is intended to be illustrative rather than exhaustive, i.e. there could be other OECD countries where such exceptions also exist.

Competition Law Applied in Banking - Some Examples of Special Regimes	
Country	**Special Features Pertinent to Merger Review**[69]
Canada	The Minister of Finance has the option to remove the Competition Tribunal's power to block an anti-competitive merger s/he certifies to be, "...in the best interest of the financial system in Canada."
France	Bank mergers are exempt from application of France's general competition law and formal review by its competition authorities.
Italy	The Bank of Italy applies the country's general competition law to bank mergers. In doing so, it is required to consider, but not necessarily follow, the opinion of the Italian competition agency.
Switzerland	The Swiss competition law is applied by the general competition agency, but there is one potentially important exception. If the country's Federal Bank Commission (FBC) deems it necessary to take action to protect creditors (presumably including depositors), the FBC effectively replaces the Competition Commission as regards those actions. The FBC might therefore have to balance creditor protection and competition concerns in mergers involving failing banks.[70]

The Summary to the OECD Report on Regulatory Reform included the following recommendation [OECD (1997, 3-4, emphasis added)]:

> Review and strengthen where necessary the scope, effectiveness and enforcement of competition policy.
>
> - Eliminate sectoral gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways.
>
> - Enforce competition law vigorously where collusive behaviour, abuse of dominant position, *or anticompetitive mergers* risks frustrating reform.
>
> - Provide competition authorities with the authority and capacity to advocate reform.

Given the experience of many OECD countries where economy-wide competition laws are being successfully applied to bank mergers, it would seem difficult to argue that "compelling public interests" indicate that bank mergers should be excepted from competition laws. In addition, taking account of the regulatory reform underway in many OECD countries' banking sectors, it can fairly be said that anti-competitive mergers could risk frustrating reform in that sector. Vigorous application of competition law against them is certainly warranted.

Deciding who should undertake the vigorous enforcement of competition laws to bank mergers, involves making certain tradeoffs.[71] On the one hand, bank regulators possess important sector information of relevance to merger decisions, and are also in a better position to monitor behavioural remedies for mergers. On the other hand, competition agencies enjoy the advantage of possessing analytical skills and judgement honed in reviewing many more mergers than bank regulators are likely to encounter. It is unlikely that sector information is as crucial to merger review as are the economics based skills required to define markets, assess market power and devise appropriate remedies.[72] As for the sector regulator's edge in applying behavioural remedies, such an advantage might well be insufficient to make behavioural superior to structural remedies, hence could be basically irrelevant to the question of who

should review bank mergers. Finally, and perhaps most importantly, sector specific knowledge is probably more transferable through inter-agency co-operation than are analytical skills and judgement.

It is interesting to note that although the United Kingdom has given concurrent powers to several sector regulators to enforce competition laws regarding anti-competitive agreements and abuse of dominance, it has not done so as regards merger review. Moreover, the UK decided not to give the Financial Services Authority the same competition enforcement powers enjoyed by various sector regulators.[73]

10. Summary remarks

Bank mergers are expected to continue at a high level especially in markets like the US where there are still a large number of independently controlled banks.[74] There may also be something of a restructuring in terms of the activities banks choose to group together. As concentration edges upwards, bank mergers may more frequently present competition problems unless electronic banking and regulatory reform continue to lower barriers to entry. Competition agencies should encourage these and other market opening developments, and vigilantly guard against incumbents protecting their existing market shares in ways that do not benefit consumers.

Bank merger review will be considerably facilitated if competition agencies establish clear lines of communication and means of co-operating with other government bodies intervening in the banking sector, especially the prudential regulators.[75] Enhanced co-operation may also be needed among national competition agencies, where bank mergers cross national boundaries.

Some of this paper's more notable points are:

1. the impact of electronic banking developments on proper market definition and assessment of barriers to entry must be carefully considered in bank merger cases;

2. competition problems in bank mergers are most commonly encountered as regards loans to small and medium sized businesses;

3. barriers to entry in banking could well be high enough to prevent a sufficiently rapid neutralisation of any anti-competitive effects that may be expected from bank mergers in sufficiently concentrated markets;

4. efficiencies could be relevant in bank mergers, but competition officials should be sceptical of claims linked to supposed economies of scale especially in dealing with mergers where all the parties are sufficiently large that each has probably exhausted virtually all available economies of scale;

5. when faced with anti-competitive bank mergers, competition agencies should consider proposals to make appropriate changes in the transaction, but should generally avoid "remedies" requiring ongoing monitoring and enforcement;

6. there is little inherent potential for conflict between competition agencies and prudential regulators; and

7. the general competition law should be applied to bank mergers by the general competition agency. It is also essential to foster co-ordination and co-operation between prudential regulators and competition agencies.

NOTES

1. For the purposes of this paper, "banks" are treated as deposit taking institutions whose activities include substantial involvement in financial intermediation and may also include brokerage functions. Readers interested in learning more about these functions are referred to: Bhattacharya and Thakor (1993).

2. For a similar list see Berger, Demsetz, and Strahan (1999, 148-151).

3. For data showing the disintermediation trend in Australia, see ACCC (1997, 29).

   Ongoing disintermediation was said to be one of the underlying reasons for the attempted Deutsche/ Dresdner merger. See "Deutsche and Dresdner", lead editorial in Financial Times, March 8, 2000, page 12.

   In some markets, Japan for example, disintermediation is being facilitated by regulatory reforms improving direct access to the financial markets.

4 . See OECD (2000b, 128-129). As an example of the large variety of ways in which the development of the Internet in particular could affect what banks do, consider the fact that three large oil companies and four financial services companies (Deutsche, Goldman Sachs, Morgan Stanley Dean Witter and SG Investment Banking) recently set up an Internet exchange, to handle bids and offers for petroleum and precious metals. See Tait (2000).

5. See ACCC (1997, 11-12 & 21). See also OECD/CLP (1998a, 6): "Most countries noted that Internet and telephone banking had yet to make a significant impact on market definition issues."

6. OECD (2000b, 129). Although it might be an isolated example it is interesting to note:

   The recent success of Egg, the direct banking arm of Prudential in the UK, using telephone and Internet.... Egg met its five-year target of five billion [pounds sterling] of new savings and 500 000 customers in just six months! [Case Associates (1999)]

   An article in a journal devoted to internet banking stated:

   The cost of the average payment transaction on the Internet is just 13 cents or less. This compares with 26 cents for a personal computer banking service using the bank's own software, 54 cents for a telephone banking service and one dollar eight cents for a bank branch. [Nehmzow (1997, 1)]

7. An article reporting that Deutsche Bank was cutting its branches in order to invest more in Internet services also stated that:

   Only 25 percent of bank transactions in Germany are done in a branch office, compared with 75 percent 15 years ago. The Internet, favoured by banks as a cheaper means of providing services, has accelerated streamlining at traditional banks. [International Herald Tribune (2000)]

   Buerkle (2000b) reports that 50 percent of the customers of Finland's MeritaNordbanken's customers currently use its Internet service. The same article reported that 13 percent of MeritaNordbanken's loans are arranged on the Web "...with customers promised a credit decision in one hour." In addition, Credit Suisse and Belgium's Dexia have announced plans to depend more on electronic banking. See Hall (2000) and Moore (2000).

8. One of the main beneficiaries from the proposed Deutsche/Dresdner merger would have been Allianz, the German financial services group. Apparently Allianz hoped to sell its savings products through a new subsidiary grouping together the Deutsche and Dresdner retail bank branches. The new subsidiary was apparently headed for eventual Allianz ownership. See Financial Times (2000).

9. Germany apparently has 604 branches for every million customers. The corresponding figure for the US is 265. See Uta Harnischfeger (2000).

10. Charles Pretzlik and Uta Harnishchfeger (2000) stated that at the Wells Faro bank "...90 percent of online customers sign up for the service in a branch."

11. In some countries, that future may already have arrived. The largest Internet bank appears to be Finland's MeritaNordbanken which reportedly has 1.2 million online customers who use the Internet to do banking transactions ranging from bill-paying to purchasing securities to arranging car purchase loans. MeritaNordbanken also offers e-banking over mobile phones, and intends to offer an electronic mobile payments system next month that will permit clients to purchase "...anything from a Coke to a concert ticket by punching in a personal identification number." Buerkle (2000, 16)

12. For a good discussion of the purpose and process of making market definitions, including discussion of the substitutability concept, see Office of Fair Trading (1999).

13. As cited in Ayres (1985, 111)

14. See Ayres (1985). Demand complementarities make it more likely that two different goods will both be purchased, but do not require they be obtained from the same supplier. Moreover, if the supplier of one of the complements becomes a monopolist, he may well have market power despite the other product being competitively supplied.

15. See OECD/CLP (1998a, 11-12). USFRB economists continue, however, to produce empirical research for the most part supporting the use of a cluster approach. Nevertheless, they have also affirmed that for the products most likely to present competition problems in a bank merger, the markets are local in nature. See, for examples: Cyrnak and Hannan (1999), Amel and Hannan (1999), Heitfield (1999), Kwast (1999), and Kwast et al. (1997).

    A dissenting note at the USFRB has been sounded by Lawrence Radecki. Because of deregulation of branching plus bank standardisation of product offerings and centralisation of decision making, Radecki hypothesised that competition is now conducted over an area wider than a mere city or county. Using 1996 data for the United States, Radecki (1998, 32) found that the:

    ...statistically significant correlation that existed at the local level in the mid-1980s [between retail deposit rates and measures of market concentration] has disappeared. In addition, [Radecki found] a significant correlation at the state level for some measures of concentration and some deposit rates.

16. See Guerin-Calvert (1996, 305, n.14). In addition, a recent study by a Federal Reserve Board of Governors economist noted that:

    ...while the number of financial services consumed primarily at banks has surely declined over time, there still exists a core of such activities for both households and small businesses. For households, this core likely consists of the "asset side" products of federally insured checking, savings, and money market accounts and services, but may also include lines of credit and certificates of deposit....

    With respect to small businesses, available data suggest a cluster that consists of checking, savings, lines of credit, mortgages, transaction, cash management, and credit related services. [Kwast (1999, 630)]

    The products Kwast referred to are the same ones for which local geographic markets appear to be appropriate. See Kwast et al. (1997, 16).

17. A senior employee of the USDOJ has noted that in virtually all bank mergers presenting competition concerns, these arise as regards loans to small and medium sized business. See Kramer (1999, 7).

18. Rozanski and Rubinfeld (1997, 254 - footnote omitted, and emphasis added). See also Bruzzone and Polo (1998, 11).

19. Relying on USFRB surveys of households and small businesses conducted in 1992 and 1993, Kwast et al. (1997, 980) reported:

> The data show that commercial banks are by far the financial institution used most frequently by both households and small businesses. More importantly, some 96.5 percent of households, and 93.5 percent of small businesses say that a depository institution is their primary financial institution... only about 4 percent of both groups call a non-depository their primary institution. To an overwhelming extent, commercial banks are also the institution most frequently designated as the primary institution. Thus, the data suggest that, overall, depositories are substantially more important for both households and small businesses than are non-depositories, although non-depositories are clearly relevant. In addition, commercial banks are, by a wide margin, the most important depository.

Referring to the view that "...the uniqueness of insured deposits is one of the basic underpinnings of antitrust policy toward bank mergers", Pilloff (1999c) investigated whether money market deposit accounts (MMDAs) not insured by the government are good substitutes for deposits at government insured depositories. His general conclusion was that "...accounts at depository institutions appear to be unique." (382) This was not based, however, on consumer behaviour in response to changes in relative interest rates. Instead, it rested on apparent differences in risk, liquidity, accessibility and convenience plus the observations that: "Relatively few households (5.7 percent in 1995) have a money fund account, and almost all that do also have a checking account or MMDA at an insured institution." (382) Pilloff also notes that this situation has remained stable between 1992 and 1995.

Amel and Hannan (1999) have recently performed an empirical analysis inspired by consumer substitution approach adopted in the United States Department of Justice and Federal Trade Commission merger guidelines. This led to the conclusion that "...only commercial banks should be included as participants in the "antitrust market" relevant to proposed bank mergers." Amel and Hannan (1999, 1667 & 1689).

In a recent bank merger review, the ACCC (1997, 23) noted that consumers might consider banks (all products not just deposits) to be safer than non-banks because of "...a form of implicit government guarantee via prudential supervision." The ACCC treated this false consumer confidence as a barrier to entry but it could also be taken as evidence of a separate market for products supplied by banks and non-banks.

20. Robert Kramer of the USDOJ underlined this point in the course of discussing the 1997 Corestates/First Union bank merger. See Kramer (1999, 2-3)

21. Canada's Competititon Bureau opted for a similar set of product markets in "branch banking". This was divided into: "personal financial services" (sub-divided into: personal long-term investments; personal short-term savings; student loans; personal transaction accounts; residential mortgages; and personal loans/lines of credit); and business financial services (sub-divided into: term loans; business transaction accounts and related services; and operating loans). See von Finckenstein (1998a, 9-10)

Commenting on a very high degree of similarity in the product market definitions applied to retail/branch banking Goddard (2000, 237) stated: "Given the similarities in merger investigation procedure and in the nature and extent of branch banking between the two jurisdictions, the close match in these product market definitions would tend to suggest that a reasonably high degree of robustness can be attached to this aspect of market definition."

The European Commission (1998, para. 11) seems to have opted for three major product groupings as regards the services provided by "universal banks" (i.e. banks with securities businesses), namely: retail banking; corporate banking; and financial market services. It has pointed out, however, that: "With respect to financial markets the following activities may constitute distinct service markets: trading in equities, bonds, and derivatives, foreign exchange and money markets...." (para. 12)

Further insight into product market definition in countries where nation wide banking has been the norm for a considerable period of time can be gleaned from Switzerland. One of the markets that received extensive attention in the Competition Commission's review of the 1997 merger creating UBS was the "commercial loan market". The Commission decided to include both lines of credit and investment loans but excluded factoring, leasing and venture capital. It also differentiated between loans below and above CHF two million because it determined that these had very different geographical markets. See Gugler (2000, 9-10).

22. See ACCC (1997, 6-13)

23. Interestingly, the ACCC had evidence of more customers having "...their personal loan and transaction account with different institutions, than those that bundle the two." It therefore decided, "...that the extent of bundling is not sufficient to conclude that personal loans are part of a broader cluster of retail banking services." ACCC (1997, 7-8)

24. See von Finckenstein (1998a) for Canadian evidence that the extent of the geographic market varies by product class and is local for...personal financial services, and for SME businesses." It is regional, however, "[f]or mid market loans between $one million and $five million" (11). All credit card services were instead found to be national in scope, while securities markets ranged from local for "full-service brokerage" to national for equity underwriting.

The Swiss Competition Commission reached similar conclusions in the UBS merger finding that geographical markets range from the canton/region to the nation depending on the service provided. See Gugler (2000, 10-12).

The European Commission seems to have concluded that "retail banking" markets are national in scope; "corporate banking" markets are national in the case of small and medium businesses, but international for large corporate clients; and "financial markets" are international. See European Commission (1998, paras. 16-17).

A recent Portuguese study supports the view that despite the introduction of the Euro, and various technological developments, European markets for bank deposits remain fragmented rather than Europe wide. See Barros (1999).

25. This generalisation also applies regarding the growing cross-border trade in financial services. There is limited evidence showing that such trade is:

> ..most prevalent and longest established in the sophisticated end of the market: wholesale commercial banking; investment banking; private banking; insurance (large risks, and reinsurance), and operational and financial information services.... Further growth in cross-border trade in these market segments is to be expected.
>
> On the other hand, the provision of retail banking and wealth management services for less sophisticated individuals and small business has been overwhelmingly through local commercial presence. The incidence of cross-border provision of these services appears extremely low....
>
> Nevertheless, there are signs of a pickup in retail cross-border activity in specific product lines related to the provision of credit (e.g. credit cards, credit lines). This development illustrates the potential impact of technology, growing technological literacy, and changing attitudes on the broader retail market.

OECD (2000a, 54)

26. For example, according to Boot (1999, 610):

The domestic banks in Europe were - and are - protected as domestic flagships. A fundamental belief that financial institutions should not be controlled by foreigners has (so far) almost prevented any cross-border merger.

Boot also opined that: "The primary response to the liberating EU directives has so far been defensive: domestic mergers are generally encouraged to protect national interests." (611)

27. See von Finckenstein (1998a, Appendix A - Glossary). Interestingly, in the two recent bank mergers where this list was propounded, Canada's Competition Bureau found potential competition problems in the "general purpose credit card network services" and "merchant acquiring" See von Finckenstein (1998a and 1998b). The USDOJ is also apparently becoming more concerned about adverse effects of bank mergers on certain credit card related activities. See Kramer (1999, 5).

28. See von Finckenstein (1998a, 30) for some suggested product divisions regarding banks' securities businesses.

29. At least one competition office would treat factoring and leasing as different from traditional bank lending markets. See Gugler (2000, 10).

30. For a discussion of co-ordinated interaction (i.e. the source of co-ordinated effects), see OECD/CLP (1999, 17-32).

.31. This list of factors was mostly inspired by ACCC (1997, 34), von Finckenstein (2000, 9) and Gugler (2000, 14). Interestingly, some recent empirical work for U.S. banking markets suggesting that significant size asymmetry may be as bad or worse for vigorous competition than too much symmetry - see Pilloff (1999b).

32. For an example of concentration levels being used in this way, see von Finckenstein (1998, Appendix B). See also ACCC (1997, 1 & 14-18). In the US the thresholds are somewhat more liberal in bank mergers than in other mergers, i.e. a merger exceeds the threshold if a merger will increase the HHI by more than 200 and the postmerger HHI will be over 1800 - see US Office of the Comptroller of the Currency (1995, 1). In non-bank mergers the thresholds are 200/1600 - see US Department of Justice and Federal Trade Commission (1997).

33. Under EC Regulation #1310/97, the European Commission's Competition Directorate switched to using actual income data instead of an arbitrary 10 percent of assets (i.e. roughly corresponding to deposits) as a proxy for turnover in bank merger cases. See Bruzzone and Polo (1998, 33-34). This change, although it could be justified or even required on legal grounds, is open to criticism on the basis that total deposits raised in a particular geographic market constitute a better measure of willingness and capacity to engage in various lending activities in that market. See Robinson (1996, 3).

34. See Cetorelli (1999, 6). See also Berger, DeYoung, Genay and Udell (2000, 28), Radecki (1998, 32), and Berger, Demsetz, and Strahan (1999, 153).

35. These factors are inspired from material found in: Kwast (1999, 633-634); ACCC (1997, 26-28); von Finckenstein (1998, 16ff); Gugler (2000, 14); and Kramer (1999). One aspect of what we referred to as "vertical relationship issues" showed up in the proposed merger between the Royal Bank of Canada and the Bank of Montreal. These two banks were members, respectively, of the Visa and MasterCard credit card systems. Canada's Competition Commissioner found that if, as a result of the merger, the Bank of Montreal switched to the Visa system, MasterCard would likely be eliminated "...as an effective competing network in Canada...." [von Finckenstein (1998, 23)]

36. Berger, Saunders, Scalise and Udell (1997, 33-34) tested the hypothesis that mergers could reduce loans to small business because of a supposed negative correlation between bank size and the proportion of assets usually devoted to small business lending. After surveying some 6000 bank mergers and acquisitions from the late 1970s to early 1990s, they concluded that the merged entity might indeed make relatively minor

reductions in their loans to small business. However, this was probably offset in whole or in part by increases in such loans by other banks in the affected local markets. They warn, though, that: "A short-term cost of switching may be paid by the borrower...through higher rates or more collateral requirements until the new banking relationship matures."(34) Berger et al.'s findings were basically supported by Jayaratne and Wolken (1999, 427). The latter were criticised by Peterson (1999).

37. Regarding multi-market contacts possibly increasing competition, Berger, DeYoung, Genay and Udell (2000, 29 - footnote omitted) state:

> There could also be less exercise of market power, at least in the short run, if firms price strategically to signal their costs or to drive competitors out of business. The data are mixed as to the effects of multimarket contact on prices for retail banking products....

38. For empirical support, based on US data, for the idea that supra-competitive profits in banking will eventually be eroded by new entry, but that this may take some time (especially as regards rural bank markets), see Amel and Liang (1997).

39. See OECD/CLP (1998b) for a good competition policy overview of bank regulation in OECD countries.

40. Fleshing this out a bit, banks are forced to offer higher and higher rates of interest to attract depositors (who basically ignore the risk they may be exposed to), rates they cannot pay unless they use depositor funds to purchase risky, high yield assets.

41. For a brief reference to this issue, see Berger and Humphrey (1992, 543-544). The same point might be made as regards state ownership in the banking sector. How much weight should be attached to such arguments when determining the probability of a merger having an anti-competitive effect is an empirical issue lying outside the scope of this paper.

> There is another point about regulation that deserves passing mention. In countries employing a substantial lessening of competition test to determine whether a merger can be prohibited, it may be difficult to demonstrate that the threshold has been met if the sector's pricing etc. is so closely regulated that there was little competition before the merger occurred.

42. It also tends to create problems for prudential regulators, which is perhaps one of the reasons the USDOJ apparently leaves the too big to fail issue largely in the hands of the bank regulators [see Kramer (1999, 4)]. By definition, if a too big to fail bank gets into financial difficulties, prudential regulators have fewer options for dealing with the problem. See Canada, Office of the Superintendent of Financial Institutions (1998, 4).

43. See Task Force on the Future of the Canadian Financial Services Sector (1998, 18) where it is noted that:

> ...while many countries do not have written ownership restrictions, most require formal or informal government approval of ownership changes. This power has often been used to ensure that institutions, particularly major institutions, are widely held and domestically controlled.

44. The best known example is the case of the regional German savings banks. State subsidies to these banks have recently come under attack from the European Commission. See Harnischfeger (2000) and Hargreaves and Barber (1999).

45. ACCC (1997, 22). See also von Finckenstein (1998a, 15-16). In addition to concerns about barriers to entry, merger induced changes in the networks could spell reduced inter-network competition. See n.37 supra.

46. See Das and Nanda (1999, 868) for steps normally required in the US to set up a revolving credit line. The compensation fee is motivated by the bank needing some assurance of a long term borrowing commitment before it incurs sunk costs investigating the credit worthiness of the applicant.

47. According to Rhoades (1997, 1003):

> Regarding small business lending, there are indications that economic barriers to entry are beginning to erode, especially as a consequence of the adoption of credit scoring models. Such models appear to be giving some major banks the confidence to extend loans to "small" businesses located in local markets where the bank does not have operations. It is not clear yet, however, whether the information advantages of local banks will substantially limit the extent of new entry into small business lending by distant firms, except perhaps for lending to relatively large and well established small firms.

48. In the case of the proposed Deutsche/Dresdner bank merger, projected cost efficiencies stemmed mostly from an expected closing of one third of the combined banks' 2800 branches. See CNN (2000). See also Dai-Ichi Kangyo Bank (1999), Asahi Bank (1999), and Asahi Bank (2000) for bank merger announcements making prominent mention of savings to be achieved through closing overlapping branches.

49. Berger, Leusner and Mingo (1997) found considerable under-utilised branch capacity in the US, but noted that this "...may be optimal from a profitability standpoint, since additional offices provide convenience for the bank's customers that may be recaptured by the bank on the revenue side." (159)

50. As taxpayers, however, consumers stand to gain by reductions in the contingent liabilities of government deposit insurance schemes.

51. A US study examining the effects of consolidating payment operations at fewer sites, noted that although this might reduce average data processing costs, resulting cost savings may be more than offset by associated increases in telecommunications expenses. See Hancock, Humphrey and Wilcox (1999, 391)

52. See Dai-Ichi Kangyo Bank (1999), Asahi Bank (1999), and Asahi Bank (2000).

53 Strategic alliances should be less anti-competitive than the same level of co-operation achieved by a merger among all the banks involved in a strategic alliance. This is because a merger covers all aspects of the businesses conducted (including future lines of business) and can be expected to be much more permanent than a strategic alliance. For more information about the competition policy implications of strategic alliances, see OECD/CLP (1992).

54. On this point Allan Fels (1998, 18), Chairman of the ACCC, stated:

> ...I believe that the factors driving merger activity overseas are as much about specific regulatory, cyclical and institutional issues pertaining to particular jurisdictions as they are about the wider commercial imperatives impacting on financial institutions at home and abroad. In this context, the implications for local financial institutions of merger activity overseas needs to be interpreted carefully and with regard to a full set of information about the precise context in which merger activity is occurring in other jurisdictions.

55. See Rodrigues (1999, 5) who bolstered this point with reference to the June 1997 Mortimer Report to the Australian government. For an alternative view, see Boot (1999, 611).

56. See Flannery (1999, 216-217) who states that Prowse (1997) found, "...that internal corporate governance is weaker for banks than for other types of corporations, and concludes that regulatory controls tend to displace some of the usual private mechanisms."

57. See Berger and Hannan (1998, 464). See also Peristiani (1997) whose empirical work based on US data found a post-merger decline in X-efficiency using US bank merger data from the 1980s.

58. See Akhavein, Berger and Humphrey (1997, 133). A note of caution is required. A study of four Australian bank mergers taking place between 1989 and 1991 noted that the results add credence to the idea that acquiring banks are more efficient than their targets. This was immediately qualified, however, with: "...the acquiring bank does not always maintain its pre-merger efficiency." Avkiran (1999, 1010)

See also Rhoades (1998, 288) who noted that although a commitment to cutting costs and having acquiring firms being more efficient than targets, "...may be important, [such factors] apparently are not sufficient to ensure efficiency gains."

59. This point was mentioned in the review of a recent bank merger review in Canada - see von Finckenstein (1998a, 26).

60. See von Finckenstein (1998a, 41), and Fels (1998, 13). Interestingly, Article 40(3) of Germany's competition law formally requires that conditions and obligations in connection with approving a merger may not amount to continuing control of an enterprise.

61. Remarking on the wisdom of this and another behavioural obligation plus a requirement to divest a certain number of branches, Gugler (2000, 16) comments:

The experience showed that this solution is quite difficult to manage and enforcing these obligations is time consuming particularly when the obligations are not purely "structural ones" but cover behavioral considerations.

62. As earlier, noted, this could now be changing because of the growth of electronic banking.

63. Robinson (1996, 4) has provided a good description of what is entailed in identifying an appropriate package of branches to be divested, and the need to find a proper purchaser:

...when we construct a network of branch offices to find an appropriate fix to potential competitive concerns, we will look beyond the amount of assets to be divested to the quality and location of the branches that are included in the divestiture package. Because our primary focus has been competition for small business loans, we investigate in some detail the characteristics of the parties' branches in those markets, including their deposit and loan make-up, locations and ease of access for businesses. Our goal is to determine and evaluate each branch's overall current use by, and potential attractiveness to, area businesses. We have requested some parties, for example, to provide photographs of the branches. We also obtain significant additional information during our interviews of other participants in the market.

We also spend considerable time evaluating the viability and overall effectiveness of branch networks proposed for divestitures in a market. The issue we address is whether a purchaser of the network would be an effective business-banking competitor in the area. The factors we consider include the number and location of branches as well as the needed mix of deposits, banking services and personnel. The result is not based solely on concentration figures. We may argue strongly for particular branches or branch locations to be included in the divestiture package. We also require that parties divest the entire relationship for each customer associated with each branch, including deposits, loans and other related services. The final package is intended to reflect the commercial realities of the markets involved, as well as to give the purchaser of the divested branches a strong presence in the market.

64. See Burke (1998). Burke included in his conclusions:

Divested branches in cases where the Department of Justice was involved in the negotiation of branch sales were, on average, not as successful as other divested branches. Thus, based on the retention of deposits, it appears that leaving most of the terms and conditions surrounding purchase agreements to the discretion of buyers and sellers [as the USFRB apparently does] has not impaired the competitive viability of divested entities. (23)

Closer examination may show that this conclusion is ill founded because of systematic differences in the difficulties faced by branch purchasers in mergers left to the USFRB and those in which the USDOJ believed it was necessary to implicate itself.

For a general examination of the problems involved in applying the divestment remedy and recommendations to improve it, see United States Federal Trade Commission (1999). The study revealed

an unexpected general weakness in the negotiating strength of prospective buyers and included recommendations to deal with that problem. The recommendations also favoured pressuring merging parties to conclude the divestment as rapidly as possible, and to sell ongoing businesses rather than merely to facilitate entry by selling assets.

65. The ACCC has signed a memorandum of understanding with the Reserve Bank of Australia seeking to eliminate regulatory overlap between the two institutions. Overlap is a real possibility given that the Reserve Bank is now charged with promoting competition and efficiency in the payments system. See Fels (1998, 16).

Annex I of Canada's "Merger Enforcement Guidelines as Applied to a Bank Merger" contains review procedures co-ordinating merger review by the Competition Bureau and the Minister of Finance. See Canadian Competition Bureau (1998).

In 1996, the Norwegian Banking, Insurance and Securities Commission and Norwegian Competition Authority signed an agreement to co-ordinate "...work on cases with a bearing on competitive conditions in financial markets". For the text of the agreement, see OECD (1998b, 166-168). It includes specific provisions regarding collaboration in mergers and acquisitions cases.

In 1994, the United States Office of the Comptroller of the Currency, the USFRB and the USDOJ adopted joint screening guidelines. See US Office of the Comptroller of the Currency (1995). The US guidelines have fostered beneficial inter-agency co-operation which in turn has produced important benefits:

For example, the lines of communication and dialogue among the agencies has improved substantially. To the extent the agencies are aware of each others' concerns, the parties can be more comfortable that the investigations are proceeding on parallel tracks, thereby minimising the potential for divergent decisions. Each agency also provides its own experience and perspective and often may pursue issues related, but not identical, to those of other agencies. [Robinson (1996, 2)]

66. For a description of the failing firm defence, see OECD/CLP (1996).

67. For example, when five Korean banks were in serious financial difficulty in 1998, the Korean Financial Supervisory Commission issued decrees mandating consolidation and restructuring of those banks. Legally required actions, including such merger decrees, are explicitly exempt from review under Korea's competition statute.

68. The cancelled Deutsche/Dresdner Bank merger provided some interesting information concerning the capacity of such mergers to generate job losses plus debate concerning how merger review might ostensibly require re-thinking in order to ensure proper consideration of such losses. See Schmid (2000a). Interestingly, an inability to agree on how to handle possible job losses at Dresdner's investment banking division (i.e. Dresdner Kleinwort Benson) led to undoing the deal. See Schmid (2000b).

69. For further details concerning Canada, France and Switzerland, see the Appendix to this paper.

70. See Gugler (2000, 4) who also points out that if such a situation ever materialised, the application of the provision "...could raise some conflicts between purely competition policy considerations and purely creditors' protection criteria."

71. For a general review of the arguments for and against centralising competition law enforcement as opposed to decentralising this to certain sector regulators, see OECD/CLP (1999, 17-50, i.e. the Background Note to the Roundtable).

72. Two examples illustrate these points: the USFRB may have insufficiently understood the need to make market definitions tailored to assessing anti-competitive impacts; and the Bank of Italy may not have appreciated the negative efficiency impact of the remedy adopted in the Sardinian bank merger referred to earlier in this paper.

73. See Cruikshank (1999) for insights concerning applying competition policy in the financial services sector. Cruikshank, as the former Director-General for Telecommunications (i.e. OFTEL), had first hand experience with concurrent enforcement of competition law pertaining to anti-competitive agreements and abuse of dominance. He nevertheless believed that concurrency "...unhelpfully fragments responsibility for enforcement." Cruikshank (1999 - page 2 of the cover letter)

74. For predictions regarding future developments, see OECD (2000b, 136) and Berger, Demsetz and Strahan (1999, 178).

75. Robinson (1996, 2) noted some important beneficial side effects flowing from the joint efforts of the U.S. bank regulators and competition authorities to produce bank screening guidelines. Lines of communication have been enhanced and so has inter-agency dialogue and mutual understanding. The latter has probably benefited parties as well as the agencies themselves by reducing the chances of divergent remedies being decided by the agencies.

APPENDIX

Some examples of countries including matters other than prudential and competition concerns in bank merger review

Australia

In Australia bank mergers are concurrently reviewed by competition and prudential regulators who report their findings to the responsible Minister, i.e. the Treasurer, who has a reserve power to block bank mergers.[1] The Treasurer does not have the power to permit mergers blocked by the competition agencies. Aside from the Treasurer's exceptional blocking power, bank mergers are reviewed using one of the two approaches applied to all other mergers. Under the first of those approaches, a merger is analysed strictly in terms of its potential to substantially lessen competition. Under the second, chosen at the option of the parties, the Australian Competition & Consumer Commission (ACCC) applies a formal public process in which a merger's anti-competitive effects are weighed against various public benefits/ efficiencies. If the balance tilts in favour of the merger, the ACCC authorises it for some specified period of time. If the ACCC refuses to authorise it, the parties can seek authorisation from the Australian Competition Tribunal (ACT).

The list of benefits/efficiencies considered in an authorisation application includes, *inter alia*, effects on: overall and regional economic development; economic efficiencies (especially those promoting international competitiveness); import substitution and export promotion; employment; the environment; industrial harmony; efficiency of small businesses; quality and safety of goods and services; breadth of consumer choice and information supplied to consumers; and promotion of equitable dealings in the marketplace [see ACCC (1996, 64-65)]. In practice, this all encompassing list is considerably narrowed since the ACCC and ACT have indicated they will give the greatest weight to efficiency factors [see ACCC (1996, 65)].

In 1997 a major financial sector inquiry recommended abolishing the Treasurer's reserve power to block mergers, but the Treasurer opted instead to retain that power [see Goddard (2000)].

Canada

Bank mergers in Canada are, in the first instance, subject to the same competition review as applies to all other mergers. This includes the possible application of an efficiency defence under which qualifying anti-competitive mergers may avoid interdiction. The wrinkle lies in the fact that the Minister of Finance has the power to prevent the Competition Tribunal from blocking or conditioning a merger the Minister certifies to be, "...in the best interest of the financial system in Canada."[2] That phrase is left unqualified in Canada's *Competition Act*. The Minister of Finance also has the final say over whether a bank merger will be permitted to proceed. The Minister makes this decision based on his view of the public interest after having received reports from both the Competition Bureau and the prudential regulator. The Minister blocked two proposed large mergers in 1998 because he concluded the mergers would have resulted in:

1. an unacceptable concentration of economic power;

2. a significant reduction in competition; and

3. a reduction in the future flexibility available for addressing prudential concerns.[3]

France

Bank mergers are exempt from application of France's general competition law and formal review by its competition authorities. Such concentrations are instead supervised by the bank licensing agency, i.e. "Comité des établissements de crédit et des entreprises d'investissement" (CECEI). This agency is headed by the Governor of the Bank of France and includes in its membership: the Treasurer or his representative; representatives of bodies authorising the subject enterprises' activities; and six persons appointed for three year terms by the Minister of Economy and Finance. Those six persons are specified by law to include: a member of the "Conseil d'Etat" (supreme administrative court); a director of a credit institution; a director of an investment institution; a representative of the pertinent labour unions; and two others chosen for their competence, presumably as regards the financial sector.

The criteria applied by the CECEI to bank mergers are set out in Articles 15, 16 and 17 of the *Banking Law of 24 January 1984*. These are principally concerned with prudential matters and do not explicitly include competition policy concerns. One must therefore deduce that competition issues are not heavily weighted compared with prudential and possibly other public policy matters in French bank merger review.

Germany

In Germany a bank merger falling outside the purview of the European Commission will be permitted unless it fails to be approved by the prudential regulator, or is blocked by the Federal Cartel Office (FCO) and that blocking decision is not overturned at the political level. Germany's review of bank mergers has the following notable characteristics: there is no special regime applying to bank mergers; the final decision to block a merger rests with a politician rather than the competition office; the responsible Minister cannot block a merger that the FCO finds unobjectionable; and the Ministerial review process includes steps tending to raise the political price the Minister must pay to approve an anti-competitive merger.

FCO review of mergers is restricted to "pure" competition concerns, but before prohibiting a merger, the FCO must give an opportunity to comment to the supreme "Land" (i.e. state) authorities in whose territory the participating undertakings have their registered seat. It should be noted that the states have ownership interests in some significant banks. An FCO decision to block a merger can be appealed to the courts. As already noted, the parties involved can also request the Federal Minister of Economics to permit a merger blocked by the FCO.

Where an over-ride is requested, the Minister must ask the opinion of the Monopoly Commission. The members of this Commission are appointed for four-year renewable terms by the Federal President on the recommendation of the Federal Government. There are legal requirements that Commission members have suitable expertise and not be affiliated with governments, industry associations or associations of employees or employers. The Monopoly Commission draws up its report based on the Minister's very wide mandate, i.e. to "...consider the benefits of a merger for the economy as a whole and assess whether it would be in the public interest, and then balance these aspects against potential restraints of competition."[4] The German competition act does not spell out what is meant by "benefit to the economy as a whole". It is also interesting that:

> In preparing his decision, the Minister must accept the Federal Cartel Office's legal findings and its description of the companies' position within the market situation with an eye to potential restraints of competition by the merger....[5]

Unlike the FCO's decision, the Monopoly Commission's report is not necessarily published before the Minister makes his decision, but it is discussed in the public hearing that usually forms part of the authorisation process.

Since 1973 there have only been sixteen applications for a Ministerial over-ride. Five of those were eventually withdrawn, five were refused and six were approved (one partially and three with conditions or restrictions).[6]

Ministerial authorisation has so far not been sought in any bank mergers. In fact, due to low levels of concentration, the FCO has only rarely prohibited mergers in the bank sector.

Switzerland

As in Germany, the Swiss bank merger review system includes the possibility of a political level over-ride of a Competition Commission decision to block a merger. Such an authorisation is available at the request of the merging parties if "...in exceptional cases, it is necessary in order to safeguard compelling public interests".[7] The notable differences with the German system are that Switzerland does not have a body analogous to the Monopolies Commission, and an over-ride application is considered by the entire Federal Council rather than a specific Minister. This special authorisation process has not yet been applied to a bank merger, or any other merger for that matter, which is not surprising since the system has been in place only since 1996.

United Kingdom

In the UK a bank merger falling outside the purview of the European Commission will basically be permitted unless it fails to be approved by the Financial Services Authority, which takes care of prudential concerns, or is blocked by the Secretary of State. From the competition policy perspective, bank mergers are treated no differently than any other concentrations. Mergers likely to create significant competition concerns will almost certainly be the subject of a report by the Office of Fair Trading (OFT) to the Secretary of State. The latter is free to approve such a reported merger or refer it to the Competition Commission (CC) for investigation. Where a referral is made, the CC must determine whether or not the merger is likely to operate against the public interest. This concept is very broad and includes, *inter alia*, reference to the desirability: of maintaining and promoting competition; of promoting the interests of consumers; of promoting static and dynamic efficiency; and "of maintaining and promoting the balanced distribution of industry and employment in the United Kingdom".[8] The CC's report is presented to both the Secretary of State and Parliament, so will eventually, but not necessarily immediately, be published. If the CC concludes that there is no harm to the public interest, no further action can be taken. In the alternative, the Secretary of State is free but not obliged to take a wide range of remedial action. This leads to the conclusion that the Secretary of State has the power to approve anti-competitive mergers, but lacks the power to block mergers, which are inoffensive in terms of their effects on competition.

NOTES TO APPENDIX

1. The material in this paragraph is heavily borrowed from Goddard (2000, 200-206).

2. See R. S., 1985, c. C-34, s. 94(b) [Competition Act - as amended].

3. See Goddard (2000, 235). As noted earlier in our paper, the last reason probably reflects a desire to avoid creating a too big to fail bank. It also illustrates the difficulties inherent in separating true prudential concerns from other factors.

4. German Federal Ministry of Economics and Technology (BMWI) (1992, 1)

5. Loc. cit..

6. Ibid., page 2.

7. Article 11 of the Swiss Federal Act on Cartels and Other Restraints of Competition of 6 October 1995. The Act does not spell out what is meant by either "exceptional cases" or "compelling public interests".

8. See Whish and Sufrin (1993, 79) where they cite from s.84 of the UK's Fair Trade Act.

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NOTE DE RÉFÉRENCE

1. Introduction

Il suffit de lire à l'occasion les journaux financiers pour constater que les fusions de banques, en particulier de banques déjà très importantes, sont plus fréquentes depuis quelques années, tant à l'intérieur de l'OCDE qu'à l'extérieur de celle-ci[1]. Les grands titres annoncent souvent des projets de fusion entre des banques qui se situent déjà parmi les cinq ou dix premières en importance dans leur pays, et bon nombre de ces annonces sont accompagnées de la nouvelle feuille de route mondiale des principales banques de la planète. Bien qu'elles ne reçoivent pas la même attention, les fusions de banques de petite ou moyenne envergure se produisent également à un rythme rapide, tout particulièrement aux États-Unis, en Allemagne et en Suisse.

Au moment d'écrire ces lignes, on pouvait encore dire sans se tromper que la plupart des fusions bancaires se produisaient au niveau national, malgré quelques exceptions majeures, notamment la prise de contrôle de Bankers Trust par la Deutsche Bank, la fusion de la BBV (Espagne) et de Bancomer (qui a donné naissance à la plus grande banque du Mexique) ainsi que la prise de contrôle du Crédit commercial de France (CCF) par la HSBC.

Comme dans la plupart des situations se produisant à l'échelle de la planète, la vague de fusions bancaires semble attribuable à des facteurs de nature mondiale. Quatre forces principales agissant en interaction sont à l'œuvre : la réforme de la réglementation, l'intégration internationale des marchés (c'est-à-dire la mondialisation), la surcapacité/la détresse financière et les changements technologiques[2].

Comme on l'a mentionné dans le cadre d'une table ronde de l'OCDE tenue en février 1998 sur le rôle de la concurrence dans la réglementation bancaire, on observe un allégement considérable de certains règlements comme le contrôle direct sur les taux d'intérêt, les frais et les commissions, ainsi que des restrictions touchant les secteurs d'activités, la propriété et les portefeuilles [OECD/CLP (1998a, p. 7)]. Parmi les changements relatifs à la propriété, mentionnons des mesures visant à faciliter l'investissement direct étranger dans le secteur bancaire. Ensemble, les réformes de la réglementation ont contribué à promouvoir une plus grande ouverture, une plus grande concurrence sur les marchés. Les pressions concurrentielles qui en ont résulté ont été accrues par une certaine « globalisation » du système bancaire et par une tendance à la désintermédiation financière. Les banques perdent une part de leur secteur d'activités traditionnel étant donné que les grandes entreprises privilégient de plus en plus le recours direct aux marchés financiers[3]. Il s'agit d'une bonne nouvelle pour les banques d'investissement (qui fournissent conseils et financement lors de grandes restructurations), mais cela pourrait donner lieu à une surcapacité dans le secteur des prêts bancaires traditionnels. La surcapacité et la détresse financière se sont avérées particulièrement problématiques en Corée et au Japon, où plusieurs banques ont subi d'importants revers financiers ces dernières années.

Tous ces changements ont sur plusieurs plans un rapport avec les améliorations technologiques qui surviennent dans le secteur bancaire. Les changements au sein des technologies de l'information, du

traitement des données et des télécommunications ont manifestement un lien avec l'utilisation accrue des cartes de crédit et de débit ainsi que des guichets automatiques de banque (GAB) et des services bancaires en ligne. Ils facilitent également la création de nouveaux produits financiers et pourraient entraîner la modification de plusieurs autres[4].

Les quatre facteurs catalyseurs dont nous avons précédemment parlé expliquent probablement en grande partie pourquoi tant de banques décident de fusionner. Quels sont cependant les effets de ces fusionnements sur l'efficience et sur la puissance commerciale ? Lorsqu'ils tentent de répondre à ces questions, les organismes chargés de la concurrence sont aux prises avec un certain nombre de difficultés. Le présent document a pour objet d'examiner ces difficultés et d'explorer la relation existant entre la politique de la concurrence, les autres politiques publiques stratégiques et les fusions bancaires.

2. Services bancaires électroniques : les succursales deviennent-elles de moins en moins importantes pour les banques ou s'agit-il simplement d'un changement de rôle ?

Commençons par les développements de la bancatique (c'est-à-dire les guichets automatiques et les services bancaires en ligne), ceux-ci ayant une incidence considérable sur les sujets qui seront discutés plus loin. Vu la baisse radicale des coûts qu'ils occasionnent en matière d'information et d'opérations, les services bancaires électroniques pourraient changer les groupes de services que les clients souhaitent obtenir sous forme de forfaits et par conséquent influer sur la définition du marché. Ils pourraient aussi élargir considérablement les marchés géographiques relatifs à certains produits. Par ailleurs, la bancatique pourrait réduire les obstacles à l'entrée sur le marché en rendant moins nécessaire l'établissement d'un vaste réseau de succursales, et pourrait influer par conséquent sur le caractère anticoncurrentiel ou non d'une éventuelle fusion.

La bancatique a connu un essor rapide quand les GAB se sont largement répandus et ont commencé à produire des économies considérables de coûts pour les banques. Certains observateurs s'attendaient à ce que les GAB entraînent une diminution radicale des besoins au plan des succursales, mais ce ne fut manifestement pas le cas. Un spécialiste décrivait en ces termes les obstacles à l'entrée sur le marché des services bancaires :

> […] les services bancaires électroniques de détail pourraient un jour abaisser considérablement les barrières à l'entrée des banques sur les marchés locaux. Néanmoins, comme l'indiquent plusieurs observateurs de même que les données disponibles, à ce stade-ci très peu de gens réalisent des activités bancaires électroniques qui les amènent à se procurer des services bancaires de base auprès de banques situées ailleurs au pays. Les services bancaires électroniques sont généralement utilisés simplement à titre de commodité supplémentaire pour effectuer des opérations avec une banque de leur localité, tout comme on utilise les GAB surtout pour obtenir de l'argent en espèces ou le téléphone pour vérifier le solde des comptes […]. [Rhoades (1997, p. 1004)]

C'est également à cette conclusion qu'est arrivée la Commission australienne de la concurrence et de la consommation (ACCC) qui, procédant à l'examen d'un fusionnement de banques en 1997, a déterminé que malgré l'avènement des services bancaires électroniques, les succursales étaient toujours nécessaires, en particulier pour les dépôts, les comptes d'opérations, les cartes de crédit et les services bancaires aux petites entreprises[5]. Un an plus tard, le Commissaire de la concurrence du Canada endossait une position semblable relativement à l'incidence des GAB et des cartes de débit ainsi que des services bancaires par téléphone, par ordinateur et par Internet [voir von Finckenstein (1998a, pp. 15-16)]. Il nuance cependant son point de vue quelque peu sceptique face aux services bancaires électroniques en mentionnant qu'une éventuelle concurrence ne revêt pas une importance cruciale pour le processus

d'examen des fusions au Canada, sauf si l'on peut présumer qu'elle puisse neutraliser en moins de deux ans tout accroissement de puissance commerciale par suite d'une fusion.

La Commission européenne semble plus optimiste que ne le sont l'Australie et le Canada sur l'utilité éventuelle de la bancatique. Après avoir souligné que le fusionnement des banques Fortis et G-Bank donnerait lieu au plus imposant réseau de succursales en Belgique (c'est-à-dire que cette nouvelle formation rassemblerait de 35 à 39 pour cent des succursales des provinces du Hainaut, de Namur et du Brabant wallon), la Commission européenne a fait remarquer que :

> [Traduction libre] […] cela ne lui conférerait pas une position de prédominance parce que les consommateurs auraient suffisamment de guichets bancaires à leur portée. De plus, l'existence de distributeurs automatiques de billets, de services bancaires électroniques et de services bancaires par téléphone atténuent à cet égard l'effet de toute position de force. [Commission européenne (1998, par. 22)]

Ce point de vue semble en quelque sorte partagé dans une récente publication de l'OCDE où il est écrit que :

> […] les particuliers ont de plus en plus recours aux plates-formes électroniques pour réaliser leurs transactions. Par conséquent, un bon nombre d'innovations en matière de conception et de prestation de services financiers reposent sur l'utilisation d'Internet comme moyen d'atteindre les consommateurs. Aux yeux de certains observateurs, Internet représente un changement spectaculaire au plan de la capacité de distribution des réseaux et constitue pour les institutions un moyen de fournir une variété de produits et services aux consommateurs à un coût avantageux prédéterminé sur des marchés mondiaux, nationaux et locaux, le tout avec un certain niveau de rapidité[6].

Les diverses annonces faites par les grandes banques de plusieurs pays relativement aux services bancaires électroniques ajoutent du poids à cet argument. La Deutsche Bank en est un bon exemple[7]. L'une des principales raisons ayant motivé sa tentative de fusion avec la Dresdner Bank était de lui permettre de se retirer plus facilement des services bancaires de détail offerts dans les succursales. L'importance de tout ceci peut toutefois sembler plus grande qu'elle ne l'est en réalité étant donné que les succursales des banques fusionnées semblent tendre non pas à la fermeture, mais à une réorientation par l'intermédiaire d'un nouveau propriétaire[8]. Manifestement, les nouvelles succursales de banques de détail auront à diversifier davantage leurs produits pour survivre. Le Commissaire de la concurrence indiquait ce qui suit relativement au fusionnement des banques canadiennes dont il a été question plus tôt :

> Le contact personnel pour des fins notamment de résolution de problèmes et de prestation de conseils financiers demeure la clé pour la vente de plusieurs produits financiers. Toutes les principales banques sont en voie de modifier leurs succursales afin d'améliorer leur potentiel de ventes. Elles soulignent toutefois l'importance constante des activités en succursales et des relations personnelles entre les banquiers et leur clientèle personnelle et commerciale. [von Finckenstein (1998a, p. 15)]

En raison d'un surplus de succursales bancaires en Allemagne et de la concurrence exercée par des banques bien établies et soutenues par l'État, cette diversification pourrait ne pas avoir semblé intéressante à la Deutsche Bank[9]. Dans cette perspective, de meilleurs profits pourraient évidemment être réalisés en se concentrant sur les activités bancaires d'investissement, la gestion de l'actif des gens riches et certains autres marchés de plus en plus « globalisés ». [Voir Tony Barber (2000)]. Il est intéressant de noter que dans le même article où il était question de la préférence qu'accordait la Deutsche Bank aux services bancaires électroniques par rapport aux succursales traditionnelles, il était également fait mention

qu'au moins une grande banque américaine trouvait que les succursales contribuaient de façon assez considérable à l'augmentation des opérations bancaires par Internet[10].

Notre bref survol des services bancaires électroniques nous permet de formuler avec certitude uniquement deux constats. D'abord, leur importance dans l'examen des fusions semble varier beaucoup d'un pays à l'autre, voire d'une fusion à l'autre. Ensuite, peu importe le degré d'importance de ces services actuellement, les organismes chargés de la concurrence devront à l'avenir les prendre davantage en considération[11].

3. Définition du marché

La définition du marché constitue d'ordinaire la première étape lorsqu'on réalise l'évaluation préliminaire de la puissance commerciale après un fusionnement en se fondant sur les parts de marché. Pour être des indicateurs relativement acceptables de la puissance commerciale, les parts de marché devraient être calculées en tenant compte de l'intention des consommateurs et des fournisseurs d'opter pour un remplacement[12]. Dans le but de simplifier cette présentation, nous assumerons, pour les besoins du présent document, que les marchés sont définis en fonction de la réponse des consommateurs aux changements relatifs de prix. La réponse des fournisseurs à ces changements sera quant à elle considérée comme étant prise en compte dans l'attribution de parts de marché hypothétiques lorsque les indices de concentration seront calculés.

L'une des définitions des marchés de produits peut se faire par l'application de l'approche « de groupement ». Cette dernière a été mise en évidence en 1963 dans le jugement rendu par la Cour suprême des États-Unis dans l'affaire *United States v. Philadelphia National Bank*, et selon lequel « le groupement de produits (diverses formes de crédit) et de services (par exemple les comptes-chèques et la gestion de fiducies) que suppose l'expression *banque commerciale* […] constitue une activité commerciale distincte »[13]. Ce groupement particulier, qui a évolué quelque peu grâce à la suite d'une série de jugements rendus dans les années 60 et 70, comprenait « les prêts personnels et les services aux consommateurs ainsi que les prêts aux entreprises et les produits commerciaux » [Rozanski et Rubinfeld (1997, p. 256)]. Dans la décision rendue par la Cour suprême en 1963, le marché géographique a été défini comme étant de nature locale.

La définition du marché établie selon l'approche par groupement peut cadrer avec la définition établie selon l'intention des consommateurs d'opter pour un substitut advenant des changements de prix. Il faut pour cela que le groupement puisse être justifié en fonction de la « complémentarité des opérations » plutôt qu'en fonction de la complémentarité des demandes[14]. La pertinence de tout groupement de produits constitue d'abord et avant tout une question empirique que résume bien l'extrait suivant :

> Pour qu'il y ait un marché de produits par groupement il semble que certaines conditions doivent être en place. Si les consommateurs *a*) sont aux prises avec des frais d'opérations considérables lorsqu'ils doivent faire affaires avec plus d'une banque ; *b*) que les coûts de « fractionnement » sont élevés par rapport au coût du forfait et *c*) que la demande pour un élément du groupement est fonction du prix de l'ensemble des produits et pas nécessairement de son propre prix, les produits pourraient alors constituer un marché de groupement. De la même façon, si les banques offrent et vendent leurs services sur la base d'un prix global, l'examen du marché devrait avoir lieu en fonction des groupements de produits. [Case Associates (1999, p. 1)]

Bien que la Réserve fédérale (USFRB) aux États-Unis utilise habituellement l'approche de groupement pour examiner les fusions bancaires, la Division antitrust de ministère américain de la Justice

(USDOJ), qui a le pouvoir de remettre en cause devant les tribunaux les fusions approuvées par la Réserve fédérale, rejette cette approche. Rozanski et Rubinfeld (1997, pp. 256-257) mentionnent que :

> dans le cas d'un « groupement de services bancaires commerciaux », certaines entreprises font très efficacement face à la concurrence en fournissant certains des produits du groupement et non la totalité. Par ailleurs, même si les consommateurs et les entreprises tendent effectivement à acheter plusieurs services de leur principale institution financière, ils effectuent leurs achats séparément aujourd'hui et le feront encore de façon plus importante si leur banque augmente les prix de certains des produits faisant partie du groupement. L'approche de groupement semble sous-évaluer la concurrence sur le marché en ne tenant pas compte du rôle des prestataires spécialisés dans certains services.
>
> L'approche de groupement peut également surévaluer la concurrence sur le marché en supposant à tort, en raison de l'existence d'une abondante concurrence pouvant fournir un des produits du groupe, que la concurrence concernant les autres marchés est suffisante. Par exemple, la Réserve fédérale définit les marchés géographiques des États-Unis pour le groupement en se fondant en partie sur les déplacements que les gens effectuent entre les régions. Cela est compréhensible dans le cas de produits bancaires destinés aux particuliers, et pour lesquels les consommateurs estiment que les services des banques situées près de leur domicile ou de leur lieu de travail sont de bons substituts. Toutefois, les marchés géographiques qui en résultent sont parfois beaucoup plus vastes qu'il ne le faut pour l'analyse de la concurrence en ce qui concerne un grand nombre de produits destinés aux petites entreprises et pour lesquels la proximité de l'emplacement d'affaires revêt une importance stratégique. Dans les cas où la structure de la concurrence n'est pas homogène au sein du marché géographique étendu, l'approche de groupement pourrait ne pas déceler les conséquences négatives de la fusion sur la concurrence locale.

L'opinion du ministère américain de la Justice semble rallier l'ensemble des spécialistes de la politique de la concurrence[15]. Il est également intéressant de voir que la Réserve fédérale semble s'éloigner de son approche traditionnelle de groupement[16].

Avant d'examiner de plus près la définition de marché géographique, la question des prêts aux petites et moyennes entreprises (PME) mérite une attention particulière, tout comme la question de différencier les institutions financières qui acceptent des dépôts et celles qui n'en acceptent pas, les banques et les quasi-banques.

Certains bureaux de la concurrence ont refusé des fusions ou les ont modifiées à cause de la perception qu'elles auraient un effet défavorable sur les petites et moyennes entreprises[17]. Ces entreprises n'ont pas toujours de solution de rechange convenable aux marges de crédit bancaires pour lesquelles l'intérêt est calculé seulement sur les sommes vraiment empruntées. Cette souplesse est particulièrement importante pour les PME qui ne sont pas toujours en mesure de prédire avec précision leurs besoins en crédit. De plus :

> Un second facteur qui explique le succès relatif des banques locales dans l'octroi de marges de crédit, c'est que leur connaissance de la conjoncture locale fait en sorte qu'elles ont tendance à être mieux renseignées sur les risques associés à une jeune entreprise ou à un démarrage d'entreprise et leur proximité du marché local tend à diminuer les coûts de surveillance du rendement et de mise à jour de l'information sur les risques. C'est pourquoi les banques locales sont susceptibles d'être capables d'identifier les petites entreprises qui constituent un meilleur risque et de livrer avec succès une concurrence auprès de cette clientèle en lui proposant des conditions relativement favorables […]. Dans le cas des marges de crédit, les fournisseurs éloignés qui n'ont pas de réseau de succursales ou de présence solide sur un marché local ont

> tendance à considérer toutes les PME, sauf les mieux établies, comme un risque relativement élevé. Les fournisseurs éloignés peuvent consentir avec succès des prêts à des cas que les prêteurs locaux considèrent également comme risqués, mais ils ne sont peut-être pas concurrentiels en ce qui concerne les entreprises que les prêteurs locaux considèrent comme relativement sûres. *C'est la concurrence pour fournir des services à ces emprunteurs relativement à faible risque qui est un enjeu dans une fusion de banques dans une région géographique donnée*[18].

La définition de groupement de marché bancaire commercial dans la cause *United States v. Philadelphia National Bank* établit une distinction implicite entre les banques et les institutions qui n'acceptent pas de dépôts. Des preuves soutiennent la justesse de cette distinction dans une optique antimonopole. Toutefois, elle n'est pas trop convaincante parce qu'elle n'applique pas de manière uniforme une approche de substituabilité à la définition du marché et s'appuie fortement sur les données d'un seul pays et d'un seul groupe d'économistes, c'est-à-dire ceux qui travaillent au Conseil de la Réserve fédérale[19]. Toutefois, il faut reconnaître que les États-Unis ont les institutions d'épargne non bancaires qui figurent parmi les mieux développées du monde et assurément le marché des capitaux le plus avancé du monde. Si les banques commerciales américaines forment effectivement un marché antimonopole distinct des institutions qui n'acceptent pas de dépôts, cette différence se défend probablement aussi dans de nombreux autres pays.

Bien qu'il soit logique de différencier les institutions qui acceptent des dépôts et celles qui ne les acceptent pas, du moins en ce qui concerne les prêts aux petites entreprises et les services bancaires aux particuliers, les « banques commerciales » ne sont pas nécessairement dans un marché à part de celui des divers établissements quasi-bancaires. En faisant référence à l'Australie, Avkiran (1999, p. 993) constate :

> Les grandes banques commerciales font face à une concurrence accrue de la part des banques locales, des sociétés d'épargne immobilières, des coopératives d'épargne et de crédit et des prêteurs hypothécaires. Depuis quelques années en particulier, la démarcation entre le domaine d'activité des grandes banques et des autres institutions s'estompe. Profitant des changements législatifs et technologiques, les banques d'État et les sociétés d'épargne immobilières livrent une concurrence directe aux grandes banques à la fois dans un rayon géographique étendu et une gamme de produits accrue. Effectivement, le secteur bancaire australien connaît une convergence. Par exemple, les grandes banques commerciales qui s'appuyaient traditionnellement sur leurs dépôts pour effectuer des prêts financent de plus en plus leurs prêts hypothécaires par titrisation. Ceci est le résultat direct du succès des prêteurs hypothécaires à fournir des prêts hypothécaires à faible coût aux particuliers. Dans le même ordre d'idées, les institutions non bancaires incluent de plus en plus dans leurs services des produits traditionnellement proposés par les banques. Dans les prochaines années, on s'attend à ce que les grandes banques en particulier connaissent une nouvelle restructuration qui mettra l'accent sur la recherche de recettes à partir des frais bancaires plutôt que de la marge d'intérêt.

Les forces en faveur de la convergence dans les marchés bancaires d'autres pays sont probablement aussi fortes qu'en Australie et auront peut-être des effets semblables sur la transformation de ce que constitue un marché de produits convenable dans les cas de fusions de banques.

Comme l'ont fait remarquer Rozanski et Rubinfeld, la principale différence entre l'approche de groupement et l'approche plus sélective retenue par le ministère américain de la Justice et de nombreux autres organismes chargés de la concurrence ressort dans la définition de marché géographique, c'est-à-dire que différents produits regroupés dans une grappe particulière pourraient concerner des marchés géographiques très différents[20]. L'ACCC en a donné un bon exemple dans son examen de la fusion de la Westpac Banking Corporation et de la Bank of Melbourne (BML) en 1997. L'ACCC a défini deux groupes fondamentaux de produits : « les services bancaires aux grandes sociétés » et « les services

bancaires de détail ». Le premier n'a pas fait l'objet d'une analyse détaillée parce que la BML n'était pas présente sur ce marché. Quant aux services bancaires de détail, l'ACCC a délimité six catégories de produits (voir l'encadré) et a constaté des différences importantes dans leur portée géographique. Cette délimitation particulière ne s'applique pas nécessairement à toutes les fusions bancaires dans tous les pays. Toutefois, il existe des ressemblances avec les listes de produits dressées dans d'autres pays[21].

Description du marché des produits et du marché géographique selon l'examen, par l'ACCC, de la fusion des banques Westpac/Bank of Melbourne[22]	
Marché des produits	**Marché géographique**
Dépôts (dépôts à terme et dépôts à plus long terme de type « placement »)	Marché à l'échelle de l'État
Prêts hypothécaires résidentiels	Marché national
Prêts personnels	Marché régional[23]
Services aux petites entreprises (ce groupement comprend les opérations, les dépôts en succursale, les prêts et le traitement des opérations par carte de crédit et transfert électronique de fonds au point de vente)	Marché local – tout au plus à l'échelle de l'État
Services de carte de crédit	Marché à l'échelle de l'État
Comptes d'opérations	Marché à l'échelle de l'État

Les variantes du marché géographique constatées par l'ACCC sont généralement confirmées par les conclusions des études effectuées sur d'autres fusions de banques dans divers pays[24]. Ces variantes sont tout à fait conformes à ce qu'on pourrait prédire en se fondant sur les frais d'opération et d'information, c'est-à-dire que plus le degré d'interaction nécessaire (y compris la surveillance) est grand, plus le marché sera local. En outre, étant donné que les frais d'opération et d'information sont plus ou moins fixes, le marché géographique devrait croître en proportion avec la taille de la transaction en jeu [25].

Il est bon de garder à l'esprit que les services bancaires électroniques pourraient faire diminuer radicalement le coût des opérations et de l'information. Par conséquent, ils pourraient agrandir le marché géographique des services qui exigent peu de négociations et d'encadrement. Il y a plus de quatre ans, un expert a réfléchi sur le sujet et écrit :

> Selon les faits, les organismes [américains chargés de la concurrence] pourraient conclure que certaines nouvelles technologies (par exemple, les services bancaires à domicile) sont des solutions de rechange aux formes traditionnelles de prestation de services bancaires. Sinon, ce qui est plus susceptible d'arriver dans un avenir proche, c'est la possibilité que les coûts associés à publiciser les produits, à joindre les clients et à bâtir des liens avec ces derniers soient considérablement réduits par l'avènement de nouveaux moyens de communication électroniques. Avec le résultat qu'il existerait un nombre de prestataires de services bancaires dans une localité beaucoup plus grand que le nombre de succursales ne le laisse croire. [Guerin-Calvert (1996, 296)]

Comme nous l'avons souligné dans l'introduction, la majorité des fusionnements récents de banques se sont produits à l'intérieur des frontières d'un pays plutôt qu'outre-frontières. Ceci est probablement en grande partie attribuable aux règlements et aux politiques gouvernementales dans de nombreux pays qui découragent la propriété étrangère des banques nationales[26]. Quoi qu'il en soit, la tendance en faveur de la diminution des barrières visibles et invisibles à la prestation internationale de services bancaires est réelle, y compris par la prise de contrôle des banques nationales par des intérêts étrangers [voir OCDE/CLP(1998a, 7) et OCDE (2000b, pp. 131-132)]. Ceci devrait éventuellement élargir les marchés géographiques, du moins en ce qui concerne certains services comme la gestion de l'actif et les prêts importants et peut-être pour les prêts hypothécaires aux particuliers à l'intérieur de la zone de l'euro.

Si nous retournons à l'aspect produits de la définition du marché, il faut souligner deux points au sujet des prêts personnels et des prêts aux petites entreprises. Premièrement, ces deux catégories se chevauchent quelque peu, étant donné que de nombreuses petites entreprises, surtout les plus récentes, ont abondamment recours au crédit personnel (c'est-à-dire les cartes de crédit générales et les hypothèques résidentielles). Deuxièmement, il est sage de faire la différence entre les prêts fondés sur une sûreté facile à évaluer et les prêts qui n'ont pas la même garantie. Les banques locales font probablement face à une concurrence plus grande de la part des institutions non bancaires spécialisées et des banques plus éloignées dans la première catégorie que dans la seconde [voir Rozanski et Rubinfeld (1997, p. 255)].

Le « marché des services de carte de crédit » peut, dans certaines fusions, faire l'objet d'une répartition détaillée. Même si nous lançons encore une fois l'avertissement que la situation peut varier dans d'autres pays, nous montrons ci-dessous la classification que le Bureau canadien de la concurrence a récemment utilisée pour examiner deux fusions chez quatre des plus grandes banques du Canada[27] :

1. émission de cartes de crédit universelles aux entreprises - fourniture de la carte de crédit plastifiée aux consommateurs ;

2. émission de cartes de crédit universelles aux particuliers - voir ci-dessus ;

3. secteur primaire de commerçant acquéreur - services fournis aux commerçants par les entreprises émettrices de cartes de crédit ou des consortiums d'institutions financières pour permettre aux commerçants d'accepter les paiements par carte de crédit de leurs clients et de recevoir le remboursement des achats ainsi faits par ces clients. « Les institutions financières, fournissant seulement les services de traitement et de règlement de paiements par carte de crédit effectués sur des achats, sont désignées sous le terme acquéreurs Visa ou acquéreurs MasterCard. Les institutions financières qui fournissent, outre les services de traitement et de règlement de paiements, le terminal d'ordinateur et le logiciel sont désignées sous le terme acquéreurs primaires » ;

4. commerçant acquéreur «Visa » - voir ci-dessus ;

5. commerçant acquéreur « MasterCard » - voir ci-dessus ;

6. services de réseaux de cartes de crédit - système permettant aux détenteurs de cartes de crédit de voir leurs cartes acceptées à grande échelle lors de l'achat de biens et de services.

Bien que le sujet soit en dehors du cadre de ce texte, il semble clair que lorsque les banques qui possèdent des maisons de courtage et/ou des compagnies d'assurances fusionnent, ces services doivent être analysés séparément comme marchés de produits additionnels. Ces marchés de produits et ces marchés géographiques supplémentaires seraient présument très semblables à ceux qui ont été recensés lors de l'analyse d'une fusion simple de deux maisons de courtage ou de deux compagnies d'assurances

indépendantes[28]. La même chose peut s'appliquer, mais pas toujours, au volet affacturage ou crédit-bail des banques en fusionnement[29].

4. Évaluation des effets anticoncurrentiels

Les fusions produisent potentiellement deux types de conséquences anticoncurrentielles : les « effets unilatéraux » qui surgissent parce que l'entreprise fusionnée peut exercer plus de puissance commerciale seule que ne possédait chacune de ses composantes avant la fusion et les « effets coordonnés » qui se produisent si une fusion accroît la capacité des entreprises de se lancer dans divers types de comportements parallèles anticoncurrentiels. Le risque d'effets coordonnés est particulièrement présent dans les marchés oligopolistiques[30].

Certains marchés bancaires dans les pays de l'OCDE sont oligopolistiques, c'est-à-dire qu'une poignée de banques accapare la plus grande part du marché. En plus du petit nombre de banques, il y a d'autres aspects qui tendent à augmenter le risque que certaines fusions bancaires produisent des effets coordonnés. Ce sont les antécédents de réglementation (c'est-à-dire le contrôle des quantités et des prix), les barrières élevées à l'entrée, la demande stagnante pour certains produits comme les comptes d'opérations, l'homogénéité des produits, les prix relativement transparents et faciles à surveiller, une grande prévisibilité de la demande et des coûts, un niveau élevé de coopération sectorielle (par exemple, dans des associations, des co-entreprises, des alliances, des réseaux et des consortiums d'agents financiers), une part de marché stable et relativement semblable et l'interdépendance[31]. Nous reviendrons plus loin à certains de ces aspects.

Les organismes chargés de la concurrence effectuent habituellement peu d'enquêtes sur les marchés touchés par une fusion si ces marchés sont suffisamment non concentrés. Autrement dit, les niveaux de concentration sont couramment utilisés comme outil de dépistage d'effets anticoncurrentiels possibles[32]. Les données sur les dépôts ont été le plus souvent utilisées pour calculer les taux de concentration, mais au moins un grand organisme s'est éloigné de cette méthode au profit de l'analyse des données sur les revenus[33].

L'utilisation des taux de concentration comme indicateur approximatif de la puissance commerciale dans l'examen des fusions bancaires a récemment été critiqué. Certains affirment qu'une approche plus directe serait préférable. On pourrait y arriver en tenant compte de la manière dont les entreprises réagissent dans les faits aux changements de prix des autres entreprises, en prenant en considération l'influence de l'évolution de la demande et des coûts ainsi que des niveaux différents d'élasticité dans la demande du marché [voir Cetorelli (1999)].

Bien que les études empiriques passées qui s'appuyaient sur des données américaines aient confirmé un lien entre la concentration des marchés locaux et l'exercice de la puissance commerciale, les études empiriques récentes soulèvent des doutes quant à ce lien[34].

Que ce lien ait faibli sur le marché américain n'a rien de surprenant. Les changements substantiels dans les règlements ont récemment levé les dernières barrières qui entravaient la création de banques à l'échelle nationale aux États-Unis ; en fait, il s'agit d'une des principales causes de la vague de fusions bancaires dans ce pays pendant les années 90. Les changements dans les règlements ont donc à la fois agrandi les marchés, réduit les obstacles à l'entrée et contribué à une incidence plus élevée de conduite interdépendante chez les banques américaines. Tous ces développements tendent à affaiblir le lien entre les niveaux de concentration locale et la puissance commerciale qui existe dans ces secteurs.

La conduite interdépendante, ajoutée aux obstacles réglementaires et non réglementaires à l'entrée, méritent d'être examinés de plus près pour tout marché bancaire où le dépistage initial a révélé l'existence possible d'effets anticoncurrentiels, c'est-à-dire plus fréquemment, du moins aux États-Unis, dans certains produits fournis aux petites et moyennes entreprises [Rozanski and Rubinfeld (1997, p. 253]. Il existe aussi plusieurs autres facteurs qui, sans faire l'objet d'une analyse détaillée dans ce texte, pourraient être importants dans certains cas de fusion. Ce sont la taille et la croissance du marché, les caractéristiques particulières d'un concurrent éliminé par une fusion (par exemple, s'agissait-il d'une entreprise « délinquante » ?), la force et la nature des concurrents restants, le pouvoir compensateur (les ménages et les PME n'en ont probablement pas beaucoup) et divers enjeux de relations verticales[35].

Dans certains pays, les banques principales peuvent avoir tendance à consacrer une moins grande partie de leur actif aux prêts en général et aux prêts aux petites entreprises en particulier. Lorsque c'est le cas, on peut déduire que les fusions bancaires réduisent les prêts aux PME et, dans ce sens, sont anticoncurrentielles. Ce raisonnement peut s'avérer faux parce qu'une réduction apparente des prêts aux petites entreprises par les banques en fusionnement peut être largement compensée par une expansion de ces prêts dans les banques qui ne font pas partie de la fusion[36]. De plus, même si ce raisonnement s'avérait fondé, dans la mesure où il est enraciné dans diverses économies d'échelle dans les activités nouvellement privilégiées, cette situation peut être vue davantage comme un gain d'efficience plutôt que comme une perte de concurrence dans le marché des prêts aux PME.

4.1 La conduite interdépendante

Pilloff (1999a, 163-164) a récemment examiné la théorie et les effets empiriques de la conduite interdépendante dans les marchés bancaires américains. Il décrit la théorie comme suit :

> Selon la théorie des oligopoles interdépendants, l'effet anticipé de la conduite interdépendante est la diminution de la concurrence. Les banques qui livrent une concurrence dans plusieurs marchés reconnaissent les avantages associés à leur interdépendance. Chaque banque détermine de son côté qu'une action agressive dans un de ses marchés pourrait être accueillie par la riposte de ses rivales dans tous les marchés qu'elles ont en commun ou une partie de ceux-ci. Dans les cas où l'effet combiné des mesures de rétorsion des rivales et de l'action agressive pourrait avoir l'effet de diminuer la rentabilité globale, les banques évitent les actions agressives et la concurrence se produit à un niveau moins intense que s'il y a absence de conduite interdépendante. Toutefois, l'influence prévue de la conduite interdépendante sur la concurrence n'est pas sans équivoque. Des contacts fréquents entre banques peuvent accroître l'intensité de la concurrence entre des rivales qui se retrouvent sur plusieurs marchés communs[37].

Vu que la conduite interdépendante peut en théorie à la fois affaiblir et renforcer la concurrence, il n'est pas surprenant que les résultats de l'analyse de régression de Pilloff soient quelque peu faibles :

> […] l'effet de la conduite interdépendante dans l'industrie bancaire concorde avec la théorie des oligopoles interdépendants. Le contact a un effet favorable sur la rentabilité des banques. Toutefois, la rentabilité est accrue de manière significative du point de vue économique seulement si l'influence potentielle du contact est extrêmement forte. Pour la plupart des banques qui sont exposées à peu de contact ou à aucun contact, la conduite interdépendante a une influence négligeable sur la rentabilité (164).

Pilloff prédit que l'importance de la conduite interdépendante sur les marchés bancaires des États-Unis va augmenter puisque l'intégration du secteur se poursuit. Cela se produit déjà dans la plupart

des pays de l'OCDE où l'ouverture de succursales à l'échelle nationale est déjà autorisée depuis longtemps, ce qui fait que la conduite interdépendante atteint déjà un niveau très élevé.

4.2 Barrières à l'entrée

Il est généralement reconnu que des barrières à l'entrée suffisamment faibles pourraient rendre des marchés raisonnablement concurrentiels malgré des niveaux de concentration élevés. A la limite, si une entrée fulgurante et éclair est possible et si les acteurs établis se trouvent dans l'impossibilité de baisser leurs prix à l'arrivée d'un nouveau concurrent, on ne verra tout simplement pas de surprofits même s'il n'y a, à ce moment-là, qu'un seul fournisseur réel sur le marché. Les marchés bancaires sont probablement très loin d'un tel niveau de contestabilité [voir Rozanski et Rubinfeld (1997, p. 255)]. Cela ne signifie pas que des profits élevés n'attireront pas de nouveaux concurrents mais plutôt que ces concurrents ne seront peut-être pas assez puissants ou leur arrivée assez opportune pour éliminer la possibilité qu'une fusion ait une incidence très négative sur les consommateurs[38]. Il est t clair cependant que les décisions prises par des organismes chargés de la concurrence en rapport avec certaines fusions ont été influencées par l'ampleur apparente des barrières à l'entrée [voir Guerin-Calvert (1996, p. 303) et Commission européenne (1998, par. 24)].

Penchons-nous maintenant sur certaines barrières à l'entrée qui revêtent une importance toute particulière pour le secteur bancaire.

a. Obstacles réglementaires, « au-delà d'une certaine taille, la faillite est hors de question » et formes diverses d'aide de l'État

Tous les pays membres de l'OCDE appliquent une réglementation prudentielle à leurs secteurs bancaires. En plus de soumettre les banques à une surveillance permanente, la réglementation prudentielle leur impose diverses exigences en matière de fonds propres (y compris les lignes directrices sur les fonds propres fondées sur les risques qu'a établies le Comité de Bâle sur le contrôle bancaire) ainsi que diverses restrictions concernant les types d'activités auxquelles elles peuvent se livrer[39]. Cette réglementation est conçue dans le but de protéger les déposants ainsi que les régimes d'assurance-dépôts contrôlés par l'État des conséquences des faillites bancaires simples ou multiples. Un autre objectif étroitement lié à ce dernier consiste à réduire le risque systémique.

Des risques de faillite pouvant entraîner des pertes potentielles pour les créanciers existent aussi dans d'autres secteurs de l'économie. Or, les règles de prudence ne sont pas appliquées à chacun de ces secteurs. Pourquoi les activités bancaires sont-elles traitées différemment à cet égard ? L'une des réponses possibles à cette question concerne le rôle particulier des banques dans le système de paiements, et une autre est que :

> La réglementation bancaire, comme les autres formes de réglementation, est justifiée par la nécessité de corriger un « dysfonctionnement du marché ». Dans le cas des banques, ce dysfonctionnement du marché résulte de la difficulté qu'elles ont à démontrer de façon crédible leur niveau de risque aux déposants et aux autres bailleurs de fonds. Il est fait valoir qu'en conséquence, en l'absence d'intervention réglementaire, les banques prendraient plus de risques qu'il n'est prudent de le faire, les faillites bancaires seraient plus fréquentes qu'il n'est nécessaire et le système financier serait instable [OECD/(1998a, 8)][40].

A condition que la réglementation prudentielle (y compris son élément de surveillance) soit conçue dans le but d'éliminer les dysfonctionnements du marché, qu'elle évite d'établir des exigences en

matière de fonds propres ou des restrictions liées aux types d'activités qui soient plus sévères que cela n'est nécessaire et qu'elle soit appliquée d'une façon juste et équitable, il y a peu de raisons de croire qu'elle puisse constituer une barrière à l'entrée sur les marchés bancaires. Une telle réglementation peut même avoir pour effet de réduire ces barrières, du moins en ce qui concerne les institutions qu'elle régit. C'est ce qui arrivera si les déposants ont confiance en l'idée que la réglementation rend le risque de faillite pratiquement le même pour toutes les banques. Un effet égalisateur similaire, quoique plus faible, peut également résulter d'une réglementation conçue pour réduire les risques de fraude dans le secteur bancaire.

Au moins un des pays membres de l'OCDE a eu recours à la réglementation pour que soient augmentés les fonds disponibles pour des prêts locaux. Aux États-Unis du moins, cette réglementation semble avoir eu pour effet de préserver des marchés bancaires locaux non concurrentiels [voir Hanweck et Shull (1999)]. Notons aussi que les conséquences négatives qui s'ensuivirent ont peut-être été limitées par la réglementation, plutôt rare maintenant dans les pays Membres, qui contrôlait alors les taux exigés et payés (sur les dépôts) par les banques[41].

La tendance générale, notamment aux États-Unis, dans l'Union européenne et au Japon, veut que soient réduites les restrictions réglementaires concernant les types d'activités auxquelles les banques peuvent se livrer. Cette tendance a nécessité un resserrement des règles de prudence. Mais tel que mentionné plus tôt, cela ne devrait pas signifier une augmentation nette du niveau des barrières à l'entrée.

L'une des barrières majeures qui soient liées à l'État est également l'une des barrières les plus difficiles à analyser. Il s'agit ici de la politique du « au-delà d'une certaine taille, la faillite est hors de question » qui fait référence à la croyance populaire voulant qu'une ou plusieurs banques, habituellement nationales, soient si grandes que le gouvernement ne saurait tolérer que l'une ou l'autre d'entre elles ne fasse faillite. Protégée par cette perception, une banque qui se situe « au-delà d'une certaine taille » et pour qui « la faillite est hors de question » prendra davantage de risques. Cela a pour effet de fausser la concurrence et d'élever des barrières à l'entrée qui désavantagent les institutions de plus petite taille [voir OECD/CLP(1998a, pp. 8-9)][42].

Une autre barrière, subtile mais apparemment efficace, consiste dans le favoritisme de l'État envers les institutions financières qui appartiennent à des intérêts nationaux[43]. Une telle réalité peut se manifester concrètement par la présence de nombreuses banques appartenant à l'État. Cela signifie également qu'une banque ne pourra pas pénétrer un marché étranger en achetant simplement une banque nationale déjà existante. Dans la mesure où un certain nombre de succursales et une bonne connaissance des conditions du marché local sont nécessaires pour pouvoir s'imposer sur ce marché, de telles restrictions sur la propriété constituent un obstacle important pour les banques étrangères.

Les conséquences des diverses subventions accordées par l'État à certaines banques déjà établies n'ont, quant à elles, rien de subtil[44]. Dans certains pays, les régimes d'assurance-dépôts gérés par l'État sont équivalents à des subventions étant donné que les primes ne sont pas suffisamment calculées en fonction du risque présenté ou que les banques ne sont pas requises de supporter la totalité des coûts de la réglementation prise à titre de complément nécessaire aux régimes d'assurance. Toutefois, du moins en ce concerne les institutions financières qui bénéficient de la couverture, les programmes d'assurance-dépôts peuvent réellement réduire les barrières à l'entrée puisque, davantage encore que les règles de prudentielles, ils ont pour effet, aux yeux des déposants, de rendre les risques égaux pour toutes les banques.

b. Accès aux réseaux GAB appartenant à des concurrents et aux systèmes de cartes de crédit et systèmes de compensation de chèques gérés principalement ou partiellement par des concurrents

Dans tous ou pratiquement tous les pays membres de l'OCDE, les principales banques ont établi des réseaux de GAB et ont développé elles-mêmes ou contribué au développement d'infrastructures permettant un accès facile aux comptes à partir des guichets automatiques de n'importe quelle banque. En outre, la plupart des banques déjà en place ont accès à des systèmes de cartes de crédit et de débit ainsi qu'à des systèmes de compensation de chèques dont elles sont ou non propriétaires. Des bureaux de la concurrence ont repéré certaines barrières à l'entrée provenant de l'existence de ces réseaux. Par exemple, au dire de l'ACCC :

> L'utilisation grandissante des nouvelles technologies aurait tendance à faire augmenter l'importance des réseaux électroniques en tant que facteur d'entrave à l'accès aux marchés. Un nouvel arrivant qui ne posséderait pas déjà un réseau de GAB ou un accès de télévirement au point de vente n'aurait d'autre choix que de mettre en place son propre réseau de GAB pour pouvoir s'imposer sur le marché, mais les coûts qu'il devrait engloutir pour ce faire pourraient fort bien être prohibitifs. La seule autre option qui s'offrirait à lui serait de conclure des ententes avec d'autres fournisseurs relativement à l'accès aux GAB […].
>
> L'accès aux systèmes de paiements électroniques suivant des conditions justes et équitables est… d'une importance majeure si on veut faciliter la venue et l'expansion d'institutions financières de plus petite taille sur le marché des comptes d'opérations victoriens. Cependant, la nécessité qui s'impose pour les utilisateurs éventuels des services de guichets automatiques et de télévirement de conclure des ententes bilatérales d'ordre commercial et technique avec les acteurs déjà établis s'est avérée un obstacle potentiel et une entrave à un accès concurrentiel pour de nouveaux arrivants[45].

Il est loin d'être certain que les banques déjà établies accepteront de donner aux nouveaux arrivants l'accès aux réseaux de guichets automatiques et de télévirement qu'elles contrôlent. Bien qu'elles sachent que leur clientèle apprécierait l'expansion des réseaux qu'entraînerait l'arrivée de ces nouveaux acteurs, une telle appréciation compenserait difficilement les coûts de renonciation que ces banques devraient assumer si elles choisissaient de faciliter l'entrée de nouveaux concurrents.

c. Les économies d'échelle et la nécessité de vastes réseaux de succursales

Dans l'analyse des projets de fusionnement, les économies d'échelle sont envisagées sous deux angles différents. Leur importance et les coûts engloutis qui leur sont rattachés ont tendance à décourager les concurrents potentiels. D'un autre côté, comme nous le verrons plus bas, les banques qui se fusionnent peuvent à juste titre faire valoir le fait que les économies d'échelle réalisées par le biais d'une fusion suffisent amplement à contrebalancer les effets anticoncurrentiels d'une telle fusion.

Du point de vue des banques, l'intérêt envers les économies d'échelle semble surtout lié aux services de soutien (c'est-à-dire. principalement au traitement des données). Du côté de la demande, les économies d'échelle offrent l'avantage de procurer le vaste réseau de succursales encore requis, semble-t-il, pour que la clientèle puisse vraiment profiter d'un accès pratique aux services bancaires. L'intérêt des banques lié aux services de soutien semble toutefois diminuer à mesure qu'augmente leur capacité d'impartir le travail de traitement des données. L'avantage lié à l'expansion du réseau de succursales risque, quant à lui, de s'avérer plus résistant, notamment en ce qui a trait au secteur des prêts aux petites entreprises. Pour ce qui est des services aux ménages, bien que les autoguichets indépendants attirent une clientèle intéressée par les retraits d'argent liquide, ils n'ont pas encore obtenu l'acceptation

générale en ce qui a trait aux paiements de factures ou aux dépôts. Ces deux services deviennent d'ailleurs de moins en moins nécessaires puisqu'on a de plus en plus recours aux virements directs pour les rentrées de fonds et les déboursés courants. Quoi qu'il en soit, dans la mesure où un vaste réseau de succursales est encore important, les banques déjà établies bénéficient vraisemblablement d'un avantage sur les nouveaux arrivants si elles ont déjà réservé les meilleurs emplacements du marché. Nous nous pencherons davantage sur la question des économies d'échelle dans la partie du document qui porte sur les économies.

Les économies d'échelle ne sont pas les barrières à l'entrée relatives aux succursales qui méritent d'être mentionnées. Il peut également y avoir d'importantes économies de gamme. De plus en plus, on vend des valeurs, des assurances et des services de gestion de biens par l'entremise des succursales. Les banques qui offrent tous ces services par l'intermédiaire d'un vaste réseau de succursales peuvent bénéficier d'un avantage considérable en termes de coûts sur les banques qui concentrent leurs efforts sur moins de services ou qui possèdent moins de bureaux. Cela signifie que les effets anticoncurrentiels d'une fusion, pour ce qui est des prêts aux petites entreprises par exemple, ne seraient pas facilement neutralisés par l'arrivée d'un nouveau concurrent qui n'offrirait que des prêts. Le nouvel arrivant serait probablement forcé d'offrir aussi une gamme d'autres services ce qui entraînerait pour lui des coûts beaucoup plus élevés et augmenterait les risques associés à ce nouveau marché.

d. Frais de changement de fournisseur et information asymétrique

Les frais de changement de fournisseur qui font le plus clairement obstacle à l'entrée des nouveaux concurrents touchent les liens qui unissent les emprunteurs commerciaux et leurs banques actuelles. Ces liens peuvent être très solides lorsque les banques et les entreprises ont des prises de participation réciproques. Ils peuvent l'être aussi lorsqu'il s'agit de relations du genre « keiretsu » où les entreprises sont encouragées à financer des immobilisations ainsi que des actifs à court terme par le biais d'emprunts bancaires qui pourraient théoriquement être appelés à être remboursés peu de temps après. Des liens beaucoup moins forts mais non moins réels pourraient également résulter du fait que de nombreuses banques demandent des « frais compensatoires » non remboursables au moment de l'ouverture d'un crédit [46].

Même lorsqu'il n'existe en apparence aucun lien entre les entreprises et leurs banquiers, on a encore raison de croire que les coûts associés à un changement de fournisseur pourraient être importants. Cela est attribuable au fait que les banques semblent davantage disposées à prêter à des petites et moyennes entreprises lorsque les emprunteurs ont leurs comptes d'opérations à la même banque. Une telle concentration de services procure aux banques davantage de renseignements concernant de futurs emprunteurs et facilite la gestion du risque. Les entreprises peuvent par contre être d'avis que le transfert d'un grand nombre de services bancaires directs, dont les services liés aux rentrées de fonds et aux déboursés courants, constitue une procédure qui, en plus de demander un investissement de temps considérable, peut s'avérer coûteuse. Il semble s'agir ici d'une circonstance où les services bancaires électroniques, conçus de manière à inclure ce type d'opérations, pourraient avoir augmenté plutôt que réduit les obstacles à l'entrée sur le marché. De plus, l'établissement d'une bonne relation entre une entreprise et sa banque peut demander beaucoup de temps, et ce genre de bonne relation est apparemment très importante lorsqu'il est question de prêts aux petites entreprises. L'attitude des banques extérieures voulant que ces dernières soient de plus en plus disposées à accorder des prêts en se basant sur des modèles d'évaluation par points semble vouloir contrebalancer de tels obstacles, y compris la nécessité de concentrer ses comptes d'opérations et ses emprunts dans les mêmes institutions[47]. Dans la mesure où une telle pratique est importante ou destinée à le devenir, les économies de gamme réalisées en offrant à la fois les services de comptes d'opérations et les lignes de crédit pourraient être en train de perdre de leur popularité, diminuant ainsi l'importance des coûts de changement de fournisseur en tant que barrière à l'entrée pour les nouveaux concurrents.

Étroitement lié à la question des coûts de changement de fournisseur, notons ici le fait que les acteurs établis bénéficient d'avantages importants sur les nouveaux arrivants en matière de réputation et de renseignements. Les petites entreprises accordent une importance particulière à la réputation d'une banque parce qu'elles savent que si elles doivent un jour faire face à des difficultés passagères ou exceptionnelles, leur survie pourrait dépendre de la confiance que leur accorde la banque avec laquelle elles transigent. Une telle relation de confiance ne peut s'établir qu'à force de temps et d'expérience. Pour ce qui est des renseignements, les banques déjà établies sont favorisées parce qu'elles ont accumulé de l'expérience à force de prêter aux ménages et aux entreprises qui sont situés à proximité de leurs succursales. Ces institutions n'ont aucune raison de partager avec leurs concurrents les informations qu'elles détiennent concernant les risques de crédit. Bien que cela ne constitue qu'un problème mineur quand il s'agit de risques peu avantageux, il en devient un d'ordre majeur lorsqu'il est question de bons risques de crédit. L'entreprise qui représente un risque peu avantageux pour la banque sera davantage disposée à payer plus cher pour un emprunt bancaire contrairement à celle qui représente un bon risque de crédit et qui choisira plutôt de demeurer en affaires avec une banque qui reconnaît déjà sa valeur en termes de crédit.

5. Gains d'efficience

Dans la plupart des pays de l'OCDE, l'examen d'une fusion comporte une certaine analyse des gains d'efficience que l'on prétend en tirer. La présentation des avantages prend habituellement la forme d'une défense, qui ne reçoit une considération attentive que si la fusion proposée semble anticoncurrentielle, éventualité qui est présumée dans la présente section.

Les organismes chargés de la concurrence ne tiennent pas compte des gains d'efficience prétendus qui ne sont en fait que des transferts d'un groupe à un autre, p. ex. les économies d'impôt, les baisses de prix d'intrants non attribuables à une réduction des coûts de production de ces intrants. Ils ne prennent pas non plus en considération les gains d'efficience qui pourraient se faire d'une façon moins anticoncurrentielle. En outre, les gains d'efficience prétendus sont d'ordinaire « corrigés à la baisse » dans la mesure où ils risquent de ne jamais se matérialiser.

Le gain d'efficience le plus souvent invoqué pour la fusion de banques est celui des économies liées à la fermeture des succursales excédentaires[48]. Ces fermetures ne représentent des gains réels que dans la mesure où les clients n'ont pas à se déplacer pour effectuer leurs opérations bancaires. Ce point n'est pas à négliger. Les faits montrent que les banques souhaitent en général exploiter des succursales à forte surcapacité, sans doute parce que leur clientèle tient à la facilité d'accès[49]. De toute manière, les gains d'efficience réalisés par l'unification de réseaux de succursales sont impossibles sans fusion, car les accords entre banques pour réduire la surcapacité par des fermetures réciproques de succursales est interdite à tout le moins par la législation de certains pays en matière de concurrence. Il apparaît également fort probable qu'une fusion entre banques exploitant le même marché géographique va effectivement entraîner la fermeture de succursales par la suite.

Le chevauchement géographique tend à augmenter la possibilité de gains d'efficience par la fusion de succursales, mais en revanche, un tel chevauchement tend à diminuer l'importance d'un autre gain d'efficience attribué aux fusions. Il s'agit de la réduction des risques pour les déposants, obtenue surtout par l'agrandissement du territoire d'exploitation de la banque, mais parfois également par une diversification accrue des genres d'actifs qu'on retrouve dans le bilan de la banque. La diversification des risques géographiques pourrait être un facteur important dans les pays étendus, où les régions sont soumises à des cycles économiques différents. Dans certaines juridictions, cet effet d'efficience peut être contesté, du fait que les déposants sont déjà protégés par les régimes gouvernementaux d'assurance-dépôts[50]. Mais surtout, il y a des manières différentes, moins anticoncurrentielles que les

fusions, d'obtenir les avantages de la diversification des risques. En ce qui regarde l'expérience américaine, il a été constaté ce qui suit :

> Depuis quelques décennies, les banques ont pu se diversifier considérablement : bureaux de prêts, réseaux pour la vente de prêts et la syndication, grâce à des accords bancaires pertinents, aux courtiers en dépôts et aux marchés de valeurs de deuxième rang dans des titres garantis par des actifs des municipalités et du gouvernement américain. En outre, l'évolution constante des marchés de capitaux procure aux banques non seulement de nouvelles possibilités de diversification, mais aussi des solutions de rechange qui diminuent les risques courus. […] Il se peut que les petites banques puissent encore profiter de la diversification potentielle amenée par certaines fusions. Mais rien ne prouve hors de tout doute que cela est également vrai pour les grandes banques. [Hanweck and Shull (1999, 264 – notes de bas de page omises)]

Une autre source de gains d'efficience attribués à la fusion de banques consiste en diverses économies d'échelle. Mentionnons en particulier les économies – souvent invoquées – que permet le regroupement des tâches administratives ou de soutien (p. ex. informatique)[51]. Bien qu'on invoque de tels arguments même pour les fusions de très grandes banques[52], une étude récente sur les structures de coûts bancaires aux États-Unis met en doute la possibilité d'économies d'échelle lorsque l'actif d'une banque dépasse le milliard de dollars. La même étude signale qu'on risque de subir certaines déséconomies d'échelle lorsqu'on s'approche du gigantisme [voir Hanweck and Shull (1999, 262)]. Curieusement, toutefois, Hanweck et Shull estiment aussi (p. 259) que les économies d'échelle sont peut-être devenues plus importantes depuis la fin des années 80.

L'une des manières dont les fusions bancaires peuvent faciliter l'utilisation plus efficiente des ressources est sans doute fort importante, bien que difficile à quantifier. Ces fusions peuvent occasionner un changement dans la proportion des actifs bancaires affectés à certaines activités. Par exemple, une étude sur les fusions de banques américaines survenues entre 1981 et 1989 a permis de constater que lorsque les deux parties détenaient plus de 1 milliard de dollars en actifs, cette concentration bancaire favorisait la conversion de valeurs en prêts [voir Akhavein, Berger and Humphrey (1997, 133)]. Récemment, dans plusieurs fusions réelles ou proposées de grandes banques européennes, les parties ont déclaré leur intention de déplacer leurs ressources communes vers des domaines plus rentables comme les services bancaires d'investissement ou la gestion d'actifs. Dans la mesure où ces réorientations de portefeuille sont attribuables en fin de compte à la réalisation de certaines économies d'échelle, elles peuvent être impossibles sans fusion.

On fait valoir aux organismes chargés de la concurrence que les banques doivent être de très grande taille pour soutenir la concurrence internationale. Cet argument peut avoir du vrai quand il s'agit de marchés comme celui des services bancaires d'investissement, surtout ceux offerts par les multinationales. Il faut dire cependant que la taille n'est pas le seul atout indispensable à la compétitivité internationale. L'expérience et la couverture mondiale sont sans doute tout aussi essentielles. De plus, les organismes chargés de la concurrence devraient exiger qu'on leur prouve que les fusions mondiales peuvent permettre des réalisations qui sont impossibles par des alliances ou des relations de correspondance avec des banques appartenant à d'autres marchés[53].

On leur fait aussi valoir parfois que, puisque les banques des autres pays grandissent à la faveur de fusions, il faut permettre aux banques nationales de faire de même afin d'acquérir la taille nécessaire pour concurrencer les géantes étrangères. Les organismes chargés de la concurrence ont raison d'être sceptiques à l'égard de tels arguments[54]. Un marché intérieur fortement concurrentiel permet autant que les fusions d'acquérir l'efficience nécessaire pour affronter la concurrence étrangère[55].

Non seulement peut-on douter de la source et de l'importance des économies d'échelle possibles pour les banques, mais encore on peut se demander s'il y a moyen des réaliser ces économies d'une manière moins anticoncurrentielle. Rozanski et Rubinfeld (1998, 10-11) soulignent que des économies en services d'administration et de soutien sont possibles en fusionnant avec une banque appartenant à un marché géographique différent plutôt qu'avec une banque appartenant au même marché. On peut aussi former des co-entreprises pour réaliser des gains d'efficience dans les services de guichet automatique et de carte de crédit. En outre, les modèles de notation basés sur les données provenant de plusieurs prêteurs et vendues par divers fournisseurs de services pourraient procurer aux petites banques à peu près les mêmes renseignements que ceux qu'elles auraient en fusionnant avec une grosse banque dont le modèle de notation est basé entièrement sur ses propres données de prêts.

Il existe un facteur général qui tend à réduire l'importance des gains d'efficience quand on envisage s'il y a lieu d'adopter une fusion bancaire qui, autrement, pourrait être considérée comme anticoncurrentielle. Dans une telle initiative, par définition, on tend à réduire les incitatifs post-fusion pour être efficient. Il pourrait s'agir d'un problème plus particulier au secteur bancaire, où la gouvernance d'entreprise est relativement faible[56]. Voilà peut-être l'une des principales raisons qui expliquent pourquoi maintes études sur les effets des fusions bancaires mettent sérieusement en doute leur capacité d'améliorer l'efficience[57].

Berger, Demsetz et Strahan (1999, 135) résument 250 études empiriques sur les résultats des fusions bancaires (survenues pour la plupart aux États-Unis) de la manière suivante :

> Les données indiquent que certains types de regroupement produisent une augmentation de la puissance commerciale ; une amélioration de l'efficience en matière de profits et une diversification des risques, *mais peu ou point d'amélioration de la rentabilité en général* ; un effet relativement faible sur l'offre de services aux petits consommateurs ; des améliorations possibles de l'efficience des systèmes de paiement ; enfin, des coûts possibles pour le système financier, dus au plus grand risque systémique ou à l'expansion du filet de sécurité financière.

Une étude portant sur une vingtaine de fusions de caisses d'épargne espagnoles survenues entre 1986 et 1998 contredit plus encore l'hypothèse voulant que les fusions bancaires génèrent des économies. Humphrey et Valverde (1999, 34) ont constaté ce qui suit : « L'effet réel des fusions de caisses d'épargne espagnoles (comparativement à ce qui s'est produit dans le reste de l'industrie) a été une hausse, et non une baisse, des coûts bancaires moyens. »

Compte tenu des données empiriques actuelles, les organismes chargés de la concurrence devraient empêcher les fusions anticoncurrentielles, malgré les gains d'efficience prétendus, à moins que les parties présentent des preuves claires et incontestables que de telles fusions entraîneront de très fortes économies compensatoires. Dans les décisions sur les gains d'efficience prévus, il faut bien se rappeler que les chances de concrétisation seront effectivement plus grandes si : l'une des banques est nettement dominante après la fusion, et peut donc imposer une rationalisation malgré les résistances ; la banque dominante après la fusion est la plus efficiente des parties en cause[58] ; et la banque dominante a récemment réalisé une fusion fructueuse[59].

6. Mesures correctives

Une fusion bancaire qui était au départ interdite peut finir par être autorisée parce que les parties s'entendent pour respecter certaines conditions ou pour remanier leur projet de fusion. Le rôle que joue l'organisme chargé de la concurrence dans la préparation de telles « mesures correctives » peut varier, mais l'objectif et le genre de mesures utilisées sont à peu près les mêmes dans tous les pays de l'OCDE.

L'objectif est de veiller à ce que la fusion ne produise pas d'effets anticoncurrentiels. Les organismes chargés de la concurrence essaient d'obtenir ce résultat dans les délais requis, tout en évitant les mesures mal ciblées ou disproportionnées par rapport au problème à corriger. Ils cherchent également à réduire au minimum le besoin d'un contrôle permanent de l'entité fusionnée[60]. Nous allons maintenant aborder trois catégories de mesures correctives utilisées lors de fusions bancaires, en donnant des exemples pour chacune. A noter que dans certains cas, les trois catégories de mesures peuvent s'appliquer à la même fusion.

6.1 Obtenir l'engagement à restreindre l'exercice de la puissance commerciale

En théorie, une augmentation de la puissance commerciale induite par une fusion ne pose pas problème si les parties peuvent prendre l'engagement – facilement vérifiable et applicable – de ne pas accroître cette puissance commerciale, p. ex. de ne pas augmenter les prix après la fusion. En pratique, cela est presque impossible à organiser, parce que l'entité fusionnée sera toujours tentée de se déroger à son engagement, et parce qu'elle bénéficiera, en matière d'information, d'un avantage sur l'organisme chargé de la concurrence. Malgré ces réalités difficiles, les organismes chargés de la concurrence acceptent parfois de tels engagements quand il s'agit d'approuver une fusion bancaire. C'est ce qui est arrivé par exemple en Suisse quand la Commission de la concurrence a approuvé, en avril 1998, la fusion qui créait l'Union des Banques Suisses (UBS). L'UBS s'est alors engagée, entre autres, à ne pas modifier avant le 31 décembre 2004 les conditions s'appliquant aux marges de crédit existantes des entreprises tombant sous la barre des quatre millions de francs suisses[61]. La Commission australienne de la concurrence et de la consommation (ACCC) a également eu recours à une contrainte comportementale quand elle a obligé la Westpac Banking Corporation, pour une période de trois ans, à permettre à sa filiale nouvellement acquise, la Bank of Melbourne, de maintenir son mode de gestion autonome [voir Rodrigues (1999, 9-10)].

6.2 Obtenir l'engagement à faciliter indirectement la venue de nouveaux concurrents ou le renforcement des concurrents actuels

Une façon de réduire le besoin d'un contrôle permanent ainsi que de permettre une plus grande liberté d'action aux forces du marché est d'adapter les conditions en vue de faciliter au lieu de réaliser directement un résultat visé. Un bon exemple de cela est la volonté d'abaisser les barrières à l'entrée de nouveaux concurrents ou à l'expansion d'entreprises existantes. Ainsi, lors de la fusion de l'UBS, la nouvelle banque a promis de maintenir pendant plusieurs années sa participation dans diverses initiatives conjointes liées à des fonctions de coordination et de financement [voir Gugler (2000, 16)]. Autre exemple : la fusion Westpac-BML comportait un engagement à fournir à la clientèle d'institutions financières concurrentes (de l'État de Victoria), selon des conditions commerciales raisonnables, un accès aux réseaux de guichets automatiques et de télévirement aux points de vente de la Westpac. L'imposition par l'ACCC d'un contrôle permanent et de mesures d'exécution a été allégée du fait que la Westpac a accepté de soumettre tout différend sur les conditions à un expert indépendant nommé par l'ACCC [voir Rodrigues (1999, 10-11)].

Un autre exemple de ce genre de mesure comportementale est survenu dans le contexte de la fusion Banque Toronto-Dominion/Canada Trust. La Banque Toronto-Dominion appartenait au réseau de la carte de crédit Visa, alors que la société Canada Trust était un membre important du réseau MasterCard. En vertu des règles de réseau en vigueur, l'entité fusionnée se devait de choisir d'appartenir soit au réseau Visa, soit au réseau MasterCard. Le commissaire canadien à la concurrence craignait que la Toronto-Dominion convertisse le portefeuille MasterCard de Canada Trust à Visa et compromette ainsi la viabilité de MasterCard au Canada. Les parties ont donc convenu de convertir la portefeuille Visa de la

Toronto-Dominion à MasterCard ou de céder les opérations MasterCard de Canada Trust [voir von Finckenstein (2000, 11-12)].

On peut voir encore un exemple de l'imposition de conditions pour favoriser l'essor de concurrents dans la décision de la Banque d'Italie, chargée d'appliquer le droit de la concurrence au secteur bancaire, a interdit temporairement à une banque nouvellement fusionnée de Sardaigne d'ouvrir des succursales dans une région qui, prévoyait-on, allait souffrir de la fusion [voir Bruzzone and Polo (1998, 37)]. Cette condition avait par contre l'inconvénient de vouloir avantager les concurrents en diminuant l'efficience de la banque fusionnante.

Le ministère américain de la Justice a manifestement recours à des mesures correctives comportementales pour les fusions bancaires où les problèmes de concurrence ne s'amplifient pas au point d'exiger la cession de filiales. A titre d'exemple, lors de la fusion Washington Mutual/Home Savings (H.F. Ahmanson), le ministère de la Justice a imposé aux parties des restrictions concernant l'inclusion de clauses de non-concurrence dans les contrats d'emploi conclus avec les directeurs de succursale et les agents de prêts [voir Kramer (1999, 3)].

6.3 Imposer des étapes visant le transfert direct d'une part du marché, c'est-à-dire céder des éléments d'entreprise – normalement des succursales ou des secteurs d'activités

Tous les engagements d'ordre comportemental présentent, à un degré ou un autre, l'inconvénient de nécessiter une supervision permanente. Certains exigent également que l'organisme chargé de la concurrence recueille des renseignements auprès d'une entreprise qui a tout intérêt à limiter ou à déformer ces renseignements. C'est pourquoi les organismes chargés de la concurrence préfèrent en général les solutions dites « structurelles » destinées à éliminer plutôt qu'à simplement atténuer les effets de toute augmentation de la puissance commerciale induite par une fusion. Les mesures structurelles sont faciles à décrire mais extrêmement difficiles à appliquer. Elles ont essentiellement pour objet de céder certaines unités et/ou succursales d'entreprise. Les cessions de ce genre sont destinées à réduire, du moins au départ, la part que détient la banque acquise dans les marchés qui sont affectés négativement par la fusion.

Les problèmes de concurrence dans les fusions bancaires surviennent le plus souvent dans le domaine des prêts aux petites et moyennes entreprises et de certains services aux ménages. Tel que mentionné plus haut, ces marchés sont de nature locale ou tout au plus régionale, et difficiles à pénétrer sans le maintien d'une succursale dans le secteur concerné[62]. Les organismes chargés de la concurrence acceptent donc parfois d'autoriser certaines fusions bancaires, qui autrement seraient anticoncurrentielles, à la condition que certaines succursales soient cédées. L'objectif de telles cessions est bien explicité par un auteur :

> […] créer un nouveau concurrent ou améliorer l'efficacité d'un concurrent existant, en transférant un groupe de succursales bien situées, rentables, qui constitueront un réseau servant aux dépôts et aux prêts, de même qu'une base solide pour les relations en matière de prêts commerciaux. [Rozanski (1999, 9)]

On ne peut guère s'attendre à ce que les banques absorbantes endossent l'objectif précité. Laissée à ses propres mécanismes, une banque absorbante qui propose des mesures de cession choisira probablement de ne vendre que les succursales situées dans les zones où sa puissance commerciale sera faible. On peut prévoir aussi qu'elle prendra des moyens pour maximiser les « fuites », c'est-à-dire le transfert de clients des succursales vendues vers les succursales maintenues. Des succursales vidées d'avance n'ont pas une grande valeur, mais ce qui est perdu en prix de vente est plus que rattrapé en surprofits dans les succursales maintenues. Pour réduire au minimum les « fuites » et garantir autrement

que les cessions de succursales donnent le résultat escompté, les organismes chargés de la concurrence devraient se réserver le droit :

- de choisir les succursales particulières qui doivent être cédées et d'exiger que les parties fusionnantes fournissent tous les renseignements nécessaires pour déterminer les effets sur la concurrence locale ;

- d'approuver le choix des acheteurs[63]

- d'empêcher les parties fusionnantes de faire obstacle à l'embauche, par les acheteurs, d'employés actuellement au service de succursales cédées ;

- de limiter ce que les parties fusionnantes peuvent faire pour convaincre les clients de transférer leurs opérations vers les succursales maintenues ;

- d'imposer des pénalités sévères, par exemple l'obligation de vendre certains « bijoux de la couronne », si les cessions ne se font pas dans un délai déterminé.

La quatrième de ces mesures peut devoir être prolongée pendant un certain temps après la cession, mais pas indéfiniment. Il ne s'agit pas de fausser à jamais le jeu de la lutte concurrentielle au détriment de la banque fusionnée, mais de rétablir le niveau de concurrence d'avant la fusion. Rien ne garantissait que ce niveau aurait pu être maintenu étant donné l'aiguillon de la concurrence, et les effets d'amélioration de l'efficience amenés par cette dynamique ne devraient pas être affaiblis indéfiniment sous prétexte qu'il y a eu fusion.

Le présent document n'a pas pour objet immédiat de fournir une orientation détaillée sur les cinq mesures précitées. Les lecteurs que cette question intéresse trouveront dans Baillie (2000a et 2000b) des exemples concrets de clauses exécutoires acceptées dans le cadre de cessions de succursales et d'entreprises de cartes de crédit.

Une étude américaine révèle que, mesurée en termes de taux de survie des succursales bancaires cédées, cette mesure corrective est généralement fructueuse[64]. Selon une autre étude américaine, moins optimiste, les fusions bancaires survenues aux États-Unis entre le 1er janvier 1992 et le 30 juin 1994, qui ont augmenté la concentration sur les marchés locaux d'au moins 200 points (l'indice HHI atteignant au moins 1800 après les fusions), semble avoir donné lieu à une réduction du taux d'intérêt payé sur les dépôts. Toutes ces fusions ont apparemment résisté à l'examen antitrust, mais les auteurs de l'étude ne précisent pas si certaines ont nécessité la cession de succursales [voir Prager and Hannan(1998)].

7. L'interface entre les considérations de prudence et de concurrence dans les fusions bancaires

Dans pratiquement toutes les juridictions de l'OCDE, les fusions bancaires sont examinées autant par l'organisme de réglementation prudentielle que par l'organisme chargé de la concurrence. Cela oblige les deux organismes à collaborer l'un avec l'autre pour éviter tout chevauchement. Il leur est utile également d'adopter des procédures claires pour que l'examen conjoint soit aussi transparent et prévisible que possible, et de ce fait pas nécessairement incompatible avec les décisions prises par le secteur privé. Plusieurs pays de l'OCDE, dont l'Australie, le Canada, la Norvège et les États-Unis, ont pris des mesures en faveur d'une telle coordination[65].

Il est important de comprendre que si un organisme de réglementation prudentielle juge nécessaire d'empêcher une fusion qui serait bénéfique pour la concurrence, la loi sur la concurrence n'en est pas abolie pour autant. C'est que la loi sur la concurrence est de nature proscriptive plutôt que prescriptive, c'est-à-dire qu'elle peut servir à empêcher des fusions mais non à les imposer. Dans la mesure où la réglementation prudentielle est elle aussi de nature proscriptive plutôt que prescriptive, les fusions anticoncurrentielles bloquées par les organismes chargés de la concurrence de devraient pas produire de conflits directs avec les organismes de réglementation prudentielle.

Il peut arriver qu'une fusion soit proposée ou imposée lorsque l'une ou plusieurs des banques fusionnantes sont en difficulté. La fusion est parfois la meilleure solution dans un tel cas. Si les préoccupations en matière de concurrence doivent alors être prises en considération comme il se doit, une prompte collaboration entre l'organisme de réglementation prudentielle et l'organisme chargé de la concurrence est indispensable. Cela réduira considérablement le risque de voir plus tard la fusion bloquée pour des motifs de concurrence. Certaines juridictions ont déjà un « argument de défense de l'entreprise défaillante » qui pourrait s'appliquer à ce genre de situation. Un tel argument de défense peut exiger qu'on détermine si un autre partenaire serait un meilleur choix du point de vue de la concurrence [66]. Dans d'autres juridictions, on peut invoquer un « argument de défense prévu par la loi » pour empêcher que les fusions légalement autorisées par un organisme de réglementation prudentielle soient bloquées par l'organisme chargé de la concurrence[67].

8. Inclure des considérations non prudentielles et non concurrentielles dans l'examen des fusions

On peut avec raison invoquer la nécessité de compromis entre les objectifs de concurrence et d'intérêt public ne comportant pas de considérations prudentielles. Les objectifs d'intérêt public s'expriment surtout de deux manières. La première est la réaction contre les fusions bancaires susceptibles d'augmenter le chômage, surtout s'il se produit dans des zones éprouvées[68]. La seconde est le désir de constituer dans le domaine bancaire des champions nationaux, de toute évidence pour créer de nombreux emplois, garantir un meilleur accès aux fonds ou tout simplement pour mousser le prestige national. Les deux attitudes peuvent aller à contresens. La première veut limiter l'autorisation des fusions, alors que la seconde est couramment invoquée comme un motif de favoriser la création de banques encore plus grosses.

Peu de pays de l'OCDE, sinon aucun, limitent l'examen des fusions bancaires uniquement aux questions de prudence et de concurrence. Cette généralisation dissimule par contre des différences importantes en ce qui regarde le niveau selon lequel d'autres objectifs d'intérêt public, d'ordre non prudentiel, entrent dans le processus décisionnel et dans le choix de l'organisme qui a le dernier mot à dire quand il s'agit de bloquer ou non une fusion bancaire anticoncurrentielle. Dans certaines juridictions, comme l'Union européenne, l'Italie, le Japon, la Corée et les États-Unis, les fusions bancaires anticoncurrentielles sont toujours bloquées, du moins en principe. Dans d'autres, comme l'Australie, le Canada, le France, l'Allemagne, la Suisse et le Royaume-Uni, il arrive parfois que des fusions bancaires anticoncurrentielles soient autorisées. Cela est sans doute vrai également pour d'autres pays de l'OCDE, mais les systèmes utilisés par les six pays mentionnés nous permettent déjà d'avoir une idée de la façon d'intégrer les considérations non prudentielles, non concurrentielles dans l'examen des fusions bancaires – voir l'Appendice pour plus de détails.

Peu importe dans quelle mesure on s'en tient à de stricts critères de concurrence pour décider ou non de bloquer une fusion bancaire, on ne peut qu'améliorer le processus en veillant à ce que tous les aspects de concurrence soient examinés à fond et à ce que les conclusions soient rendues publiques, de préférence avant la décision finale.

9. Mécanismes spéciaux pour tenir compte des aspects concurrentiels des fusions bancaires

Parmi les dix juridictions mentionnées dans la section précédente, le Canada, la France, l'Italie et la Suisse se sont signalés pour avoir fait diverses exceptions au sujet des fusions bancaires examinées en vertu d'une loi cadre sur la concurrence appliquée par l'autorité générale en la matière – voir l'encadré. La liste de pays est donnée à titre indicatif et n'est pas exhaustive, car il se peut qu'on trouve des exceptions de ce genre dans d'autres pays de l'OCDE.

Droit de la concurrence appliqué aux banques - Exemples de mécanismes spéciaux	
Pays	**Caractéristiques particulières de l'examen des fusions[69]**
Canada	Le ministre des Finances a la possibilité de retirer au Bureau de la concurrence le pouvoir de bloquer une fusion anticoncurrentielle qu'il certifie « être dans l'intérêt du système financier canadien ».
France	En France, les fusions bancaires échappent à l'application du droit général de la concurrence et à l'examen officiel des autorités en matière de concurrence.
Italie	La Banque d'Italie applique le droit général de la concurrence aux fusions bancaires. Ce faisant, elle est tenue de considérer, mais pas nécessairement de suivre, l'opinion de l'organisme italien chargé de la concurrence.
Suisse	Le droit suisse de la concurrence est appliqué par l'organisme général chargé de la concurrence, hormis une exception qui peut être importante. Si la Commission fédérale des banques (CFB) juge nécessaire de prendre des mesures pour protéger des créanciers (dont certains sont sans doute aussi des déposants), elle remplacera en fait la Commission de la concurrence pour ce qui concerne ces mesures. La CFB peut donc avoir à mettre en balance la protection des créanciers et les aspects concurrentiels quand la fusion met en cause des banques en difficulté[70].

Dans la Synthèse du Rapport de l'OCDE sur la réforme de la réglementation, on peut lire la recommandation suivante [OCDE (1997, 47)] :

> Réexaminer, et renforcer le cas échéant, le champ d'application et l'efficacité de la politique de la concurrence et les moyens de faire respecter les obligations qui en découlent.
>
> - Combler les lacunes d'ordre sectoriel que peut comporter le champ d'application du droit de la concurrence, sauf à prouver que les intérêts primordiaux de la collectivité ne peuvent être servis par des moyens plus efficaces.
>
> - Faire respecter énergiquement le droit de la concurrence en cas de comportement de collusion, d'abus de position dominante *ou de fusions anticoncurrentielles* susceptibles de compromettre la réussite de la réforme.
>
> - Doter les autorités responsables de la concurrence des pouvoirs et des moyens nécessaires pour convaincre du bien-fondé de la réforme.

Compte tenu de l'expérience de plusieurs pays de l'OCDE, où des lois cadres sur la concurrence sont appliquées avec succès aux fusions bancaires, il serait difficile pour ces pays d'invoquer les « intérêts primordiaux de la collectivité » pour soustraire les fusions bancaires aux lois sur la concurrence. En outre, eu égard à la réforme réglementaire que beaucoup de pays de l'OCDE sont en train d'appliquer à leur secteur bancaire, on peut raisonnablement affirmer que toute fusion anticoncurrentielle risque de

neutraliser une telle réforme. L'application énergique du droit de la concurrence est certainement justifiée dans ce cas.

Pour déterminer qui doit procéder à cette application énergique du droit de la concurrence aux fusions bancaires, il faut consentir à certains compromis[71]. D'une part, les organismes de réglementation bancaire détiennent des données sectorielles importantes qui peuvent être utiles aux décisions en matière de fusion, et ils sont également mieux placés pour contrôler les mesures comportementales dans ce domaine. D'autre part, les organismes chargés de la concurrence ont l'avantage de posséder des compétences d'analyse et de jugement qu'elles ont pu polir en examinant beaucoup plus de cas de fusion que ne l'ont fait les organismes de réglementation bancaire. Les données sectorielles ne sont sans doute pas aussi indispensables à l'examen des fusions que ne le sont les compétences économiques utilisées pour définir les marchés, évaluer la puissance commerciale et concevoir des mesures correctives pertinentes[72]. Pour ce qui est de la prédominance que confère à l'organisme de réglementation sectorielle l'application des mesures comportementales, un tel avantage risque d'être insuffisant pour rendre les mesures comportementales plus utiles que les correctifs structurels, et par conséquent d'être hors de question quand il s'agit de déterminer qui doit examiner les fusions bancaires. Enfin, ce qui est peut-être le plus important, la coopération inter-organismes permet sans doute plus facilement le transfert des connaissances sectorielles que celui des compétences d'analyse et de et jugement.

Il est intéressant de noter qu'au Royaume-Uni, bien que le gouvernement ait donné à plusieurs organismes de réglementation sectorielle des pouvoirs simultanés leur permettant d'appliquer des lois sur la concurrence à des accords anticoncurrentiels et à des cas d'abus de pouvoir dominant, il n'a pas agi de même en ce qui regarde l'examen des fusions. Il a même décidé de ne pas accorder à la Financial Services Authority les mêmes pouvoirs de contrainte en matière de concurrence que ceux attribués aux divers organismes de réglementation sectorielle[73].

10. Rappel de quelques observations

Les fusions bancaires vont sans doute se poursuivre de plus belle, surtout dans des marchés comme celui des États-Unis, qui compte encore un grand nombre de banques autonomes[74]. On peut s'attendre aussi à une certaine restructuration en ce qui regarde les activités que les banques souhaitent regrouper. Plus la concentration augmente, plus les fusions bancaires risquent d'entraîner des problèmes de concurrence, à moins que les services électroniques et la réforme réglementaire ne continuent à faire baisser les barrières à l'entrée. Les organismes chargés de la concurrence devraient encourager ces développements et les autres moyens d'ouvrir les marchés, et se montrer vigilants pour empêcher les banques de protéger leur part actuelle du marché au détriment des consommateurs.

L'examen des fusions bancaires sera grandement facilité si les organismes chargés de la concurrence établissent clairement les voies de communication et les moyens de collaboration avec les autres intervenants gouvernementaux dans le secteur bancaire, en particulier les organismes de réglementation prudentielle[75]. Une meilleure collaboration peut également s'imposer entre les organismes nationaux chargés de la concurrence lorsque les fusions impliquent des banques d'autres pays.

Rappelons quelques-uns des points saillants de la présente étude :

- dans les cas de fusion bancaire, il faut prendre soigneusement en considération l'effet des développements de la bancatique sur la définition appropriée des marchés et l'évaluation des barrières à l'entrée ;

- les problèmes de concurrence qu'amènent le plus souvent les fusions bancaires concernent les prêts aux petites et moyennes entreprises ;

- les barrières à l'entrée sont parfois suffisamment importantes pour empêcher une neutralisation assez rapide de tous les effets anticoncurrentiels que risquent d'avoir les fusions bancaires dans des marchés suffisamment concentrés ;

- les gains d'efficience sont possibles dans les fusions bancaires, mais les autorités en matière de concurrence doivent accueillir avec scepticisme les prétentions d'économies d'échelle, surtout quand il s'agit d'une fusion où chacune des parties est déjà assez colossale pour avoir sans doute épuisé toutes les économies d'échelle possibles ;

- devant l'éventualité d'une fusion bancaire anticoncurrentielle, l'organisme chargé de la concurrence doit envisager des propositions pour modifier comme il se doit la transaction, mais éviter en général les « correctifs » qui exigent une surveillance et des mesures d'exécution permanentes ;

- il n'y a guère de risques inhérents de conflit entre l'organisme chargé de la concurrence et l'organisme de réglementation prudentielle ;

- dans l'ensemble, le droit de la concurrence doit être appliqué aux fusions bancaires par l'organisme général chargé de la concurrence. De plus, il est essentiel de favoriser la coordination et la collaboration entre l'organisme de réglementation prudentielle et l'organisme chargé de la concurrence.

NOTES

1. Dans le cadre du présent document, le terme « banque » désigne une institution qui accepte les dépôts et dont les activités comportent une implication considérable dans l'intermédiation financière, et parfois des fonctions de courtage. Les lecteurs qui souhaiteraient en savoir davantage sur ces fonctions sont priés de se reporter à *Bhattacharya et Thakor* (1993).

2. Pour obtenir une liste du même type, consulter *Berger, Demsetz et Strahan* (1999, pp. 148-151).

3. Pour obtenir des données indiquant la tendance à la désintermédiation en Australie, consulter ACCC (1997, p. 29).

   La désintermédiation en cours serait l'une des raisons qui a motivé la fusion de la Deutsche Bank et de la Dresdner. Voir l'éditorial du Financial Times du 8 mars, page 12.

   Dans certains marchés, notamment le Japon, la désintermédiation est facilitée par les réformes réglementaires permettant un accès direct aux marchés de capitaux.

4 . Voir OCDE (2000b, pp. 128-129). Comme exemple des diverses façons dont le développement d'Internet peut influer sur les activités bancaires, il faut prendre en compte le fait que trois grandes sociétés pétrolières et quatre sociétés de services financiers (Deutsche, Goldman Sachs, Morgan Stanley Dean Witter and SG Investment Banking) ont récemment mis sur pied des échanges Internet pour gérer les offres et les demandes relatives au pétrole et aux métaux précieux. Voir *Tait* (2000).

5. Voir ACCC (1997, pp. 11-12 et 21). Voir aussi OCDE/CLP (1998a, p. 6) : « La plupart des pays ont constaté que les services bancaires par Internet et par téléphone devraient être utilisés davantage avant de produire un impact significatif sur la définition du marché. »

6. OCDE (2000b, p. 129). Bien qu'il puisse s'agir d'un exemple isolé, il est intéressant de constater que :

   Le récent succès de Egg, le prolongement direct de La Prudentielle au Royaume-Uni, relativement à l'accès par téléphone ou par Internet…Egg ayant atteint en seulement six mois son objectif (qu'il comptait atteindre en 5 ans) de réaliser de nouvelles économies de 5 milliards (de livres stergling) et d'obtenir 500 000 nouveaux clients. [Case Associates (1999)]

   Dans un article d'un journal traitant des services bancaires sur Internet, on pouvait lire :

   Le coût de la transaction moyenne de paiement sur Internet est de seulement 13 cents ou moins. Ce coût est de 26 cents lorsque la transaction est effectuée par ordinateur personnel au moyen du propre logiciel de la banque, de 54 cents lorsqu'elle est effectuée par l'intermédiaire des services bancaires téléphoniques et de 1,80 $, dans une succursale. [Nehmzow (1997, 1)]

7. Dans un article où l'on mentionne que la Deutsche Bank éliminait certaines de ces succursales dans le but d'investir davantage dans les services Internet, on indiquait également qu'il y a 15 ans, 75 pour cent des transactions bancaires en Allemagne étaient faites en succursale comparativement à seulement 25 pour cent aujourd'hui. L'Internet, que privilégient les banques car fournir des services par son intermédiaire coûte moins cher, a accéléré les mesures de rationalisation dans le secteur des services bancaires traditionnels. [International Herald Tribune (2000)]

   Buerkle (2000b) déclare que 50 pour cent de la clientèle de la MeritaNordbanken de la Finlande a recours aux services Internet. Dans le même article, il mentionne que 13 pour cent des transactions de prêts de cette banque se font par l'intermédiaire du Web et que l'on promet aux clients une réponse dans. Par ailleurs, le Crédit Suisse et Dexia de la Belgique ont annoncé leur intention de s'en remettre davantage aux services bancaires électroniques. Voir Hall (2000) et Moore (2000).

8. Le groupe de services financiers allemand Allianz aurait été l'un des principaux bénéficiaires du projet de fusion entre la Deutsche Bank et la Dresdner. Il semble qu'Allianz souhaitait vendre ses produits d'épargne par l'intermédiaire d'une nouvelle filiale regroupant les succursales de la Deutsche Bank et de la Dresdner offrant des services bancaires de détail. La nouvelle filiale serait selon toute apparence devenue la propriété éventuelle d'Allianz. Voir le Financial Times (2000).

9. En Allemagne, il y aurait 604 succursales pour un million de clients. Aux États-Unis, ce nombre est de 265. Voir Uta Harnischfeger (2000).

10. Charles Pretzlik et Uta Harnishchfeger (2000) mentionnent que 90 pour cent des clients utilisant les services en ligne de la banque Wells Faro ont souscrit ces services en succursale.

11. Dans certains pays, ce pourrait bien être déjà le cas. La banque la plus importante sur Internet serait la banque finlandaise MeritaNordbanken qui aurait 1,2 million de clients utilisant ses services Internet, que ce soit notamment pour payer des factures, acheter des titres ou transiger un prêt-automobile. La MeritaNordbanken offre aussi la possibilité d'accéder à ses services bancaires électroniques au moyen d'un téléphone mobile et compte offrir le mois prochain un mode de paiement électronique accessible par téléphone mobile qui permettra à ces clients d'acheter « […] n'importe quoi, qu'il s'agisse d'un Coke ou d'un billet de concert simplement en entrant un numéro d'identification personnel. » Buerkle (2000, p. 16)

12. Pour obtenir des renseignements approfondis sur le sujet et les processus de définition des marchés, notamment le concept de la « substituabilité », se reporter à la référence bibliographique *Office of Fair Trading* (1999).

13. Traduction d'un extrait d'un article de Ian Ayres paru dans le Yale Law Journal (1985, p. 111).

14. Voir Ayres (1985). Les complémentarités relatives à la demande risquent plutôt de faire en sorte que deux produits différents seront achetés sans qu'il soit pour cela nécessaire de les acheter du même fournisseur. De plus, si le fournisseur de l'un des compléments détient un monopole, il pourrait tout aussi bien bénéficier de cette puissance commerciale même si l'autre produit était fourni par la concurrence.

15. Voir OCDE/CLP (1998a, pp. 11-12). Les économistes de l'USFRB continuent cependant de réaliser des travaux de recherche empiriques qui la plupart du temps vont dans le sens de l'approche de groupement. Néanmoins, ils ont aussi affirmé que les produits les plus susceptibles de présenter des problèmes de concurrence lors d'une fusion de banques concernent des marchés de nature locale. Pour obtenir des exemples à ce sujet, consulter les ouvrages suivants : Cyrnak et Hannan (1999), Amel et Hannan (1999), Heitfield (1999), Kwast (1999), Kwast *et coll.* (1997).

    Lawrence Radecki a une toute ature opinion à ce sujet. Étant donné la dérèglementation touchant les succursales ainsi que la normalisation des offres de produits bancaires et la centralisation de la prise de décisions, Radecki a émis l'hypothèse selon laquelle la concurrence se déroule maintenant sur une plus vaste étendue et va au-delà de la simple ville ou du simple comté. Se fondant sur données de 1996 sur les États-Unis, Radecki (1998, p.32) constate :

    […] la disparition de la bonne corrélation statistique qui existait à l'échelle locale au milieu des années 80 (entre le pourcentage des dépôts au détail et la mesure des concentrations du marché). De plus, Radbecki remarque une bonne corrélation à l'échelle de l'État en ce qui concerne la mesure de certaines concentrations et de certains pourcentages de dépôts.

16. Voir Guerin-Calvert (1996, p. 305, n.14). Par ailleurs, une récente étude effectuée par un économiste de la Réserve fédérale révèle que :

    […] bien que le nombre de services financiers essentiellement utilisés dans les banques ait certes diminué, il existe toujours un noyeau d'activités de ce type pour les ménages et les petites entreprises. En ce qui concerne les ménages, ce noyau se compose principalement de produits axés sur les biens, soit des comptes

assurés par l'État (comptes-chèques, comptes épargnes, comptes de dépôt du marché monétaire) et les services connexes, mais comprend également les marges de crédit et les certificats de placement […]

En ce qui concerne les petites entreprises, les données disponibles suggèrent un groupement constitué de services relatifs aux chèques, à l'épargne, aux marges de crédit, aux hypothèques, aux transactions, à la gestion de trésorerie et au crédit. [Kwast (1999, p. 630)]

Les produits auxquels Kwast fait allusion sont les mêmes que ceux pour lesquels les marchés géographiques locaux semblent appropriés. Voir Kwast *et coll.* (1997, p. 16).

17. Un cadre du ministère de la Justice des États-Unis fait remarquer que, dans pratiquement toutes les fusions de banques suscitant des inquiétudes en matière de concurrence, cette question concerne les prêts aux petites et aux moyennes entreprises. Voir Kramer (1999, p. 7).

18. Rozanski et Rubinfeld (1997, p. 254 – note en bas de page omise et ajout pour mise en évidence). Voir aussi Bruzzone et Polo (1998, p. 11).

19. A la lumière de sondages que l'USFRB a effectués auprès de ménages et de petites entreprises en 1992 et en 1993, Kwast *et coll.* (1997, p. 980) déclarent :

Les données indiquent que les banques commerciales sont de loin les institutions financières les plus souvent utilisées par les ménages et les petites entreprises. Fait plus important encore, 96,5 pour cent des ménages et 93,5 pour cent des petites entreprises disent que l'institution où ils font leur dépôts est leur principale institution financière […] ; seulement 4 pour cent environ de ces deux groupes ont désigné une institution autre qu'une institution de dépôt comme étant leur principale institution. Dans une très large mesure, les banques commerciales sont aussi les institutions les plus souvent désignées comme institutions principales. Par conséquent, si l'on se fie à ces données, les institutions de dépôt sont beaucoup plus importantes pour les ménages et les petites entreprises que celles n'acceptant pas les dépôts, bien que ces autres institutions soient très pertinentes. Par ailleurs, les banques commerciales remportent la palme des lieux de dépôt les plus importants.

Se basant sur un point de vue selon lequel « le caractère distinct des dépôts assurés constitue l'un des principaux fondements de la politique antitrust à l'égard des fusions bancaires », Pilloff (1999c) a tenté de savoir si les comptes de dépôt du marché monétaire n'étant pas assurés par le gouvernement constituaient de bons substituts aux dépôts que le gouvernement assure. Sa conslusion générale est que les comptes des institutions de dépôt semblent revêtir un caractère distinct (p. 382). Néanmoins cette conclusion ne se fondait pas sur les attitudes des consommateurs face aux changements de taux d'intérêt relatifs, mais plutôt sur les différences en matière de risque, de liquidité, d'accessiblité et d'aspect pratique, et sur ses observations selon lesquelles « peu de ménages (5,7 pour cent en 1995) ont un compte de fonds de placement sur le marché monétaire mais presque la totalité de ces ménages possèdent aussi un compte-chèques ou un compte de dépôt du marché monétaire dans une institution assurée » (p. 382). Pilloff ajoute aussi que cette situation est demeurée stable de 1992 à 1995.

Amel et Hannan (1999) ont dernièrement effectué une analyse empirique en s'inspirant d'une approche adoptée par le ministère de la Justice américain et la *Federal Trade Commission* dans leurs lignes directrices sur les fusions. Ils en sont arrivés à la conclusion que seules les banques commerciales devaient être comptées comme participantes au marché antitrust quant aux fusions bancaires proposées. Amel et Hannan (1999, p. 1667 et p. 1689).

Lors de l'examen d'un fusionnement de banques, l'ACCC (1997, p. 23) a indiqué que les consommateurs pouvaient estimer que les banques (en ce qui concerne tous leurs produits et non seulement les dépôts) étaient plus sûres que les autres établissements en raison de la garantie implicite que leur confère le gouvernement en exerçant un contrôle prudentiel. L'ACCC a trouvé que cette fausse impression des consommateurs constituait une barrière à l'entrée mais pouvait aussi prouver qu'il s'agit d'un marché distinct en ce qui concerne les produits fournis par les banques et les autres établissements.

20. Robert Kramer du ministère de la Justice des États-Unis fait ressortir ce point lors d'une discussion sur la fusion des banques Corestates et First Union réalisée en 1997. Voir Kramer (1999, pp. 2-3).

21. Le Bureau de la concurrence du Canada a opté pour un groupe semblable de marchés de produits pour les services bancaires offerts en succursale, lequel a été divisé en services financiers personnels (subdivisions : placements personnels à long terme, épargnes personnelles à court terme, prêts étudiants, comptes opérations personnels, prêts hypothécaires résidentiels et marges de crédit/prêts personnels) et en services financiers aux entreprises (subdivisions : prêts à terme, comptes d'opérations commerciaux assortis des services connexes, et prêts d'exploitation). Voir von Finckenstein (1998a, pp. 9-10).

Faisant état de grandes similitudes entre les définitions des marchés de produits s'appliquant aux activités bancaires de détail/en succursale, Goddard (2000, p. 237) mentionne que l'étroite ressemblance de ces définitions, compte tenu des similitudes au sein de la procédure d'enquête relative aux fusions et de la nature et de l'étendue du réseau de succursales entre les deux territoires, donne à penser qu'on peut accorder une grande validité à cet aspect de la définition des marchés.

La Commission européenne (1998, par. 11) semble opter pour les trois principaux groupements de produits en ce qui concerne les services fournis par les banques universelles (p. ex. banques oeuvrant au niveau des valeurs mobilières) notamment, les services bancaires de détail, les services aux grandes entreprises et les services relatifs aux marchés de capitaux. Cette décision fait cependant ressortir qu'en ce qui concerne les marchés de capitaux, les activités suivantes pourraient représenter des marchés distincts : négociation de titres, obligations et produits dérivés, opérations de change et marchés monétaires (par. 12).

On peut en savoir davantage sur la définition des marchés de produits dans les pays où les services bancaires à l'échelle nationale ont longtemps été la norme en se tournant du côté de la Suisse. Le secteur des prêts commerciaux constitue un des marchés ayant considérablement retenu l'attention lors de l'examen de la Commission de la concurrence sur la fusion de 1997 qui a créé l'UBS. La Commission a décidé d'y inclure les marges de crédit et les prêts à l'investissement sans englober toutefois l'affacturage, le crédit-bail et le capital de risque. Elle établit également une distinction entre les prêts étant au-dessus et en-dessous de deux millions de francs suisses, parce qu'elle a déterminé qu'ils concernaient des marchés géographiques très différents. Voir Gugler (2000, pp. 9-10).

22. Voir ACCC (1997, p. 6 à 13).

23. Il est intéressant de souligner que l'ACCC disposait de renseignements démontrant que le nombre de consommateurs ayant des prêts personnels et des comptes d'opérations auprès d'établissements différents était plus élevé que le nombre de clients privilégiant un même établissement. Elle a donc décidé que l'étendue du groupe de produits n'est pas suffisante pour conclure que les prêts personnels font partie d'un groupement plus vaste de services bancaires de détail. ACCC (1997, pp. 7-8).

24. Voir von Finckenstein (1998a) pour obtenir des données canadiennes indiquant que l'étendue du marché géographique varie selon la catégorie de produits, qu'elle est locale en ce qui concerne les services financiers offerts aux particuliers et aux PME, mais que «…concernant les prêts d'une valeur variant entre 1 million de dollars et 5 millions de dollars consentis aux entreprises intermédiaires, le marché géographique a une étendue régionale » (p. 9). On a cependant conclu que le marché géographique des cartes de crédit était national alors que «…le courtage de plein exercice est un secteur d'activité qui est essentiellement de nature locale. », mais peut également être d'envergure nationale en ce qui concerne la souscription de titres.

La Commission de la concurrence de la Suisse est parvenue à des conclusions semblables lors de l'examen de la fusion ayant créé l'UBS ; elle trouvait que les marchés géographiques pouvaient s'établir à l'échelle d'un canton ou d'une région ou à l'échelle nationale, le tout dépendant du service offert. Voir Gugler (2000, p. 10 à 12).

La Commission européenne semble avoir conclu que les marchés des banques de détail sont d'envergure nationale, le secteur des services bancaires aux entreprises aurait une étendue nationale lorsqu'il s'agit de

PME, mais internationale lorsqu'il s'agit de grandes sociétés; et le secteur des marchés financiers aurait une étendue internationale. Voir la référence se rapportant à la Commission européenne (1998, par. 16-17).

Une étude réalisée récemment au Portugal conclut que, malgré l'avènement de l'euro et les diverses innovations technologiques, les marchés européens de dépôts bancaires demeurent fragmentés plutôt que d'être à l'échelle européenne. Voir Barros (1999).

25. Cette généralisation vaut également pour les échanges transnationaux croissants de services financiers. Quelques faits indiquent que ce type d'échange :

> […] est surtout prédominant et de plus longue durée à l'autre extrémité bien nantie du marché : services bancaires commerciaux de gros, services bancaires d'investissement, services bancaires aux particuliers, assurance (risques élevés et réassurance), services d'information financière et services d'information sur les opérations. Il faut s'attendre à une augmentation des échanges transnationaux pour ces segments de marché.
>
> Parallèlement, la fourniture de services de gestion des avoirs et des services bancaires de détail aux personnes moins bien nanties et aux petites entreprises s'est faite dans une très large mesure par l'intermédiaire d'une présence commerciale locale. La fourniture transfrontière de ces services semble très rare.
>
> Il existe toutefois des signes d'activités transfrontières dans les services bancaires de détail concernant des gammes de produits spécifiques liées au crédit (par ex. carte de crédit, marges de crédit). Cette situation illustre l'impact potentiel de la technologie, de l'accroissement des connaissances au niveau technologie, et des changements d'attitudes sur ce marché de détail élargi.

OCDE (2000a, 54)

26. Par exemple, selon Boot (1999, p. 610) :

> Les banques d'Europe étaient et sont toujours protégées à titre de bannière nationale. La croyance fondamentale que les institutions financières ne devraient pas être sous contrôle étranger a (jusqu'ici) pratiquement empêché toute fusion transfrontière.

Boot reconnaît ensuite que la réaction première aux directives de l'UE en matière de libéralisation a été jusqu'ici de type défensif, c'est-à-dire que les fusions à l'intérieur d'un pays visent en général à protéger les intérêts nationaux (p. 611).

27. Voir von Finckenstein (1998a, Annexe A - Glossaire). Fait intéressant, lors des deux récentes fusions bancaires où cette liste fut proposée, le Bureau de la concurrence du Canada a déterminé que des problèmes de concurrence pourraient survenir en ce qui concerne « les services de réseaux de cartes de crédit » et « les services d'acquisition pour les commerçants ». Voir von Finckenstein (1998a et 1998b). Le ministère de la Justice des États-Unis semble être de plus en plus préoccupé par les conséquences négatives des fusions bancaires sur certaines activités relatives aux cartes de crédit. Voir Kramer (1999, p. 5).

28. Voir von Finckenstein (1998a, p. 26) pour des suggestions de divisions de produits ayant trait au secteur des valeurs mobilières dans les banques.

29. Au moins un bureau de la concurrence traitera l'affacturage et le crédit-bail comme étant à part des marchés bancaires traditionnels de crédit. Voir Gugler (2000, p. 10).

30. Pour une discussion sur l'interaction des effets coordonnés (c'est-à-dire la source des effets coordonnés), consulter OCDE/CLP (1999, p. 17 à 32).

31. Cette liste de facteurs a été surtout inspirée de l'ACCC (1997, p. 34), de von Finckenstein (2000, p. 9) et de Gugler (2000, p. 14). Il est intéressant de mentionner que des travaux empiriques effectués dernièrement pour les marchés bancaires américains suggèrent qu'une grande assymétrie pourrait être tout aussi mauvaise qu'une trop grande symétrie, voire pire, pour la saine concurrence– voir Pilloff (1999b).

32. Pour obtenir un exemple des niveaux de concentration utilisés de la sorte, voir von Finckenstein (1998, Annexe B). Consulter également ACCC (1997, p. 1 et p. 14 à 18). Aux États-Unis, les seuils sont un peu moins sévères pour les fusions bancaires que les autres fusions, c'est-à-dire qu'une fusion dépasse le seuil si elle augmente le HHI de plus de 200 et que le HHI postérieur à la fusion dépasse 1 800. Voir *U.S. Office of the Comptroller of the Currency* (1995, p.1). Les seuils dans les cas de fusions non bancaires sont de 200 et 1 600. – Voir *U.S. Department of Justice* et *Federal Trade Commission* (1997).

33. En vertu du règlement no 1310/97 de la CE, la Direction générale de la concurrence de la Commission européenne utilise maintenant les données relatives aux revenus plutôt qu'un arbitraire 10 pour cent de l'actif (c'est-à-dire correspondant plus ou moins aux sommes déposées) comme indicateur du chiffre d'affaires dans les cas de fusions bancaires. Voir Bruzzone et Polo (1998, pp. 33-34). Ce changement, bien qu'il puisse être justifié ou même exigé dans certaines juridictions, peut faire l'objet de critiques étant donné que les dépôts totaux obtenus dans un marché géographique donné constitue une meilleure façon de mesurer la volonté et la capacité de souscrire à diverses activités de crédit. Voir Robinson (1996, p. 3).

34. Voir Cetorelli (1999, p. 6). Se reporter également à Berger, DeYoung, Genay et Udell (2000, p. 28), à Radecki (1998, p. 32), et à Berger, Demsetz, et Strahan (1999, p. 153).

35. Ces facteurs sont inspirés d'informations obtenues dans : Kwast (1999, pp. 633-634); ACCC (1997, p. 26 à 28); von Finckenstein (1998, 16ff); Gugler (2000, p. 14) et Kramer (1999). L'un des aspects que nous appelons « enjeux de relations verticales » fut en cause dans le projet de fusion de la Banque Royale du Canada et la Banque de Montréal. Ces deux banques étaient respectivement les émetteurs principaux des cartes Visa et MasterCard. Selon le Commissaire du Bureau de la concurrence du Canada, si, à la suite de la fusion, «…la Banque de Montréal se tournait vers Visa, il en résulterait vraisemblablement une baisse importante du nombre des transactions de MasterCard au Canada et ….ceci mènerait vraisemblablement à l'élimination de MasterCard en tant que réseau concurrentiel efficace au Canada » [von Finckenstein (1998, p. 20)].

36. Berger, Saunders, Scalise et Udell (1997, pp. 33-34) ont vérifié l'hypothèse selon laquelle les fusions pouvaient entraîner une baisse des prêts consentis aux petites entreprises en raison d'une probable corrélation négative entre la taille d'une banque et la proportion de l'actif habituellement destinée aux prêts aux petites entreprises. Après avoir étudié près de 6 000 fusions et acquisitions bancaires réalisées entre la fin des années 70 et le début des années 90, ils sont arrivés à la conclusion que l'entité résultant de la fusion pouvait en fait occasionner des baisses relativement mineures des prêts aux petites entreprises. Toutefois, cette situation est probablement contrebalancée en totalité ou en partie par l'augmentation des prêts que consentent les autres banques sur les marchés locaux touchés. Ils émettent cependant une mise en garde : « (traduction) Les emprunteurs pourraient à court terme devoir assumer les frais de ce transfert… par l'entremise de taux plus élevés ou d'exigences plus élevées de garantie tant que la nouvelle relation bancaire ne se sera développée. (p. 34) Les résultats de Berger et ses collègues ont été dans l'ensemble reconnus par Jayaratne et Wolken (1999, p. 427). Peterson (1999) émet des réserves quant à cette dernière conclusion.

37. Berger, DeYoung, Genay et Udell (2000, p. 29 – note en bas de page omise) mentionnent ce qui suit à propos de l'augmentation de la concurrence pouvant résulter des conduites interactives :

> Cela pourrait aussi donner lieu à l'exercice d'une moins grande puissance commerciale, du moins à court terme, si les entreprises établissent des prix stratégiques pour signaler leurs coûts ou faire fermer leurs conccurrents. Les données sur les effets de la conduite interactive sur les prix des services bancaires de détail sont partagées…

38. Voir Amel et Liang (1997) pour des travaux empiriques effectués à la lumière des données américaines et appuyant l'idée que les surprofits dans le secteur bancaire seront éventuellement atténués par un nouvel arrivant, et que cela pourra prendre un certain temps (en particulier en ce qui concerne les marchés ruraux).

39. Voir OCDE/CLP (1998b) pour obtenir un bon survol de la politique de la concurrence touchant la réglementation bancaire dans les pays membres de l'OCDE.

40. Si l'on approfondit un peu, les banques sont forcées d'offrir des taux d'intérêt de plus en plus élevés pour attirer les déposants (qui au fond méconnaissent le risque auquel ils sont exposés), des taux qu'elles ne peuvent payer à moins d'utiliser les fonds des déposants pour acheter des actifs risqués à rendement élevé.

41. Pour un bref exposé sur la question, lire Berger et Humphrey (1992, pp. 543-544). On peut en dire autant en ce qui concerne la propriété de l'État dans le secteur bancaire. Quelle valeur doit-on accorder à cette argumentation quand le calcul de la probabilité d'un effet anticoncurrentiel résultant d'une fusion constitue une question empririque qui dépasse la portée du présent document.

    Un autre point concernant la réglementation vaut la peine d'être mentionné. Dans les pays où il y a un assouplissement de l'examen de la concurrence visant à déterminer s'il faut ou non interdire une fusion, il pourrait s'avérer ardu de démontrer que le seuil est atteint lorsque les prix du secteur, etc., sont tellement réglementés que la concurrence est déjà très peu élevée.

42. Cela a également occasionné certains problèmes aux responsables de la réglementation prudentielle, et c'est probablement une des raisons pour lesquelles le ministère américain de la Justice a, semble-t-il, laissé la question du « au-delà d'une certaine taille, la faillite est hors de question » entre les mains des organismes de réglementation du secteur bancaire [voir Kramer (1999, 4)]. Par définition, si une banque « trop importante pour faire faillite » éprouve des difficultés financières, les organismes chargés de la réglementation de prudence ont peu de choix quant aux moyens de régler le problème. Voir Bureau du surintendant des institutions financières – Canada (1998, p. 4).

43. Voir le document du Groupe de travail sur l'avenir du secteur des services financiers canadiens (1998, p. 20) où l'on indique que :

    […] il n'existe pas de restrictions formelles en matière de propriété dans beaucoup de pays, mais la plupart d'entre eux soumettent les changements de propriété à l'agrément – officiel ou officieux – de l'État. Les autorités ont souvent exercé ce pouvoir pour s'assurer que les institutions en particulier les plus grandes d'entre elles, avaient un capital largement réparti et étaient contrôlées par des intérêts nationaux.

44. Le cas le plus connu est celui des caisses d'épargne régionales de l'Allemagne. Les subventions que versent l'État à ces banques ont récemment fait l'objet de critiques de la part de la Commission européenne. Voir Harnischfeger (2000) ainsi que Hargreaves et Barber (1999).

45. ACCC (1997, p. 22). Voir aussi von Finckenstein (1998a, pp. 15-16). En plus des préoccupations au sujet des obstacles à l'entrée, les changements occasionnés par les fusions dans les réseaux pourraient aussi donner lieu à une baisse de la concurrence entre réseaux.

46. Voir Das et Nanda (1999, p. 868) pour connaître les étapes normalement requises aux Etats-Unis pour la création d'une marge de crédit renouvelable. Les frais compensatoires sont justifiés par la nécessité pour la banque de s'assurer d'une certaine façon de l'engagement d'emprunt à long terme avant qu'elle n'enquête sur la solvabilité du demandeur.

47. Rhoades écrit (1997, p. 1003) :

    (Traduction) En ce qui concerne les prêts aux petites entreprises, certains faits indiquent que les obstacles économiques à l'entrée commencent à diminuer, en particulier en raison de l'adoption de modèles de pointage du crédit. Ces modèles semblent rassurer les grandes banques et les encouragent à consentir des prêts aux « petites » entreprises situées dans les marchés locaux où elles n'ont pas d'établissements. L'on

ne peut dire avec certitude cependant si les avantages relatifs à l'information qu'ont les banques locales vont limiter considérablement l'entrée d'entreprises éloignées dans le secteur des prêts aux petites entreprises, sauf peut-être pour les prêts à des petites entreprises relativement importantes et bien établies.

48. En ce qui regarde le projet de fusion bancaire Deutsche/Dresdner, les économies projetées découlent surtout de la fermeture prévue du tiers des 2 800 succursales combinées des deux banques. Voir CNN (2000). Voir aussi Dai-Ichi Kangyo Bank (1999), Asahi Bank (1999) et Asahi Bank (2000), où l'on annonce des fusion bancaires en faisont largement état d'économies attendues de la fermeture des succursales qui font double emploi.

49. Berger, Leusner et Mingo (1997) constatent que les succursales bancaires américaines sont largement sous-utilisées, mais soulignent que ce fait « peut être idéal du point de vue de la rentabilité, car des points de service additionnels offrent des avantages pratiques aux clients, qui peuvent être pressentis pour d'autres services producteurs de revenus ». (159)

50. A titre de contribuables, cependant, les consommateurs tiennent à la réduction du passif éventuel des régimes gouvernementaux d'assurance-dépôts.

51. Une étude américaine sur les effets du regroupement des opérations de paiement pour réduire le nombre de points de service constate que, malgré la diminution des coûts moyens de traitement des données, les économies réalisées peuvent être plus qu'annulées par l'augmentation des dépenses de télécommunications. Voir Hancock, Humphrey et Wilcox (1999, 391).

52. Voir Dai-Ichi Kangyo Bank (1999), Asahi Bank (1999), et Asahi Bank (2000).

53 Une alliance stratégique doit, par le niveau de coopération qu'elle permet, être moins anticoncurrentielle que ne le serait la fusion de toutes les banques impliquées dans cette alliance stratégique. C'est qu'une fusion englobe tous les aspects des activités menées (y compris les secteurs d'activité futurs) et a bien plus de chances qu'une alliance stratégique de devenir permanente. Pour plus de détails concernant les répercussions des alliances stratégiques sur la politique de la concurrence, voir OECD/CLP (1992).

54. Voici ce qu'Allan Fels (1998, 18), président de l'ACCC, affirme à ce sujet :

> […] je crois que les facteurs qui amènent les fusions outre-mer ont autant à voir avec des questions particulières d'ordre réglementaire, cyclique et institutionnel concernant des juridictions données qu'avec des impératifs commerciaux plus larges affectant les institutions financières américaines et étrangères. Dans ce contexte, les conséquences de ces fusions pour nos institutions financières doivent être interprétées avec prudence et compte tenu de tout un ensemble de renseignements sur le contexte exact dans lequel se déroulent les fusions dans les autres juridictions.

55. Voir Rodrigues (1999, 5), qui confirme cette opinion en mentionnant le rapport Mortimer de juin 1997 au gouvernement australien. Pour un autre point de vue, voir Boot (1999, 611).

56. Selon Flannery (1999, 216-217), Prowse (1997) constate que « […] la gouvernance interne d'entreprise est plus faible dans les banques que dans les autres types de sociétés, et conclut que les contrôles réglementaires tendent à déplacer certains des mécanismes privés habituels.»

57. Voir Berger and Hannan (1998, 464). Voir également Peristiani (1997) qui, dans ses travaux empiriques fondés sur des données américaines, a constaté une baisse d'efficience X comparativement aux données sur les fusions de banques américaines survenues dans les années 80.

58. Voir Akhavein, Berger and Humphrey (1997, 133). Une mise en garde s'impose ici. Une étude concernant quatre fusions de banques australiennes survenues entre 1989 et 1991 donne du poids à l'idée que les banques absorbantes sont plus efficientes que les banques acquises. L'auteur cependant apporte aussitôt la nuance qui suit : « […] la banque absorbante ne garde pas toujours son efficience d'avant la fusion. » Avkiran (1999, 1010.) Pour sa part, Rhoades (1998, 288) note que même si la volonté de couper les coûts

et de rendre les entreprises absorbantes plus efficientes que les entreprises acquises « […] peut être importante, [de tels facteurs] ne sont manifestement pas suffisants pour assurer des gains d'efficience ».

59. Ce point a été mentionné dans une étude récente sur les fusions bancaires au Canada - voir von Finckenstein (1998a, 26).

60. Voir von Finckenstein (1998a, 41) et Fels (1998, 13). Fait intéressant, le paragraphe 40(3) de la loi sur la concurrence de l'Allemagne dit explicitement que les conditions et obligations liées à l'approbation d'une fusion ne doivent pas équivaloir à celles d'une surveillance continuelle d'entreprise.

61. A propos de la sagesse de cette mesure et d'autres attitudes prescrites, en plus de l'obligation de céder un certain nombre de succursales, Gugler (2000, 16) écrit :

L'expérience a montré que cette solution est fort difficile à gérer et que la mise en oeuvre des ces obligations exige beaucoup de temps, surtout quand elles ne sont pas purement d'ordre « structurel » mais concernent des attitudes.

62. Tel que mentionné plus haut, cela est peut-être en voie de changer à cause des opérations bancaires électroniques.

63. Robinson (1996, 4) explique bien ce que comporte la détermination d'un ensemble approprié de succursales à céder, ainsi que la nécessité de trouver un acheteur convenable :

[...] quand nous constituons un réseau de succursales pour trouver une solution appropriée aux craintes éventuelles en matière de concurrence, nous considérons non seulement la somme des actifs à céder, mais aussi la qualité et l'emplacement des succursales qui sont comprises dans le programme de cession. Comme notre priorité principale est la concurrence touchant les prêts aux petites entreprises, nous examinons d'assez près les caractéristiques des succursales situées dans le marché, y compris la nature de leurs dépôts et de leurs prêts, leur emplacement et leur facilité d'accès pour les entreprises. Notre but est de déterminer et d'évaluer l'utilité globale actuelle et l'attractivité potentielle de chaque succursale pour les entreprises locales. Nous avons par exemple demandé à certaines parties de fournir des photographies des succursales. Nous avons également obtenu de précieux renseignements additionnels lors de nos entrevues avec d'autres participants au marché.

Nous prenons aussi beaucoup de temps pour évaluer la viabilité et l'efficacité générale des réseaux de succursales proposés dans le cadre des cessions effectuées dans un marché. La question est de savoir si l'acheteur du réseau peut être un concurrent efficace en matière de services bancaires aux entreprises du secteur. Les facteurs pris ne considération sont le nombre et l'emplacement des succursales ainsi que la composition de leurs dépôts, de leurs services bancaires et de leur personnel. Le résultat n'est pas fondé uniquement sur des données en matière de concentration. Nous insistons parfois pour faire inclure des succursales ou des emplacements particuliers dans le programme de cessions. Nous exigeons également que les parties abandonnent entièrement leurs relations avec la clientèle de chacune des succursales, que ce soit pour des dépôts, des prêts ou d'autres services connexes. Le programme final vise à tenir compte des réalités commerciales du marché concerné, de même qu'à donner à l'acheteur des succursales cédées une forte présence sur ce marché.

64. Voir Burke (1998). Burke mentionne dans ses conclusions :

Les succursales cédées sans que le Department of Justice prenne part aux négociations de vente ont été, en général, moins fructueuses que les autres. Si l'on se base sur la conservation des dépôts, on constate que le fait de laisser la plupart des conditions entourant les ententes d'achat à la discrétion des acheteurs et des vendeurs [comme le fait de toute évidence la USFRB] n'a pas nui à la viabilité des entités cédées (23).

Un examen plus attentif peut montrer que cette conclusion est non fondée, vu les différences fondamentales entre les difficultés que les acheteurs de succursales ont connues lors des fusions confiées à la USFRB et celles qu'ils ont connues dans les cas où le USDOJ a cru devoir intervenir.

On trouvera un aperçu des problèmes que comporte l'application des mesures correctives de cession, ainsi que des recommendations pour les améliorer, dans l'étude de la United States Federal Trade Commission (1999). Cette étude révèle une faiblesse générale inattendue dans les équipes de négociation des acheteurs éventuels et contient des recommandations pour corriger ce problème. On y recommande également d'inciter les parties fusionnantes à conclure l'entente de cession le plus rapidement possible et à vendre des entités commerciales existantes plutôt que de simplement faciliter l'accès au marché en vendant des éléments d'actif.

65. L'ACCC a signé avec la Reserve Bank of Australia un protocole d'entente en vue d'éliminer les chevauchements de réglementation entre les deux institutions. Les risques de chevauchement sont réels, car la Reserve Bank est désormais chargée de promouvoir la concurrence et l'efficience dans le système de paiements. Voir Fels (1998, 16).

L'Annexe I du document canadien « Lignes directrices pour l'application de la Loi : Fusionnements de banques » renferme des procédures visant à coordonner les examens de fusion effectués par le Bureau de la concurrence et par le ministre des Finances. Voir Bureau de la concurrence du Canada (1998).

En 1996, la Commission norvégienne des banques, des assurances et des valeurs mobilières et l'Autorité norvégienne en matière de concurrence ont signé un accord visant à coordonner leurs « […] travaux sur les cas ayant un rapport avec les conditions concurrentielles des marchés financiers ». Le texte de l'accord figure sous OECD (1998b, 166-168). Il contient des dispositions portant expressément sur la collaboration dans les cas de fusion et d'acquisition.

En 1994, le United States Office of the Comptroller of the Currency, le USFRB et le USDOJ ont adopté des lignes directrices communes en matière de présélection. Voir U.S. Office of the Comptroller of the Currency (1995). Ces lignes directrices américaines ont permis une fructueuse coopération entre les organismes, qui a entraîné d'importants avantages :

Par exemple, les lignes de communication et de dialogue entre les organismes se sont grandement améliorées. Dans la mesure où les parties sont conscientes des préoccupations des autres, elles acceptent mieux le fait que les examens se déroulent de façon parallèle, ce qui réduit au minimum le risque de décisions divergentes. Chaque organisme apporte également sa perspective et son expérience propres et, souvent, peut s'occuper de questions analogues (sans être identiques) à celles qui incombent aux autres organismes. [Robinson (1996, 2)]

66. Pour une description de l'argument de défense des entreprises défaillantes, voir OECD/CLP (1996).

67. En 1998 par exemple, alors que cinq banques coréennes éprouvaient de sérieuses difficultés financières, la Commission coréenne de supervision financière a émis des décrets imposant la fusion et la restructuration de ces banques. Les mesures exécutoires, y compris les décrets de fusion de ce genre, sont explicitement exemptées de l'examen normalement effectué en vertu de la loi coréenne sur la concurrence.

68. Le projet annulé de fusion Deutsche/Dresdner fournit des renseignements intéressants sur le risque de pertes d'emplois qu'implique une telle fusion, et alimente le débat sur la nécessité évidente de repenser l'examen des fusions pour garantir qu'on tienne compte de telles pertes. Voir Schmid (2000a). Fait intéressant, l'incapacité de s'entendre sur la façon de gérer les éventuelles pertes d'emplois à la division des placements bancaires de la Dresdner (c'est-à-dire Dresdner Kleinwort Benson) a mené à l'annulation de l'entente. Voir Schmid (2000b).

69. Pour de plus amples détails au sujet du Canada, de la France et de la Suisse, voir l'Appendice du présent document.

70. Voir Gugler (2000, 4), qui ajoute que si jamais une telle situation venait à se produire, l'application de cette disposition « risquerait de susciter des conflits entre les considérations purement de politique de concurrence et les critères purement de protection des créanciers ».

71. Pour une analyse générale des arguments pour et contre l'application centralisée du droit de la concurrence, par opposition à sa décentralisation par secteurs, voir OECD/CLP (1999, 17-50, Background Note to the Roundtable).

72. Deux exemples illustrent ces affirmations : la USFRB n'a peut-être pas suffisamment compris la nécessité de définir les marchés en fonction d'une évaluation des effets anticoncurrentiels ; la Banque d'Italie, pour sa part, n'a peut-être pas su percevoir l'impact négatif sur l'efficience de la mesure corrective adoptée lors de la fusion de la banque de Sardaigne dont il a été question précédemment.

73. Voir Cruikshank (1999) pour mieux comprendre l'application de la politique de concurrence dans le secteur des services financiers. Cruikshank, à titre d'ancien directeur général aux Télécommunications (OFTEL), a une expérience concrète de l'application simultanée de lois sur la concurrence aux accords anticoncurrentiels et aux cas d'abus de pourvoir dominant. Il croit néanmoins que la simultanéité dans ce domaine « […] fragmente inutilement la responsabilité d'exécution de la loi ». Cruikshank (1999 - page 2 de la lettre d'accompagnement)

74. On trouvera des prévisions concernant les développements à venir dans OECD (2000b, 136) et Berger, Demsetz and Strahan (1999, 178).

75. Robinson (1996, 2) note certains avantages secondaires importants qui découlent des efforts que les organismes américains de réglementation du secteur bancaire et de la concurrence ont faits pour produire conjointement des lignes directrices sur la sélection des banques. Les voies de communication ont été améliorées, de même que le dialogue et la compréhension mutuelle entre les organismes. Ce dernier effet a sans doute profité aux parties autant qu'aux organismes eux-mêmes, en diminuant la possibilité que les organismes adoptent des mesures correctives contradictoires.

APPENDICE

Exemples de pays qui intègrent à l'examen des fusions bancaires des considérations qui ne sont pas d'ordre prudentiel ou concurrentiel

Australie

En Australie, les fusions bancaires sont examinées à la fois par l'organisme chargé de la concurrence et par l'organisme de réglementation prudentielle, qui présentent leurs conclusions au ministre compétent, c.-à-d. au Trésorier, lequel détient un pouvoir de réserve l'autorisant à bloquer une fusion bancaire[1]. Le Trésorier n'a cependant pas le pouvoir d'autoriser une fusion qui aurait été bloquée par un organisme chargé de la concurrence. En plus d'être assujetties au pouvoir de réserve du Trésorier, les fusions bancaires sont examinées au moyen de l'une des deux approches appliquées à tous les autres genres de fusions. La première approche consiste à analyser la fusion uniquement sous l'aspect du risque qu'elle diminue considérablement la concurrence. La seconde approche, dont le choix est laissé à la discrétion des parties, consiste à faire appel à la Commission australienne de la concurrence et de la consommation (ACCC). Cette dernière applique un mécanisme public officiel au moyen duquel elle analyse les effets anticoncurrentiels d'une fusion en regard des divers avantages collectifs et gains d'efficience qu'elle permettrait. Si la balance penche en faveur de la fusion, l'ACCC l'autorise pour une période définie. Dans le cas contraire, les parties peuvent demander au Tribunal australien de la concurrence (ACT) d'autoriser la fusion.

La liste des avantages et des gains d'efficience considérés dans l'examen d'une demande comprend entre autres les effets sur : le développement économique national et régional, les gains d'efficience économique (en particulier en matière de compétitivité internationale), le remplacement des importations et la promotion des exportations, l'emploi, l'environnement, l'harmonie dans les relations de travail, l'efficience des petites entreprises, la qualité et la sécurité des biens et services, la variété des choix et les renseignements offerts aux consommateurs, enfin la promotion d'échanges équitables sur le marché [voir ACCC (1996, 64-65)]. En pratique, cette liste exhaustive est considérablement raccourcie depuis que l'ACCC et l'ACT ont fait savoir qu'ils allaient donner la priorité aux facteurs d'efficience [voir ACCC (1996, 65)].

En 1997, à la suite d'une vaste enquête sur le secteur financier, il a été recommandé d'abolir le pouvoir de réserve qui autorise le Trésorier à bloquer les fusions, mais celui-ci a choisi de conserver ce pouvoir [voir Goddard (2000)].

Canada

Les fusions bancaires au Canada sont, à prime abord, assujetties au même examen des aspects concurrentiels que tout autre genre de fusions. Cela inclut le recours éventuel à un argument de défense de l'efficience, en vertu duquel une fusion anticoncurrentielle admissible peut éviter l'interdiction. La subtilité réside dans le fait que le ministre des Finances peut empêcher le Tribunal de la concurrence de s'opposer ou d'imposer des conditions à une fusion que le ministre certifie « être dans l'intérêt du système financier canadien »[2]. Cet énoncé n'est pas explicité dans la *Loi sur la concurrence* du Canada. Le ministre des Finances est également celui qui décide en dernier ressort si la fusion pourra avoir lieu. Il prend cette décision en fonction de sa perception de l'intérêt public, après examen des rapports remis par le Bureau de la concurrence de même que l'organisme de réglementation prudentielle. Le ministre a bloqué deux grands projets de fusion en 1998 parce qu'à son avis, ils auraient entraîné :

- une concentration inacceptable de pouvoir économique ;
- une réduction sensible de la concurrence ;
- une réduction de la latitude disponible à l'avenir pour aborder les préoccupations d'ordre prudentiel[3].

France

En France, les fusions bancaires échappent à l'application du droit général de la concurrence et à l'examen officiel des autorités en matière de concurrence. Les concentrations de ce genre sont plutôt supervisées par l'organisme qui octroie les permis de banque, soit le « Comité des établissements de crédit et des entreprises d'investissement » (CECEI). Dirigé par le Gouverneur de la Banque de France, cet organisme se compose des responsables suivants : le trésorier ou son représentant, les représentants des organismes chargés d'autoriser l'objet des activités des entreprises, et six personnes nommées pour une durée de trois ans par le ministre de l'Économie et des Finances. En vertu de la loi, ces six personnes comprennent : un membre du « Conseil d'État » (tribunal administratif suprême), un directeur d'établissement de crédit, un directeur d'entreprise d'investissement, un représentant des syndicats compétents et deux autres personnes choisies en fonction de leur compétence, vraisemblablement en matière financière.

Les critères appliqués par le CECEI aux fusions bancaires sont énoncés aux articles 15, 16 et 17 de la *Loi bancaire du 24 janvier 1984*. Ils portent principalement sur des questions d'ordre prudentiel et ne font pas explicitement allusion à des aspects de politique de concurrence. On peut donc en déduire qu'en France, dans l'examen des fusions bancaires, les aspects concurrentiels ne pèsent pas très lourd comparativement aux facteurs prudentiels et éventuellement à d'autres facteurs de politique gouvernementale.

Allemagne

En Allemagne, un fusion bancaire qui n'est pas du ressort de la Commission européenne sera autorisée si elle est approuvée par l'organisme de réglementation prudentielle, ou sera bloquée par le l'Office fédéral des cartels (OFC) si cette décision n'est pas renversée au niveau politique. L'examen des fusions bancaires en Allemagne se caractérise comme suit : il n'existe aucun mécanisme spécial qui s'applique aux fusions bancaires ; la décision finale de bloquer une fusion incombe à un politicien plutôt qu'à un office de la concurrence ; le ministre compétent ne peut bloquer une fusion que l'OFC juge contestable ; enfin, le processus d'examen ministériel comporte des étapes qui tendent à faire monter le prix politique que devra payer le ministre s'il approuve une fusion jugée anticoncurrentielle.

L'examen des fusions fait par l'Office fédéral des cartels se borne aux aspects purement concurrentiels. Par contre, avant d'interdire une fusion, l'OFC doit donner une occasion de s'exprimer aux autorités suprêmes du « Land » (c'est-à-dire de l'État) où se trouve le siège social des entreprises concernées. Il faut rappeler ici que les États ont une participation dans certaines grandes banques. Tout refus d'une fusion par l'OFC peut faire l'objet d'un appel devant les tribunaux. Comme nous l'avons déjà mentionné, les parties en cause peuvent également demander au ministre fédéral de l'Économie d'autoriser une fusion qui aurait été bloquée par l'OFC.

Quand une telle dérogation est demandée, le ministre doit consulter la Commission des monopoles. Les membres de cette commission sont nommés pour des termes renouvelables de quatre ans

par le président fédéral, sur recommandation du gouvernement fédéral. Les membres de la commission sont obligés selon la loi de posséder l'expertise pertinente et de n'avoir aucun lien avec les gouvernements, les syndicats et les associations d'employeurs. La Commission des monopoles rédige son rapport en se fondant sur le mandat très large du ministre, de manière « à prendre en considération les avantages d'une fusion pour l'économie en général et à évaluer si elle est dans l'intérêt public, puis à mettre ces aspects en balance avec les risques de restrictions de la concurrence »[4]. La loi allemande sur la concurrence ne définit pas explicitement la notion d'« avantage pour l'économie en général ». Autre point intéressant :

> En préparant sa décision, le ministre doit accepter les conclusions juridiques de l'Office fédéral des cartels et la description qu'il fait de la position des entreprises dans le marché, tout en songeant aux restrictions de la concurrence qui pourraient découler de la fusion […][5].

Contrairement à la décision de l'OFC, le rapport de la Commission' des monopoles n'est pas nécessairement publié avant que le ministre ne prenne sa décision, mais est discuté lors de l'audience publique habituellement liée au processus d'autorisation.

Depuis 1973, il n'y a eu que seize demandes de dérogation ministérielle. Cinq d'entre elles ont finalement été retirées, cinq ont été rejetées et six ont été approuvées (une partiellement et trois moyennant certaines conditions ou restrictions)[6].

L'autorisation ministérielle n'a été demandée jusqu'ici pour aucune fusion bancaire. En fait, vu le faible niveau de concentration dans le secteur bancaire, l'OFC n'y a que rarement interdit les fusions.

Suisse

Comme celui de l'Allemagne, le système d'examen des fusions bancaires de la Suisse prévoit la possibilité d'une dérogation politique à une décision de la Commission de la concurrence de bloquer une fusion. Les entreprises participantes peuvent demander une telle autorisation « si, à titre exceptionnel, elle est nécessaire à la sauvegarde d'intérêts publics prépondérants »[7]. Le système suisse comporte des différences notables par rapport à celui de l'Allemagne : on n'y trouve pas d'organisme comparable à la Commission des monopoles, et les demandes de dérogation sont examinées par l'ensemble du Conseil fédéral plutôt que par un ministre désigné. Ce processus d'autorisation spéciale n'a pas encore été appliqué à une fusion bancaire ni à aucune autre fusion analogue, ce qui n'est pas surprenant car le système n'est en place que depuis 1996.

Royaume-Uni

Au Royaume-Uni, un fusion bancaire qui n'est pas du ressort de la Commission européenne est en principe autorisée si elle est approuvée par la Financial Services Authority, chargée des aspects prudentiels, ou est bloquée par le Secrétaire d'État. Du point de vue de la politique de la concurrence, les fusions bancaires sont traitées exactement de la même manière que tous les autres genres de concentration. Les fusions susceptibles de nuire sérieusement à la concurrence feront presque certainement l'objet d'un rapport du bureau des pratiques commerciales loyales (Office of Fair Trading, OFT) au Secrétaire d'État. Ce dernier peut approuver la fusion en cause ou renvoyer l'affaire à la Commission de la concurrence (CC) pour fins d'enquête. Advenant le renvoi de l'affaire, la CC doit déterminer si ou non la fusion risque de nuire à l'intérêt public. Cette notion est très large et englobe entre autres le bien-fondé : de maintenir et de promouvoir la concurrence ; de promouvoir les intérêts des consommateurs ; de promouvoir l'efficience statique et dynamique ; enfin, « de maintenir et promouvoir la distribution équilibrée de l'industrie et de l'emploi au Royaume-Uni »[8]. Le rapport de la CC est présenté à la fois au Secrétaire d'État et au

Parlement, de sorte qu’en fin de compte, mais pas forcément tout de suite, il finira par être publié. Si la CC établit que la fusion ne compromet pas l'intérêt public, aucune autre mesure ne peut être prise. Dans le cas contraire, le Secrétaire d'État a la possibilité, mais non l’obligation, d’imposer une gamme étendues de mesures correctives. On peut en conclure que le Secrétaire d'État à la pouvoir d’approuver les fusions anticoncurrentielles, mais non celui de bloquer les fusions qui sont inoffensives quant à leurs effets sur la concurrence.

NOTES DE L'APPENDICE

1. Ce paragraphe s'inspire largement de Goddard (2000, 200-206).

2. Voir L.R.C., 1985, c. C-34, par. 94(b) [Loi sur la concurrence - modifiée].

3. Voir Goddard (2000, 235). Comme nous l'avons déjà souligné, le dernier motif vient sans doute du désir d'éviter de créer une banque grosse au point que la faillite soit hors de question. Il montre également qu'il est difficile en soi de distinguer les considérations proprement prudentielles des autres facteurs.

4. Ministère allemand de l'Économie et de la Technologie (BMWI) (1992, 1)

5. Loc. cit.

6. Ibid., page 2.

7. Article 11 de la loi suisse du 6 octobre 1995 intitulée Loi fédérale sur les cartels et autres restrictions à la concurrence. La loi ne définit pas explicitement les termes « à titre exceptionnel » et « intérêts publics prépondérants ».

8. Voir Whish and Sufrin (1993, 79), où l'on cite l'article 84 du Fair Trade Act du RU.

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QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT*

The questions presented here are designed with bank mergers in mind, but some of them could also have a bearing on mergers in other parts of the financial services sector. Countries are encouraged to address these and any other questions they find interesting by providing detailed examples of one or more actual cases. Countries may also wish to confine themselves to one or two sectors rather than seeking to cover the entire financial services domain.

1. Product market definition

a) The product cluster debate - is a single measure of a bank's commercial activity (i.e. deposits) sufficient for calculating market shares and making initial estimates of the effect of a bank merger on competition, or alternatively, must one adopt a finer product market definition?

b) This debate also has ramifications for geographic market definition, determining who is in the market, and assessing barriers to entry.

c) Does your evidence suggest that companies providing factoring and leasing services, residential mortgages, or money market funds compete with services offered by banks? Please describe your reasoning as regards the inclusion or exclusion of these or other potentially competing products in product definitions you have relied on in bank mergers.

d) What separate markets have you determined exist in relation to credit card networks?

2. Geographic market definition

What geographic markets have you identified for the principle products? What evidence did you rely on in doing this?

What is the impact of any *de jure* or *de facto* foreign ownership constraints that your country might have?

3. Assessing anti-competitive impact other than barriers to entry

How strongly do multi-market contacts promote co-ordinated effects in banking markets in your jurisdiction?

a) Does your agency believe that the failing firm doctrine should be customised for application in bank mergers? If so please explain why and indicate how this should be done.

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* The following communication to delegates is included in this publication because some of the country submissions assume familiarity with it.

b) How does regulation of commercial conduct, if any affect your assessment of a merger's competitive effect?

c) Do state owned banks, including those operated through publicly owned postal services, provide a means for, in effect, regulating interest rates (both offered and charged) in the banking sector? If so, how does this affect your analysis of the competitive effects of a merger?

4. Barriers to "entry" (i.e. including barriers to expansion and exit)

How is your analysis of the competitive effects of a bank merger influenced by barriers to entry and related factors? You might wish to give special consideration to the following:

a) developments in electronic banking (ATMs, debit cards and internet banking);

b) Are branches becoming obsolete? How and why is their role changing?

c) existence and importance of economies of scale and economies of scope;

d) state provided deposit insurance, including related regulations;

e) impact of regulation restricting entry;

f) state ownership plus any special advantages conferred by the state on a sub-set of the country's banks; and

g) the existence of banks considered too big to fail (i.e. banks, which are virtually assured of whatever state aid is necessary to keep them afloat in a crisis).

5. Efficiencies

a) Are mergers necessary in order to reap significant efficiencies and, sometimes, to permit banks to survive and prosper in increasingly globalised markets? How credible are such claims?

b) Do you consider that geographical diversification contributes to the stability of your country's banking system? Is this something you weigh when assessing bank mergers, and if so, how important is it?

6. Remedies

a) What structural and behavioural remedies have you applied in order to condition what would otherwise be an unacceptable bank merger?

b) In your experience, what have been the advantages and disadvantages of structural as opposed to behavioural remedies in bank merger cases?

c) What should agencies do to ensure that branch divestitures effectively eliminate anti-competitive effects?

7. How do you interact with prudential regulators in the course of analysing and reaching decisions concerning bank mergers? What could be done to improve that interaction?

8. Other than failing firm considerations, is there a need for a special regime for bank merge review?

a) Does the general competition law enforced by the general competition agency fully apply to bank mergers in your country? If not, could you please describe what role, if any is played by the competition agency in reviewing bank mergers.

b) If a special regime is indeed applied for reviewing bank mergers in your country, are you satisfied with it? If not, how would you like it changed and why?

c) Have you dealt with mergers of banks having substantial influence (due to equity holdings, inter-locking directorates, loan dependency etc.) over the competitive behaviour of firms in the non-financial sector of the economy? If so, have any such mergers amounted to mergers as well of the closely linked non-financial companies? If this has been the case, what problems (e.g. meeting review period deadlines etc.), if any, have been encountered and how have they been resolved?

9. Have bank mergers in your country involved special political sensitivities? If so, what was their nature and how were they addressed by your agency or by some other part of the government?

a) If your country applies a public interest test in reviewing bank mergers, who applies it, what criteria are considered, and how are they balanced against each other (in specific, what weight is given to competition considerations)?

b) What steps are taken, if any, to make political considerations in bank mergers more transparent? Note that "political considerations" could be linked to things like public distrust of big banks or concerns about the employment or regional development effects of bank mergers

10. As regards bank merger cases, please describe your agency's experience of the costs and benefits of co-operation with other countries' competition offices. How, if at all, could that co-operation be improved

QUESTIONNAIRE SOUMIS PAR LE SECRÉTARIAT*

Les questions présentées ci-après ont été conçues dans une optique de fusion de banques, mais elles pourraient éventuellement s'appliquer à d'autres types de fusions dans le secteur des services financiers. Les pays sont invités à examiner ces questions et à en proposer d'autres le cas échéant, en fournissant des exemples détaillés d'un ou deux cas concrets. Ils peuvent choisir de se limiter à un ou deux secteurs plutôt que couvrir l'ensemble du secteur des services financiers.

1. Définition des marchés de produits

a) Pour ce qui est des produits à prendre en compte, un seul indicateur de l'activité commerciale d'une banque (les dépôts par exemple) est-il suffisant pour calculer les parts de marché et procéder à des estimations initiales de l'incidence d'une fusion bancaire sur la concurrence, ou faut-il adopter une définition des marchés de produits plus élaborée ?

Ce débat concerne également la définition des marchés géographiques, la détermination de qui est un acteur sur ce marché, et l'évaluation des obstacles à l'entrée.

b) De par votre expérience, les sociétés prestataires de services d'affacturage et de crédit-bail, de crédit hypothécaire sur immeubles à usage résidentiel ou de gestion de fonds communs du marché monétaire font-ils concurrence aux banques prestataires de ces mêmes services? Veuillez décrire votre mode de raisonnement concernant l'inclusion ou l'exclusion de ces produits ou d'autres produits potentiellement concurrents dans les définitions de produits que vous avez retenues pour les opérations de fusion de banques.

c) Quels sont, d'après les données d'expérience dont vous disposez, les marchés liés aux réseaux de cartes de crédit ?

2. Définition des marchés géographiques

Quels sont les marchés géographiques que vous aviez identifiés pour les principaux produits ? Sur quelles données vous êtes-vous fondés pour cette identification ?

Quelle est l'incidence des contraintes de jure ou de facto éventuelles concernant les participations étrangères ?

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* Le document ci-dessous est inclus dans cette publication car quelques soumissions par pays y font référence.

3. Evaluer l'incidence anticoncurrentielle autre que les obstacles à l'entrée

a) Les contacts multimarchés encouragent-ils un certain degré de coordination sur les marchés bancaires dans votre pays ?

b) L'autorité de la concurrence de votre pays juge-t-elle opportun d'intégrer la doctrine sur les entreprises en difficulté pour l'appliquer dans le cadre des fusions de banques ? Si tel est le cas expliquez pourquoi et indiquez les moyens d'y parvenir.

c) Comment la réglementation des comportements commerciaux, si elle existe, influence-t-elle votre évaluation des effets d'une fusion sur la concurrence ?

d) Les banques détenues par l'Etat, notamment celles qui sont gérées par le biais de services postaux à capitaux publics, peuvent-elles servir en fait à réglementer les taux d'intérêt (taux de rémunération et taux d'emprunt) dans le secteur bancaire ? Si tel est le cas, quel est l'impact sur votre analyse des effets concurrentiels d'une fusion ?

4. Obstacles à l'entrée (y compris les obstacles à l'expansion et à la sortie)

Comment votre analyse des effets d'une fusion bancaire sur la concurrence est-elle influencée par les obstacles à l'entrée et les facteurs connexes ? Il serait utile d'accorder une attention spéciale aux points suivants :

a) développement des services bancaires électroniques (guichets automatiques de banques, cartes de débit et services bancaires sur Internet) ;

b) les succursales deviennent-elles dépassées, comment évoluent-elles et pourquoi ?

c) existence et importance des économies d'échelle et de champ ;

d) assurance des dépôts fournie par l'Etat, et réglementations connexes ;

e) incidence de la réglementation limitant l'entrée ;

f) propriété d'Etat et tous autres avantages spéciaux donnés par l'Etat à un sous-ensemble de banques du pays ; et

g) existence de banques considérées comme trop importantes pour faire faillite (c'est-à-dire des banques qui sont quasiment assurées qu'en cas de crise, elles disposeront de l'aide de l'Etat nécessaire).

5. Efficiences

a) Les fusions sont-elles indispensables lorsque l'on cherche à obtenir des gains importants d'efficience et sont-elles dans certains cas le moyen pour les banques de survivre et de prospérer sur des marchés de plus en plus mondialisés ? Quelle est la crédibilité de ce principe ?

b) Considérez-vous que la diversification géographique contribue à la stabilité du système bancaire de votre pays ? Est-ce un élément que vous prenez en considération lorsque vous

évaluez des fusions de banques, et si tel est le cas quelle est l'importance que vous lui accordez ?

6. Actions correctrices

a) Quelles sont les mesures structurelles et comportementales que vous avez prises afin de faire évoluer un projet de fusion bancaire jugé au départ inacceptable ?

b) De par votre expérience, quels sont les avantages et les inconvénients des mesures structurelles par opposition aux mesures comportementales dans les cas de fusions de banques ?

c) Que devraient faire les autorités pour s'assurer que les démantèlements de succursales se traduisent par une élimination efficace des effets anticoncurrentiels ?

7. Quelles sont vos relations avec les responsables de la réglementation prudentielle lorsque vous analysez et prenez des décisions concernant les fusions de banques ? Que pourrait-on faire pour améliorer cette interaction ?

8. Outre les considérations relatives aux entreprises en difficulté, faut-il mettre en place un régime spécial pour examiner les fusions de banques ?

a) Le droit de la concurrence générale mis en application par l'autorité de la concurrence s'applique-t-il totalement aux fusions bancaires dans votre pays ? Sinon pourriez-vous décrire quel rôle éventuel joue votre autorité de la concurrence dans l'examen des fusions bancaires ?

b) S'il existe un régime spécial d'examen des fusions de banques dans votre pays, en êtes-vous satisfaits ? Si tel n'est pas le cas, comment voudriez-vous que ce système évolue et pourquoi ?

c) Avez-vous été confronté à des problèmes de fusions de banques ayant une influence importante (en raison de prises de participation, d'interaction des postes de dirigeants croisées, de situations de dépendance liées à l'endettement etc.) sur le comportement concurrentiel d'entreprises n'appartenant pas au secteur financier de l'économie ? Si tel est le cas ces fusions ont-elles abouti aux fusions des entreprises non financières qui étaient étroitement liées à ces banques ? Quels sont les problèmes que vous avez rencontrés à cette occasion et comment les avez-vous résolus (respect des délais prévus pour d'examen par exemple etc.) ?

9. Les fusions de banques dans votre pays ont-elles donné lieu à des réactions politiques spécifiques ? Si tel est le cas quelle était la nature de ces réactions et comment les autorités (de la concurrence ou autres) ont-elles réagi ?

a) Si votre pays fait intervenir des critères d'intérêt public dans l'examen des fusions de banques, à quel niveau cet examen est-il réalisé, quels sont les critères pris en compte, et

comment sont-ils évalués les uns par rapport aux autres (quel est notamment le poids accordé aux considérations relatives à la concurrence) ?

b) Quelles sont les mesures prises, le cas échéant, pour rendre les considérations politiques plus transparentes dans le cadre des fusions de banques ? Il convient d'observer que les « considérations politiques » peuvent être liées à la méfiance du public vis-à-vis des grandes banques, à des inquiétudes concernant l'emploi ou à l'incidence des fusions de banques sur le développement régional.

10. Dans les cas de fusions de banques, comment votre autorité perçoit-elle les coûts et les avantages de la coopération avec les autorités de la concurrence des autres pays. Comment cette coopération pourrait-elle être améliorée ?

AUSTRALIA

Introduction

The national competition statute, the *Trade Practices Act 1974* (the Act), prohibits acquisitions which result in a substantial lessening of competition[1]. There are no special provisions in the Act which deal with financial services sector mergers and the general prohibition is enforced by the national competition regulator, the Australian Competition and Consumer Commission (ACCC), which has powers under the Act to seek interim injunctions and other remedies. Where an acquirer considers that a prohibited acquisition would result in a net public benefit, it may seek an administrative authorisation from the ACCC under the Act and, if authorisation is granted, the acquisition is then immune from court action under the Act.

Acquisitions are also subject to the provisions of the *Financial Sector (Shareholdings) Act 1998* where a 'national interest' test applies. This test normally only comes into operation once the ACCC has decided to take no action. In forming an opinion, the Treasurer considers a broad range of factors taking into account, but not limited by, the ACCC's assessment under the Trade Practices Act.

In recent years the ACCC has examined a number of mergers in the financial services market. Mergers that have occurred in the sector have been influenced by the restrictions imposed by the Government, independently of the Act, on mergers between the four major banks.

In enforcing the Act the ACCC has developed and refined its approach to market definition and the impact of such mergers on competition. Its approach has been influenced by the Report of the Financial System Inquiry[2] (the Wallis Inquiry) published in 1997. One of the major themes of the Wallis Inquiry Report was that Australia was irreversibly connected to global financial markets and that competition in many financial services markets may occur at a global rather than national or sub-national level.

The Wallis Inquiry Report recommended the removal of the so-called "six pillars" policy which prohibited mergers between Australia's four largest banks and its two largest life insurance companies. The Government responded by ending the "six pillars" policy but decided that mergers among the four major banks would not be permitted at this time. This is locally known as the "four pillars" policy. The Government will review this policy when it is satisfied that competition from new and established participants in the financial industry, particularly in respect of small business lending, has increased sufficiently to allow such mergers to be considered.

1. Product market definition

The Australian banking market is characterised by four large banks operating in all Australian States and Territories (and overseas) and a number of small regional banks typically operating in one or two States. Over the past few years, the ACCC has examined a number of mergers (and proposed

mergers) between a 'big four' bank and a regional bank. Between 1995 and 2000 the market definitions used have changed significantly.

1.1 The Westpac/Challenge merger and market definition

In 1995 the ACCC's predecessor, the Trade Practices Commission (TPC), examined the proposed acquisition of Challenge Bank, a regional bank in Western Australia, by Westpac, one of Australia's four national banks. The approach to market definition undertaken by the TPC was influenced by an inquiry conducted by Australia's Prices Surveillance Authority into bank fees and charges[3].

The Authority's report had stated:

It appears … that by focusing on a customer's broad range of needs over time, rather than particular products at a point in time, institutions are able to reduce the impact of price competition from competitors who offer individual products.[4]

The Authority pointed to relationship banking as a means of product differentiation which:

… allows banks to retain business they may otherwise be losing faster to more specialised competitors and camouflage fees and charges through packaged product design and pricing. Relationship banking essentially makes a homogeneous product different in the eyes of the customer. This approach by banks is intended to undermine the price-attractiveness of competitors' offerings on a product specific basis, while also highlighting the advantages of purchasing a range of services from the one institution.[5]

In its merger analysis market definition, the TPC took account of the importance that financial institutions attach to developing a long-term relationship with customers and capturing all of the demand for a wide range of financial services by its customers.

The TPC took the view there was a considerable competitive advantage in supplying a full range of banking services, notwithstanding partial but often vigorous competition for particular banking products from non-bank suppliers. In developing its view that the appropriate market was one for 'retail banking services' or as it is sometimes described a "cluster market definition" the TPC noted the importance of the following factors:

- branch networks were of considerable importance. While recognising the growing importance of electronic banking, the TPC in 1995 took the view that small business and personal customers establish a banking relationship with a branch and utilise the physical branch facilities for a range of retail banking services. Transaction banking was seen as the basis of a relationship which generated other retail banking business;

- the transaction relationship enabled "cross selling" of service products and "price rises" (increases in loan interest rates and decreases in deposit rates and higher bank fees) without significant movement of customers;

- banking products were delivered through combined or linked accounts such as linked transaction accounts and credit cards and linked personal loans and home loans;

- the integration of banking products via electronic banking is likely to lower transaction costs for integrated product supply, decreasing the likelihood that consumers would be willing to pay

the significant search and transaction costs involved in sourcing different products from different suppliers;

- the TPC identified a range of products, which comprised retail-banking services. They included:

- deposit accounts, including term deposits and savings accounts;

- loans, including housing finance and personal finance (credit cards, small business loans and personal loans); and

- payments, including retail transactions accounts, automatic teller machines (ATMs), electronic funds transfer at point of sale (EFTPOS), cheques and electronic payments and transfers (bill paying, drafts etc).

- The Westpac/Bank of Melbourne merger and market definition

In 1997, the ACCC revisited its market definition in its analysis of the proposed acquisition by Westpac of another regional bank, the Bank of Melbourne. This merger was considered shortly after the publication of the Wallis Inquiry Report and took account of the rapid changes that had occurred in Australia's banking industry since its analysis of markets in the Westpac/Challenge merger proposal.

In its examination of the relevant markets, the ACCC noted that while product bundling was still occurring to a considerable degree, an increasing number of bank customers were willing to unbundled their banking requirements to obtain the best priced products where unbundling costs were significantly less than the potential pricing benefit.

The Wallis Inquiry Report had found that a significant percentage of consumers banking products were not bundled. It found that, on average, consumers acquire a significantly greater number of banking products per person (3.19) than they do from a single institution (1.67) [6]. However, other information provided to the Inquiry found that 64 percent of consumers prefer to deal with one institution (primarily due to convenience and loyalty deals) while the remaining 36 percent prefer to deal with several institutions (to obtain better rates, risk management and to put money aside for special goals)[7].

The ACCC found that in certain banking products considerable unbundling had occurred. For example, non-bank mortgage originators had had a significant effect on variable home loan mortgage rates. Mortgage originators offered home loans at lower interest rates than banks. In January 1996 Australian banks were charging an average of 10.5 percent on variable home loans while non-banks were charging nine percent. By March 1997 the gap had been eliminated as banks responded to competition by cutting rates.

The ACCC decided that while there were many hundreds of differentiated banking products and services it was neither feasible nor useful to examine each separately. Instead it was decided to assemble the products into a small number of groups, ensuring that close substitutes were located within the same group. Each of these product groupings represented a separate market and each had its own geographic market dimensions. Six distinct product markets were identified:

- deposits: This group consisted primarily of products such as term deposits and longer-term "investment" type products. Three key criteria were identified with respect to retail deposits – liquidity, security and return. For retail customers, cash management trusts, building societies, friendly societies and credit unions were seen as partial substitutes for bank deposits. While

superannuating investments are also a depository alternative, their illiquid nature made them a poor substitute for bank deposits;

- home loans: The ACCC found that the cost of unbundling a home loan is relatively low compared to the potential benefits. Margins on bank home loans fell by more than 50 percent between 1993 and 1997 and re-financing increased by 60 percent indicating that a high degree of mobility in home loans had developed;

- personal loans: Market evidence indicated that customers often acquire personal loans separately from the institution where they acquire most of their other banking services. More Australian consumers had personal loans and transaction accounts with different institutions than those who bundle the two;

- small business banking: It was considered that there was a separate "cluster" of products/services in relation to small and medium enterprises (SME's). The difficulty of assessing credit risk for small businesses gives banks (or any other providers of bundled transactions and credit services) an advantage. Transaction accounts provide valuable information to financial institutions in monitoring the viability of businesses. This, in turn, makes it costly for small businesses to unbundled their ongoing credit needs from their transaction accounts. A 1995 Report[8] found that 85 percent of small businesses surveyed applied to their main bank for a loan, with 78 percent nominating one of the four major banks as their main financial institution;

- credit Cards: The ACCC considered that while credit cards combine the features of transaction accounts and personal loans they are an imperfect substitute for either. While the absence of transaction fees makes them an attractive substitute for transactions accounts, a customer is unable to write a cheque on them and if a cash withdrawal is made when the credit card balance is negative, interest accrues immediately. While credit cards offer greater flexibility when compared to personal loans, they do so at significantly higher cost. Thus the ACCC considered the provision of credit card services as a separate product market;

- transaction accounts: The provision of basic everyday banking accounts, used to withdraw and deposit cash and cheques, receive salary and social security payments were considered by the ACCC to constitute a separate market. Such accounts whether accessible by bank branch, phone, ATM, EFTPOS, Internet and personal computers form a distinct market.

1.2 The Commonwealth Bank/Colonial State Bank merger

In April 2000 the ACCC began to examine a third merger between a "big four" bank and a regional bank. The merger parties proposed new market definitions. In some instances the definitions did not differ substantially from the ACCC's 1997 market definitions. The parties indicated that they saw unique markets for housing finance and small and medium enterprise finance which were similar to those previously proposed by the ACCC. They also proposed a market for corporate funding which would include the provision of funds to large corporations including listed companies and other major institutions.

However, other market definitions differed from those adopted by the ACCC in 1997.

The parties proposed a market for deposits and investments. This market comprised products used by consumers to manage their surplus funds. It was argued that while products in this market may offer a means of payment, this was not a defining characteristic. Products within this market would

include interest-earning investments (capital secure) and performance based products such as managed funds, government securities and direct equity. Transaction services would also be part of this market because many of the products would incorporate transaction services.

A separate market was proposed for retirement saving. The merger parties argued that such a market was distinguishable from the deposit and investment markets because the taxation and regulatory regime for superannuating and retirement products was significantly different to that for deposits and investments.

The merger parties also proposed a market for consumer finance. This market would be comprised of all types of personal borrowings. The products within the market would include overdraft and personal loan borrowings, credit cards, private network cards, charge cards and also home equity loans. The inclusion of home equity loans with attached supplementary loan facilities decreases the distinction between the housing and personal loan markets in Australia. Many consumers use the built up equity in their home to extend their housing mortgage to purchase consumer durable, cars, holidays and other items often purchased on credit.

Under such an approach to market definition, the market for housing finance is less clearly delineated. Typically, finance for the purchase of residential, owner occupied housing has been considered to be a separate market. However, as financial institutions modify this traditional market category to allow consumers to utilise equity in the home to finance other spending, it may be that consumer finance and residential housing finance distinctions may become arbitrary in terms of competition analysis.

This particular merger is still under consideration by the ACCC.

2. Geographic market definition

The ACCC has concluded that some product markets are regional and essentially state based while others are more likely to be national markets and some are even global.

The Wallis Inquiry Report noted that banks were generally unable to raise deposits in Australian States where they had no branch representation. This tends to suggest that the market for deposits is State based.

With regard to home loans, there is considerable diversity in the strategies taken by various suppliers of home loans in Australia. A branch presence is no longer essential to initiating home loans. Some market participants operate national call centres for loans. Non bank home mortgage providers have established a significant national presence. Consequently the ACCC has reached the conclusion that it is appropriate to adopt a national geographic definition for its analysis of the home loan market.

At the present time, competition in the market for the supply of personal credit appears to be regional. Competition is provided by building societies and credit unions (who have traditionally been strong in personal loans for cars) and such providers tend to be State based.

Similarly the SME market has regional and/or State based geographic dimensions. The need for cash based SMEs in particular to have physically close transaction and/or deposit facilities suggests that convenient access to branches is very important. While some products demanded by SMEs may be retailed nationally, the bundling of SME banking products typically gives competition in the SME market a local or State based dimension.

For large corporate lending the geographic dimensions is at least national, and probably global.

Credit cards have both regional and national geographic dimensions. Credit card issuers have argued that the geographic dimension is national. However, around 50 percent of Australian credit card holders used a branch to make payments according to surveys in the late 1990s. The linkage of credit cards to ATMs also added a regional aspect as to make ATM transfers, customer's need a linked transaction account and such accounts are unlikely to be held with out of State/region banks. However, as alternative credit card payment methods gain greater usage, it may be more appropriate to delineate a national geographic market.

3. Assessing anticompetitive impact other than barriers to entry

The ACCC has not assessed any bank mergers under a failing firm doctrine. In rare instances it has been suggested to the ACCC that a particular acquisition may be desirable on the grounds that the entity being acquired has no longer-term viability. However, this does not necessarily mean that at the time of the merger there were severe prudential concerns regarding the immediate viability of the bank, but merely that the bank had little growth opportunity and was insufficiently capitalised to be a long term significant competitor in the banking industry.

The Australian banking industry is subject to prudential regulation by the Australian Prudential Regulation Authority (APRA). The ACCC has close liaison with APRA when it examines bank mergers. APRA has responsibility from a prudential perspective in determining whether the acquisition should proceed. However, in Australia there have been few instances where an acquired firm has had prudential problem and so competition analysis has normally been the critical element. The provisions of the *Financial Sector (Transfers of Business) Act 1999* enable the Treasurer to direct a compulsory transfer of business of a failing regulated institution to a competitor after consultation with the ACCC.

Australia has no fully state owned banks. The publicly owned Australia post does not operate a bank but provides agency services for banks. Thus the Government, through bank ownership, is unable to influence price (interest rates) in financial services markets. Official domestic interest rates are set independently by the Reserve Bank of Australia, Australia's central bank, through its operations in the short-term money market.

4. Barriers to entry

The need for a widespread branch presence has often been considered to be the most significant barrier to entry in retail banking. However, new technologies and alternative distribution mechanisms may be reducing the importance of the branch network.

In Australia a banking licence is required to enable an institution to accept deposits. To obtain a banking licence firms must meet prudential regulations and minimum capital requirements. The need to obtain a licence has not been a barrier to entry and governments have issued numerous bank licences since deregulation of the industry in the early 1980s. However, the Australian market has not seen significant new entry, indicating that there may be barriers to entry more relevant than licensing requirements.

The importance of branch networks has been identified in a number of Australian studies. While the proportion of consumers who elect to do all or most of their banking at a branch is falling, there is still a significant minority who rely on branch networks. The emerging structure of the industry appears to be a mix encompassing full service branches, transaction only type branches and 'kiosk style' branches in supermarkets and shopping malls and electronic networks.

This emerging structure may be less costly to replicate than traditional branch networks especially as electronic networks of ATMs, EFTPOS, phone and Internet banking become commonplace. Insurance companies and home mortgage originators may be able to enter, as electronic banking becomes more popular and less costly.

Of course electronic banking exhibits numerous network characteristics which may be a barrier to entry. A new entrant without an ATM network or EFTPOS access would need to establish these facilities to enter the market, and the sunk costs are likely to be substantial. Alternatively, an entrant would need to establish arrangements with other electronic networks.

A new entrant may also be constrained by the existence of interchange fees. Interchange fees are levied on or between, institutions whose customers use each other's ATM and EFTPOS networks. These fees tend to reflect the relative bargaining strengths of the institutions involved in bilateral negotiations. The more card-carrying customers a card issuer has, the stronger is its bargaining position. Similarly, the larger the merchant network that a bank has developed (i.e. the merchants who have agreed to take a bank's EFTPOS processing facilities), the stronger its position. A new entrant with few customers and few merchants signed to its system will generally not be able to negotiate low interchange fees.

In Australia, customer inertia has been identified as a barrier to entry[9]. Information difficulties, transactions costs involved in 'shopping around', maintenance of credit standing and banking relationships have been identified as factors contributing to this inertia.

Economies of scale and scope appear to be significant in the provision of most banking services. Card and data processing and back office functions provide important scale opportunities. It has also been claimed that full service banks have considerable scope advantage over entrants via their national branch and electronic networks. However, in Australia the four major national banks have sometimes argued that the high costs associated with the maintenance of such networks and their significant sunk costs, disadvantage them relative to new entrants and smaller regional competitors.

Apart from the central bank, Australia has no government owned banks.

The authorisation procedure in the Act provides for the ACCC to consider a range of public interest issues. This would include the impact on the stability of the financial sector of a bank failing.

5. Efficiencies

In many industries it is often claimed that mergers are necessary for the firm to achieve the efficiencies associated with large scale and to effectively compete in global markets. Australian merger policy recognises that such claims may be legitimate and via its processes of authorisation is able to allow a merger to proceed even when the merger results in a substantial lessening of competition. Merger parties may sometimes argue that even though their merger might lessen competition in the Australian market, their merger should be authorised on public benefit grounds. Public benefit analysis might recognise the need to merge to generate efficiencies and/or compete in global markets.

In Australian financial markets no merger proposal has yet made an application for authorisation. Therefore the ACCC has not been required to consider in detail arguments that globalisation of financial markets requires increased domestic concentration in financial services markets. However, in its analysis related to market definition in financial service mergers, the ACCC has not seen evidence that would indicate that most financial services markets are global. While the market for corporate finance is clearly

beyond national borders, the market for many other financial services does not appear to be significantly influenced by globalisation. While most of Australia's largest financial institutions operate in overseas markets, their offshore activities do not necessarily indicate that markets are global. Foreign financial institutions operate in Australia yet many of the markets still remain national and even regional.

Australian financial institutions have generally not diversified geographically across Australia for the purpose of reducing risk. The risk profile of regions across Australia is unlikely to differ significantly so there is little incentive for Australian financial institutions to engage in geographic diversification to reduce risk. Australia's regional financial institutions are generally strong competitors to their national rivals.

6. Remedies

In one recent bank merger the ACCC required undertakings as a condition for merger approval. The Westpac acquisition of the Bank of Melbourne was allowed to proceed after Westpac provided the ACCC with a range of behavioural undertakings.

In the course of the ACCC's assessment of the merger, it became clear that the anti-competitive effects were regional and related mostly to markets for transaction accounts. In order to overcome the ACCC's concerns, the parties offered undertakings which committed them to implementing a strategy based on significant local autonomy. Westpac agreed to: maintain the Bank of Melbourne's opening hours; preserve the entitlements of certain transaction accounts to fee exemptions; and grant access to the combined electronic network for new and small local competitors for a reasonable period.

The ACCC took the view that the undertakings would preserve the competitive elements that existed via the Bank of Melbourne's presence in the market. The undertakings were both transparent and enforceable and enabled the ACCC to be satisfied that significant elements of competitive behaviour would be maintained.

7. Interaction with prudential regulators

The ACCC has extensive and regular communication with prudential regulators in Australia not only with regard to mergers but also with regard to consumer protection in financial services. There are clearly defined roles for each organisation and all agencies are responsible to the same Minister. Where appropriate the sharing of information and intelligence is encouraged and regular meetings facilitate a high level of co-operation between agencies.

8. A special regime for bank mergers?

There are no special rules for bank mergers under Australia's principal competition legislation, the Act. Bank mergers neither receive more lenient treatment than mergers in other sectors nor are required to face a more stringent competition test than mergers in other sectors.

Generally speaking acquisitions by Australian banks have been of other financial institutions. In recent months a major Australian bank has acquired a major insurance company. The ACCC saw no significant competition concerns from the merger. As Australian banks are not major shareholders in companies in other market sectors, acquisitions by banks of their banking competitors have not raised competition issues in other markets.

9. Bank mergers and political sensitivities

Bank mergers are politically sensitive in Australia and the *Banking Act 1959* obliges banks to obtain the Treasurer's approval prior to selling their banking business, merging or reconstructing the bank in Australia. In addition, the Government has placed a ban on any mergers between the four largest Australian banks. This ban is separate from the standard merger provisions of Australia's competition law. The Government's ban is designed to ensure the maintenance of competition in particular sectors of the financial services market. The Government has indicated that it would consider lifting the ban when sufficient competition beyond the big four banks develops.

Australia has certain foreign ownership constraints but, as noted earlier, these constraints have not prevented and are not designed to prevent the entry of foreign financial institutions. Any proposed foreign take-over or acquisition of an Australian bank will be considered on a case-by-case basis and will be evaluated on its merits. Under the Financial Sector (Shareholdings) Act, the Treasurer's approval can only be given if it is considered in the national interest for the person to hold a stake in a financial institution. The Treasurer considers a broad range of factors in making a decision taking into account, but not limited to, the ACCC's competition assessment. While the national interest test could come into play before the competition test has been assessed, this has not happened in practice.

Foreign owned banks wishing to operate in Australia are permitted where APRA is satisfied that the bank is of sufficient standing and subject to adequate standards of prudential supervision in its home country, and where the bank agrees to comply with APRA's prudential requirements.

The competition test is clear, consistent and transparent and applies to mergers in all sectors. The ACCC publicises and explains the rationale for its decision in all mergers. If the Treasurer applies a national interest test then this would generally be accompanied by a public statement and the Treasurer would be accountable to Parliament for any decision made.

10. Co-operation with other countries

Recent bank merger cases have involved acquisitions of Australian financial institutions by other Australian financial institutions. The ACCC has used formal and informal arrangements with overseas agencies to consider issues relevant to the Australian circumstances, especially with regard to market definition and barriers to entry but co-operation in the evaluation of the mergers has not been necessary or appropriate.

NOTES

1. A substantial lessening of competition test operated from the commencement of the Act in 1974 until 1977. A dominance test was then used between 1977 and 1993.

2. Financial System Inquiry (The Wallis Inquiry) Wallis, Stanley 1939 - AGPS 1997.

3. *Inquiry into Fees and Charges imposed on Retail accounts by and other Financial Institutions and by Retailers on EFTPOS transactions.* Australia. Prices Surveillance Authority. 1995.

4. Ibid., p 125.

5. Ibid., p 167.

6. *Wallis*, op. cit., p 433.

7. *Wallis* op. cit., p 435.

8. *A Special Report on Finance & Banking Issues.* Yellow Pages Australia, Small Business Index. Sept 1995, p 11.

9. *Inquiry into Fees and Charges Imposed on retail accounts by Banks and Other Financial Institutions and by Retailers on EFTPOS Transactions.* Prices Surveillance Authority, 1995, p 128.

CANADA

1. Introduction

Mergers among large financial institutions are pervading markets around the world. Canada is no exception. The acceleration of merger activity and the resulting changes in the structure of the financial services industry present important challenges to competition policy in Canada.

This submission discusses recent Canadian experience relating to three significant merger transactions involving five of Canada's largest financial institutions. It provides a summary of the analytical framework employed by the Competition Bureau (the Bureau) in its merger reviews, and the key conclusions reached in the examinations.[1]

2. Scope of the bureau's reviews

The mandate of the Bureau is to ensure that Canada has a competitive marketplace and that all Canadians enjoy the benefits of competition. This requires that the Bureau review proposed mergers to determine if they are likely to substantially lessen or prevent competition.

The Bureau has no regulatory authority to allow or disallow mergers between financial institutions. Its role is to review proposed mergers for their impact on competition and to communicate the results of its analysis to the parties concerned. Under the *Bank Act*, the *Trust and Loan Companies Act*, and section 94 of the *Competition Act*, it is the Minister of Finance who has the ultimate authority to approve such mergers. Consequently, at the end of its review, the Bureau advises the Minister of Finance of its conclusions regarding the competitive effects of a proposed merger.

In January 1998, the Royal Bank of Canada and Bank of Montreal announced their intention to merge. This proposed merger would combine the first and third largest banks in Canada, ranked by the value of Canadian assets. Shortly thereafter, in April 1998, the Canadian Imperial Bank of Commerce (CIBC) and Toronto-Dominion Bank (TD Bank) announced their proposed union. This proposed merger would combine the second and fifth largest banks in Canada, ranked by the value of Canadian assets. These proposed mergers resulted in the largest merger reviews undertaken by the Bureau.

The Bureau conducted its analysis of both of these mergers at the same time. To ignore either proposed transaction in the analysis of the other would fail to capture the full impact of both occurring at the same time. It was important to assess how the removal of two major banks would affect concentration levels and the competitive vigour of the industry.

Throughout its review, the Bureau met with representatives of the banks at every stage of the process to ensure that it fully understood their position, to obtain information, and to explain and discuss the results of its review.

The Bureau obtained valuable information from individuals, groups representing consumers and business, other providers of financial services, and government agencies. Furthermore, the Bureau sought the advice of more business and economic experts than in any other merger it has reviewed.

The review process took approximately 10 months because of the voluminous nature of the documentation, the complexity of the banking business, the timing of the report of the Task Force on the Future of the Canadian Financial Services Sector (the Task Force), and the need to obtain information under court order from third parties and the merging banks.[2]

Following a thorough examination, the Bureau concluded that the proposed mergers, individually and together, would result in a substantial lessening or prevention of competition in numerous product and geographic markets. Based on these and other concerns, the Minister of Finance declined to approve these transactions, and consequently, these proposed mergers were ultimately abandoned.

In the second half of 1999, Canada faced yet another merger among two of its largest financial institutions, namely TD Bank and Canada Trust, the largest remaining trust company in Canada. In its review of this merger, the Bureau relied on current information from TD Bank and Canada Trust, market contacts, and advice from experts in the credit card and retail banking sectors. To a large extent, the Bureau relied on the conclusions it reached during its reviews of the proposed bank mergers in 1998 since there had been no significant developments since then and no evidence was presented to suggest that those conclusions would not be applicable to this transaction. In addition, Bureau staff met with representatives of TD Bank and Canada Trust at every stage of the process to ensure that the Bureau fully understood the parties' submissions, to obtain information, to explain the results of the review, and to discuss proposed remedies.

In the merger between TD Bank and Canada Trust, the magnitude of competition issues was significantly less compared to the previously proposed mergers of 1998. Upon the advice of the Bureau following its review, this merger was approved by the Minister of Finance with conditions that TD Bank and Canada Trust would remedy competition issues through divestitures.

The analytical framework and the key conclusions reached in the review of these three mergers are described more fully below.

3. Analytical framework

The Bureau assessed the proposed mergers in the traditional manner by gathering information and analysing possible anticompetitive effects, such as undue concentration and the removal of a vigorous competitor, that would indicate a substantial lessening or prevention of competition would result should the merger proceed. In each case, the Merger Enforcement Guidelines as Applied to a Bank Merger (BMEGs), issued by the Bureau in July 1998, provided the framework for the analysis.[3]

As explained in the BMEGs, four major steps are involved in determining whether or not a particular transaction would substantially lessen or prevent competition.

First, relevant markets are defined to identify which products, where and with whom the banks compete. A relevant market consists of a group of products that are close substitutes. Each group represents a separate product market with its own geographic market dimensions.

Secondly, market shares and concentration levels are calculated for each relevant market. A more detailed review is generally required if *a*) the share held by the merging banks is 35 percent or greater, or

b) the combined share held by the four largest competitors is 65 percent or greater (and the share held by the merging banks exceeds ten percent).

Thirdly, a variety of competitive criteria are evaluated for each relevant market under detailed review to determine whether or not the merged entity would be in a position to exercise market power. Criteria to be examined include the extent of foreign competition the banks face, the barriers that would be encountered should other companies wish to enter a particular market, the impact of technology, whether or not the merger would remove a vigorous and effective competitor, the effectiveness of remaining competition, and any other factor relevant to competition. These criteria are assessed within the context of a two-year time frame.

Finally, claimed efficiencies are considered if it is concluded that the merger results in a substantial lessening or prevention of competition. The Competition Act provides that a merger may proceed provided *a*) it is likely to result in efficiencies that would not otherwise be realised, and *b*) such efficiencies would be greater than, and would offset, the anti-competitive impact.

The Bureau's analytical approach presumes a merger will not harm competition when markets are unconcentrated, entry is easy or effective competition remains. Therefore, the analysis of a particular market ends if at any stage the evidence demonstrates that the relevant market will not be subject to anti-competitive effects.

4. Key findings

The Bureau identified three major lines of business in which the financial institutions in question were engaged, namely (*i*) branch banking to individuals and to businesses; (*ii*) credit cards, and (*iii*) securities. Within each of these lines of business, financial institutions offer a myriad of products and services. Therefore, the Bureau's analysis of the mergers covered an extensive range of products and geographic areas.

A description of relevant product and geographic markets, the methodologies used to calculate corresponding market shares and concentration levels, as well as key conclusions regarding the evaluative criteria used to assess the competitive effects of the three mergers are described below.

- branch Banking;
- product Markets;
- retail Services.

Within the category of products and services provided to individuals through branches, the Bureau defined the following product markets:

- personal long-term investments;
- personal short-term savings;
- student loans;
- personal transaction accounts;

- residential mortgages;
- personal loans/lines of credit.

Personal long-term investments include most mutual funds, bonds and stocks, whereas personal short-term savings include guaranteed investment certificates, money market mutual funds, Canada and provincial savings bonds, and treasury bills.

Personal loans and lines of credit is a distinct type of consumer credit. Since most credit cards, with the exception of low-rate credit cards, carry interest rates that are more than twice the interest rates of personal loans and lines of credit, the Bureau determined that they were not good substitutes. Similarly, loans from consumer finance companies are priced so much higher than loans from deposit-taking institutions that they were excluded from this market.

In each of the three mergers, the Bureau determined that the proposed mergers did not raise competition issues with respect to student loans, personal long-term investments and short-term savings and personal credit because the remaining competition was effective or the applicable thresholds were not crossed for these products. However, the proposed mergers of 1998 raised competition issues with respect to residential mortgages and each of the three mergers raised competition issues with respect to personal transaction accounts. A competitive analysis of these markets is described below.

4.1 Personal transaction accounts

Personal transaction accounts are the core of the personal banking relationship. They enable an account holder to make deposits and withdrawals through savings or checking accounts and to receive reports on those activities. These transactions may take place either at the local branch or through some other means such as an automated banking machine (ABM), debit card, telephone, personal computer or the Internet.

4.2 Residential mortgages

Residential mortgages are the principal form of long-term personal debt for many Canadians. Most mortgages are used to buy a home. While consumers with significant equity may use a line of credit to fund a home purchase, this option is not open to those with lower levels of equity. It was therefore concluded that mortgages are sufficiently distinct from lines of credit that they each constitute a relevant product market.

4.3 Business services

Within the category of services provided to businesses at the branch level, the Bureau defined the following product markets:

- term loans;
- business transaction accounts and related services;
- operating loans.

Term loans, including non-residential mortgages, are generally mid- to longer-term in nature and typically secured by collateral to purchase or lease equipment, buildings and real estate. In each of the three mergers, the Bureau determined that the proposed mergers did not raise competition issues with respect to term loans, because the remaining competition was effective and provided businesses with adequate competitive alternatives or the applicable thresholds were not crossed. In addition, the merger between TD Bank and Canada Trust did not raise competition issues in business banking markets because Canada Trust was a minor supplier of services to businesses. However, the proposed bank mergers in 1998 did raise serious competition issues with respect to business transaction accounts and operating loans for small and medium sized enterprises (SMEs).[4] A competitive analysis of these markets is described below.

4.4 Business transaction accounts and related services

Transaction accounts are the core of the business banking relationship. They allow firms to pay bills and collect receivables. Other products, such as night deposit and cash and coin services, are generally linked to this account.

4.5 Operating loans

Operating loans are intended for the short-term operating needs of businesses such as financing receivables and inventory. Banks will generally not give an operating loan unless a business has its transaction account at the same bank. This gives the lending banks the ability to monitor a customer's business on a continuing basis. To gauge the potential impact of the proposed merger in this market, it is necessary to examine the competitive choices available to firms of different sizes.

Since large corporations typically have access to more domestic and foreign suppliers and ready access to capital markets, operating loans to these businesses were not considered problematic. In contrast, SMEs generally have fewer choices and rely on banking services at the local level. Operating loans with authorisations up to $one million were examined for SMEs. Larger firms in the mid-market tier also face more limited choices than those in the large corporate sector. Loan authorisations in the $1-million to $5 million range were examined for these mid-market firms.

4.6 Geographic markets

After extensive examination of the records produced by the banks, interviews with industry participants, econometric analysis prepared by the Bureau, and on the advice of the experts retained by the Bureau, it was concluded that the geographic market for the relevant products listed above for customers of personal financial services and for SMEs is local, primarily due to the importance of branches to these customers. In addition, the geographic dimensions of local markets varied as between urban and rural areas.

For mid-market loans between $one million and $five million, the geographic market is regional in scope. The Bureau used provincial boundaries to approximate these regional geographic markets.

Draft BMEGs circulated in early 1998 indicated that the Bureau would conduct an initial threshold test using census subdivisions as pre-defined geographic areas. However, further examination revealed that census subdivisions were not appropriate for defining geographic markets. Instead, with respect to urban areas with population sizes of 10 000 to 100 000, the Bureau used the integrated economic areas classified by Statistics Canada as census agglomerations (CA) and identified 112 local urban

markets. In urban areas with population of more than 100 000 people, classified by Statistics Canada as census metropolitan areas (CMA), the Bureau identified 25 local urban markets. In total, 137 local urban markets were identified for Canada.

With respect to rural areas, the Bureau examined the competitive environment of the branches of the merging parties located within 20 km of one another. The decision to apply this rule of thumb was largely based on evidence found in the banks' internal documents as well as the advice of economic experts.

The table below summarises the number of overlapping local urban and rural markets in each of the three merger cases. Given the extensive nation-wide branch network of Canada's largest banks, there was significant competitive overlap between Royal Bank and Bank of Montreal, and between CIBC and TD Bank.

	Urban Markets	Rural Markets	Total
Royal Bank/Bank of Montreal	125	99	224
CIBC/TD Bank	111	68	179
TD Bank/Canada Trust	63	11	74

4.7 Market shares and concentration levels

To calculate market share and concentration levels for branch banking products, the Bureau, in 1998, supplemented the market share database of the Canadian Bankers Association with information from many other financial institutions as well as the Canadian Payments Association. As a result, the database included nearly all deposit-taking institutions. In 1998, Bureau staff also modified the database to accommodate products for which non-deposit-taking institutions are significant competitors, such as insurance companies dealing in residential mortgages. In 1999, the Bureau updated the database with new information from TD Bank and Canada Trust. This database was the best available in Canada at the time of the merger reviews.

4.8 Barriers to entry

To assess the competitive effects of the proposed mergers, the Bureau considered the level of barriers to entry, and whether or not entry or expansion was likely to occur on a sufficient scale within a two year period to constrain an exercise of market power. Even when a merger exceeds the Bureau's thresholds, low barriers to entry would increase the likelihood that new entrants could force the merged entity to behave in a manner consistent with a competitive market.

The Bureau determined that the barriers facing new entrants into branch banking were high. The extensive branch networks of the major Canadian financial institutions represent a significant investment that would be difficult for new entrants to replicate. Moreover, it would take an extended period of time (usually three to seven years) for a branch to break even. The incumbent banks also have an advantage over new entrants because they have already secured the best locations in most markets.

In addition to the costs of establishing a branch-banking network, it was determined that new entrants face a number of other barriers, including customer inertia. Customers are reluctant to switch their primary financial institution, which handles day-to-day banking, payroll deposits and automatic bill payments. The major financial institutions have also developed strong brand names through decades of advertising and strong local branch presence throughout Canada.

A 1998 report prepared for the Task Force on the Future of the Financial Services Sector provided an indication of the strength of customer loyalty by noting that no institution had gained more than one percent market share in any year, except by acquisition.

The Bureau determined that small and medium-sized business customers appear to be even more branch-dependent than personal banking customers, due to the need for services such as night deposit, and cash and coin services. As with individual consumers, SME customers do not change their primary banking relationship very often, which makes it more difficult for new entrants to attract customers.

Furthermore, the Bureau also found that a number of regulatory barriers still existed at the time of review that had the effect of discouraging entry. In particular:

- capital taxes must be paid regardless of profitability, raising the sunk costs of entry through start-up losses;

- capital requirements and reporting costs are proportionately a greater burden for smaller firms;

- provincial regulation and restrictions on business powers in the federal Co-operative Credit Associations Act may place limits on the ability of credit unions to compete in certain areas, such as commercial lending;

- after ten years, new Canadian banks (other than those owned by financial institutions, which are themselves widely held) become subject to the widely held rule. This means that no shareholder can own more than ten percent of any class of shares;

- this ten percent rule combined with the rules requiring the head office to be located in Canada and the majority of the board of directors to be Canadian residents, effectively eliminates the possibility of foreign entry through the acquisition of an existing Schedule I (widely-held) bank;

- unless exempted by the Minister of Finance, once a Schedule II (closely-held) bank or trust company has equity of $750 million or greater, there must be a public float of at least 35 percent of its voting shares;

- access to the payments system is limited to federally and provincially regulated deposit-taking institutions.

While existing competitors are not confronted by the same levels of barriers that new entrants face, their expansion is impeded by the high costs of gaining new customers. This is due to the cost to consumers of switching and the expectation that new branches may not be profitable for up to seven years.

4.9 Changes in technology and innovation

The Bureau examined the impact that technology and innovation could have on lowering barriers to entry in the banking sector and in expanding the scope of the geographic market. While it was noted that some Canadians have begun to use technology for their banking needs, all evidence indicated that branches remain critical to the overall success of a bank. Banking experts agreed that this was unlikely to change within two years following the merger.

In some respects, technology may have raised rather than lowered barriers to entry. According to records produced by the banks, customers have come to expect access to the new channels of distribution as a complement to using their branches.

For example, the major banks have established a proprietary nation-wide automated banking machine (ABM) network. While this network – the Interact system – allows cash withdrawal on a shared basis, other functions, such as deposits, passbook update, the transfer of funds between financial institutions, and bill payment, are not currently offered on a shared basis over the Interact network. New entrants would have to offer a network of ABMs to match the major banks. Should the Interact system allow for full functionality, including deposit-taking and funds transfer, the need for an extensive proprietary ABM network for new entrants would be reduced.

Foreign Competition

The Bureau defined foreign competition as foreign institutions that offer Canadian consumers financial services from outside Canada. Due to regulatory constraints, the Bureau determined that competition for individual banking products offered by foreign-controlled deposit-taking institutions operating in Canada is minimal.

4.10 Remaining competition

The Bureau determined that remaining competitors offering personal transaction accounts and branch banking services to businesses, while effective in some markets, would not be sufficient to constrain an exercise of market power by the merging banks. In making this determination, the Bureau considered both deposit-taking institutions such as credit unions and other regional banks, as well as non-deposit taking institutions.

As noted above, it is generally difficult to entice consumers to switch their primary banking relationship, except by acquisition. The Bureau determined that the potential for the merged banks too cross-sell and data mine their larger customer bases would likely further impede switching. While a competitive opportunity may arise during the transition of customers from one of the merging parties to the other, the history of past acquisitions has been that such windows of opportunity last less than one year and that customer retention by the merging parties has been very high. Under these conditions, the incentive of the remaining firms to compete vigorously could be diminished.

4.11 Interdependent behaviour

The Bureau examined the potential for a substantial lessening or prevention of competition through the exercise of interdependent behaviour at both local and national levels. Such an effect on competition can result from either explicit agreements or from implicit recognition among firms that, in the new post-merger environment, reduced competitive vigour would be more profitable for all.

A small numbers of sellers in any one market increase the risk of interdependent behaviour. The Bureau determined that each of the proposed mergers in 1998 would significantly increase concentration in an already concentrated industry. If both proposed mergers proceeded, the number of major banks would have declined from five to three, and concentration would have been even higher.

A high level of concentration in the relevant market is a necessary, but not sufficient, condition for determining whether or not interdependent behaviour is likely to substantially lessen or prevent competition. Other factors that facilitate interdependent behaviour include high barriers to entry, the homogeneity of products, the predictability of demand and costs, the stability of market shares, good information about pricing and customers, and the degree of industry co-operation (e.g. in associations, joint ventures, alliances, networks and loan syndicates). To a large degree, these factors appeared to be present in this industry.

While the Bureau did not believe that collusion in banking would be likely given the repercussions such conduct would have if detected, in view of the expert advice received by the Bureau on this issue, there was concern that each of the proposed mergers between Royal Bank and Bank of Montreal, as well as CIBC and TD Bank would increase the risk for reduced competitive vigour among the remaining major banks. This risk would be compounded if the other proposed merger also proceeded at the same time.

The Bureau determined that it was less likely that the merger between TD Bank and Canada Trust would lead to interdependent behaviour because Canada Trust was a regional player with a more limited product offering than the major Schedule I banks and TD Bank intended to adopt Canada Trust's unique service model. However, since Canada Trust had been characterised as an innovator in the industry, the loss of this firm raised the concern that the merger could increase the risk for reduced competitive vigour among the remaining major banks.

4.12 Identification of problematic markets

To identify problematic markets, the Bureau classified each product and geographic market according to the principles set out below to determine the likelihood that a merger would result in a substantial lessening or prevention of competition.

- Red - post-merger market share in either personal or business transaction accounts is 45 percent or greater, and market share being acquired is five percent or greater;

- Orange - post-merger market share in either personal or business transaction accounts is 45 percent or greater, and market share being acquired is less than five percent;

- post-merger market share in either personal or business transaction accounts is between 35 percent, and market share being acquired is five percent or greater;

- post-merger market share in any one of the following: personal loans/lines of credit, residential mortgages, small and medium-sized business operating loans is 35 percent or greater, and the market share being acquired is five percent or greater;

- Green- post-merger market share is less than 35 percent in any product market;

- post-merger market share in either personal or business transaction accounts is between 35 percent and 45 percent and the market share being acquired is less than five percent;

- post-merger market share in any of the following: personal loans/lines of credit, residential mortgages, small and medium-sized business operating loans is 35 percent or greater, and the market share being acquired is less than five percent.

Taking into account its findings concerning the evaluative criteria described above, the Bureau determined that markets classified as "red" would result in a substantial lessening or prevention of competition and would require a remedy. Markets classified as "orange" would require further review to determine whether they should be classified as red or green. Any green markets were not considered problematic.

4.13 Credit cards

A unique feature of the Canadian credit card industry is non-duality. That is, in order to participate as an issuer of Visa or MasterCard credit cards in Canada or as an acquirer of Visa or MasterCard transactions for merchants, the rules and policies of the associations require that financial institutions choose membership in either but not both of the Visa or MasterCard associations. As a result, mergers involving financial institutions that are members of different associations require the merged entity to choose membership in only one association, thereby necessitating the sale or conversion of one of the portfolios.

Within the credit cards business, the Bureau defined the following product markets:

- general-purpose Credit Card Issuing to Individuals;
- general-purpose Credit Card Issuing to Businesses;
- visa Merchant Acquiring;
- MasterCard Merchant Acquiring;
- primary Merchant Acquiring;
- general-purpose Credit Card Networks.

4.14 General-purpose credit card issuing to individuals and to businesses

While individual consumers and businesses use different methods for paying for goods and services, credit cards offer certain unique features that distinguish them from other means of payment, including the provision of a convenient form of credit, widespread merchant acceptance and the ability to make remote purchases. Charge cards offered by American Express and Diners Club/enRoute offer many of the same features as Visa and MasterCard credit cards. Accordingly, the Bureau included all four branded cards in the issuing market

While the branch network had historically been an important channel in the issuance of credit cards, the market appeared to be changing. Since credit cards are effectively sold to consumers by mail, the Bureau concluded that the geographic market is national.

The Bureau concluded that none of the proposed mergers raised competition issues in the market for credit card issuing to individuals or to businesses (including corporate cards and purchasing cards),

because the applicable thresholds were not crossed and the remaining competition was effective in providing businesses with adequate competitive alternatives.

4.15 Visa and MasterCard merchant acquiring

In order to accept credit cards as a method of payment, merchants must contract with an acquirer to process and guarantee payment of the credit card transactions. Visa or MasterCard acquiring members who provide acquiring services are responsible for setting the fees charged for this service (the merchant discount rate), for guaranteeing payment to the merchant and for settling with other issuers who are members of either the Visa or MasterCard associations, respectively.

Visa acquirers compete with each other for the right to acquire and settle Visa transactions, while MasterCard acquirers compete with each other to acquire and settle MasterCard transactions. Most merchants need to be able to accept both Visa and MasterCard and thereby require the services of both a Visa acquirer and a MasterCard acquirer. Under the existing rules and policies of Visa and MasterCard, members may not acquire transactions of a competing card. Therefore, the Bureau determined that Visa merchant acquiring and MasterCard merchant acquiring constitute separate markets.

In Canada, Royal Bank, CIBC and TD Bank are members within the Visa association, whereas Bank of Montreal and Canada Trust is a member within MasterCard. By virtue of their exclusive membership in one of the associations, the proposed mergers between Royal Bank and Bank of Montreal, and between TD Bank and Canada Trust did not raise competition issues in either the Visa acquiring market or the MasterCard acquiring markets since there was no overlap between the merging parties in this part of the merchant acquiring business. However, the proposed merger between CIBC and TD Bank did raise competition issues in the Visa acquiring market.

4.16 Primary merchant acquiring

Primary merchant acquiring is defined as a package of services sold to merchants that includes both the provision of terminal services as well as Visa or MasterCard acquiring services.

Terminal services include the provision of the terminal at the merchant’s location. It also includes data transmission and software to route transactions to the appropriate network, such as MasterCard, Visa or interact debit. The majority of terminals now being deployed in Canada are multi-functional and allow merchants to accept all types of credit cards as well as debit cards.

For small and medium-sized merchants, terminal services and acquiring services for either Visa or MasterCard are usually purchased as a package from the same financial institution, although the Bureau recognised that, for large merchants, the services may be purchased separately.

The Bureau determined that the geographic scope for primary merchant acquiring, particularly for small and medium sized merchants, was primarily local since many financial institutions serviced their merchant acquiring customers through their branches. The Bureau recognised; however, that financial institutions increasingly rely on centralised service centres and specialised teams of sales representatives to service this market. Consequently, the Bureau concluded that this is a market in transition to the national level.

The four largest primary merchant acquirers in Canada are Royal Bank, Bank of Montreal, CIBC and TD Bank. The combined effect of both proposed mergers in 1998 would have significantly altered the competitive landscape

The Bureau determined that there were significant barriers to entry, particularly in providing primary acquiring services to small and medium sized merchants. Bank incumbents have a strong advantage in an established brand name and the use of an extensive national branch network to facilitate referrals and/or service to clients.

While the merging banks contended that non-banks, particularly third-party processors capable of leveraging scale from their US operations, were poised to enter the Canadian marketplace as primary acquirers, such firms would need to ally themselves with an existing Visa or MasterCard acquiring member in order to provide the full primary acquiring package. Although there was some evidence that these processors operate in Canada as providers of terminal services, in partnership with some Visa and MasterCard acquirers, they were not generally servicing small and medium sized merchants. The Bureau determined that significant entry or expansion was not likely to occur within the two-year time frame of the review.

The merger between TD Bank and Canada Trust did not raise competition issues in the primary acquiring market because Canada Trust was not a significant participant in this market.

4.18 General-purpose credit card network market

A general-purpose credit card network enables cardholders to have their cards widely accepted. Networks compete with each other to be the preferred method of payment for goods and services by promoting brand awareness and continually improving their systems. The geographic market for general-purpose credit card networks is national.

Visa is the largest network in Canada in terms of total dollar volume of transactions — that is, total dollars spent by customers with general-purpose credit and charge cards. Visa, is followed by MasterCard, American Express and Diners Club/enRoute.

Because of non-duality in Canada, a merger between two financial institutions who are members of different networks requires that at least one of the merging parties convert its membership to the association of choice. This was the case for the proposed merger between Royal Bank and Bank of Montreal as well as the merger between TD Bank and Canada Trust. Conversion would not be required in the TD Bank and CIBC merger because both banks are members of the same association.

In each respective review, the Bureau determined that Bank of Montreal and Canada Trust were significant members of MasterCard, whose sizeable portfolios were important to maintaining a competitively viable and effective MasterCard network in Canada. Given the much smaller market share of MasterCard relative to Visa in Canada, the Bureau determined that a conversion of either of these portfolios to Visa would have a negative impact on the MasterCard network. The loss of such significant MasterCard business resulting from the mergers would have had the likely effect of weakening the MasterCard brand within Canada to the point that its viability would be in jeopardy.

The Bureau determined that the barriers to new entry into the network market are very high, involving significant investment in establishing brand recognition among consumers and merchants, as well as in developing systems infrastructure.

As a result, the Bureau concluded that a conversion of either the Bank of Montreal or the Canada Trust portfolios to Visa would have resulted in a substantial lessening or prevention of competition among the networks in Canada. Conversely, conversion of the Royal Bank or TD Bank portfolios to MasterCard would not raise competition concerns and, in fact, would have been pro-competitive.

4.19 Securities

Within the securities business, the Bureau identified the following product markets:

- discount brokerage (execution of trades without advice);
- debt underwriting;
- mergers and acquisitions advice;
- institutional equity trading;
- institutional debt trading;
- full-service brokerage (execution of trades with advice);
- equity underwriting**.**

The Bureau concluded that the proposed mergers of 1998 did not raise competition concerns in the discount brokerage (execution of trades without advice), debt underwriting, mergers and acquisitions advice, institutional equity trading and institutional debt trading markets. These conclusions were based on sufficient competitive alternatives remaining post-merger or the applicable thresholds not being exceeded.

The proposed mergers of 1998 would have had anti-competitive effects in the full-service brokerage market and the equity underwriting market.

The merger between TD Bank and Canada Trust, however, did not raise competition issues in the securities industry since Canada Trust was a relatively minor player in this business.

4.20 Full-service brokerage

Product and geographic market definition

Full-service brokers are distinct from discount brokers because they provide advice. Given evidence of significant price differentials between full service brokerage and discount brokerage, as well as evidence that discount pricing did not discipline full-service pricing, the Bureau determined that full-service brokerage is a distinct product market.

Furthermore, the Bureau determined that the geographic scope of the full service brokerage market is local. The Bureau found that most clients seeking investment advice want to be served at convenient locations, close to where they live or work. Each of the merging parties operates a network of branch offices throughout Canada to service their client needs.

4.21 Market shares

To determine the market position of the parties, the Bureau gathered first-hand information on assets under administration from the full-service brokers in each local market. This measure is commonly used in the industry to measure market shares.

4.22 Barriers to entry

The Bureau determined that barriers to entry and expansion into the full-service brokerage market are high. Building a base of trained investment advisers is both costly and time-consuming. Based on estimates from third parties, it costs between $300 000 and $800 000 to develop a successful investment adviser.

Furthermore, integrated firms that offer full-service brokerage as well as equity underwriting and institutional trading, have a number of advantages over smaller unintegrated firms. Each of the merging parties is an integrated firm. Since reliable research is a key component of the advice given by the investment adviser and is also a necessary input into underwriting services and institutional trading, integrated firms can more easily support the costs of research across these three business lines. Underwriting services also provide a competitive advantage in those clients of the integrated firm will have greater access to new issues of securities than clients of unintegrated firms. Bank-owned dealers have the additional advantage of obtaining a significant proportion of their business from referrals of bank branch customers.

4.23 Removal of a vigorous and effective competitor

The proposed merger of Royal Bank and Bank of Montreal would have combined the first- and second-largest full-service brokers in many local markets and would have removed a vigorous and effective competitor. The proposed merger of CIBC and TD would also have removed an effective though relatively smaller competitor from the marketplace.

4.24 Effective competition remaining

The Bureau determined that while a few effective competitors would remain in the marketplace, this competition would not likely be sufficient to replace the lessening of competition resulting from the removal of two significant full-service brokerage firms in Canada.

4.25 Equity underwriting

Product and Geographic Market Definition

Equity underwriting refers to the practice whereby the securities dealer assumes the risk of buying a new issue of securities from the issuing corporation or government entity and then resells it to the public through full-service brokers or to institutional investors. In order to spread risk and ensure effective distribution, underwriting typically involves groups or syndicates.

The Bureau determined that the underwriting business has many participants across a broad range of underwriting activity, from small or niche issues with market capitalisation as low as $five million to

large corporate issues exceeding $500 million in market value. The focus of the major underwriters in Canada, such as RBC Dominion Securities and Nesbitt Burns has been on issues above $50 million in market value. Many of the small or niche underwriters do not have the capabilities or capital to lead or participate in the larger deal range exceeding $50 million. The geographic scope of the equity underwriting market is national.

4.26 Market shares

To estimate market share, the Bureau examined the industry practice of using proxies based on underwriting liability, combined with various weighting schemes to reflect the greater compensation earned by the lead underwriter, and adopted the method of allocating full credit to the lead underwriter. The methodology used was based on all deals with a market value of $50 million or greater, in the period from 1995 to 1998.

4.27 Barriers to entry

The Bureau determined that barriers to entry into the equity underwriting market are high. It takes considerable time to build the expertise and reputation necessary to compete successfully as a lead underwriter in this market. Furthermore, fully integrated firms are best able to benefit from the economies of scope available in the industry, particularly since the ability to win lead positions is enhanced when one is active in the trading of securities in the institutional market. In addition, having retail distribution provides the underwriter with an important alternative distribution channel should the institutional market decide not to support the issue.

4.28 Foreign competition

The Bureau's review revealed that seeking equity financing through underwriters in a foreign jurisdiction is not a competitive alternative for the majority of Canadian companies. Canadian issues are generally smaller and tend to have difficulty attracting investor and research analyst interest in the United States. In addition, Canadian placement is more attractive because many Canadian institutional investors are required to hold a significant portion of their portfolio in Canadian securities.

4.29 Removal of a vigorous and effective competitor

The proposed merger between Royal Bank and Bank of Montreal would have combined two of the three largest underwriters in Canada. While other significant competitors would remain in the market, the evidence from records produced by the merging banks revealed that each firm considers the other to be its most important competitor, based on the range of client relationships, industry coverage, quality of research and distribution capabilities of both firms.

4.30 Interdependence

The Bureau also determined that, while certain forms of co-operation are both necessary and legitimate in this industry, the proposed merger raised concerns about interdependence since it would be difficult for issuers to exclude such a large firm from underwriting syndicates.

4.31 Efficiency claims

As stated in the BMEGs, the onus of demonstrating efficiencies rests with merging parties. The merging banks claimed that their mergers would result in significant cost savings by eliminating duplication in the branch network, in technology spending, and in overhead and administration.

US research of mergers between large banks indicated that cost savings were likely to be realised only after successful integration, and that successful integration was more likely to occur if merging banks had previously participated in a large merger. While financial institutions in Canada have had experience with smaller acquisitions, not one has merged with an organisation of comparable size. This made it difficult to assess the likelihood that expected efficiencies would in fact be realised. Research also indicated that about one-half of large bank mergers reduce costs, while one-half realise no change in costs or even incur increased costs. This added to the uncertainty as to whether claimed efficiencies would be realised.

When it is likely that the efficiencies would outweigh the anti-competitive impact of a merger, the Competition Act provides an exception to allow the merger to proceed. As outlined in the BMEGs, it has been the Bureau's policy that, in non-bank cases where there is a likelihood of a substantial lessening or prevention of competition, as there is in this case, and the parties to the merger are claiming efficiency gains, the case would be brought to the Competition Tribunal for resolution.

However, in the case of the bank mergers in 1998, any efficiency gains arising from the mergers would have been shaped to a large extent by the public interest concerns to be expressed by the Minister of Finance, particularly relating to projected branch closures. As a result, the merging banks were not able to accurately project the magnitude of efficiencies.

5. The impact of the task force report

In reviewing the proposed bank mergers, the Bureau considered the impact of the recommendations made by the Task Force on the regulatory environment. Enhancing competition in the financial services sector was a major focus of the Task Force report, released on September 15, 1998.

Among the various measures proposed by the Task Force to enhance competition, those relating to ownership structure, enhancing the capacity of the co-operative sector, and access to the payments system would have had the potential for the greatest impact on the marketplace.

While adopting the recommendations of the Task Force would have enhanced the competitive environment, the effects would not have occurred within the two-year time frame used in the Bureau's merger analysis. Making the necessary legislative changes to implement regulatory reforms would have taken some time and would involve some delay before market participants would respond.

Since the impact of the Task Force's recommendations would likely be felt beyond the Bureau's two-year time frame, the proposed mergers were assessed in the context of the existing regulatory framework.

The Task Force report also commented on the analytical framework used by the Bureau in reviewing mergers in the financial services sector. While supporting the approach outlined in the Guidelines, the Task Force suggested that the Bureau give particular attention to a number of factors relating to market definition and the impact of a bank merger within certain markets.

Specifically, the Task Force recommended that the Bureau pay particular attention to the following:

- the competition concerns of small and medium-sized business;
- users of personal financial services who may still be branch-dependent; and
- the new competitive choices that already exist in respect of certain product lines and that are also likely to emerge as a result of new distribution channels and the liberalisation of public policy constraints.

In assessing the proposed mergers, the Bureau considered each of these factors carefully.

6. Remedies

In general, after being informed of the competition concerns by the Bureau, merging parties must determine whether or not they wish to proceed with the proposal, and if so, to identify and present remedies that address these concerns. To be effective, a remedy must embody the following principles:

- the substantial lessening of competition must be removed in all affected markets;
- it must permit sustained and effective competition so that consumers will continue to enjoy the benefits of competition;
- it must be implemented on a timely basis. For instance, assets should be sold prior to the completion of the merger, or within a specified time thereafter. Failure to comply would result in assets being placed in the hands of a trustee for sale;
- the necessity for ongoing regulatory oversight should be limited;
- implementation of the remedy must be enforceable and transparent.

In most merger cases, the above principles have been satisfied through remedies that focus on structural rather than behavioural measures, particularly through the divestiture of assets. The extent to which such a remedy is possible is case-specific and dependent upon the nature and extent of the competition concerns that have been identified.

Competition concerns relating to branch banking have been remedied in other jurisdictions through branch divestitures. Such remedies have generally been considered to be effective in the United States. Prior to 1998, mergers among financial institutions in Canada had not raised competition concerns that warranted branch divestitures in Canada.[5]

With respect to the bank mergers of 1998, the magnitude of the competition concerns relating to branch banking would have necessitated the divestiture of numerous in a large number of local markets. The merging parties would have also been required to address the competition concerns in the credit card and securities markets. However, since the proposed transactions were abandoned after the Minister of Finance announced his decision that they would not be in the public interest, remedies did not reach the negotiation stage.

In contrast, while the merger between TD Bank and Canada Trust raised some competition concerns in particular markets, the magnitude of such concerns was significantly less than that of the previous bank mergers, and as such required minimal divestitures.

TD Bank and Canada Trust proposed to remedy the competition issues arising from their merger through branch divestitures in the local markets where the Bureau identified that a substantial lessening or prevention of competition would otherwise result. While the competition issues related only to personal transaction accounts, the Bureau determined that divestiture of the entire branch, including other branch-based lines of business such as personal loans and residential mortgages and business banking, was required in order to create a viable remedy. In addition, TD Bank and Canada Trust proposed the sale of Canada Trust's MasterCard portfolio to address the competition issues that would otherwise result in the credit card network market in Canada.

The terms and conditions relating to these proposals were formulated in written undertakings from TD Bank and Canada Trust to the Bureau. As a result, the Minister of Finance approved the merger of TD Bank and Canada Trust in January 2000, upon the condition that they fulfilled their undertakings to the Bureau.

In May 2000, TD Bank announced that it had sold 12 of the 13 branches that it was required to divest to the Bank of Montreal, and intended to sell one branch to the Laurentian Bank of Canada. While Bank of Montreal and Laurentian Bank are in-market purchasers, the Bureau determined that these divestitures would effectively address the competition issues that would have otherwise resulted from the merger of TD Bank and Canada Trust. At this time, the divestiture of the Canada Trust MasterCard portfolio is still outstanding.

7. Future directions

The Bureau anticipates that merger activity among large financial institutions will continue in the next few years. This will continue to present important challenges to competition policy in Canada as we seek to promote and maintain competition in the provision of key products and services to individuals and businesses in Canada while recognising the ever-changing environment facing Canada's financial institutions.

NOTES

1. A more detailed discussion of the Bureau's findings can be found in the letters provided to each of the merging parties at the end of each review. These letters are available on the Bureau's web site at competition.ic.gc.ca.

2; The Task Force on the Future of the Canadian Financial Services Sector was established by the Minister of Finance in December 1996 to inquire into public policies affecting the financial services sector.

3. The Bureau's general approach to assessing a merger in any industry is described in the Merger Enforcement Guidelines. The BMEGs describe how these general guidelines are applied to a merger involving two or more banks and set out the statutory framework relating to the review of the proposed mergers. English and French versions of the BMEGs will be available as room documents at the June 6th roundtable discussion. They can also be obtained from the Competition Bureau's web site at: "http:/strategis.ic.gc/ca/SSG/ct01280e.html" (English) and "http:/strategis.ic.gc/ca/SSGF/ct01280f.html" (French).

4. The SME sector encompasses a diverse range of businesses and services that defy easy measurement based on dollar sales or loans outstanding. However, to simplify the analysis, the Bureau has adopted the definition of SME borrowers used by the Conference Board of Canada, that is, firms that borrow $one million or less. Within the SME sector, there are at least two distinct groups based on the nature of security offered for the loan: individuals and small firms that rely on a personal covenant; and firms that secure the loan based on an assessment of the creditworthiness of the business itself. In attempting to capture these differences, the Bureau looked at market share information for operating loans up to $200 000 and between $200 000 and $one million.

5. The structure of the banking industry in Canada is distinct from that of the US. The banking sector in Canada is largely dominated by six major banks with extensive nation-wide branch networks. Canada also has a relatively weaker second tier of financial institutions, including regional banks and local credit unions. In contrast, the US is comprised of thousands of financial institutions, including a strong second tier of institutions that are based at the state and local levels.

FINLAND

Introduction

In the Finnish contribution to the OECD Roundtable on Mergers in Financial Services, we first chart the special features of the Finnish financial market and the structural arrangements of the field in the 1990s. Secondly, we examine the factors, which may affect the possibilities of entry of new competitors into the Finnish financial market. Such factors include electronic banking services and the decreasing importance of the branches, in particular. Thirdly, we assess the product and geographical market of the products in the financial field on the basis of the cases investigated by the Finnish Competition Authority (hereinafter FCA).

The Finnish contribution is only partially built around the numbering of the Secretariat's questionnaire because Finland only has practical experience of a small number of the merger issues raised. The legislation on the control of concentrations entered into force in October 1998, and subsequently, only one acquisition covered by the national legislation and involving a bank has so far been concluded. On the other hand, the FCA's decisions in the financial field made on the basis of provisions other than the merger regulations are likely to function as basis of the forthcoming merger assessments.

General on Finnish financial market

In Finland, banks still play quite a central role in the financial market. Up until recently, for instance, bank deposits have been the major placement targets of the general public. Likewise, the granting of credit and payment traffic is, to a large extent, services provided by the banks. Of all the credits offered by the companies, approximately one half consists of bank funding, and the share of banks of household credit amounts to approximately 90 percent. In payment traffic, there currently exists no alternative to banks. The fact that the possibilities of companies in other fields to act as competitors of banking concentrations are still limited is e.g. partly due to regulation. Under the Act on Credit Institutions, professional banking business based on deposits received from the general public requires a deposit bank licence. In this respect, however, the provisions are in line with the EU rules harmonising the sector.

The financial market is undergoing a thorough change, however, due to IT development, the deepening of European integration and deregulation. Competition has increased and more versatile services are now offered. The changes show as mergers in the banking and insurance field and in the growth of financial department stores. A law reform is planned, with the intention of promoting the possibility of companies in other fields to receive repayable funds from the public and to offer financial and payment intermediation services. Particularly the largest grocery store chains have shown an interest to offer the said services. The special position of banking deposits as an investment will also be removed, as the tax benefit previously granted to banking deposits in income taxation will be withdrawn. Banking deposits have started to transfer into other investments, such as insurance savings and mutual funds. This naturally serves to decrease the emphasis on banks in the financial field.

Before the provisions of the control of concentrations entered into force, two major acquisitions in the financial markets were concluded. The first one involved the splitting of the Savings Bank Group, which had landed into economic crisis, to the four biggest banks (KOP, SYP, OP Group and PSP). Prior to

this, the market share of the Savings Bank group of the banking deposits and private customer credit was approximately 25 percent.

In 1995, another major banking merger took place when the two biggest commercial banks (KOP and SYP) merged into Merita bank. After the transaction, the joined market share of the parties e.g. in company funding rose to approximately 40 percent. The national authorities did not investigate the acquisition, because the Finnish competition legislation did not yet include provisions on the control of concentrations. The acquisition did not fulfil the turnover thresholds of application of the EU merger regulation either.

Subsequently, in 1997, the Merita bank merged with the Swedish Nordbanken. The Merita/Nordbanken merger did fall within the competence of the EU competition authorities, and the European Commission accepted the acquisition. In its decision, the Commission took a stand to the barriers to market entry in the Finnish banking market and e.g. found that the entry of new banks into Finland was likely. The summary of the Commission decision is annexed to the present contribution.

1. Barriers to entry, barriers to expansion and exit

The small size and the geographical seclusion of the Finnish market could be considered as entry barriers to the financial market. The traditional bank loyalty of the clientele and the established position of the banks which have long operated in the market may hinder the entry of new competitors into the field.
Developments in electronic banking

Banks have traditionally sought to increase their market share by a dense branch office network. In Finland, however, the new technology and the expansion of IT connections have strongly affected the operating possibilities of banks. The competitive benefit of a dense branch network has decreased compared to the service capacity and potential clientele which can be reached by investing in the development of road networks and electronic banking services using electronic information technology. In Finland, the electronic banking services, which have established their position, include, in particular, the Internet bank, the payment traffic programmes for computers, ATMs and different payment cards and electronic cash. The Finnish banks have so far been among the leading European Internet banks, cf. MeritaNordbanken (850 000 Internet clients), the Osuuspankki (Co-operative Bank) Group (420 000 clients) and the Leonia Group (300 000 clients).

It should be noted that, in Finland, different views have been put forth as to whether the increase in electronic banking services will remove or increase entry barriers.

Electronic banking removes entry barriers by eliminating the importance of an expensive office network and related staff. The increasing amount of information on the new services and their providers also promotes the tendering of the services and the entry of new competitors into the field. It should be noted, however, that the increase in electronic banking services may also bring with it factors which raise barriers to entry. Offering electronic banking services entails advanced technology and major investments. Additionally, offering electronic banking services in other countries could be complicated by the lack of international standards; the information systems require national adaptation when operations expand into other countries. Incumbent banks, which have established their position by tight collaboration within electronic banking services, may also jointly create technical entry barriers to the banking networks for new competitors.

In Finland, the high technological level of electronic banking services and their widespread use may complicate entry for those foreign competitors in whose home market the electronic services do not

hold such a central position. The situation may be problematic for foreign banks planning entry to the Finnish market because, for instance, the three biggest Finnish banks have a joint venture with Tietoenator, who administers the Finnish financial information technology market. Due to the company form – joint venture – the purchase of services is free from value-added tax, which creates a competitive benefit. In principle, similar restrictive effects could be contained in the cash card and electronic certification service joint ventures of the three biggest banks, as the joint ventures create national standards, which entrants must adjust to on the dominant firms' terms. However, entry barriers in this respect are likely to be removed by the adaptation of an international EMV standard for the chip card, the terminal equipment and the applications of the chip and the terminal.

2. Are branches becoming obsolete? How and why is their role changing?

As stated above, the importance of a dense branch office network has decreased in Finland. The number of branches has halved during the past ten years. The main reasons for the reduction include deregulation and the ensuing increased competition, the downswing at the start of the 1990s and the banks' profitability crises and the spread of electronic banking services. These have forced the banks to cut down on costs, which has occurred particularly by closing down branches and dismissing staff.

Although the importance of the office network has decreased in Finland, personal service is still needed. Not all customers will ever have e.g. payment cards or Internet connections, which would enable taking care of one's banking business without having to visit a branch office. Personal service is also important in more demanding expert services and in financial services requiring the analysis of customer risks.

3. Product market definition

Since no acquisitions involving banks have been concluded in Finland after the provisions on the control of concentrations entered into force, the FCA has not yet defined the markets in the merger cases in the banking sector. However, in two cases, one of which concerned the merger of two insurance companies (Sampo and Leonia) and the other the merger of an insurance company (Sampo) and a bank (Leonia), the FCA examined the relevant market of insurance products when e.g. the life insurance product market became under review. Part of the life insurance products shall also be held as investment products, which are also offered by the banks in addition to the insurance companies. It is because of this that the market definition in the said cases offers a point of departure for determining whether the banks' market shares in concentration cases shall be investigated on the basis of one area of the banking operations only, i.e. the deposits.

In the cases cited, the FCA has preliminarily found that in the market definition of life insurance products, the different competitive conditions of the financial services between private customers and the various community customers should be taken into consideration. The customer-specific market definition can be justified e.g. by the different needs of the customer groups, and the supply to the various groups requires different resources and expertise.

In other than concentration issues, the FCA has, for instance, investigated payment traffic and ATMs as their own separate markets.

The FCA has not had any cases where it would have had to take a stand on whether companies offering factoring and leasing services or mortgage banks compete with banks. Considering the nature of the services, it is apparent, however, that e.g. companies offering factoring and leasing funding may

compete with traditional bank loans. On the other hand, it should also be noted that, in Finland, several banks have themselves integrated to factoring and leasing funding via the subsidiaries owned by the banking groups. The mortgage bank business is only commencing in Finland and there is not yet sufficient experience of the possibility to use other forms of housing mortgage than that offered by the banks.

4. Geographic market definition

In the above-mentioned Sampo/Pohjola and Sampo/Leonia mergers, the FCA has examined the market definition of insurance products and found that almost all-relevant product markets in the insurance field are national. The basis of the decision was that the offering of products to Finnish customers has, in practice, required a branch office network whose staff is capable of advising customers in the domestic languages and who is knowledgeable of the Finnish operating environment. The stating of the insurance transaction and paying the compensation as well as knowledge of the market and risk control have required presence in Finland. There are also some legislative differences, which restrict the geographical market to Finland.

The FCA finds it possible that part of the private citizens and entrepreneurs' basic banking services shall be assessed in regional markets narrower than the national market. However, the increasing spread of electronic banking operations may affect the definition of the geographical markets of some financial products in such a way that markets formerly perceived as regional at most shall now be reviewed as national.

5. Is there a need for special regime for bank review merger?

Does the general competition law enforced by the general competition agency fully apply to bank mergers in your country?

The provisions of the Finnish Act on Competition Restrictions apply fully to acquisitions in the banking and insurance markets, if the acquisition is otherwise covered by the provisions on the control of concentrations (e.g. with respect to turnover). In mergers concerning the banking and financial institutions, the FCA has sole powers to assess the competitive effects of the acquisition. Under the Act on Credit Institutions, the permission of the Ministry of Finance or the Financial Supervision Authority is needed for certain types of concentrations, but these officials do not examine the applications from the viewpoint of competition. In concentrations involving banking and financial institutions, there exist no detailed provisions on the powers of the FCA and the special regulators. However, in concentrations involving the insurance business there does exist special regulation.

In concentrations involving an insurance institution, the arrangement is first processed by the Insurance Supervision Authority operating under the Ministry of Social Affairs and Health. The mergers under its jurisdiction may include mergers between insurance institutions and e.g. a merger between an insurance company and a bank. Before the Insurance Supervision Authority gives its decision on a merger, it has to request a statement on the issue from the FCA, if the merger simultaneously falls under the provisions on the control of concentrations of the FCA.

If the FCA finds in its statement to the Insurance Supervision Authority that there are obstacles to the merger, the concentration shall be notified to the FCA even if the Insurance Supervision Authority would accept the merger. The notification shall be made to the FCA within one week from the date the applicant has received notice of the Insurance Supervision Authority's decision. The concentration does not have to be notified, however, if the Insurance Supervision Authority prohibits the merger.

The parallel competence of the Insurance Supervision Authority and the FCA is not very successful from the point of view of an efficient control of concentrations. In its own decision-making, the Insurance Supervision Authority pays attention not only to competitive considerations but also to other issues: it solves the licence application from the viewpoint of the benefits of the insured and safeguarding the development of insurance business. Despite the partially similar assessment criteria it is possible that the authorities could come to different conclusions. Parallel and consecutive powers may also prolong the investigation periods. It is our experience that the consecutive powers of the Insurance Supervision Authority and the FCA may function satisfactorily in cases that are clearly to be forbidden or to be accepted. The problems appear in cases where conditions shall be imposed on the approval of the concentration and where quick investigation periods are aimed at. With the aid of co-operation between the authorities, the investigation periods have so far been reasonable.

Have you dealt with mergers of banks having substantial influence over the competitive behaviour of firms in the non-–financial sector of the economy?

Finnish insurance companies and banks have major holdings in Finnish companies. Due to the relatively large size of the holdings, representatives of insurance companies and banks often participate in the executive committees of the domestic listed companies.

In one merger between a bank and an insurance company, the FCA sought to investigate whether, as a result of a combined share of ownership, genuine control was established in some large domestic listed companies. This could not be shown, however. The FCA estimated that the increase in holding power gave the parties competitive benefits, as the position of the owner and the membership in the executive committee may be used for the promotion of one’s own products in the companies that are the target of the investments. As a general practice in the financial field, holdings and the influence these provide in the customer companies may serve to limit the entry of competitors, as the companies may find it hard to ignore the offer of a large owner in the major funding decisions, at least.

APPENDIX 1

Summary of the Commission decision in Merita/Norbanken case*

The Commission concluded that the notified operation does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement. Geographically the activities of the parties were primarily found to be complementary. The only minor overlaps are in sectors of corporate banking in Finland and in Sweden.

Commission defined Merita and Nordbanken -groups as a "universal banks" which provides a wide range of banking and financial services to households, companies and institutions and sale of life and pension insurance. Merita provided these services mainly in Finland and Nordbanken mainly in Sweden. In the Merita/Noredbanken –case the Commission stated that it has consistently held that the services typically supplied by a "universal bank" may be divided into the following areas :

- retail banking (banking services to households which consist, for example, of deposits, lending, credit cards and mutual funds and other forms of asset management);

- corporate banking (banking is meant banking services to corporate clients which consists, for example, of deposits, lending, international payments, letters of credit and advice concerning mergers and acquisitions."and

- financial market services (i.e. with respect to financial markets the following activities may constitute distinct service markets: trading in equities, bonds, and derivatives, foreign exchange and money markets (i.e. treasury bills and commercial paper from banks and companies.

According to the Commmission the investigation with regard to Finland and Sweden, confirmed this view.

With regard to the geographic markets, the notifying parties stated that the relevant geographic markets are either national or international in scope depending on the specific banking sector. The Commission stated that with regard to retail banking the relevant geographic market is to be considered national in scope due to the competitive conditions which in individual Member States are still different despite the increasing trend towards internationalisation, and due also to the importance of a network of branches. As far as the situation in Finland and in Sweden is concerned, the Commission stated that the results of the investigation have confirmed this view. It, however, concluded that there are indications according to which the present situation may change in the longer term with the introduction of the single currency and new technologies, e.g. internet and telephone banking.

With regard to corporate banking the Commission concluded that certain product segments will continue to be required and supplied at national level. However, some sectors of corporate banking "seem to have a more international dimension" and that the results of the investigation in Finland and in Sweden

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* Commission decision of 10/12/1997 declaring a concentration to be compatible with the common market (Case No IV/M.1029 - MERITA/NORDBANKEN) according to Council Regulation (EEC) No 4064/89 (Only the English text is authentic).

EU Official Journal C 044, 10/02/1998 p. 0005.

confirm this view, but that the results also indicate that the relevant geographic market appears to be national for small and medium-sized corporate clients and international for large corporate clients.

Furthermore, for the financial market the relevant geographic market appears to be international in scope.

The Commission noted that the Finnish and Swedish markets should be seen in the context of the ongoing restructuring of the financial market in the Nordic countries. For instance, legal and regulatory barriers to entry, in the form of government authorisations etc., have traditionally been important in the banking sector. However, the entry of Finland and Sweden to the European Union has resulted in the deregulation of financial activities. The highly innovative and evolving nature of the banking market combined with the recent increase of electronic banking tools may further contribute to easier access to the market.

According to the Commission its investigation has shown that market entry in Finland by foreign banks is considered to be possible and likely and that several major Nordic banks have already entered the Finnish market and future expension plans cannot be excluded. The investigation also indicates that the possibility to enter the Finnish market will be further increased following EMU in 1999.

The Commission noted that, in principle, Nordbanken might have been a potential entrant and thus the situation of an elimination of potential competitor would have occured. However, the result of the investigation of the EC indicated that Nordbanken would probably not have entered the Finnish market, at least on its own. The Commission reminded that Nordbanken withdrew from the Finnish market a few years ago and that even if Nordbanken would have been a possible entrant to the Finnish market, it would only have been one among several potential entrants.

According to the Commission, Merita has a strong position in the Finnish market, but the merger did not reinforce its position, either in the banking sector or insurance sector and that the financial power of Nordbanken did not significantly reinforce Merita's position either. The Commission noted, that on the contrary, EMU, further internationalisation and deregulation of financial activities could erode, in the future, the present position of Merita.

GERMANY*

1. Product market definition

Ad a. – c.

The Federal Cartel Office has developed a highly differentiated market definition based on various banking products. Its normal practice is to draw a fundamental distinction between deposit business and loan business. Based on the subdivisions of the Bundesbank statistics, the Federal Cartel Office regards the following services as relevant product markets as defined by the law:

Deposit business:
- sight deposits
- time deposits
  - less than three months
  - three months to less than four years
  - over four years
- savings deposits
- bonds

Loan business:
- overdrafts
- loans with fixed repayment dates
  - up to four years
  - over four years

Real estate loans
- housing loans
- commercial real estate financing
- municipal loans.

The other financial services are treated distinctly from these markets and market segments; they have their own relevant markets. The Federal Cartel Office normally includes the following:

- securities business, i.e. trading in shares and loans on behalf of customers;
- leasing business, subdivided into leasing of movable assets and real estate;
- factoring business;
- share issues, i.e. IPOs and capital raising for third parties;
- building society business;

* In reading this submission, delegates may find it helpful to refer to the Secretariat's questionnaire on page 107.

- fund business, comprising public and special funds;
- real estate financing;
- financing of foreign trade and payments;
- venture capital business.

Some of these markets can again be subdivided into markets for private customers and corporate customers, assuming the products are not in themselves tailored to a certain clientele, e.g. factoring.

This structure basically corresponds to the market definition used by the European Commission (cf. Case IV/M.873 "Bank Austria/Creditanstalt", fig. 15). It is still unclear whether the direct banking market is a separate market.

2. Geographic market definition

Ad a. and b.

The relevant geographic market for banking services where the customer relies on direct contact with a bank on the spot is generally defined on a regional basis (branch-related business). This particularly covers services which the customer uses frequently to conduct his payment transactions (transfers, standing orders, direct debits, cash transactions, etc.) and for which he therefore needs an easily accessible bank close to his place of residence or work. The regionally defined markets accordingly cover sight deposits, overdraft loans and savings deposits where they are mass transactions (up to DM 100 000). The same goes for the short-term and medium-term loan business, which is often related to a savings or current account. This does not apply to business with larger loan amounts, which generally have longer terms, since these are offered supra-regionally or nation-wide. In the case of commercial property and housing, demand is nation-wide, whereby it is doubtful in the field of financing of owner-occupied housing for retail customers whether one can still assume a regional market definition or whether this can also now be regarded as a nation-wide market.

For all other banking services, one can assume at least a nation-wide, and in some cases even a European and a worldwide market.

It remains to be seen whether and to what extent the developments will lead towards online banking via direct banks by phone and the Internet and thus to a different regional market definition, particularly for retail banking. For a variety of reasons, a number of bank customers will not initially have access to online banking, so that the current view of the Federal Cartel Office is that one can continue to work from the regional market definition for retail banking described above.

3. Assessing anti-competitive impact other than barriers to entry

Ad question a., the Federal Cartel Office has no specific information.

Ad b.

The "failing firm doctrine" is of no practical significance for bank mergers in Germany. Banks rarely go bankrupt in Germany. The alignment of prudential rules to the size and complexity of the banks has been set in motion at international level (Basle Committee) and national level (Complex Groups Supervisory Team). This will presumably further reduce the risk of a bank collapsing. Also, German banks are relatively small in the international comparison (market capitalisation and market share). The situation

cannot therefore be compared with the situation in other countries, e.g. in the United States a few years ago.

Ad c.

In Germany, special regulations apply to the commercial operations of public-law banks in particular. The so-called regional principle applies to Sparkassen. According to this, Sparkassen may normally only open branches in the territory of their guarantee authority. Furthermore, their commercial activity is supposed to concentrate on this area. They may not actively advertise for customers (active business) outside their area. In passive business, the regional principle applies to a limited degree. Such restrictions play a role in mergers and are taken into consideration when a planned merger is assessed in terms of competition.

Ad d.

Public-law banks participate in general transactions just like private banks. Accordingly, their interest rates are also oriented to current market conditions and are not normally set "politically". These banks thus have no special influence on interest rates on the market.

4. Barriers to "entry" (i.e. including barriers to expansion and exit)

Ad a.

Online and electronic banking is developing rapidly in Germany. The number of users is rising sharply. This trend is driven by the fast-growing number of Internet users, coupled with the rapid establishment of direct banks and the new interest in the stock exchange and related business. Deutsche Bank AG has just announced its intention to reorientate and substantially strengthen its activities on the Internet. In general terms, this development is probably only just starting, even if Germany is regarded as one of the European leaders in this field. However, it is still extremely difficult at present to predict future developments and to derive the appropriate conclusions for competition law. There are indications that the trend may come to have a particular influence on the regional market definition. For the above-mentioned reasons, however, the Federal Cartel Office currently still assumes a need for a regional market definition in the retail-banking field.

Ad b.

In the international comparison, Germany is considered to be "overbanked" in view of the large number of bank branches. The network of branches will probably be thinned out in the future.

Ad c.

This question plays a minor role in terms of competition-based reviews of the banking sector.

Ad d.

Germany has a broad-based system of deposit insurance. The deposit insurance systems are regulated in line with the EU directive. The state does not bear the responsibility for managing these systems. The organisations of the Sparkassen and the co-operatives have systems providing insurance for their banks, and these are funded by contributions from the banks. There are deposit insurance systems for the private banks and for a group of public-law banks, which are funded via contributions from members and audited by auditing associations. The same goes for the voluntary deposit insurance systems run by both groups alongside the statutory deposit insurance. In this regard, it should be borne in mind that bankruptcies of banks have been very rare in Germany in the past.

Ad e.

There are no statutory or informal barriers to market access.

5. Efficiencies

Ad a.

Since for certain bank products (e.g. investment banking) it is assumed that there are pan-European, or even global markets, it is often claimed that banks which focus on that sort of product need to attain a certain corporate size in order to ensure an appropriate presence on these markets. However, in the investment banking segment of Mergers & Acquisitions, it is not the largest banks which are most successful, but those with the greatest expertise and the highest degree of specialisation. This question is in any case related more to operational aspects and less to competition law.

Ad b.

In the German view, an excessive concentration of risk can have negative repercussions on the stability of banks (cf. Asian crisis), where the nature of the risks is insufficient for an appropriate distribution of risk. The control on mergers exerted by the Federal Cartel Office does not consider such aspects in practice at present.

6. Remedies

The mere existence of an independent competition authority is likely in many cases to make a substantial contribution to preventing anti-competitive mergers before they get off the ground.

7. How do you interact with prudential regulators in the course of analysing and reaching decisions concerning bank mergers? What could be done to improve that interaction?

The Federal Cartel Office informs the Federal Banking Supervisory Office every time an intention to merge is registered and obtains comments from it. Co-operation between the Federal Cartel Office and the Federal Banking Supervisory Office runs smoothly.

8. Other than failing firm considerations, is there a need for a special regime for bank merger review ?

Since it is desirable to have uniform competition rules for all sectors of the economy which ensure the same standards in all areas, specific merger rules for banks are rejected. The competition legislation in force provides the necessary instruments for effective control.

9. Have bank mergers in your country involved special political sensitivities? If so, what was their nature and how were they addressed by your agency or by some other part of the government?

The Federal Cartel Office examines planned mergers solely in terms of competition. No authorisation for a bank merger is required from any government agency other than the Federal Cartel Office.

10. As regards bank merger cases, please describe your agency's experience of the costs and benefits of co-operation with other countries' competition offices. How, if at all, could that co-operation be improved?

So far, bank mergers have all been national cases. For this reason, co-operation with competition authorities apart from the European Commission is very rare, so that no further comment can be made on this point.

HUNGARY

Introduction

The subject of the mini-roundtable on mergers in financial services is for Hungary in many respects interesting and topical. To better appreciate the answers given to specific questions by the Hungarian Office of Economic Competition (OEC) it is best to begin with an overview of the general Hungarian situation.

Hungary's competition rules are contained in the Act No. LXXXVI of 1990 on the Prohibition of Unfair Market Practises. According to this Act, until the end of 1993 the competition supervision of the banking sector fell under the competence of the Hungarian Banking Supervision. From 1994 on and according to the Act No. LVII in effect from 1996 on the Prohibition of Unfair and Restrictive Market Practises has been supervised by the sector of financial services by the OEC. The prudential regulator from 1 of April 2000 is the State Supervision of the Financial Institutions, which was united from the Hungarian Banking and Capital Market Supervision, the Supervising Authority of Insurance and the Supervision of the Pension Funds.

The Hungarian regulation of banking activity did not allow banks to take part directly and fully in the security market until 1998. The rules on ownership allow also today only for pure financial groups (consisting of banks, insurance companies and investment services) to function. This rule would be changed by the planned modification of the Act on Credit Institutions introducing the concept of companies with mixed activity.

The Hungarian banking system became a two-tiered system only in the second half of the eighties. As a consequence, the main tendency of the nineties with view to competition on the market was that the former monopoly was replaced by an increasing competition between a growing number of market players. The feature characteristic of more important bank mergers was that only one participant of the merger was a Hungarian bank and the other one, acquiring control and property was a foreign bank (e.g. in case of Hungarian Foreign Trade Bank Ltd. or Hungarian Credit Bank Ltd). Until 1997, bank mergers of this type-taking place through the privatisation process were not covered by the Competition Act, hence not reviewed by the competition authority. In consequence of scope regulation of the new Competition Act from 1997 all mergers affecting the Hungarian banking market - above threshold regulated in the Act - are supervised by the OEC.

These general characteristics have influenced the way and the degree the issues included in the preliminary questionnaire for the mini - roundtable have come up in the course of supervisory activity until now. The changed Hungarian financial market attributes, mainly increasing merger tendency, international impacts and the modification of regulation can give new importance for these questions. We've tried to draft the contribution taking into account all the above - mentioned factors.

Our answers to questions drafted in the preparing questionnaire are the follows (we touch upon only those questions, which already have arisen in reviewed merger cases and can have importance in the near future):

1. Product market definition

For making initial estimate of the effect of a bank merger on competition on the strength of calculated market shares it is sufficient to review the next four reviewed measures: personal deposit, personal credit, entrepreneurial credit and deposit. Besides, the OEC ask for more detailed, broken down information according to the products on the data-sheet attached to the merger application. Thus, the possibly critical product might come up already in the initial assessment. In those bank merger cases which had effect - due to ownership interest - on the insurance and security markets we examined more measures in the initial estimate, while in some cases we considered less than four measures. (For example in the authorisation proceedings concerning the sale of ING Bank Ltd 's retail branch)

We think, that the mentioned services can be in certain cases potentially competing products for classical banking products, therefore the inclusion of these in reviewing may be justified. However, the accurate investigation of above-mentioned products hasn't been relevant because of their relative insignificant importance on the Hungarian market and the significant market share of banks in these services. Decisive share of leasing services is car selling and this product is supplied typically by banks (i.e. Porsche Bank Hungaria AG. Opel Bank Hungary Ltd.) or a service provider with bank support**.** Mortgage lending is just developing, and in respect of investment funds banks have got also a leading role.

2. Geographic market definition

In competition supervision proceedings relating to the banking industry the relevant geographic market was determined in all cases as the territory of Hungary. The size of the country and characteristics of the financial system don't give a reason for narrower geographic market definition in merger reviewing. Narrower geographic market definition has been adopted only to the supervision of the prohibition of abuse of a dominant position because of the differences of regional branches whereas it also hadn't proved to be justified due to the homogeneity of banking services. Despite the fact that Hungarian undertakings may borrow from foreign credit institutions, we don't take for reasonable wider geographical market definition in the short term.

The OEC also adopt the country-wide market definition by authorisation of mergers between foreign banks having effect to Hungarian financial market due to the extraterritorial scope of the Competition Act. Just like in the following case:

Arising from the scope of the Competition Act Bank Austria turned to the OEC for authorisation of the acquisition in Austria of Creditanstalt-Bankverein in 1997. In Hungary both Austrian banks had bank subsidiaries and other subsidiaries. The joint turnover of the Hungarian subsidiaries exceeded the notification threshold stipulated by the Competition Act which is the concentration was subject to authorisation. Pursuant to the Competition Act the OEC may not refuse the authorisation if the concentration neither creates or strengthen a dominant position, nore impedes the formation, development or continuation of effective competition on the relevant market or on a considerable part of it. In this particular case the relevant market was the national market of banking, securities and leasing services. The market shares of the parties to the merger varied from below one percent to 13.5 percent. During the proceedings it was stated that the acquisition resulted in no significant effect on the Hungarian market, no change took place in market structure even if both commercial banks would merge. Since the acquisition did not create or strengthen a dominant position on the relevant markets and did not cause detrimental effects to consumers, the OEC authorised the concentration. Future mergers, concentrations of the affected undertakings will not be subjected to OEC authorisation because the Competition Act does not require an authorisation in the case of non- autonomous undertakings (e.g. in the case of undertakings belonging to the same owner).

There's no distinctive legal restriction for foreign ownership in Hungary. The banks' entry to the financial market is regulated on the basis of the same principle and there's not even any "*de facto*" restriction.

The equal treatment principle is fulfilled according to Hungary's commitment towards the OECD, the Act on Credit Institutions was modified in December 1997 and according to this modification branching of foreign banks is also permitted since 1 January 1998. All applicants who wish to open a bank or a branch of foreign bank will obtain the necessary authorisation of the State Supervision of the Financial Institutions if they meet the requirements laid down in the Act. Once credit institutions are properly licensed in Hungary they are free to open branches anywhere in the country but must register such branches with the State Supervision.

Convincing proof of equal treatment of foreign ownership is its high share in the financial market structure:

Owners	1997	1998	1999
Domestic Ownership Of which %	**36.99**	**36.21**	**33.01**
Direct State	20.57	21.47	20.10
Other Companies	14.83	11.89	10.26
Private Persons	1.58	2.85	2.65
Foreign Ownership of which %	**60.83**	**61.04**	**64.41**
Banks, Investment Funds	48.66	46.44	49.67
Others	12.17	14.60	14.74
Preference Shares	1.37	1.80	2.11
Own Shares	0.81	0.94	0.46
Total %	**100.00**	**100.00**	**100.00**
Shared Capital (Bn HUF)	**303.2**	**322.5**	**343.2**

3. Assessing anticompetitive impact other than barriers to entry

The Hungarian competition law does not provide explicitly special treatment for a failing firm. However the consideration of all advantages and disadvantages of a merger prescribed by Article 30(1) of the Competition Act generally afford possibility to apply the failing firm doctrine. Although there were some cases in the Hungarian banking sector (e.g. the Mezõbank Co. Ltd. - Agro Deposit and Credit Bank Co. Ltd. merger) where the failing firm doctrine might have been applied, this was not necessary because the competition agency found the mergers produced no significant anti-competitive effect.

We think that the failing firm doctrine can be applied in bank mergers, but it is not primarily the OEC's scope of duty. Regarding the failing firm doctrine, it is necessary to thoroughly analyse how the successor would employ the failing firm's assets, but it is not less important to put emphasis on considering the systemic risk posed by the possible default of the failing bank without the merger. Considering a bank merger may comprise macro-economic and budgetary aspects and even cost-benefit analysis depending on the size of the failing bank in terms of total turnover, the number of clients or the amount of deposits insured by the deposit insurance scheme. A merger as one means to keep a bank solvent and operational should be considered to be acceptable if the impact of the default would be unbearable on the banking

sector or the country's economy as a whole. Therefore, it may be allowed even if the merger would be otherwise questionable, if on the one hand defence by merger would be justified, on the other hand there's no more favourable party for merge from competitive aspects. If there's more undertakings for merge with the failing firm, the competitively best one should be chosen.

With the exception of specialised credit institutions (e.g. Hungarian Development Bank Ltd., Hungarian Export-Import Bank Ltd.) the rate of the state ownership is minimal. (Only one major bank, the Postabank and Savings Bank Co. is under state ownership. After saving the bank from failure with state aid there is a plan for privatisation, so the ability for regulating interest rates - asked in the questionnaire - couldn't come up.)

4. Barriers to entry (i.e. including barriers to expansion and exit)

Beyond personal and physical conditions regulated in the Act on Credit Institutions there's no other barrier and influencing factor considered and applied by the OEC during reviewing effects of bank mergers.

Electronic banking is developing, new services - Internet banking, home banking - have appeared, but these factors as a barrier to entry and expansion are not relevant to the analysis.

Consequently in Hungary the most effective distribution channel is the branch office, well ahead of the electronic banking and agency network.

Furthermore we can lay down as a fact that the need for personal contact by financial services is the main characteristic of consumers' requirements, therefore we can not reckon with the decreasing number of branch offices in the next five years from now despite the cost-saving advantages.

The market participants gradually extended their scopes of activity in the last couple of years, which resulted in fierce competition in every segment of the Hungarian banking sector for the time being. For the possible participants in the banking business economies of scale and scope are not considered as real barriers to entry, therefore those factors can not be considered as of great significance.

There is no state provided deposit insurance in Hungary. All credit institutions - except specialised credit institutions regulated in separate act whose liability is secured by the state - have to join the National Deposit Insurance Fund. The Fund provides 100 percent coverage for deposits up to HUF one million (at the current rate equal to USD 3448). The premium is and related to the average size of deposits and the number of depositors. The expected modification of the Act on Credit Institutions may change the one million HUF limitation to six million in one or two steps.

Reviewing the competition effect of bank mergers has been influenced by neither regulation of deposit insurance nor by market entry barriers like capital limitation (capital limit for banks is two billion HUF, for co-operative credit institutions 100 million HUF).

As mentioned above the share of state ownership in the Hungarian banking sector is low and the state does not confer any kind of special advantage for the country's banks.

Effect of the existence of banks which are too big to fail is in close relationship with the failing firm defence doctrine. Some factors can bring about a situation in which a bank is given every means of state aid to maintain its solvency. Among those factors we mention the total turnover compared to the banking sector as a whole, the amount of deposits under its management or the number of depositors.

Besides, possible consequential sectorial financial restraints should be taken into account and the systemic risk should be considered that the eventual default can pose on the banking sector. Until today there has not been any single bank merger authorisation by the OEC in which those concerns have played a decisive role. There's not always a need to apply the failing firm defence, of course and otherwise it is no longer typical in Hungary to keep the failing bank afloat in a crisis with state aid.

5. Efficiencies

The OEC has not encountered practical evidence of efficiency considerations necessitating bank mergers. While bank mergers could have positive impact on efficiency, mergers in the Hungarian banking sector were motivated by different factors such as acquiring the assets and expertise of a niche player on a particular segment of the financial services or consolidation of a subsidiary.

The drive to increase efficiency by mergers in order to be a capable competitor in the globalised market is not of great importance in Hungary. A significant part of equity in banks is in foreign hands and the majority of banks operate as subsidiaries of western banks. The merger authorisations generated by the increasingly globalising markets can not be expected to happen in Hungary. Foreign mergers having effects on the Hungarian market raise the issue of co-operation with other countries' competition offices. We' will address this point in question below.

Considering the size of Hungary and the allocation of businesses and infrastructure it can be established that geographical diversification is not a great concern. Besides there has not been any legal restrictions to diversify financial services geographically. All of the banks have their headquarters in the capital but perform their activities country-wide through their branches.

6. Remedies

Since there has not been any unacceptable bank merger in the Hungarian practice, the OEC hasn't got any experience in this field, so the question can not be answered.

Pursuant to Article 30(3) of the Competition Act in effect the OEC may describe conditions for authorisation in order to moderate the detrimental effects of an unacceptable merger.

The State Supervision of the Financial Institutions has been the supervisory authority of the banking sector from 1st. April, 2000. (legal predecessors are: Hungarian Banking Supervision, later Hungarian Banking and Capital Market Supervision)

Until 1996 the Competition Act obligated the OEC to ask the supervisory authority's opinion. The Act presently in effect does not contain such obligation. Financial institutions shall submit the application for authorisation at the same date both to the OEC and the supervisory authority and the merger should be authorised by both offices.

The supervisory authority and the competition office consider mergers in parallel but independently. The OEC decision is supported by the data-base of the Supervision.

In 1999 the two offices concluded co-operational agreement according to which the parties engage themselves reciprocally to inform each other about their own experiences on the financial and capital market. For the better supervision of the market efficiency the parties make consultations and in crisis situations on the financial and capital market when the best solution seems to be a concentration

within the meaning of the Competition Act, the parties undertake to establish an operational work-team for the better handling of the situation.

We think there is no need for special regime for bank merger review except failing firm considerations. The general competition law - the Act No. LVII of 1996 - is fully applied to financial services thus, to banking sector. (We enclose to the present contribution the text of Chapter VI. concerning mergers.)

All merger cases exceeding a specified threshold size are subject to the OEC's review, so there is no reason for special regulation for bank mergers. The specific features of the banking sector are taken into account by the OEC.

As mentioned in the introduction, question can not be answered, because this situation has never occurred in Hungary.

Until now authorised bank mergers haven't involved special political sensitivity. The OEC is an independent institution, structurally not subordinated to the government.

The OEC is legally bound to safeguard the public interest through defence of competition in the market therefore the office always applies a public interest test in its merger reviews. Article 30 provides essential criteria for assessment. Other political or public interest considerations have not yet come up.

Due to the ownership structure of Hungarian banking sector the OEC might be very interested in co-operation with other countries' competition offices.

It is a fact that we haven't yet co-operated with European competition offices, so we can not give account of our experiences. At the same time we support future co-operation in every way. This could be useful and necessary for the OEC in two respects. On the one hand the larger, more experienced competition offices could assist the OEC especially in certain critical mergers. On the other hand, a co-operation would make possible the in-depth analysis of the effects on the Hungarian banking market of foreign mergers.

ANNEX

Act No LVII of 1996
on the Prohibition of Unfair and Restrictive Market Practices
(Hungarian Competition Act)

Chapter Six

Control of Concentration of Undertakings

Article 23

(*1*) A concentration of undertakings is effected, if two or more previously independent undertakings merge or an undertaking is integrated with another or a part of an undertaking becomes part of another undertaking which is independent of the first one, a sole undertaking or more than one undertaking jointly acquire control of the whole or parts of one or more than one other undertakings, or more than one undertaking, which are independent of each other, jointly create an undertaking controlled by them, into which they integrate an identical activity they each performed earlier or complementary activities provided this does not qualify as an agreement restricting economic competition pursuant to

Article 11.

(*2*) A sole undertaking or more than one undertaking jointly shall be deemed to acquire control of another undertaking if they acquire the interests or shares of another undertaking ensuring majority voting rights, or acquire more than fifty percent of the voting rights, or obtain the right to appoint, elect or recall the majority of its executive officials.

(*3*) For the purposes of this Act the contractual right, which is linked with a member (shareholder) capacity, to influence decisively the decisions of another undertaking shall be assessed as equal to the acquiring of majority voting rights mentioned in Subsection (*a*) of Section (2).

Article 24

(*1*) For a concentration of undertakings the authorisation of the Office of Economic Competition shall be applied for in cases where the aggregate net turnover of the undertakings concerned (Article 26) exceeded HUF ten billion in the previous business year provided the net turnover of the undertaking, becoming integrated or coming under control, or of two at least of the undertakings which take part in the merger, was higher than HUF five hundred million each.

(*2*) The obligation of applying for authorisation is also present in cases where the net turnover of an undertaking becoming integrated, or of one of the undertakings merging, or the undertaking getting under control did not exceed HUF five hundred million if, taking this turnover into account, the concentrations implemented by this undertaking during the last two years preceding the concentration concerned exceeded HUF five hundred million in aggregate.

(*3*) In the case of concentration of financial institutions, ten per cent of their total assets shall be considered in place of net turnover. In the case of concentration of insurance companies, the value of gross premiums committed shall be considered in place of net turnover.

Article 25

Temporary acquisitions of control or ownership by financial institutions, insurance companies, financial holdings, investment companies or property managing organisations for the purposes of preparing a resale do not qualify as concentrations. For the purposes of this Act activities of liquidators or of those in charge of account of settlement do not qualify as exercise of control.

Article 26

Undertakings concerned are undertakings participating directly and indirectly in concentrations. Direct participants are the undertakings with the participation of which the concentration is effected. Indirect participants are undertakings under the control, as referred to in Subsection (*b*) of Article 23 Section (1), of a direct participant, controlling, as referred to in Subsection (*a*), a direct participant, under the control, as referred to in Subsection (*a*) above, in addition to direct participants, of an indirect participant, as referred to in Subsection (*b*), being under the joint control of two or more participants whether they are direct participants or indirect participants enumerated under Subsections (*a*)-(*c*).

Undertakings which relinquish their controlling powers as a conclusion of the concentration shall be left out of account when identifying the range of the indirect participants.

Article 27

(*1*) When applying Sections (1) and (2) of Article 24, in calculating net turnover, the turnover of the undertakings concerned (Article 26) or parts of them shall be reduced by the sales between themselves.

(*2*) In calculating the net turnover of undertakings of foreign nationality the net turnover realised from sales in the previous business year in the territory of the Republic of Hungary shall be taken into account.

(*3*) In calculating the net turnover of undertakings concerned of majority state or municipality ownership, economic units with autonomous decision-making powers in determining their market conduct shall be taken into account.

Article 28

(*1*) For a concentration to take place it is the obligation of the direct participants or the acquirers of the controlling rights, in merger and integration cases or in any other cases respectively, to apply for authorisation in accordance with Article 24.

(*2*) An application for authorisation shall be submitted within eight days of the date of the publication of the invitation to tender, the conclusion of the contract or the acquisition of the controlling rights, whichever is the earliest.

(*3*) In cases of concentrations of financial institutions or insurance companies the application for authorisation shall be submitted to the Office of Economic Competition at a date identical with that of the application for permission to be submitted to the branch supervisory authority as provided for by a separate legal norm.

Article 29

For a contract resulting in the concentration of undertakings in accordance with Article 24 to come into effect, the authorisation of the Office of Economic Competition shall be applied for.

Article 30

(*1*) When appraising an application for authorisation of a concentration both concomitant advantages and disadvantages shall be considered. In the course of this consideration the following aspects shall be examined, in particular:

– the structure of the relevant markets; existing or potential competition on the relevant markets, procurement and marketing possibilities; the costs, risks and technical, economic and legal conditions of market entry and exit, the prospective effects of the concentration on competition on the relevant markets;

– the market position and strategy, economic and financial strength, business conduct, internal and external competitiveness of the undertakings concerned and expectable changes in them;

– the effect of the concentration on suppliers and on intermediate and final consumers.

(*2*) The Office of Economic Competition may not refuse the authorisation of a concentration if - with a view to the stipulations of Section (1) - it does not create or strengthen a dominant position, does not impede the formation, development or continuation of effective competition on the relevant market (Article 14) or on a considerable part of it, or if the concomitant advantages outweigh the concomitant disadvantages.

(*3*) In order to moderate the detrimental effects of a concentration, the Office of Economic Competition may, as a condition for the authorisation, demand by its decision the divestiture of specified parts of the undertakings or specified assets or the relinquishment of control over an indirect participant setting an appropriate time limit for the carrying out of these requirements.

Article 31

If it is stated in the course of the proceedings of the competition supervision that a concentration which is subject to authorisation pursuant to Article 24, has been carried out without obtaining such an authorisation and may not have been authorisable, the Office of Economic Competition may require by its decision setting an appropriate time limit, the separation or divestiture of the merged undertakings, assets or interests or the relinquishment of joint control or it may make other conditions in order to restore effective competition.

Article 32

The Office of Economic Competition shall revoke its decision made pursuant to Article 30 if an authorisation, which has not been reviewed yet by the court was based on misleading information concerning a fact which was important from the point of view of the decision, or the undertakings concerned have not fulfilled certain conditions set by the decision.

ITALY*

1. Introduction

Italian antitrust provisions are contained in law no. 287, which was enacted in 1990. The law applies to all sectors and to all enterprises. The general antitrust authority in Italy, the Autorità Garante della Concorrenza e del Mercato (the "Antitrust Authority"), is a body established in 1990 with specific responsibility for competition policy. An exception to this otherwise general rule is represented by the banking sector. The law assigned to the Bank of Italy the task of safeguarding competition in the banking sector. The subsequent incorporation of this mandate into legislative provisions regarding the objectives and addressees of supervision represented a significant innovation. This institutional arrangement enacted in Italy for banking antitrust purposes is not unique. It recognises the specificity of banking. The special features of banking are also taken into account in the antitrust legislation of other countries, sometimes as a matter of form and almost always as a matter of substance.

Special features distinguish the banking industry from all other sectors of economic activity. Its specificity derives in the first place from the non-negotiability of banks' loan assets, reflecting banks' particular function in reducing the information problems that characterise the relationship between savers and investors. Secondly, banks play a particular role in the functioning of the payment system: they are the only institutions able to create purchasing power; hence the pre-eminence of bank money in the settlement of transactions and the central function of the banking system in supplying liquidity to the economy, a function especially visible when markets are strained. In the final analysis, the specificity of banking stems from the particular link between liquid, easily transferable liabilities and non-negotiable, typically opaque assets. This has implications not only for the stability of credit institutions, but also for the play of competition and its analysis.

This paper is divided into two parts. First it examines and illustrates the relationship between supervision and the safeguarding of competition (Section 2.1), the Bank of Italy's role in promoting competition (Section 2.2) and in the enforcement of the Law 287/1990 (Section 2.3). It, then, briefly describes the principles that the Bank has followed in applying the antitrust law to mergers and acquisitions in the banking industry (Section 3).

2. Competition and antitrust policy in the banking sector

2.1. The relationship between stability and competition

The special nature of credit and financial activities does not lessen the importance of competition, nor does it imply that safeguarding the market should rank after the other public interests that the Bank of Italy is mandated to protect.

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* This submission was prepared by the Bank of Italy which is the institution charged with enforcing Italy's competition law in the banking sector

The intensification of competition, by narrowing banks' profit margins, may reduce the incentive of investors to acquire shares of companies operating in banking and, more important, may induce excessive risk-taking on the part of banks. On this reading, therefore, there is a degree of competition that the banking market cannot sustain without becoming more fragile, more exposed to exogenous shocks and more vulnerable to contagion and systemic risk. Controlling the structure of supply may offer the means for public intervention to curb the potentially destructive repercussions of competition, fostering an industrial structure that is not excessively fragmented, with an overabundance of intermediaries and points of sale. A relevant reference in this framework is the extensive debate on overbanking in the sixties, most notably in the United States. Government intervention affecting market structure, either by limiting entry or by controls on branching, was frequently interpreted as a response to the need to prevent competition for customers from degenerating and triggering failure rates incompatible with the stability of the credit function.

In Italy this attitude had long been superseded, in practice, in the course of deregulation, as described afterwards.

Actually, the simple inverse correlation between degree of competition and level of stability is a highly questionable representation of the complex way in which interaction between a bank and the market may trigger crisis or lead to problems of systemic stability. Under ordinary conditions a properly functioning market helps to discipline banking conduct. The drive for efficiency and the capacity to respond to external stimuli, which must characterise undertakings that operate in a competitive market, are factors that strengthen a bank, enabling it to respond promptly to shocks, to adapt to changing market conditions, to immediately perceive problems and to promptly react. Conversely, the history of bank failures is replete with instances of banks that were able to conceal inefficiency by exploiting their market power, thanks often to administrative barriers that limited potential competition but were unable to cope when the external environment required new responses.

In such circumstances, when a bank's condition begins to deteriorate, perverse competitive interactions may arise. For instance, banks whose asset quality has degenerated to the point of wiping out their capital can pose a threat to the financial soundness of their competitors: their management has every interest in plunging into high-risk assets, gambling for resurrection; nor will their shareholders have any incentive to enforce more prudent conduct, as their investment is already worthless. Such a bank will offer much higher rates of interest to depositors; it will relax its standards of creditworthiness; it can become hostage to its debtors, with no option but to grant additional lines of credit or capitalise back interest in the hopes of eventual repayment. Looking at cases that have generated systemic problems, one almost always finds this kind of perverse competition, which drags even sound banks into less than prudent behaviour.

If one agrees that this is the kind of competition that can come into conflict with systemic stability, one naturally concludes that a contradiction between safeguarding competition and exercising banking supervision can never arise. On the contrary, banking supervision can stimulate a competition based not on excessive risk-taking but on efficiency. In a framework without effective banking supervision, when competition increases, banks increase their risk in order to safeguard profits. But in a framework with effective banking supervision, when competition increases, banks are instead stimulated to reduce their average costs in order to safeguard their profits. Therefore, thanks to banking supervision, market competition is able to generate banking sector stability. The need for banking supervision arises essentially because of special difficulties in distinguishing a good bank from a bad one, because of the information problems that characterise the credit business. This problem is exacerbated by the inability of depositors, who are small and scattered stakeholders, to exert any significant control to prevent improper actions by management from harming their interests.

When the repercussions of a bank crisis are judged to be substantial, public salvage intervention may be required; implementation must comply with Community rules on state aid. Such intervention is modulated so that the first to bear the cost of crises are the shareholders and management. Public support must be provided in such a way as to generate no significant distortion of competition: if necessary, on condition of compensatory remedies for competitors. The adjustment plan must give reasonable assurance of the effective restoration of efficiency and solvency so as to return the bank to the market.

This kind of situation has little to do with safeguarding competition. The only possible conflict of interest that may arise is when resolution of the crisis and protection of depositors can both be achieved only by a take-over, in which the bank acquiring control agrees to incur the costs of adjustment in consideration of the market power that it gains. This is a familiar case widely studied and commonly contemplated in the framework of competition rules. Many legal systems provide expressly for the "failing firm defence" (see 4.5). Apart from this case, the safeguarding of competition and banking supervision are two aspects of public action directed to convergent results.

The stability of financial institutions and competition among them are complementary aims. Both refer to operative and allocative efficiency, which is the basis of the sound and prudent management of credit[1]. The Bank of Italy's action has long been guided by awareness of this complementarity, on the supposition that lack of competitive stimulus generates inefficiency and with it instability. Accordingly, the Banking Law (law n. 385/1993, art. 5) and the Financial Intermediation Law (law n. 58/1998, art. 5) assign to the Bank of Italy the task of ensuring the competitiveness of the entire financial system and the efficiency of payment systems. In keeping with Community guidelines, these recent laws require the credit authorities to abandon such notions as "economic needs of the market", overbanking, or other grounds for public intervention that unduly interfere with freedom of enterprise in the financial field. In the same way, regulations must avoid all distortion of competition.

According this interpretation, which corresponds more closely to the history of banking and banking regulation in Italy, the Bank of Italy has been given the responsibility for applying the rules that safeguard competition in banking, not in order to reconcile some hypothetical contradiction between different functions, but quite simply to foster competition in the banking market. Above all the key to the Bank's role is to be found in the special nature of the information on the banking and financial system available to it as supervisory authority. In other words, the Bank of Italy acts exactly like an independent authority, with procedures and standards of judgement comparable to those of the other antitrust authorities. Internally, the Bank's organisational arrangements are such as to keep the assessment of competition separate from that of stability, in order to avoid confusing market participants or giving the impression that a single decision-making process embraces all the aspects involved in evaluating mergers or conduct potentially restrictive of competition.

In this way, the problem of possible conflicts between supervision and competition have been resolved ex ante by the stance adopted by the Bank of Italy. The Bank's internal organisation ensured the autonomy of the function of safeguarding competition, separating the evaluation of restraints on competition from that of matters relating to supervisory activity proper. The two functions are entrusted to different departments of the Banking and Financial Supervision area.

The heightened neutrality of the new statutory provisions facilitates this separation. Article 5 of the 1993 Banking Law, echoed by Article 5 of the 1998 Financial Intermediation Law, definitively sanctions the new arrangement by directing the credit authorities to exercise their powers with the least possible impingement upon market discipline.

In conclusion, its vast pool of information, profound knowledge of the evolution of the financial markets, and constant analysis of changes in the provision of banking services enable the Bank of Italy to perform the function of safeguarding competition in optimal fashion.

2.2 The Bank of Italy's role in fostering competition

The Bank of Italy has paid increasing attention to the implications of its supervisory action for competition. Over the years its stance has changed in relation to the situation of the banking system and the conditions of the economy.

Simplifying, in the fifties and sixties higher priority was given to the objective of the stability of the banking system, which was deemed essential for Italy's economic development. Supervisory action was therefore conducted primarily by means of controls on the structure and operations of intermediaries. During the seventies the objective of stability was gradually coupled with that of higher efficiency, to be achieved by promoting competition. Subsequently, the Bank of Italy stepped up its efforts to foster a more competitive market while Parliament reaffirmed the entrepreneurial nature of banking and expanded banks' decision-making autonomy, a move that also led to more competition among banks. This campaign was in line with the principles that were gaining sway both in the European Commission and among the main national competition authorities, according to which competition is a fundamental principle in its own right and a lever for restructuring the economy along competitive lines and limiting the role of public intervention. Accordingly, the Bank of Italy encouraged the transformation of public banks into corporations and the disposal of control or substantial shareholdings in banks held by the State or charitable foundations.

In this period the Bank of Italy's primary strategic objective was to guide finance towards a regulated competitive market, on the basis of the principle that rules and competition are inseparable, not antithetical. A far-reaching revision of the instruments of supervision was undertaken to this end. Many of the changes gradually introduced into secondary as well as primary legislation fostered and extended the scope of supervised institutions' discretionary judgement: the gradual replacement of case-by-case authorisation with general limits pegged to operating indicators, the removal of operational and institutional segmentations with the reform of banks' bylaws, the greater autonomy of banks in branching, the expansion of the geographical scope of operations and the possibility of choosing among different organisational models (the banking group, the universal bank, the niche or specialist bank). Finally, the Bank of Italy's revisions of secondary legislation lowered the barriers to entry, permitting other financial institutions to engage in banking following transformation, and widened banks' distributive channels by allowing them to sell their products via insurance companies and, for consumer credit operations, through retailers.

It is important to stress that the possibility of choosing in full autonomy constitutes the very essence of competition. By expanding the sphere of autonomy and responsibility of supervised institutions, which is the thrust of all these remedies, the Bank of Italy came down clearly in favour of enterprise, market and competition.

The decision to raise the tenor of competition was also made taking into account the increasingly urgent needs of the national economy, whose weaknesses had been revealed by the repeated crises of the seventies. Vigorous efforts to encourage, indeed almost create, competition among the different markets of financial Intermediation accompanied the drive to foster competition within the banking market. The reorganisation of the securities market, which the Bank had urged, tends to put banks in competition with other channels of intermediation as well as with one another. This gives credibility to the action to

safeguard competition, which can benefit from the extensive analytical apparatus developed in the course of prudential supervision.

The secondary legislation in the field of prudential supervision issued by the Bank of Italy in the last few years is aimed at encouraging banks and banking groups to establish and develop new means of distribution for financial products, which may be complementary to the already established branch. The aim of this policy is to decrease existing territorial segmentations and to widen customers' choices.

In keeping with the diversification of bank's distribution networks, the Bank of Italy also took steps to promote the efficiency of the payment system towards full integration of the different payment circuits. This integration has been possible thanks to the qualification of the National Interbank Network (RNI) as an essential facility and the fact that access to the network had to be complete and non-discriminatory for any body offering payment services to the public.

In conclusion, while the Competition Department within the Bank of Italy is concerned not only with defending competition but also, indeed primarily, with promoting it, the Bank of Italy as a whole pays great attention to drafting rules more suited to a competitive context.

2.3 The enforcement of Law 287/90 in the banking sector

Since the introduction of Law 287/1990 the Bank of Italy's action to safeguard competition has been guided by Community principles, by the experience of other industrial countries and by that of the Antitrust Authority. The assessment methodologies the Bank employs are well established and are continually being refined. In deciding antitrust cases *vis-à-vis* the banking sector, the Bank of Italy acts in close co-operation with the Antitrust Authority which is required by law to give a prior non binding opinion on all competition cases falling within the competence of the Bank of Italy.

The problems involved in establishing the necessary collaborative relationship between the Bank of Italy and the Antitrust Authority were solved with the Memorandum of Understanding that the two authorities signed in March 1996. The document addressed the need for appropriate procedures to give shape and substance to collaborative efforts. It defined the scope and procedures for exchanges of information and delineated the relevant markets to be considered as a first approximation for the purposes of assessing competition. The agreement has resulted in effective co-operation between the two authorities, to the benefit of intermediaries and the market. The new system has shortened the response time to notifications from intermediaries and made it clear to them which authority has jurisdiction in a given situation. The identification of the relevant product and geographic markets has given intermediaries useful information about and increased the speed and homogeneity of the two authorities' findings. Above all, the agreement specified the procedures and form with which the experience and statistical and information resources of the Bank of Italy would be made available to the Antitrust Authority for the latter's institutional purposes.

Since the enactment of the law, the Bank of Italy, in its capacity as antitrust authority in the banking sector, has carried out 33 formal proceedings. Such a high number of formal proceedings concerning a credit system can not be found in many other countries.

The Bank of Italy, as well as the majority of antitrust agencies, is attributing increasing importance to anticompetitive behaviour, both in the form of collusive agreement or abuse of a dominant position. For this reason 17 of the above-mentioned proceedings concerned abuses of dominant position and collusive agreements. Some of them referred to price fixing or geographical market division practices carried out by Italian banks. Other proceedings referred to violations of the antitrust provisions carried out

by the Italian Bankers' Association through (*i*) providing Norme Bancarie Uniformi (standardised contracts to be used by banks with their customers), (*ii*) fixing prices (both *vis-à-vis* the customers or other banks, with specific reference to the payment system), (*iii*) recommending the adoption of a standard mechanism to determine the amount to be charged for exchange rate transactions relating to EMU countries' banknotes.

The other 16 proceedings concerned merger and acquisition transactions. They will be dealt with in the next section of the paper.

3. Mergers and acquisitions in banking

3.1 Product market definition

The definition of the relevant market, both product and geographical dimension constitutes the central point in the competitive evaluation of a merger. Banks' commercial activities are extremely complex. The substitutability, the overlapping, the innovation of financial products are growing. In this field the relevant product market definition constitutes one of the major problems of analysis.

A single measure of product (generally deposit, in the US experience) could be sufficient for the estimates of only the simplest merger. The European Commission has constantly held that the banking activity may be divided in three relevant product markets: retail, corporate and financial market services.

According to the Commission, the retail banking market consists of all the banking and financial services offered to households and therefore not only the traditional deposit, taking and lending product activity, but also credit cards and asset management. In several cases this product market consisted also of accounts, deposits' certificates, consumer credit and payment services. The corporate banking market consists of all banking and financial services offered to non-bank companies such as deposits and lending banking services, the latter divided basically into short term and long term lending (business loans and investment credit), international payments, credit letters, and mergers and acquisitions' advice. In other cases the market consisted also of leasing and debts issue. As for the financial services' market, the Commission has divided it by the characteristics of the relevant financial products involved, such as shares, derivatives and bonds.

However, it must be noted that it is not clear how much further this subdivision of the product market should be taken. Until now all the operations examined by the Commission were deemed compatible with the common market, so it has not been considered necessary to deepen product market definition.

In the initial screening of mergers and acquisitions for antitrust purposes, the Bank of Italy, in accordance with the Antitrust Authority, defines as relevant products the market for funds (sight and time deposits, including CDs) and credit (both short and long-term). However, if necessary, product market definition can be further detailed according to the relevant dimension and characteristics of products. For instance, the growing importance of new financial products other than the traditional ones within the banks' activities can require a more in depth competitive investigation. This has been the case for those products close to the traditional lending and deposit taking activities such as leasing and factoring and asset management. In Italy these products are supplied either by banks or companies directly controlled by banks.

In particular, mergers affecting the asset management activity, now being a relevant part of retail banking could produce significant overlaps. In some cases a basic distinction could be drafted between production and distribution of asset management products. In fact, on one hand it is not always the case that a producer has his own distribution network and on the other hand some operators can prefer not to produce and distribute in house products but just to distribute other operators' ones.

3.2 Geographic market definition

Geographic market definition is also one of the most sensitive questions of antitrust analysis in the banking sectors. The different competitive conditions in diverse countries could also lead to different solutions.

Also in this case the European Commission makes use of the retail, corporate and financial services tripartition of products relating them to a different definition of the geographic dimension. For retail products the Commission generally considers that the geographic dimension should be considered national, taking into consideration the importance of the branches network. It reaches the same decision for the wholesale products even if the supply and the demand of some of these products are typically national while for other products they are international. Instead the geographic dimension for the financial products is considered to be international.

In applying the criterion of prevalent area of operation, the Bank of Italy initially selected provinces as the basic geographic unit for both fund-raising and loan markets. Subsequently, it was decided to adopt regions as the relevant geographic market for lending. (Italy is divided into about 100 provinces grouped into 20 regions). The purpose of this choice is aimed at preserving competitiveness even in the narrowest territorial markets.

As for the other financial products eventually concerned by a merger, geographic dimension has always been considered to be national in scope. However, the sub national level could come into discussion for those cases where the merging parties were both active in the production and distribution of financial products such as the asset management activity, they have a dominant position in the fund raising market and there was a significant overlap of their distribution networks. In those cases, due to the fact the branch networks are used as the main distributive channel for the asset management products, the mergers' competitive assessment could require to consider the relevant geographic dimension also at the provincial level as it is for deposits.

3.3 Barriers to entry and developments of new banking distributive channels

During the last few years, the number of distribution networks available for Italian banks has rapidly grown due to the development of information technology and the introduction of a new regulatory framework. Wideness and rapidity characterise this process.

Banks can now choose among several distribution networks: traditional branches, financial "shops", employees or independent financial salesmen (promoters) placing financial products off the premises, ATM and POS, internet and phone banking. Moreover, they can distribute products through other banks, securities firms, and insurance brokers. Investments in information technology are increasing and a growing number of banks are entering into agreements with national and European telecommunication and e-business companies.

The range of distributive channels alternative to branches is wide and makes it possible for clients to select the most suitable to their requirements and financial needs. At the end of 1999, there was one ATM every 1 900 people. 660 banks offer their clients the possibility to use the electronic networks for their financial transactions (home banking). Banks offering phone banking services are 31 and those operating on Internet network are continuously increasing. Banks use more than 12 000 financial promoters to distribute their products. The users (families and companies) of banking services by means of home electronic networks reached 2 330 000 units, with an increase of 42 percent on the previous year.

The consequent development of these new means of distribution might provide for a further increase in competition within the banking sector. The early results of a survey covering banks other than mutual banks show that information technology applied to the banking sector is gradually increasing the level of competition between banks. The increasing number of distribution networks alternative to traditional bank branches might also lead to the reconsideration of the geographical dimension of relevant markets.

3.4 Evaluation of bank mergers and structural and behavioural remedies

In Italy, bank concentrations began to emerge in the late seventies but the phenomenon has accelerated in the last decade under the stimulus of competition. Since the entry into force of the antitrust law in October 1990, about 580 mergers and acquisitions have been notified. In its decisions regarding concentrations, the Bank of Italy has aimed to prevent the creation or strengthening of lasting dominant positions. Formal proceedings of thorough investigation have been initiated in 16 of the above cases.

In general, a formal investigation is unlikely to be opened when an operation involves firms with an aggregate share of less than 25 percent of the relevant market. The assessment is conducted on the basis of the market strength of the competing banks, the structure of supply and the level and change in the degree of concentration. When aggregate shares do not exceed 15 percent, the Memorandum of Understanding with the Antitrust Authority provides for an even simpler assessment procedure.

In view of the different conditions facing the various categories of borrowers, the credit market for producer and consumer households is examined at the provincial level, while lending to more mobile counterparts is assessed at the regional level. Even more detailed analysis is conducted when a formal investigation is opened. The creation or the strengthening of a dominant position is ascertained with respect to each relevant market on which the bank operates. In this regard, price developments in each market are considered together with the behaviour of incumbents in the presence of new entrants, the role of potential competition[2] and any announced new entry.

Nevertheless, the nature of the service that banks provide and financial innovation make it difficult to trace precise, absolute boundaries. The difficulty of using quantitative tools to examine complex phenomena such as market entry and exit conditions and strategic integration between firms also make antitrust analysis arduous. It is therefore necessary to review the product and geographical borders of the reference markets in assessing competitive conditions.

In more than half of the above 16 proceedings the Bank of Italy adopted structural and behavioural remedies in order to make sure that a dominant position is not created or strengthened.

Structural remedies consisted in branch divestitures or closures; behavioural remedies consisted in the prohibition for the bank resulting from the merger to open new branches for a certain period.

The aim of these remedies is to make it possible for banks to realise concentrations without generating substantial alterations in local market competitive conditions. In fact, bank mergers in the Italian experience show that, even if the banks involved are often the larger ones, the most important competitive impact is not at the national but at local level.

Usually structural remedies, such as divestitures, may have the highest effectiveness because they eliminate from the source the market power of the bank, without impeding further its competitive behaviour; they may also allow a new competitor to enter the market buying a system of client relationships overcoming informative barriers.

The effectiveness of divestitures depends fundamentally on two factors: the market power of the buyer and the size of the divested branches. Therefore antitrust decision establish *1*) that the buyer has to be a high qualified firm able to develop sensible competitive pressure; *2*) that all the assets and liabilities of the branch have to be divested.

Closures and prohibition to open new branches are usually considered to be less effective. Branch closures can have different effects according to the competitive dynamic of the specific market; if, after the closures, the bank has other branches in the same market, the redistribution of the market share to other banks may be limited and the market power of the bank, resulting from the merger, could be substantially unchanged; but, if the remedies refer to almost all the branches of the bank resulting from the merger in a particular market, the competition impact of closures can be more effective. Moreover, this remedy has another advantage: it can be easily realised because it does not require a competitor interested in buying the branch.

In the enforcement of state aid rules by the European Commission the different types of remedies tend to be assimilated (e.g. the “Banco di Sicilia/Sicilcassa” decision considered both closures and divestitures).

The prohibition to open new branches for a certain period can generate new problems either because they need continuous control by the antitrust Authorities or, by limiting the number of branches in the market; they might cause damage to customer opportunities. But, in the long run, behavioural remedies could limit the market power of the bank in a dominant position.

In the case of Italy, the short time elapsed since the remedies (structural and behavioural) were enforced does not allow to reach definitive conclusions about their effectiveness. However, at this point in the analysis, it could be possible to conclude that in the banking markets where compensate remedies were introduced, the degree of competition has generally increased. In fact, the structural conditions (with regard to concentration level) have significantly improved. This improvement has been stronger than in those markets where compensate remedies were not enforced.

On the other hand numerous statistical indicators show increasing concentration at the national level of the Italian banking industry during the Nineties accompanied by increasingly vigorous competition.

The average number of competitors per province (significantly increased during the eighties from 20 units in 1979 to 27 in 1989) has risen to 31 units. Branching distribution has become widespread: there is a branch every 2 100 people; about eighty per cent of the population can choose between at least three banks in the their own town. The analysis of prices confirms the increase in the competition of credit market. The spread between lending and deposit rates - already fallen from nine to seven percentage points during the Eighties – has further decreased at the end of 1999 and is less than four percentage points.

Other indications about the existence of a higher degree of competition can be found recurring to market share mobility analysis. Market share redistributed between banking groups in provincial deposit markets has risen to three percentage points in 1999 (it was 2.6 percent in 1991), thus confirming a rising variability in the market positions of banks.

3.5 The "failing firm defence theory"

There are some circumstances in which mergers with appreciable anticompetitive effects on the relevant market might benefit from a particular consideration under antitrust rules. This is the case of a take-over of a failing firm provided that its life can be extended whereas otherwise it would have been closed down. In those cases the market power, resulting from the simple combination of the market shares of the firms involved in the merger or the acquisition, cannot be recognised as a valid indicator for the real impact of the concentration of competition. In particular, there are some other factors that should be taken under consideration, such as the comparison between the structure of the market after the acquisition and the probable situation without concentration, taking into consideration even the public interest. For all these reasons, competition authorities have defined some specific criteria for analysing mergers or acquisitions involving failing firms.

One example on the application of this theory might be found in the USA. Under the US Horizontal Merger Guidelines (1992), a merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met: *1*) the allegedly failing firm would be unable to meet its financial obligations in the near future; *2*) it would not be able to successfully reorganise under the Bankruptcy Act; *3*) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe threat to competition than does the proposed merger; and *4*) absent the acquisition, the assets of the failing firm would exit the relevant market.

The "failing firm defence" was applied for the first time in the EC Competition Policy by the European Court of Justice in the case "Kali und Salz AG – Mitteldeustche Kali AG" (31 March 1998). The Court accepted the reasoning adopted by the European Commission in its 1993 decision, where it quoted that the situation of bankruptcy of a firm might be an important factor in analysing the competition impact of a merger in the relevant market[3]. In particular the Commission argued that since there were just two competitors in the market, both in the case of acquisition and in the case of failure, the market share of the filing firm would "go" to the other one.

The Bank of Italy admitted the possibility of applying the "failing firm defence" for the first time in the case "Banco di Sardegna - Banca Popolare di Sassari" (5 April 1993) and, more recently, in the case "Banco di Sicilia – Sicilcassa – Mediocredito Centrale" (3 April 1998). In these cases the Bank of Italy proved not only that the Banca Popolare di Sassari and the Sicilcassa were really failing and that no less anticompetitive acquisition offers them a way out but also that the acquired firm could not have been successfully reorganised in bankruptcy proceedings.

4. Conclusion

In conclusion, the specific features of competition in the credit sector calls for specific care in the application of the antitrust rules. This does not mean that competition is less important in banking. On the contrary, it is even more important than in other sectors, since the level of competition in these is strongly influenced by the conduct of banks. Indeed competition lowers costs in relation to assets and services that banks provide, stimulates innovation, prompts banks to grow in order to meet the challenges of

international markets. All this justifies assigning the safeguarding of competition to a specialised authority. The Bank, in its organisational decisions, has made sure that prudential supervision and the defence of competition maintain a degree of reciprocal independence. Thus, the offices of the Bank of Italy having competence for competition constitute a separate structure within the area of banking and financial supervision.

Following the enactment of the 1993 Banking Law and the 1998 Financial Intermediation Law, competition comes twice under the control of the Bank of Italy. Once as a goal of supervisory action alongside other aims and once as the main objective of antitrust enforcement. The antitrust law enables the Bank of Italy to evaluate not only mergers and acquisitions but also banks' behaviour for which it would not otherwise have instruments for intervention.

Economic theory has shifted the emphasis placed on the structure-behaviour-performance schema to the analysis of behaviour in oligopolistic markets, the prevalent form in modern industrial economies and one that is certainly typical of financial and credit markets. The reference model is no longer perfect competition, but rather a normal situation of strategic and workable competition, so-called competitive parity. In particular, recent theoretical work has suggested that there is scope for public action to safeguard competition, focusing above all on the conduct of market participants. In this context, the economic role of competition is to be sought not only in incentives and efficient price/cost behaviour but also in product quality, auxiliary services and, above all, the capacity for innovation.

NOTES

1. Bank of Italy, The Governor's concluding remarks, Ordinary General Meeting of Shareholders, Rome, 1997..

2. The importance of potential competition in assessing mergers was recognised by the Antitrust Authority in its measure no. 7086 "*SIA_Società Interbancaria per l'Automazione/CedBorsa*" of 15 April 1999, published in bulletin no. 15 of 3 May 1999, which states that "the new firm resulting from the operation will face greater competition from specialised firms operating in other Community financial centres. The integration of European financial markets, which is also being stimulated by the introduction of the single currency and technological innovation, will increase competition between such markets to attract the largest number of participants and the largest share of savings".

3. See F.E. Gonzalez-Diaz, *Commentaire sur l'arret de la Court du 31 mars 1998 dans l'affaire Kali und Salz*, Competition Policy Newsletter, number 2, June 1998.

JAPAN

1. Recent trends in the restructuring of the financial sector

Japanese financial institutions are restructuring themselves in efforts to respond to changes in the circumstances surrounding the financial sector, such as globalisation resulting from the reform of the financial system and the need to write off bad loans they incurred because of the bursting of the speculation-driven, asset-inflating "bubble" economy. As a result, moves toward selection and integration of businesses are speeding up. Under such circumstances, some of the nation's leading banks has announced plans to restructure through, for example, mergers, since the latter half of last year.

Besides this large-scale restructuring, the restructuring of regional financial institutions has been rapidly progressing. The number of cases of the acquisition of financial institutions reported to the Japan Fair Trade Commission (JFTC) has doubled over the past three years.

1.1 Recent cases of restructuring of major financial institutions

Fuji Bank, Dai-Ichi Kangyo Bank Ltd. and the Industrial Bank of Japan Ltd. have agreed to establish a joint holding company in 2000 with total assets worth 141 trillion yen, making it the largest company in the banking sector in the world.

Asahi Bank, Sanwa Bank and Tokai Bank have agreed to establish a joint holding company in 2001 with total assets worth 100 trillion yen, making it the world's second largest bank.

Sumitomo Bank and Sakura Bank have agreed to merge into a bank in 2001 with total assets worth 99 trillion yen, making it the world's third largest bank.

2. Legal regulations on bank mergers

If banks intend to merge, they must file a report concerning the plan on their merger to the JFTC under Section 15 of the Antimonopoly Act (hereinafter "AMA").

The JFTC must examine the plan to see if the merger concerned would substantially restrain competition in any particular field of trade. If it deems that the merger would restrict competition, the JFTC will order the banks to dispose of a certain amount of their business.

Banks intending to merge must file an application to the Financial Supervisory Agency for approval of their merger in addition to filing one to the JFTC.

3. Tools for examining bank merger plans under the AMA.

(*1*) Scope of a particular field of trade (Market definition)

In general, the scope of a particular field of trade is defined in terms of the goods or services traded trading area (geographic area), stage of trade and other factors.

A. Scope of the market of a bank

The scope of the market of a bank to be founded through a merger is determined by the types of services the bank concerned will provide - deposits, loaning and foreign exchange.

B. Geographic area

Generally, the geographic area of the market of a bank is delineated by the business activities of the company. Concerning regional banks, the geographical area of a bank to be established through a merger is determined in each prefecture where it intends to operate business. On the other hand, the geographical market of banks that intend to operate business across the country, such as city banks, is all of Japan.

(*2*) Specific determining features of examination

When the JFTC examines if a bank merger substantially restrains competition in any particular field of trade, it comprehensively considers the conditions of the market concerned and position of the company concerned.

A. Industry position of the companies

Market share is a basic indicator, which indicates the position of the companies in the market. If the companies attempting to effect an M&A have a high market share, the increase in shares caused by the M&A is larger, or there is a substantial difference between the market shares of the companies concerned and those of the competitors, the M&A will have a substantial impact on competition.

B. Market condition

(*a*) Number of competitors and degree of concentration

If there are a small number of competitors in any particular field of trade, then the M&A will have a strong impact on competition. Especially, if the number of competitor decreases and the market become oligopolistic, for example, the three-firm concentration ratio exceeds 70 percent, the tendency towards co-operative conduct between competitors will also be considered.

(*b*) Market entry

The extent of barriers to new entry into the market, such as whether there are legal restrictions on new entry, is an important factor to see the effects on competition.

(c) Business capability of a new company to be established through a merger -- how to deal with failed financial institutions

In addition to the market share of the company group after the M&A, changes in the overall business capabilities of the company group such as raw material procurement ability, technological resources, marketing capability, access to credit, brand power, advertising capability will be examined.

Moreover, mergers having the following characteristics will be deemed to present few problems under the AMA Act:

a) one of the merging companies is overloaded with debt and essentially can no longer obtain sufficient operating funds;

b) there is a high probability of its bankruptcy and exit from the market in the near future; and

c) it is difficult to find a less anti-competitive way to relieve the failing firm than the merger by the other company.

4. Cases concerning merger and acquisition in the financial sector

(*1*) Merger between Mitsubishi Bank Co., Ltd. and the Bank of Tokyo Co., Ltd. (1995)

a) Mitsubishi Bank Co., Ltd. and the Bank of Tokyo Co., Ltd. merged in 1995 in order to increase its international competitiveness through the expansion of their network both in Japan and abroad;

b) since the two partners were so-called city banks that had extensive networks of branches, the JFTC examined mainly the possible impact of the merger on the competition between city banks in the market across the country;

c) as a result of the merger, the share of the Bank of Tokyo-Mitsubishi among banks with nation-wide operations was established to be 14.2 percent in terms of deposit and 14.7 percent in terms of loaning at the time of the merger. Both of these represent the second largest such market shares. Also at the time of the merger, the merging banks accounted for 19.1 percent of all outstanding city bank loans to major companies, the largest such market share. However, the JFTC deemed that the merger would not substantially restrain competition in any particular field of trade because:

the market share of the new bank was expected to be no more than 15 percent, only 2 percentage points above the next largest bank;

the competition between city banks in loans to major companies was intensified because such loans involve low credit risks since major companies are secure clients, and there already was keen competition between banks in this field. Furthermore, major companies were trying to raise more funds on their own by issuing commercial paper and bonds. Therefore, the competition between bank loans and funds that major companies raised directly from the financial market was intensified; and

the competition between banks in deposits and loans was expected to intensify as the ratio of bank loans to the entire funds that companies raised was declining, and the regulations restraining competition such as regulations on interest rates and operations have been either relaxed or eliminated.

(*2*) Hokuyo Bank's acquisition of business of Hokkaido Takushoku Bank (1998)

Hokkaido Takushoku Bank, which was the nation's 11th largest city bank, gave up rebuilding itself because it became almost unable to raise funds from the short-term financial market. It decided instead to transfer its business in the Hokkaido area to Hokuyo Bank, which operates mainly in Hokkaido.

Even though the market shares of Hokuyo Bank in deposits and loans was expected to rise to approximately 20 percent in terms of deposit and 30 percent in terms of loans, the JFTC concluded that the acquisition would not restrain competition in this particular field of trade because Hokkaido Takushoku Bank had given up rebuilding itself due to difficulties in raising funds and there were strong competitors.

5. The impact on the entire industry caused by restructuring of the financial sector

Some speculate that mutual ownership of shares and corporate groups will eventually disappear if the large-scale plans to restructure financial institutions are carried out. Others fear that new mega banks will support only selected companies, as a result, financial institutions and other companies will become closer and eventually new corporate groups will be formed.

Taking these concerns into consideration, the JFTC is assessing plans on mergers between financial institutions.

KOREA*

1. Product Market Definition

1-a.

With respect to five bank mergers initiated after 1997, the product market was defined based on total assets, taking into account the special circumstance of the mergers concerned, i.e. these mergers were implemented as part of national efforts to restructure the financial industry to overcome the foreign exchange crisis that broke out in late 1997. Such circumstances required assessing anti-competitive effect based on total assets (covering loans, investment assets, etc.) of the merging banks. The Korean Fair Trade Commission (KFTC), however, did not apply its review procedure to those five bank mergers because they were deemed legitimate mergers in accordance with other statutes, hence exempted under article 58 of the Monopoly Regulation and Fair Trade Act.

For countries, such as Korea, having chronic excess demand for financial resources, competition in the deposits market remains fierce while inter-bank competition in the lending market is meager. In such circumstances, deposits can serve as a useful measure of a bank's commercial activity. Bearing this in mind, the KFTC took into consideration the amount of deposits in the product market definition, when reviewing an M&A of commercial banks (the merger involving Chohung Bank and Kangwon Bank in June 1999). In defining markets, the KFTC has given weight to both deposits and lending markets.

1-b.

In reviewing commercial bank mergers, the KFTC has deemed that similar products offered by non-bank financial institutions have low demand/supply substitutability and thus are not in competition. Therefore, it has excluded those services in product definitions. This is because specialised products carry a high risk, since non-bank financial institutions are relatively small in size and unstable, and deposit insurance is not extended to certain specialised products such as trusts.

However, when terms of trade such as interest rates and commission between specialised products and banks' cluster products change, the two services may be deemed to be in a competition. It is true that customers such as consumers and businesses ordinarily tend to transact in relatively stable products that bundle savings, loans and issuance of checks from their primary financial institution. When non-bank financial institutions offer more favourable terms of trade such as lower interest rates and commission, however, the customers can shift their transaction partners to select non-bank institutions. In particular, the growing diversity of services provided by non-bank financial institutions and increased ease in transaction thanks to the advance in electronic banking and readjustments of functions among financial

* In reading this submission, delegates may find it helpful to refer to the Secretariat's questionnaire on page 107.

institutions is expected to accelerate this trend. In this sense, the KFTC may consider the evolving trend of e-banking and non-bank financial institutions in its commercial bank merger reviews.

1-c.

Currently, seven credit card companies and 23 banks operate in Korea's credit card market. Credit card companies offer services such as credit card, debit card, prepaid card, micro lending, and redemption of various products and services. However, debit cards and prepaid cards are not considered separate markets, since they are not actively used in Korea.

In addition, there exist Value Added Network (VAN) operators that are in vertical transaction relations with credit card companies, who carry out functions related to application for and authorisation of the use of credit cards, linking consumers, card companies and their affiliated merchants. In a previous case, the KFTC defined the credit card VAN market as a separate market. Currently, there are seven companies including Korea Information and Communications Co. operating in this market

(ex.) In a case involving undue concerted act committed by five credit card VAN operators (Dec. 1997), the KFTC took a corrective measures against the violation of Article 19 of the MRFTA, concerning the joint fixing and maintenance of prices of credit card sales slips and card authorisation terminal (CATs).

2. Geographic market definition

2-a.

The KFTC, in its commercial bank merger reviews, has identified the geographic market to cover the entire nation, given that commercial banks can and do provide nation-wide services and their branches are located throughout the country.

2-b.

The Korean government has placed a ceiling on share ownership of banks by a single person (Article 15 of the Bank Law) in order to fend off industrial capital's dominance of banks. However, in order to attract foreign capital, foreigners are given preferential treatment compared to Koreans. With regard to commercial banks, foreigners can own up to ten percent of the issued shares with voting rights, and can exceed this threshold provided that is authorised by the Financial Supervisory Commission (FSC). In contrast, locals cannot own more than four percent. Foreigners can own up to 50 percent of shares when incorporating a jointly invested bank. They can also establish a local entity, owning 100 percent of its shares. In the case of Korea First Bank with total assets amounting to 980 billion Won that was sold off to Newbridge Capital in December 1999, a foreigner came out as the largest shareholder with 51 percent stakes.

3. Assessing anti-competitive impact other than barriers to entry

3-a.

Korea's commercial banks offer a variety of similar products and at the same time compete in several markets. In this sense, they are in multimarket contacts. The KFTC has formulated and applied the M&review guidelines, allowing for the review of the possible co-ordination among rival enterprises, based on the high homogeneity of products supplied by companies in competing relations and the similar terms of production and sale faced by competing firms. However, in Korea, there have been no cases where M&As were not approved or were granted conditional approval because of this effect.

3-b.

The MRFTA specifically addresses business combinations involving failing firms (Paragraph 2 of Article 7). Since the MRFTA covers all industries including the financial sector, the failing firm doctrine in principle applies to bank merger reviews as well. However, pursuant to the Act concerning the Structural Improvement of the Financial Industry enacted and revised around the time of the 1998 crisis, when the Financial Supervisory Commission issued orders to liquidate ailing banks under the P&A procedure, the resulting bank mergers weredeemed legitimate business combinations in accordance with other statutes (Article 58 of the MRFTA). Such mergers were, accordingly, not subject to KFTC's merger review.

The doctrine, however, applies to mergers not resulting from the exit order of the FSC provided they meet the conditions elaborated in the condition for failing firm unde KFTC's M&A Review Guidelines. More specifically, the KFTC can review the possible application of the doctrine on a case-by-case basis to voluntary mergers even though they result from Prompt Corrective Action by the FSC such as the recommendation, demand and order for management improvement. However, the doctrine has never been applied to M&As of financial institutions, since there have been no cases of anti-competitive mergers and acquisitions of troubled banks.

3-c.

In Korea, financial institutions that intend to offer services other than those stipulated under relevant financial business statutes have to acquire authorisation from the FSC. However, recently, new product markets are formed as banks provide more supplementary services related with their original services stipulated under relevant Acts. Examples include Bancassurance being permitted to engage in banking and insurance services and the allowance of banks' subsidiaries to enter non-bank businesses such as insurance and securities.

The KFTC takes government regulations against the types and territories of banking businesses and other commercial conduct, if any, into account when examining possible anti-competitiveness of mergers. For example, since the Mutual Savings and Finance Companies Act restricts the scope of business of mutual savings and finance companies, specified local markets are defined as the relevant markets.

3-d.

In Korea, commercial banks and state-owned banks including postal offices are engaged in cutthroat competition, making it impossible to adjust interest rates of the entire financial market by

changing interest rates offered or charged by government-owned banks. Currently, all interest rates are liberalised in Korea, except several short-term rates on banks' demand deposits and company deposits that run less than seven days, among others, and rates on public finance fund loans. Therefore, the KFTC, in reviewing bank mergers, has never taken government's regulation of interest rates into account.

4. Barriers to "entry"

4-a.

The KFTC has included the existence of legal and institutional barriers to entry as criteria for assessing anti-competitiveness under its M&review guidelines.

The development of electronic banking is expected to expand the geographic boundaries of banking business, stimulate the development of new financial products and foster competition, thereby bringing down entry barriers. Korea also witnessed rapid advances in e banking. This is expected to increase the number of potential competitors, by making the contact with foreign financial institutions easier, etc.

In the past, customers had to visit branches in order to engage in transactions of financial services such as deposits and lending. The development of electronic banking, however, has lessened the significance of such branches. Despite such advances in e banking, the number of branches is on the rise in Korea, even in the face of the decrease in the number of unsound banks' branches because of restructuring under way. This phenomenon seems to mainly stem from Koreans' preference for cash.

Deposit insurance expedites the exit of financial institutions from the market, which may contribute to ease of entry into financial markets and the promotion of competition. The financial crisis made the liquidation of financial institutions, including banks that never went bankrupt based on the government guarantee, a reality. Since the crisis, deposit insurance has been the premise of bank liquidation. However, deposit insurance exceeding certain thresholds may breed moral hazard among customers, as can be seen in the government's protection of banks. Thus, it is essential to extend appropriate level of insurance. The Deposit Protection Act, revised in 1999, provides guarantee to only the principal, within the range of 20 million Won, of financial products, such as deposits, when banks, securities firms, insurance companies and other financial institutions are forced out of the market. It does not cover trust products and indirect products that invest in stocks. Effective from Jan. 1, 2001, only partial insurance will be offered within 20 million Won ranges.

It is true that Korea also had a prevailing belief that banks were too big to fail. However, with the outbreak of the financial crisis, 17 large business groups including Hanbo, Halla, and Jinro were forced to exit the market or are now under court receivership. In particular, this year, the 2nd largest conglomerate, Daewoo Group, is being under workout. As was the case in the real sector, the financial sector also witnessed the exit of five banks. Many that engaged in financial transactions were injured as a result. In this light, it is fair to say that the myth that financial institutions are too big to go under has been shattered. In the process of government-driven economic growth of the past, financial institutions played the role of allocating financial resources. In this situation, their bankruptcy would also lead to the collapse of the real economy. It naturally followed, therefore, that people expected the government to come up with measures to rescue troubled banks. However, such expectations are no longer in place.

5. Efficiency

5-a.

Mergers can be beneficial if they can allow the realisation of economies of scale and scope, thereby improving customer service, rationalising asset management, enhancing internal business process, and foster specialisation, so far as they do not have anti-competitive effects.

5-b.

Since Korean banks provide nation-wide services, there have been no cases of mergers for the purpose of geographical diversification. In the case of local banks, their business areas are confined to the regions designated by the government. Thus, they are more likely to tie the knots with national banks rather than with other local banks. A case in point is the merger between Kangwon and Chohung Banks.

6. Remedies

6-a.

There have been no remedies applied to mergers between financial institutions.

7.

7-a.

In Korea, mergers involving financial institutions are reported to the FSC pursuant to the Act concerning the Structural Improvement of the Financial Industry and the FSC evaluates the soundness of the merger concerned. In determining whether the merger is anti-competitive or not, opinions of the KFTC are reflected in the financial authorities' review process through prior consultation. If the FSC fails to take into account KFTC's views, the KFTC can open its own review procedure.

8.

8-a.

The general competition law fully applies to bank merger. However, for the sake of convenience and consistency in the review process, the FSC is in charge of receiving a reporting of merger and granting approval. The relevant statute requires, however, that the FSC conduct prior consultation with the KFTC with regard to possible anti-competitive effects associated with the merger. As was previously stated in 7-a, the KFTC can initiate its own review if the FSC fails to reflect its opinions.

Questions 8-b through 10 have no relevance to the KFTC.

MEXICO

Introduction

Following the crisis of December 1994 several banks got into trouble upon which some of them were capitalised and restructured. A number of them came under control of FOBAPROA (the Mexican deposit insurance scheme at that time) and were sold off afterwards. Most of those banks were acquired by foreign banks.

Before 1994, the establishment of affiliates by foreign financial institutions was not allowed in Mexico. With NAFTA, which entered into force in January 1994, a first step was made towards the opening up of the financial sector to foreign investment. In view of the positive role that foreign banks could play in the capitalisation (and the rescuing) of troubled national banks, restrictions on foreign participation in the national financial system were gradually removed further after the 1994 crisis.[1]

These two phenomena, the progressive opening up of the Mexican financial system to foreign investment and the capitalisation problems of most banks after the 1994 crisis set the stage for a number of mergers and acquisitions, including restructuring, in the Mexican financial system. Such mergers are subject to review by the Federal Competition Commission (FCC) for their potentially harmful impact upon competition in the financial markets and by the Ministry of Finance and Public Credit (MFPC) from a public interest point of view, and from a perspective of the interests of bank employees. None of the above mentioned mergers was objected by the FCC nor by the MFPC, basically for the following reasons.

In the first place, most mergers involved small and medium failing banks being acquired by other banks of the same size or by foreign banks without active presence in domestic financial markets before the merger. Thus market structures were hardly affected. In fact, they would have passed even if the acquired banks would have been healthy. In the second place, capitalisation ratios clearly improved particularly where foreign banks acquired small and medium failing national banks, which was definitely considered in the public interest. Last but not least, the strengthening of those banks was considered to enhance competition in the financial sector because they would be in a better position to compete effectively with the Big Three (Banamex, Bancomer and Serfin) which together account for well over 50 percent of all assets hold by the national financial system.

Serfin, the third biggest bank in Mexico, which was recapitalised by the Institute for the Protection of Bank Savings (IPAB), the successor of FOBAPROA, was recently offered in public auction.[2] The FCC did not oppose the participation of any of the four candidates in the auction, including among them Banamex, the first biggest bank of Mexico.

Recently, Banco Bilbao Viscaya-Argentaria (BBVA) informed the FCC about its intention to acquire 40 percent of the capital stock of Bancomer, the second biggest bank of Mexico. This concentration is still under review. Afterwards, Banamex showed also its interest to acquire the control of Bancomer. It is known that Bancomer is studying both offers.

For a somewhat more detailed but less recent description of the regulatory framework of the Mexican financial system and of the involvement of the FCC in the financial sector see OECD, Committee on Competition Law and Policy, *Enhancing the Role of Competition in the Regulation of Banks*, DAFFE/CLP(98)16, Paris, 1998, pp. 147

1. Product market definition

In the analysis of mergers in the financial sector there is a general awareness in the FCC that markets should be defined at a desegregated level. In the first place different types of financial services, such as banking, securities, factoring, leasing, pension funds and insurance, should be separated into different relevant markets. In the second place, it may be necessary to split up such types of services further into narrower groupings: for example, banking services into deposits, credit to different types of clients, payments, credit cards, etc. and insurance services into life, health, accidents and damage, among others.

a. The product cluster debate – is a single measure of a bank's commercial activity (i.e. deposits) sufficient for calculating market shares and making initial estimates of the effect of a bank merger on competition, or alternatively, must one adopt a finer product market definition?

1.1 Banks

Until recently, most bank mergers in Mexico involved mainly the acquisition of small failing banks by foreign banks, either with minor shares in domestic markets or not participating at all before the merger. In the analysis of such mergers it was fairly clear from the beginning that they would not raise serious competition concerns, so that it was not necessary to go into much product detail. Instead, a cluster approach was adopted in which the market shares of the participants in the mergers were measured in terms of deposits.

In the evaluation of the prospective participants in the public auction of Serfin, - the third most important financial group in Mexico - mentioned above deposit and credit operations were dealt with separately and pre and post-merger concentration indexes were calculated for both markets. The reason for the auction was that Serfin got into solvency problems and was recapitalised by the IPAB with the aim of auctioning it later. The participants were three foreign financial groups: Santander Mexicano, HSBC Bank and Citicorp, and one domestic financial group: Banamex. The FCC did not object the participation of any of these groups.

A similar approach is adopted in the analysis of the merger between BBV-Argentaria and Bancomer which is currently under review by the FCC[3]. There, a further distinction is made between different kinds of bank deposits and between credits to different types of clients, such as corporate credit, mortgages, credit cards, credit for cars, etc., all of which are considered to belong to different product markets.

1.2 Insurance

In the analysis of mergers of insurance companies the FCC has established that different types of insurance belong to different product markets. A first distinction has been made between three broad types of insurance: life, accidents and health, and damage insurance. Although the first two types can be desegregated further no such desegregation was deemed necessary for the purpose of the analysis of one of

the most important transactions evaluated by the FCC in the insurance sector, the auction in 1995 of 70 percent of the total capital stock of Aseguradora Mexicana (Asemex), belonging to the Asemex-Banpais financial group. The sell off of Asemex by Banpais was a consequence of financial problems suffered by the latter. In the evaluation of the participants in this tendering damage insurance was split up further into the following relevant markets: fire, civil liability, maritime and transport damage, cars, agriculture, credit and various.

1.3 Pension funds

Since the reform of the pension funds system in 1996 the FCC has analysed transactions creating Afores (private companies administrating private pension funds) and Siefores (mutual funds companies investing those pension funds) as well as mergers between different Afores and Siefores[4]. The relevant market of the Afore transactions was defined as the administration of the worker's individualised accounts and of the mutual funds created for the investment of the pension funds.

b. Does your evidence suggest that companies providing factoring and leasing services, residential mortgages, or money market funds compete with services offered by banks? Please describe your reasoning as regards the inclusion or exclusion of these or other potentially competing products in product definitions you have relied on in bank mergers.

Factoring, leasing and residential mortgages have been considered as separate services. Evidently, there is competition within each of these services between banks and non-bank providers of the same services, but potential competition between those services and with other credit operations by banks has not been taken into account explicitly in the analysis of merger cases so far. A quantitative assessment of the degree of substitutability between those services would be an extremely difficult exercise, however.

c. What separate markets have you determined exist in relation to credit card networks?

Merger cases analysed by the FCC so far did not involve the merging of credit card systems so that those mergers did not affect market structures irrespective of the market delineation that would have been adopted. However, in the analysis of monopolistic practices incurred by credit card systems a distinction was made between three different functions: (*i*) services to affiliated merchants paid for through commissions charged to merchants, (*ii*) credit to card holders paid for through interest rates and (*iii*) clearance operations. These services are not substitutable but highly complementary, so that there is little doubt that they belong to separate relevant product markets.[5]

2. Geographic Market Definition

a. What geographic markets have you identified for the principle products? What evidence did you rely on in doing this?

In the analysis of merger cases in the financial sector the geographic dimension of the markets has been recognised and the regional and local shares of the merging parties have occasionally been analysed. However, considering that bank licences have a national dimension, markets were defined to be national and concentration indexes which underlie the decisions of the FCC have been calculated at the

national level[6]. Where markets surpass national boundaries, which may be the case in markets such as credit to large corporations and reinsurance, competition concerns are usually small.

b. What is the impact of any de jure or de facto foreign ownership constraints that your country might have?

As a result of legal amendments of trade agreements, which Mexico has signed with its NAFTA partners, participation of foreign capital in the Mexican financial sector has increased progressively and entry barriers in most markets have been lowered. Since 1998 foreign economic agents are allowed to own 100 percent of the capital stock of Mexican banks. So far, this kind of measures have increased competition in the financial market.

To give an example, in the insurance markets competition has become more intensive in the previous decade as a result of amendments to the General Law of Insurance Institutions and of the entry into force of NAFTA, by which entry barriers were lowered. Partly in view of the intensification of competition in the relevant market, the FCC resolved to authorise the participation of all candidates in the Asemex auction, mentioned earlier, even though at the time the competition analysis was carried out the market was considered moderately concentrated.

3. Assessing anticompetitive impact other than barriers to entry

a. Does your agency believe that the "failing firm doctrine" should be customised for application in bank mergers? If so please explain why and indicate how this should be done.

There is no explicit recognition of a failing firm defence in the Mexican competition legislation. However, the possibility that a firm might be obliged to close down operations definitively, in case its acquisition by a competitor would not be allowed, has definitely been taken into account in the assessment of the pro and anticompetitive effects of such mergers.

As mentioned in the introduction, the previous decade has witnessed number of acquisitions of small failing banks mostly by foreign firms. However, none of these transactions has raised competition concerns, irrespective of the condition of "failing firm" of the acquired party. Therefore, the FCC has never been involved in the prospective search of alternative candidates to acquire the failing firm, typical for failing firm defence procedures in other countries.

b. How does regulation of commercial conduct, if any affect your assessment of a merger's competitive effect?

In Mexico neither interest rates nor fees for other services are established by the authorities. There are some minor regulations, such as the obligation of banks to relate variable interest rates to officially authorised reference rates but such regulations have never been of concern in the analysis of bank mergers.[7]

c. Do state owned banks, including those operated through publicly owned postal services, provide a means for, in effect, regulating interest rates (both offered and charged) in the banking sector? If so, how does this affect your analysis of the competitive effects of a merger?

All commercial banks in Mexico are privately owned. The government stake in them is very small. However, there are six development banks and three trusts with a majority state ownership. Taken together the latter have a small share in the Mexican credit market. Therefore, it is unlikely that they could effectively regulate interest rates. An exception should be made for special groups of clients not having access to commercial credit and thus dependant on credit granted by development banks. If those credits are considered to belong to separate markets, interest rates in these markets are effectively set by development banks. Such effective regulation of interest rates has not affected the analysis of mergers between commercial banks, however.

4. Barriers to entry (i.e. including barriers to expansion and exit)

How is your analysis of the competitive effects of a bank merger influenced by barriers to entry and related factors? You might wish to give special consideration to the following:

a. Developments in electronic banking (ATMs, debit cards and Internet banking);

Electronic banking is transforming the way financial services are provided and will be provided in the future. Nevertheless, there are several financial services that still need personal contact to be offered such as credit to small and medium size businesses. Furthermore, the penetration of internet in Mexico is low, and is not expected to increase significantly in the near future, so the FCC is not yet giving much attention to electronic banking in defining larger relevant markets for the evaluation of mergers.

b. Are branches becoming obsolete? How and why is their role changing?

For similar reasons, bank branches are still very important for the provision of financial services in Mexico. Therefore, the availability of branches is still very necessary for a bank to offer retail services.

c. Existence and importance of economies of scale and economies of scope;

In 1995, when the consolidation process in the Mexican banking market began, there were many banks, but some of them with very small market shares. In addition to solving the capitalisation problems faced by some banks, some mergers involving small banks were intended to achieve an appropriate size for competition in the market. Economies of scope seem to be a plausible explanatory factor of mergers once a minimum optimal size is achieved.

d. State provided deposit insurance, including related regulations;

Institutions competing with some of the services banks provide, such as savings institutions, do not have state provided deposit insurance, and some of them had experienced bankruptcy affecting its consumers. For this reason, consumers might view the services these institutions provide as imperfect substitutes for the services of banks. State provided deposit insurance might be an entry barrier for deposit-taking institutions other than banks.

e. Impact of regulation restricting entry;

Regulation on entry into the market of financial services has experienced important changes recently, diminishing significantly entry barriers; this has been taken into account in the evaluation of some mergers. Banking and securities markets have been considered contestable by foreign institutions, and this was an important reason for the approval of participants in the public auction of Asemex, as mentioned above.

With the entry into force of NAFTA, Canadian and United States financial institutions were allowed to participate through affiliates with an aggregate market share of eight percent in 1994, increasing gradually to 15 percent. This limit was released further in 1995 allowing financial institutions a 25 percent aggregate market share. Capital structure requirements were also reformed in 1995, permitting foreign capital's share in a bank increase from 30 percent before the reform, to 49 percent after. In 1998 all remaining restrictions on foreign shares in Mexican financial institutions were eliminated. Furthermore, 1995 reforms allowed limits on stock holding of foreign capital in subsidiaries decrease from 99 percent before the reform, to 51 percent after.

The 1995 reforms applied to banks accounting individually for less than six percent of the total net capital of the banking system, but in 1998 this requirement has been eliminated, permitting the share of foreign capital in all banks to increase.

Nevertheless, foreign banks are not allowed to establish branches directly. That is, if they want to establish branches, they will first have to constitute an affiliate subject to all-applicable authorisations and regulations.

f. State ownership plus any special advantages conferred by the state on a sub-set of the country's banks; and

See the answer to question 3d.

g. The existence of banks considered too big to fail (i.e. banks which are virtually assured of whatever State aid is necessary to keep them afloat in a crisis)

Evidently, consumer perception of the safety of their deposits may be different from big long established banks to new entrants. This is, however, a normal phenomenon and up to a certain extent, independent of the expectations that big banks would never be allowed to fail. As long as the rules governing the access to the deposit insurance scheme are not discriminating against new entrants, there is little to worry about, because deposits with new entrants would be equally safe.

5. Efficiencies

a. Are mergers necessary in order to reap significant efficiencies and, sometimes, to permit banks to survive and prosper in increasingly globalise markets? How credible are such claims?

In the analysis of bank mergers evaluated so far the FCC has considered the possibility of synergies through economies of scale and scope. However, because of a lack of competition concerns in those mergers it has never been necessary to arrive at a detailed quantification of those synergies. Moreover, the FCC is aware that mainstream literature is rather critical about the existence of economies of

scale in the banking sector once a minimum size has been achieved. For example, by outsourcing software services for payments clearance small banks can fully enjoy the network benefits of clearance systems.

Another important effect, which can be taken into account more easily, is that a merger of an undercapitalised bank with a bank with a strong capitalisation ratio may result in a bank without capitalisation problems.

One such transaction was the shares' acquisition of Grupo Serfin by HSBC with the aim of capitalising Banca Serfin. Despite the size of the Mexican financial institution, the transaction had no significant impact on the relevant market structure due to the prior absence of HSBC in the domestic market. The concentration was rather aimed at to strengthening Grupo Serfin and the international geographic diversification of HSBC.

Another important transaction involved the purchase of stock in Grupo Financiero Bancomer, S.A. by the Bank of Montreal, that was aimed at capitalising Bancomer, and also at the development of new products and services in the USA and Canada, taking advantage of Bank of Montreal's position in those markets. The merger was approved considering these efficiencies, and because it had no significant impact on the structure of the relevant market.

Competition analysis on transactions evaluated so far, involving foreign banks, have led to the conclusion that these operations add to restructure and strengthen the Mexican banking system, and to further competition. For example, capitalisation of Serfin ensures a balance among the three big institutions that account for 50 percent of funding; on the other hand, growth of banks with a smaller share in the banking market reinforces them as competitors in a concentrated market.

b. *Do you consider that geographical diversification contributes to the stability of your country's banking system? Is this something you weight when assessing bank mergers, and if so, how important is it?*

So far, all bank mergers have had a national dimension.

6. Remedies

a. *What structural and behavioural remedies have you applied in order to condition what would otherwise be an unacceptable bank merger?*

Until now there has been no need to impose structural or behavioural remedies to bank mergers in the Mexican experience.

b. *In your experience, what have been the advantages and disadvantages of structural as opposed to behavioural remedies in bank merger cases?*

Not applicable

c. What should agencies do to ensure that branch divestitures effectively eliminate anticompetitive effects?

We have no experience.

7. How do you interact with prudential regulators in the course of analysing and reaching decisions concerning bank mergers? What could be done to improve that interaction?

Mexican competition law fully applies to mergers in the financial sector. Prudential regulators do not intervene in the competition aspects of bank mergers, they rather consider other aspects such as banks financial health, consumer protection, etc.

Bank regulators in Mexico are the following:

- Ministry of Finance and Public Credit (MFPC): This is the most important Federal Government agency engaged in bank regulation. It has the power to co-ordinate, plan and supervise the banking system, and to grant and revoke authorisations of financial intermediaries.

- National Banking and Securities Commission (CNBV): This is an agency of the MFPC, in charge of the supervision, surveillance and of certain regulatory aspects of the banking system.

- Banco de México: This is the autonomous central bank. It regulates financial services and intermediation, as well as the payment system. It is in charge of foreign exchange policy.

The Credit Institutions Law also contains certain rules regarding mergers. Article 27 of that law states that any merger between two or more banking institutions requires approval by the MFPC, which in turn will consult the Banco de México and the CNBV. In its decisions the MFPC will look after the interests of the public and of the banks' employees. The bank's creditors may object to the merger within 90 days with the sole objective of obtaining credit repayment, not to suspend the merger.

As the mergers in the banking sector analysed so far have not raised important competition concerns there has been little need for intensive interaction with prudential regulators. The FCC and the MFPC evaluate the merger with their own criteria and each of them can block the merger even if the other does not. That is, a merger may raise no public interest concerns but still be undesirable from a competition perspective and vice versa. Until now no such conflicts have arisen, however.

8. Other than failing firm considerations, is there a need for a special regime for bank merger review?

a. Does the general competition law enforced by the general competition agency fully apply to bank mergers in your country? If not, could you please describe what role, if any is played by the competition agency in reviewing bank mergers.

The Federal Law on Economic Competition (FLEC) fully applies to bank mergers in Mexico. Every bank merger exceeding the thresholds established in the Competition Law must be notified to the FCC.[8]

b. *If a special regime is indeed applied for reviewing bank mergers in your country, are you satisfied with it? If not, how would you like changed it and why?*

Not applicable.

c. *Have you dealt with mergers of banks having substantial influence (due to equity holdings, inter-locking directorates, loan dependency etc). Over the competitive behaviour of firms in the non-financial sector of the economy? If so, have any such mergers amounted to mergers as well of the closely linked non-financial companies? If this has been the case, what problems (e.g. meeting review period deadlines etc.), if any, have been encountered and how have they been resolved?*

Control by banks over firms outside the financial sector is limited by restrictions on equity holdings. However some industrial groups have important stakes in some banks. Moreover, the big banks have important stakes in some important firms that were on the verge of bankruptcy during the 1995 crisis as a result of capitalisation of overdue loans. Apart from that, Banamex and Bancomer have a strong participation in Avantel and Alestra respectively. The latter companies are long-distance carriers in the telecommunications sector.

9. Have bank mergers in your country involved special political sensitivities? If so, what was their nature and how were they addressed by your agency or by some other part of the government?

Usually bank mergers involve economic sensitive aspects but so far political sensitivities have been absent.

10. As regards bank merger cases, please describe your agency's experience of the costs and benefits of co-operation with other countries' competition offices. How, if at all, could that co-operation be improved?

Mergers in the banking sector involving foreign firms have not raised competition concerns so far. During 1999 the FCC has consulted with competition authorities in Spain, Switzerland and Canada not so much about concrete merger cases but about technical aspects related to the evaluation of bank mergers.

NOTES

1. Until 1998, national banks with a market share larger than six percent were excluded from being acquired by foreign banks under this liberalisation scheme.

2. In Mexico, the institution in charge of protecting bank deposits is the IPAB. At the moment the protection is almost complete but it will progressively be dismantled until 2005 when only deposits up to approximately 110 000 US dollars will be protected.

3. This merger is analysed independent from the hostile offer by Banamex to acquire Bancomer. Evidently, only one of the two transactions can materialise.

4. The intimately related Mexican social security and pension systems were reformed in 1994 and in 1996 respectively. The reform brought the FCC involvement in the evaluation of transactions on the pension funds market.

   The Mexican social security system is financed by compulsory contributions by workers, employers and the government. Before the 1994 reform, the social security system received the financing for all the services that it provides, related to illness, accidents, childcare, maternity, and pensions of death, retirement and disability. There was no separation of the funding for each kind of service, which brought insolvency risk to the whole system.

   The 1994 reform consisted of the separation of the financing of pensions and housing, creating separate accounts for each worker. The 1996 reform consisted of the compulsory administration of the pension funding by the Afores. Furthermore, since its creation, each Afore must establish a Siefore.

5. For a more detailed description of those cases see OECD, (1998), Ibidem

6. In the evaluation of the participants of the public auction of Serfin the shares of the participants in each of the 32 states were considered although no concentration indexes are presented at that level.

7. This does not imply a regulation of interest rates themselves. Banks remain free to set the number of percentage points that will be charged in excess of the reference rate.

8. Article 20 of the Law establishes that mergers must be prenotified in the following cases: (*i*) the transaction involved has a value higher than twelve million times the minimum daily wage for the Federal District (equivalent to roughly US$ 42 million); (*ii*) the transaction implies an accumulation of more than 35 percent of the capital of an economic agent whose capital value or annual sales exceed twelve million times the minimum wage; or (*iii*) the merging parties together account for a capital value or annual sales of more than 48 million times the minimum wage (US$ 190 million) and the transaction implies an accumulation of capital of more than 4.8 million times the minimum wage (US$ 19 million).

POLAND

The banking sector is the biggest and the most developed segment of financial market in Poland. At the end of 1999, net assets of the banking system constituted approximately 90 percent of the assets of regulated financial sector (banks, brokerage houses, pension funds, insurance companies, trust and investment funds). They were about thirteen times higher than the assets of the insurance companies - the second biggest sector of the financial market.

1. Dynamics of the sector, concentration processes (data as of 1999)

In order to maintain or enhance market position, banks can choose two development strategies:

- internal growth through re-invested earnings;
- external growth realised by mergers and take-overs.

While the first strategy is long-term, the second one – directed towards the concentration of capital enables fast increase of share in the market and synergy benefits.

In this context, we can distinguish the following key growth strategies:

- construction of branch network, banks' interest in retail banking in order to ensure liquidity by opening branches with "front office" only, e.g. WBK S.A, Kredyt Bank S.A., Bank Handlowy in Warsaw S.A., PBK S.A, BIG Bank Gdanski S.A;
- activities of former retail banks are subject to diversification towards corporate segments, e.g. PKO BP, Bank Pekao S.A.;
- diversification of activity into non-bank services, e.g. pension and investment funds, insurance, brokerage houses, leasing, by such banks as Bank Handlowy S.A, Kredyt Bank S.A, PBK S.A., BRE Bank S.A., Bank Pekao S.A., BIG Bank Gdanski S.A., BPH S.A.;
- growth through consolidation processes, mergers and purchases: BIG Bank Gdanski S.A., Bank Pekao S.A., Kredyt Bank S.A., BRE Bank S.A.

Among main reasons and purposes of concentration processes in Poland we can distinguish:

- consolidation of foreign banks that is directly reflected by their Polish equivalents;
- improvement of effectiveness (synergy effect), necessity to adjust the scope, quality and prices of services to international competition;
- increase of own funds of banks (increase of the activity scale, ensuring safe development);

- getting the "critical mass" to realise the benefit of scale;

- development of universal banks (combining retail, corporate and investment banking), using existing countrywide networks.

The Polish banking sector (likewise in other countries) is in the process of consolidation. The year 1999 was the year of mergers and take-overs:

- on January 1st, the biggest merger in the Polish banking sector took place - combined four banks that were the members of Grupa Pekao S.A. (Powszechny Bank Gospodarczy S.A., Pomorski Bank Kredytowy S.A. and Bank Depozytowo-Kredytowy S.A. with Bank Polska Kasa Opieki S.A.);

- Powszechny Bank Kredytowy S.A. purchased the banking enterprise Pierwszy Komercyjny Bank S.A. and as of July 1st included its offices into its structure;

- in 1999, the statutory fund of Bank Gospodarstwa Krajowego was increased by including the possessed block of shares of Bank Rozwoju Budownictwa Mieszkaniowego S.A. that, as a result, became a bank indirectly (formerly directly) controlled by the State Treasury.

Moreover, in the IV quarter of 1999, the following took place:

- - merger of Bank Energetyki S.A. with Bank Inicjatyw Spoleczno-Ekonomicznych S.A.;

- - consolidation of three banks possessed in Poland by Bayerische Hypo-und Vereinsbank AG, i.e. 100 percent shares of HYPO-BANK Polska S.A. were contributed into Bank Przemyslowo-Handlowy S.A., and Hypo Vereinsbank Polska S.A. was merged with Bank Przemyslowo-Handlowy S.A.

As a result of consolidation, the number of commercial banks decreased from 83 at the end of 1998 to 77 at the end of 1999. One new bank was established (RHEINHYP-BRE Bank Hipoteczny S.A.) and the bankruptcy of SAVIM Bank Depozytowo-Kredytowy S.A. was declared.

In 1999, the ownership structures of many commercial banks were essentially changed mainly through privatisation (BPH S.A., Bank Pekao S.A., Bank Zachodni S.A. and Bank Wlasno•ci Pracowniczej -Unibank S.A.), and mergers with both financial and non-financial companies. Prominent among these changes were:

- BWR S.A. sold the majority block of shares of BWR Bank Secesyjny S.A. to DaimlerChrysler Services (debis) AG;

- foreign investors took over Grupa Kredyt Banku S.A. (also indirectly over Prosper-Bank S.A.);

- the shareholder structure of BIG BG S.A. was changed;

- Kredyt Bank S.A. acquired 18.6 percent shares of Bank Ochrony Srodowiska S.A.;

- Belgian Fortis Bank NV acquired 98.4 percent shares of PPA Bank S.A.;

- German DG Bank AG increased (to 71.1 percent) its share in Bank Amerykanski w Polsce S.A. “AmerBank”;

- the strategic investor of Invest-Bank S.A. became Telewizja “Polsat” S.A., which with the depended entity at the end of December possessed 51.7 percent shares of the bank;

- Bank Pocztowy S.A. became a strategic investor in Wielkopolski Bank Rolniczy S.A.;

- in December, Bank Komunalny S.A. was taken over by Nordbanken.

In 1999, the quantitative and ownership structure in the banking sector according to the data of the General Inspectorate of Banking Supervision was as follows:

- the number of banks with the State Treasury capital majority that performed their activities in Poland decreased from 13 at the end of 1998 to seven at the end of 1999 (including three banks that are directly controlled by the State Treasury);

- there were 70 privately controlled banks in Poland in 1999 (unchanged from 1998);

- at the end of 1999, the shareholder's equity of majority foreign owned banks accounted for 57.6 percent of all shareholder equity in commercial banks. Funds and net assets of majority foreign owned banks – reflecting respectively their potential and real share in the bank services market, constituted 50.2 percent and 47.2 percent respectively of funds and net assets of the banking system.

Foreign capital in Polish banks is characterised by a high degree of dispersing. At the end of 1999, the biggest share in the capital of banking sector in Poland belonged to capital from: Germany – 14.73 percent, USA – 12.95 percent, Holland – 7.37 percent.

During the latest period, the range of bank product offerings was subject to an evolution. At the beginning of the 1980’s, banks offered only basic banking products such as loans, deposits and transfers. Now, their offer becomes more and more complex and it includes advising and managing services in the area of non-bank financial services.

In order to enter other segments of the financial market, Polish banks establish affiliate firms. The necessity to establish separate firms in such segments as leasing and brokerage houses results from the Banking Act that forbids banks to perform non-bank activities. Now, earnings of affiliate firms are generally positive but they still play a little role as compared to earnings from banking operations, however, the role of affiliate firms increases.

The most important areas of activities of banks’ affiliate firms are the following:

- lease companies;

- brokerage houses;

- investments in insurance companies;

- insurance funds established as joint ventures with foreign partners and banks;

- pension funds also established as joint ventures with foreign partners.

2. Barriers to entry/exit

In the opinion of the Polish banking sector representatives, one can identify the following barriers to entry/exit:

Legal and regulatory requirements are considered as serious barriers due to the complexity, high number and constant evolution of the pertinent regulations. Difficulties among others include the requirement for an authorisation to conduct banking activity (The Commission for Banking Supervision in consultation with the Ministry of Finance grants authorisations), in conformity with art. 22.3 of the Banking Law, the appointment of the two-bank board's members including President require the approval of the Commission for Banking Supervision.

Capital. The requirement concerning the initial capital amounts to EURO five million, which is not considered as a serious entry barrier to the market.

People, as the commercial banking sector in Poland has only got ten-year experience in conditions of market economy, the number of qualified and experienced staff is still not sufficient and the costs of the qualified staff employment are high. The above conditions are considered as a serious entry barrier.

"History", this concept relates to reliability and reputation and it plays a key role in attracting customers and increasing the market share, in the opinion of the representatives of the branch it is considered to be a medium barrier.

3. Banks' mergers control: antitrust law and sector regulations

The banking sector is generally subject to regulations resulting from the *Act on counteracting monopolistic practices and protection of consumer interests of February 24, 1990* (Poland's general competition law)**,** both in the scope of counteracting monopolistic practices and influence upon formation of structures of undertakings in terms of protection and development of competition.

Thus, the Office for Competition and Consumer Protection (OCCP) controls the following situations:

(*1*) Mergers with the sole participation of banks

The following transactions concluded between banks are subject to notification to the antitrust authority if the total value of the participating banks' combined shareholder equities exceed EURO 50 million at the end of the preceding calendar year:

- merger of banks;
- taking over or acquiring shares or equities of another bank that results in reaching or exceeding 25 percent, 33 percent or 50 percent of votes at the general shareholders meeting or the meeting of partners of this bank;
- acquiring or taking over by a bank once or several times during next twelve months the organised part of another bank's property if the total value of this property exceeds EURO five million, and this value is calculated according to buying rate of foreign currencies, announced by the NBP on the day before the notification;

- taking over by the same person the position of a director, deputy director, member of management board, supervisory board or internal audit commission or chief accountant in banks that are competitors;

- taking over in any other way, directly or indirectly, the control of another bank.

The criterion of EURO 50 million is only applied to establish the notification obligation in case of transactions where all the parties are banks. If a bank and a non-bank participate in a transaction considered by the antitrust law to be a merger, the criteria for the notification obligation are different.

(*2*) Mergers of banks with non-bank entities

A bank may be obliged by the antitrust law to notify its intent to effect a transaction with the participation of a non-bank entity.

Practically, this obligation may be established in the following cases:

(*a*) Acquisition of shares or equities

The notification is required in case of the acquisition or taking up by a bank the shares or equities of other entrepreneurs at the amount that results in reaching or exceeding 25 percent, 33 percent or 50 percent of votes at general shareholders meeting or the meeting of such entrepreneur partners only when the total value of annual sales of the acquired entity exceeded EURO 25 million in a calendar year before the year when the intent is notified. In calculation of the total value of annual sales of the acquired entity there are considered both the value of sales of the entity itself the shares or equities of which are being acquired and the sales made by its parent entity and dependent entity.

The notification will not be required if the taking up or acquisition of shares (equities) by a bank was made with an intent to sell them before one year and, at the same time, the rights of the possessed shares or equities are not exercised except for the right to dividend and the right to sell them.

Since January 1st 1998, the notification obligation also relates to the intent to acquire shares traded publicly (before, the notification was made only to the Securities Commission, which consulted the antitrust authority, before making decision).

(*b*) Acquisition of the organised part of the property

The notification obligation also relates to the intent to acquire or take up by a bank, once or several times during next 12 months, the organised part of the property of the non-bank entity if the total value of this property exceeds EURO five million.

(*c*) Take-over of the control

The notification obligation also relates to the intent to take over by a bank, in a way that is different from the above mentioned, the direct or indirect control over another non-bank entrepreneur if the total value of annual sales of the merging entrepreneurs (i.e. the bank and the acquired entrepreneur and their dependent entities and parent entities) exceeded EURO 25 million in a calendar year before the year of notification. An example can be the agreement with the majority shareholder of the company according to which this shareholder will be obliged to vote in some issues according to recommendations given by the bank. This case also includes the bank's right to object or to approve any decisions in key matters connected with the activities of the entrepreneur that result from a loan agreement, for instance.

All the decisions made by the antitrust authority that forbid merger or transformation of entrepreneurs or order the division or the liquidation of an entrepreneur and the limitation of its business activities could be appealed to the Antitrust Court.

The control of capital ties in the banking sector is performed not only on the basis of antitrust regulations but also on the basis of sector regulations and regulations concerning the public trade of securities.

The Banking Act of August 29, 1997

According to Article 113 item 1 of this act, domestic joint-stock banks may merge to form banking groups, so-called bank holdings. It is defined that a banking group shall constitute a group of banks organised in such a way that the bank termed the "dominant bank" holds an equity interest in another bank or banks, termed "dependent banks", conferring the right to over 50 percent of the total votes exercisable at shareholders`s general meetings of each subsidiary bank. A dependent bank shall not hold equity in a dominant bank. A dominant bank, in turn, shall not be related by capital and management with another domestic bank as the dependent entity. A bank may belong solely to one banking group; this shall not deprive banks belonging to such a group of the right to acquire shares in other banks, including banks within the same group, with the exception of acquiring shares in the dominant bank by a subsidiary.

Such laws are to prevent the so-called "double gearing". Therefore, the act includes the direct ban of the so-called "cross" shares.

In the scope of mergers' control, the bank holdings are subject to the regulations of the Act on counteracting monopolistic practices and protection of consumer interests.

In turn, Article 124 of the Banking Act says that joint-stock banks can merge with each other. However, the performance of a merger by contributing the assets of one bank to another in exchange for equity shall require the approval of the Commission for Banking Supervision.

Additionally, the Banking Act imposes some restrictions in case of banks acquiring shares in other entities, the so-called capital concentration limits. Therefore, banks can take up or acquire shares and rights conferred by such shares, shares of other legal non-bank entities or participation units in trust funds but their total value, however, in relation to one entity cannot exceed 15 percent of a bank's own funds. The total value of a bank's investments in shares, stocks and participation units cannot exceed 60 percent of a bank's own funds. It does not relate, *inter alia*, to the acquisition of shares and rights conferred by shares of other banks, shares of pension companies and companies that run brokerage houses if at least 75 percent shares of these entities is owned by a bank or banks. Therefore, such a solution does not impose additional barriers in the process of banking sector consolidation. The attention should be paid to the fact that capital concentration limits relate to the insurance sector. At some degree, it restricts establishing in Poland financial conglomerates with the participation of banks and insurance companies. Therefore, as the final objective it is planned to exclude insurance companies from the capital concentration limit requirements, and this solution is consistent with the Second Banking Directive of 1989.

The banking law also introduces, within the framework of the licensing process, the control of the acquisition of banks' shares. According to Article 25 of this Act where a party takes up or acquires shares in a bank or the rights conferred by such shares, or intends to do so, the party shall be required to obtain, in each case, the approval of the Commission for Banking Supervision for the taking up or acquisition of shares, or the rights conferred by such shares, where such shares or rights, together with any already held, would give that party a holding entitling them to over ten percent, 20 percent, 25 percent,

33 percent, 50 percent, 66 percent or 75 percent, respectively, of voting rights at a general meeting of the bank's shareholders.

The Commission for Banking Supervision may refuse approval for the acquisition of shares, or the rights conferred by such shares, where the party intending to acquire such shares or rights does not give adequate guarantee of conducting the bank's affairs in a manner that will properly safeguard the interests of its customers, or where the funds assigned by the party in question to the acquisition of the shares or rights constitute the proceeds of a loan or advance, or the sources of such funds are undocumented.

Moreover, in order to enhance the banking sector stability, on the basis of the *Act on the Bank Guarantee Fund of December 14th 1994*, the Bank Guarantee Fund has been established. The tasks of the Fund, *inter alia*, are as follows:

- provision of the refundable financial assistance in case of the threat to the solvency or for the acquisition of shares or equities of banks;
- purchasing debts of banks that are in the situation where their solvency is threatened;
- control of the proceedings aimed at the sanation of the activity of the entity that is covered by the guarantee system, in situations defined in the act.

In relation to banks that have obtained the status of public companies, the *Act on public trade of securities of August 21st 1997* (Article 149) any party that intends to acquire shares of a public company at the amount that would result in reaching or exceeding 25 percent, 33 percent or 50 percent, respectively, of the total number of votes at the general shareholders' meeting, is obliged to notify this to the Securities Commission. The Commission refuses to grant the approval if the acquisition results in the breach of the act or threatens the important interest of the state or the national economy.

The legal act that provides for the exclusion from the domestic competition law the defined cases of banks' mergers is the *Act on merger and association of joint-stock banks of June 14th 1996.* This Act defines a banking group (Article 2) that may be established by joint-stock banks (Article 1, item 2), the share capital of which is possessed by:

- state Treasury;
- a state-owned bank;
- a state-owned enterprise;
- a joint-stock company the share capital of which is possessed by the State Treasury;
- a joint-stock company the share capital of which is fully possessed by the National Bank of Poland or partially by the National Bank of Poland and partially by one or more entities mentioned in points 1-4 above.

The provisions of the Act (Article 13) provide that two or more banks, mentioned in points 1-5 above, may merge into one bank. Such merger, however, is not regulated by Poland's general competition law A; i.e. the intent to merge need not be notified to the antitrust authority.

Due to the nature and importance of the banking sector for the economy, and also due to the need to protect the interests of bank services consumers, banks are subject to different regulations aimed at

reducing their risks. Banks are also subject to more supervision as compared to other enterprises. The mentioned regulations undoubtedly influence the principles of competition on the bank services market.

Generally, the antitrust authority is responsible for the implementation of the competition law in the banking sector. However, due to the regulations discussed above which set forth the banks' activities, the essential influence on competition in banking is exercised by such institutions as the National Bank of Poland, the Commission for Banking Supervision or the Bank Guarantee Fund.

The National Bank of Poland (NBP) as the central bank of the state and the bank of issue has got such tasks as, *inter alia*, formation of monetary policy and establishing the necessary conditions for the appropriate functioning and development of the banking system.

The President of the NBP is appointed by the Sejm, upon the motion of the President of the Polish Republic for the period of six years (Art.9.1 Act on NBP). The NBP implements the monetary policy and regulates the banking system, issues the currency. The NBP manages the most important monetary policy instruments such as interest rates, foreign currency exchange rules, the required indices of reserves. Besides the monetary policy, the NBP is responsible for the foreign exchange and balance of payments policies.

The President of NBP chairs the Monetary Policy Council that draws up the monetary policy guidelines.

A special role is played by the Commission for Banking Supervision (CBS) the tasks of which are, *inter alia*, the following:

- setting out principles for the conduct of banks' activities that ensure the safety of the funds held by customers at banks;

- supervising banks in terms of their compliance with law, their articles of association and other legal regulations, and also with mandatory safeguard standards, performing periodic assessments of the financial condition of banks.

An important area of the banking supervision activities are procedures connected with sanation proceedings, liquidation or a bank take-over and its bankruptcy. According to the provisions of chapter 12 of the Banking Act, a bank that has suffered a net loss may merge with another bank only when so authorised by the CBS. Where a bank has incurred a loss amounting to more than half of its shareholders' equity, the CBS may order it to be acquired by a consenting, solvent bank. Such a merger is subject to the same OCCP review as any other bank merger. There have been instances where the CBS has ordered such mergers. So far the OCCP has not blocked any of them, which is not surprising given that they have all involved the acquisition of quite small banks. The CBS also makes decisions as far as the authorisation for the establishment of a bank is concerned and must be informed regarding the establishment of a banking group.

The Bank Guarantee Fund may grant loans or guarantees to entities covered by the guarantee system on conditions that are more favourable than the conditions commonly used by banks in cases when the entity's solvency is threatened or in case of an intent to take over a bank, merger of banks or the purchase of the other bank's shares. The entities covered by the mandatory system of guarantee for funds held at bank accounts are all banks that conduct their activities in the Republic of Poland according to the Banking Act, except for co-operative banks that participate in regional associations.

It should be emphasised that the above mentioned institutions' activities are based on the different than the competition protection criteria that result from the legal regulations being the basis of their activities. These regulations do not exclude the antitrust law.

4. Antitrust authority practices

While performing the analysis of banks' mergers notified according to the antitrust law, the antitrust authority defined the market considering both consumers (households or natural persons, entrepreneurs) and the offered products (deposits denominated in PLN, foreign currency deposits, loans, bank accounts, savings accounts, home banking services, etc.).

The geographical market was most often defined as the domestic market. In some cases, it was the regional (local) market. New types of bank services, via Internet or phone banking, are currently rendered by few banks and not to a large extent. Therefore, they do not substantially affect the objective structure of banking services market. Growth in significance of banking services is only a question of time bearing in mind that the development of the banking services is dynamic.

Mergers in banking sector considered by antitrust authority within the period 1995 – 1st half 1999

#	Description	1995	1996	1997	1998	1st half 1999	Total 1995-1st half 1999-
1.	Total (sum of rows: 2,6,7)	1	11	14	36	10	72
2.	Including the ones related to: - mergers of 2 banks (Art. 11 item 2, point 3 and item 3 of the Act on counteracting monopolistic practices and protection of consumer interests), (sum of positions: 3,4,5) where:	-	9	8	21	6	44
3.	◆ domestic banks	-	5	6	6	-	17
4.	◆ a domestic bank with a foreign bank	-	4	-	13	5	22
5.	◆ foreign banks (with registered seats outside Poland)	-	-	2	2	1	5
6.	Acquisition of shares of a domestic bank by the other entity (non-bank)	1	-	1	12 (including 5 by a foreign entity)	2	16
7.	- merger of two banks due to joining by the same people the positions defined in Article 11 item 2 point 5 of the Act on counteracting monopolistic practices and protection of consumer interests	-	2	5	3	2	12

SPAIN

1. Introduction

1.1 Scope of our work

We will analyse in this report two major banking mergers notified to the Spanish Competition Authorities during 1999, and we will explain how the Competition Authorities have approached and assessed the product and geographical markets of the merging banks. Neither of these mergers involved a failing firm consideration, and they have no EU dimension because more than 2/3 of the turnover of the banks was domestic. The first merger to be notified was Banco de Santander and Banco Central Hispano, followed by Banco Bilbao Vizcaya and Argentaria. We will give details about the conditions under which the mergers were approved. These conditions do not relate to the banking market. Instead, they relate to the participation of the merged banks in the stocks of major undertakings in key economic sectors of the Spanish economy.

1.2 Key figures of the Spanish banking sector

The degree of concentration of the Spanish banking system has increased during the last decade and the share in the system's total assets of the ten biggest banking groups grew from 50 percent in 1992 to over 70 percent in 1998. The number of saving banks fell from around 80 in the eighties to 51 in 1997. This process of concentration has not prevented a growing degree of competition in almost all the relevant segments of the banking product markets. It seems that the clearest effect of the first mergers of the last decade was the increase in the capital-adequacy ratio of the merged institutions.

As of 30/12/1999, Spain's approximately 40 million inhabitants were served by 158 banks, 51 savings banks and 97 credit co-operatives together operating some 38 000 branch offices (17 727 belong to banks). These institutions have 239 935 employees and a total asset value of 163 978 135 million pesetas. The total credits of the banks (December 1997) were 227 400 million Ecus.

Regional savings banks (cajas de ahorro) have 17.5 percent of the number of banking institutions, 46.1 percent of the total of branch offices and 35.1 percent of the total assets, and, in fact, they offer the same products in retail banking and corporate banking for small and medium enterprises as the banks. La Caixa, and Caja Madrid are the most important regional saving banks, and they compete in most of the markets with the two major merged banks.

In the last fifteen years steps were taken for the total liberalisation of banking activities, and lately in 1998 for the total privatisation of the state owned banking corporation, Argentaria (including the postal services bank). Legal barriers to entry have also disappeared.

Following the 1999 mergers, two major groups have a lead position in the Spanish retail and corporate banking markets, BSCH GROUP (Santander, Central-Hispano, Banesto) and BBVA GROUP (Bilbao-Vizcaya, Argentaria).

1.3 Banking mergers since the eighties

Since the end of the 1980s six major banking mergers have taken place in Spain:

- 1988 Banco Bilbao and Banco Vizcaya;
- 1991 Banco Central and Banco Hispano;
- 1991 The state owned banks merged in Argentaria;
- 1994 Banco Santander and Banesto;
- 1999 Banco Santander and Banco Central Hispano;
- 1999 Banco Bilbao Vizcaya and Argentaria.

The Banco Santander and Banesto merger, due to its community dimension was notified to the EU Competition Authorities (DGIV). The last two mergers were notified to the Service for the Defence of Competition, which duly advised the Minister of Economy to send both cases to the Tribunal for the Defence of Competition. During 1999, two other mergers of regional saving banks (cajas de ahorro) were notified to the Service and were sent to the Tribunal. Both mergers were unconditionally approved by the Council of Ministers.

2. Relevant markets indicators

To assess the position of the banks in the different markets of the banking industry, retail banking, corporate banking, investment banking, financial trading and money market trading, the Service for the Defence of Competition analysed the following cluster of indicators for each of the markets.

Retail banking:

- branch offices market share;
- number of ATM (automatic teller machines);
- total domestic assets market share ;
- deposits market share;
- credits market share;
- loans secured by collateral and mortgage market share;
- investment funds market share;

- credit and debit cards market share;
- corporate Banking;
- market share in syndicated bonds;
- market share in commercial credit;
- investment banking and money market trading;
- market share in underwriting issues nominated in pesetas;
- market share in mortgage securitisation bonds;
- market share in matador bonds;
- geographical market.

The Spanish Competition Authorities consider that the retail banking market is national in scope, nevertheless, our analysis has a regional focus due to some specific factors related to features of regional saving banks (cajas de ahorro). The market for corporate banking is national for small and medium enterprises and it could be international when clients are multinational enterprises. The investment banking market, due also to local languages preferences and business culture could be national for small and medium enterprises but international for major enterprises, while money market trading, brokerage and foreign exchange trading are international markets.

Barriers to Entry

Law 13/1994 governs the conditions for the establishment of new credit institutions and branch offices in Spain. New banks with the approval of the Bank of Spain must be authorised by the Minister of Economy, and then registered in the Register of the Bank of Spain. One of the conditions is a minimum stock of 3 000 million pesetas. There is freedom for the establishment of branch offices.

For banks established in a EU country and wishing to open offices in Spain, the banking authorities of the EU country have to communicate to the Bank of Spain to register the said bank.

Although in Spain there are no legal barriers to entry, due to the dense branch office networks of existing banks it is very difficult for a new comer to go into the retail banking market and the corporate banking market serving small and medium size enterprises.

Assessment of the mergers competitive effects

To assess the competitive effects of the analysed mergers, in the retail, corporate and investment banking markets, the Spanish Competition Authorities used the above mentioned indicators. However, due to the fact that the merged banks are shareholders of major undertakings of our country, the mergers could affect sectors of the Spanish economy other than the financial sector. The merged banks are shareholders of major undertakings in sectors such as, electricity, telecommunications, petroleum, television broadcasting, construction, residential development, insurance, among others.

The Spanish Competition Authorities thoroughly analysed, in the two cases (Banco Santander-CentralHispano and Banco BilbaoVizcaya-Argentaria) the sectors in which both merged banks had interests.

If, prior to the merger, the banks had a significant participation in the stocks of competing undertakings and they do not desinvest, they merged group becomes shareholder of competing undertakings. If these undertakings operate in sectors with barriers to entry, oligopolistic structure and few operators, the strategic and functional independence of the competing operators could be at risk, and anticompetitive restrictive practices could emerge.

Following this approach the Competition Authorities assessed the competitive effects of the mergers in the non-financial sectors of the economy, in order to prevent market structures that could favour the co-ordination of strategic behaviours.

3. Banco Santander-- Banco Central Hispano

The merger was notified to the Service for the Defence of Competition on January 25, 1999. The notification was analysed and a report was sent to the Minister of Economy, who forwarded the case to the Tribunal on February 25, 1999, to determine whether the merger would hinder competition in the Spanish retail banking market and in other non financial markets. The Tribunal sent its report to the Minister of Economy on May 24, 1999. The Council of Ministers approved the merger subject to conditions, on July 16, 1999.

Banco de Santander, a universal bank, is one of the most important Spanish financial institutions. Its main areas of activities were retail banking, corporative banking, investment banking, and money market trading. Total assets amounted in 1997 to 25 954 560 (million pesetas) of which 12 324 530 (million pesetas) were in Spain. Main shareholders were Royal Bank of Scotland, Fundación Marcelino Botin and Metropolitan Life Insurance. It is listed on the Frankfurt, New York, London, Paris, Tokyo and Madrid Stock Exchanges.

Banco Central Hispano is also a universal banking institution with main activities in retail banking, investment banking and money market trading. Total global assets in 1997, amounted to 11 739 410 million pesetas, of which 8 821 350 million pesetas were in Spain. Its main shareholders were Banco Comercial Portugues, Assicurazioni Generali, and Commerzbank .

Both banks had interests in undertakings active in key sectors of the Spanish economy includinginsurance, food distribution, residential development, construction, engineering, television broadcasting, telecommunications, petroleum and electricity utilities.

The Service for the Defence of Competition studied in detail the interests of the merging banks in competing undertakings in key economic sectors of the Spanish economy.

4. Remedies

The Competition Authorities underlined the fact that the merger could affect competition in some non-financial markets due to the holdings of the banks in the stocks of competing undertakings in key sectors of the Spanish economy. The merged Group held major stock participation's in undertakings that compete in the electricity utility sector and in the telecommunication sector. These regulated strategic sectors were recently liberalised or undergoing liberalisation. Because of barriers to entry there are only a small number

of undertakings in these two sectors. The merger created an undesirable potential risk of anticompetitive behaviour.

Therefore, the Tribunal recommended that the Government approve the merger subject to the condition that the merged entity retain a significant position in the stock of only one undertaking in each of the electricity utility and telecommunication sectors.

The Council of Ministers decided to approve the merger subject to the following conditions:

If, BSCH retains its equity participation's, either directly or indirectly, in two or more undertakings, operating in the electricity generation or distribution markets, in the hydrocarbons market, or in the mobile telephone or fixed telephone markets, its combined stock holdings can exceed or indirectly, can only be of three percent in only one of the "major operators" in each of those markets.

The BSCH can only nominate, either directly or through agreements with other shareholders, members of the Board of just one of the "major operators" active in each market.

Major operators are defined to include the five undertakings having the largest market shares.

The BSCH would communicate to the Service for the Defence of Competition within two months from the date of the conditional approval, a programme of divestments to comply with the conditions established by the Government. This programme and its possible modifications will be strictly secret.

5. Banco Bilbao Vzcaya-- Argentaria

The merger was notified to the Service for the Defence of Competition on November 19, 1999. The notification was analysed and a report was passed to the Minister of Economy, who sent the case to the Tribunal on December 20, 1999, to determine whether the notified merger would hinder competition in the Spanish retail banking market and in other non financial markets. The merger was approved by the Council of Ministers on March 2000, subject to some conditions.

Banco Bilbao Vizcaya with total assets of 22 000 000 million pesetas is a universal bank, operating in retail, corporate and investment banking. It holds interests in key sectors of Spanish industry including energy, telecommunications, residential development, food, steel, insurance and promotion of foreign trade. No shareholder has more than five percent of the bank's shares, and the Chase Manhattan Bank has the largest number of such shares.

Argentaria, the former state owned banking corporation, was fully privatised in 1998. Its total assets are over 13 000 000 million pesetas. It too is a universal bank and is the market leader in mortgage provision. In 1998 there were 900 000 shareholders of Argentaria. The largest shareholder was the Chase Manhattan Bank accounting for 5.2 percent of the stock.

While the merger was being analysed by the Tribunal the merged group BBVA signed on February 11, 2000 a strategic agreement with Telefonica to develop access to Internet, electronic trade, and systems functionalities (transactional banking) among others products. BBVA was to buy up to ten percent of Telefonica stock and Telefonica was to buy three percent of BBVA stock. As a result BBVA became a shareholder of two major undertakings in the media sector.

The merger could have important consequences in certain non-financial sectors, due to the fact that the resulting bank held shares in undertakings that compete in the media sector, the

telecommunications sector and the electricity industry. The media sector (television broadcasting, and press) is a very sensitive sector where competition and freedom of entry constitute the backbone of a democratic system. The increased influence of the merged bank BBVA on Telefonica, with its dominant position on the telecommunication market, may increase the risks of anticompetitive behaviours in the sector.

6. Remedies

The Tribunal in its Report advised the Government to approve the merger subject to conditions. The resulting group BBVA could not have significant participations in the stocks of undertakings competing in the media, telecommunications or electricity sectors.

The Council of Ministers approved the merger subject to the following conditions:

Should BBVA hold either directly or indirectly participation's in the stocks of competing undertakings in the following markets: generation and transmission of electricity; production, transmission and distribution of hydrocarbons; direct access through band width technologies to local loop services, cellular telecommunications, fixed telephony, Internet services suppliers, services provided by cable operators, broadcasting, free and pay television broadcasting, free and pay TV broadcasting rights; and services provided to export and import undertakings, BBVA would have to comply with the following conditions:

Its stock share either directly or indirectly could only exceed three percent in one of the "major operators" in each market.

It can only nominate members of the Board in one of the major operators of each market.

"Major operators" are defined to be the five undertakings having the biggest market shares.

BBVA had to submit to the Service for the Defence of Competition an appropriate divestment programme within two months of the conditional approval.

This programme and its possible modifications will be strictly secret.

SWITZERLAND

Over the last decade, the trend in the Swiss financial services market has been one of concentration. In 1989, about 494 banks were operating in Switzerland, 135 of them were agencies or subsidiaries of foreign banks. In 1996, when merger control was introduced to the Swiss Competition Law for the first time, only 403 banks (155 foreign) were still licensed by the Federal Banking Commission. Two years later, the number of established banks had again dropped to 376 (149 foreign) and the tendency to concentration looks set to continue.

Since mid 1996, the Swiss Competition Authority processed about 16 mergers in the financial sector. 15 mergers were considered to present no risk to competition (14 of them in the preliminary review and one case after a deep examination). One merger was only allowed after imposing obligations on the merging parties.

Of these 16 mergers, eleven referred to pure bank mergers whereas three cases affected mergers between a bank and an insurance company. Two mergers, where banks were involved, did not refer to financial services. One of them was a joint venture company, active in travel business (Westdeutsche Landesbank Girozentrale/Carlson Companies Inc./Preussag AG), the other merger was a take-over of a company active in media business (Credit Suisse Group/Belcom Holding AG).

The following table gives an overview of all mergers in the banking sector since the enforcement of the merger control:

MERGERS SINCE 1996	PreRe[1]	Ex[2]	Date of decision
1997			
Spar- and Leihkasse Bern/Gewerbekasse Bern/BB Bank Belp	X		21.04.1997
General Electric Capital Corp./Bank Aufina	X		19.08.1997
Credit Suisse Group/Winterthur Versicherungen	X		15.10.1997
Valiant Holding/Bank Langnau	X		30.10.1997
1998			
Union Bank of Switzerland /Swiss Bank Corporation		X	20.04.1998
General Electric Capital Corp./Bank Prokredit		X	18.05.1998
Banque Nationale de Paris/United European Bank	X		28.08.1998
Banca della Svizzera Italiana/Assicurazioni Generali S.P.A.	X		11.09.1998
1999			
Société Générale/Paribas	X		09.03.1999
Westdeutsche Landesbank Girozentrale/Carlson Companies Inc./Preussag AG	X		09.03.1999

Table (cont'd)

MERGERS SINCE 1996	PreRe[3]	Ex[4]	Date of decision
Rentenanstalt-Swiss Life/Banca del Gottardo	X		10.03.1999
Credit Suisse Group/Belcom Holding AG	X		15.07.1999
HSBC Holdings plc/Republic New York Corp.	X		21.07.1999
GE Capital/Lisca	X		18.10.1999
2000			
Basler Kantonalbank/Coop Bank	X		09.02.2000
Banque Nationale de Paris/Paribas	X		17.04.2000
total mergers	14	2	
pure bank mergers	9	2	

1. Swiss competition law governing merger control

The law governing merger control in Switzerland is the Federal Law on Cartels and Other Restrictions of Competition of 6 October 1995 (Competition Law, Acart). The previous competition law had been revised in the mid-1990s and a section on merger control was introduced in the new law, which came into force on 1 July 1996. The Ordinance on the Control of Concentration of Enterprises of 17 June 1996 (OCCE) clarifies provisions on the control of concentration of enterprises in more detail.

The law defines a concentration as: "The merger of two or more previously independent companies (merger by absorption or by formation of a new entity); or any operation which enables one or several companies to take direct or indirect control over one or several previously independent companies or over part of them" (Art. 4 par. 3 Acart).

1.1 Notification

Notification is mandatory if the proposed concentration reaches the following thresholds during the financial year preceding the concentration (Art. 9 par. 1 Acart): The aggregate world-wide turnover of the companies concerned amounted to at least CHF two billion or the aggregate turnover of the companies within Switzerland amounted to at least CHF 500 million; and the aggregate turnover in Switzerland by each of at least two of the companies concerned amounted to at least CHF 100 million.

However, special thresholds apply to banks (turnover is replaced by ten percent of total balance sheet assets), insurance companies (thresholds are calculated with reference not to turnover, but to aggregate annual gross premiums) and to the media sector (turnover is multiplied by 20), (Art.9 par. 2 and 3 Acart).

Notwithstanding the above thresholds, notification is required if a decision enacted by the Commission has established that a participating firm holds a dominant position in a market in Switzerland, and if the concentration in question involves either that same market, a related market or an upstream or downstream market (Art. 9 par. 4 Acart).

In case of mandatory notification, the Competition Commission cannot authorise a concentration prior to implicit or explicit approval. The Competition Commission has published a notification form under its website 'www.wettbewerbskommission.ch'. This form specifies key information that must be included in the notification.

1.2 Assessment of concentration of enterprises

The Competition Commission shall investigate concentrations of enterprises subject to notification if a preliminary review reveals signs that they create or strengthen a dominant position (Art. 10 par.1 ACart).

The Commission may prohibit a concentration or authorise it subject to conditions or obligations if the investigation indicates that the concentration creates or strengthens a dominant position liable to eliminate effective competition, and does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position (Art. 10 par. 2 Acart). The latter provision regarding the fact that a strengthening of competition in another market may offset a harmful effect has not yet been applied. The Competition Commission does not take into account this provision unless participant firms explicitly request it to be considered.[5]

A special rule addresses the possibility that a bank merger might involve a bank being bankrupt. In such case, if the Swiss Federal Bank Commission deems it necessary in order to protect the interests of creditors, it has the power to take the place of the Commission and decide with due regard to the "protection of creditors" issue (Art. 10 par. 3 Acart). This provision secures the stability of the banking system. This is, however, supposed to be an exception and has not yet occurred.

In assessing the effects of a concentration of enterprises on the effectiveness of competition, the Competition Commission shall also take into account market developments and the situation with regard to international competition (Art. 10 par. 4 ACart).

A concentration of enterprises prohibited by the Competition Commission may be authorised by the Federal Council (government) at the request of the enterprises taking part if, in exceptional cases, it is necessary in order to safeguard compelling public interests (Art. 11 Acart).

To sum up, the rules of competition which apply to bank mergers are essentially the same as the general rules applying to all other industry mergers with two exceptions: first, the thresholds implying a mandatory notification are based on the total balance sheet assets instead of on the turnover and second, the ability granted to the Federal banking commission to intervene in case of bankruptcy.

2. Definition of markets in bank mergers

According to the OCCE, market definition essentially has two dimensions. On the one hand the "product market", which "shall include all goods or services, which by the other market side are considered to be a substitute in view of their characteristics and foreseeable use" (Art. 11 par. 3(a) OCCE). And on the other, the "geographical market" which contains "the territory in which the other market side offers or demands the goods and services of the product market" (Art. 11 par. 3(b) OCCE). These two elements of market definition determine together the so-called "relevant market".

The Commission only scrutinises the "affected markets". A market is generally considered affected by the merger "if two or more of the enterprises involved jointly hold a market share of 20 percent in Switzerland or if one of the enterprises involved holds a market share of 30 percent in Switzerland" (Art. 11 par. 1(d) OCCE).

In the case of Spar- and Leihkasse Bern/Gewerbekasse Bern/BB Bank Belp[6] the Commission defined for the first time the relevant product and geographical market in the banking sector. As the case only involved regional banks, the relevant product market consisted of retail banking (saving accounts, current accounts, payment services, consumer loans, mortgage loans and commercial loans to SMEs). The geographical market was defined as a regional market, because the demand of the customers for these services was clearly a regional one (also confirmed in Valiant Holding/Bank in Langnau[7]).

This definition of the relevant market was later taken up in the decision regarding Credit Suisse Group/Winterthur Versicherungen[8], a merger between two of the biggest enterprises of the banking and insurance business in Switzerland. Moreover, in this case the Commission had to decide if a new product market definition was necessary to describe the creation of a conglomerate with integrated financial services such as Credit Suisse Group/Winterthur. It was confronted with questions such as: do saving accounts services as well as insurance services, distributed over the same network (cross-selling), require the same product market definition or does this depend on the form of the co-operation (contract, joint venture or merger)? Another question was the market determination of products like life insurance, which contains also financial components.

The Commission did not doubt the importance of these questions for the future but left the question open due to the fact that the other market side still had the possibility to obtain a single service either from a bank or an insurance company. In line with the former practice the Commission relied on the relevant markets already defined in the case of Spar- and Leihkasse Bern/Gewerbekasse Bern/BB Bank Belp[9].

At this time, Credit Suisse Group was one of the three biggest domestic banks in Switzerland offering a broad range of financial services. So the authority had also to define the following product markets in addition to the above-mentioned services (retail banking, consumer loans, mortgage loans and commercial loans):

- private banking (for individuals);
- asset management (for institutionals);
- depository facilities and related services;
- issue business.

With the exception of the “depository facilities and related services” market, the geographical markets for private banking, asset management and the issue business were considered to be at least national in scope because of the national and, even more, the international demand of the customers involved (individuals with a minimum sum of investment capital, institutionals, large enterprises, public institutions). As far as retail banking is concerned, the Commission essentially stuck to the former decision but left the possibility for future decisions to widen these regional markets on the basis of the argument that at least the national operating banks can easily absorb a demand in a regional market even when they are not actually present.

In the same decision the Commission defined the geographical market for bank services like trade- or project finance, investment banking, merger and acquisition advice and international private banking (for foreign individuals) as international markets. These geographical market definitions were also confirmed in other cases (Rentenanstalt-Swiss Life/Banca del Gottardo, HSBC Holdings plc/Republic New York Corp., Basler Kantonalbank/Coop Bank and finally in the decision Banque Nationale de Paris/Paribas).

In the case of the UBS merger[10] the Commission examined the mortgage loan market and the commercial loan market in some depth. In these two markets the parties concerned hold individually either in excess of 20 percent or over 30 percent of market shares. Concerning the mortgage loan market, the Commission considered it as a regional one (loans granted on a regional basis due to the necessary knowledge of the local real estate market).

As far as the market for commercial credits was concerned, the Commission considered the substitution of commercial credits with other financing instruments such as commercial leasing, factoring or venture capital and the necessity to distinguish between credits for SMEs and credits for larger enterprises as well as between short, middle and long term credits.

The Commission defined the relevant product market as commercial loans in a broad sense, including lines of credits and investment loans. But the question related to leasing, factoring or venture capital was left open. This general market definition was in line with other national competition authorities.

Finally the market upper limit for commercial loans was restricted to CHF two million. This reflects the credit policy of large banks relating to the size and the activity sector of enterprises. A market analysis showed that the commercial loan market for SMEs was mainly a regional market. Therefore, credit limits above CHF two million are generally requested on a national or even an international market.

In the merger case General Electric Capital Corp./Bank Aufina[11] the Commission distinguished between a product market for consumer loans and for car leasing. It considered that in the case of car leasing, the other market side would take a consumer loan, as a substitute for a leasing contract but in reverse a consumer loan would be effectual for other consumer goods. Therefore, the two financial services would generally not belong to the same product market. Besides, the Commission determined that fleet leasing belongs to the same product market as car leasing.

Later, in the case General Electric Capital Corp./Bank Prokredit[12], the Commission again took up the former definitions, but also focussed its attention anew on the product market for consumer goods leasing. It decided that consumer loans differ from car leasing and consumer goods leasing for the following reasons:

- the average consumer loan is between CHF 8 000 and 12 000 and is mostly applied to buy used cars whereas car leasing amounts rise up to CHF 32 000 and are therefore mostly applied to buy new cars;

- the interests for consumer loans are much higher (nine – 14 percent p.a.) than those for car leasing amounts (four – eight percent p.a.);

- the use of consumer loans (also used for house sales in foreign countries or for the payment of debts) is not the same as the use of consumer goods leasing.

Therefore, consumer loans, car leasing and consumer goods leasing were each considered as a separate product market. By also examining other possible substitutes, the market for consumer loans was widened with short and long-term credit limits on salary accounts and with short term credits on credit or retailer cards.

As in earlier decisions, the geographical market for consumer loans was again determined to be regional or at the most cantonal. Meanwhile the market for car and consumer goods leasing was set up as a nation-wide market due to the rarity of these financial transactions and the presence of both the product

seller and the offer or of leasing contracts. This decision was later confirmed in the case GE Capital/Lisca[13].

The following table summarises relevant markets as defined by the Commission (two crosses mean that at least the narrower market was considered as a relevant geographical market):

Product market	Geographical market			
	regional	**Cantonal**	**national**	**International**
Retail banking	X			
Consumer loans (incl. credit limits on salary accounts and credits on credit or retailer cards	X	X		
Car leasing (incl. fleet leasing)			X	
Consumer goods leasing			X	
Mortgage loans	X	X		
Commercial loans < CHF 2 million	X	X		
Commercial loans > CHF 2 million			X	X
Trade and project finance				X
Private banking			X	X
Asset management			X	X
Deposits	X			
Money market instruments				X
Capital market instruments			X	X
Foreign exchange				X

3. Remedies in bank mergers

As already mentioned above, the Commission can authorise mergers by imposing conditions or obligations on the participating firm (Art. 10 par. 2 ACart.). Since the Competition Law and the OCCE entered into force in 1996, the Commission has imposed obligations in the banking sector once: in the UBS merger[14].

In that case the Commission determined two affected markets: the mortgage loan market and the commercial loan market (see above). With regard to the mortgage loan market, the Commission had no doubt that there was effective competition by other banks, even though the merger led to a strong position for UBS. Therefore, neither conditions nor obligations had to be imposed upon the new bank.

In the commercial loan market, the Commission restricted the product market definition to commercial loans up to CHF two million. In eight regional markets (see table below) serious concerns about the risk of creating a collective market dominance arose.

[Market shares in percent]

Region/canton	Cantonal Bank	Credit Suisse	Union Bank of Switzerland (A)	Swiss Bank Corporation (B)	UBS = A+B	Others
AI-AR-SG (= 3 cantons)	[36-40]	[6-10]	[26-30]	[6-10]	[36-40]	[10-15]
BL-BS (= 2 cantons)	[21-25]	[21-25]	[16-20]	[16-20]	[31-35]	[20-25]
GE (= 1 canton)	[31-35]	[21-25]	[16-20]	[11-15]	[26-30]	[6-10]
NE (= 1 canton)	[31-35]	[21-25]	[16-20]	[11-15]	[26-30]	[6-10]
SO/ Seeland – Oberaargau (= 1 canton + 1 area)	[6-10]	[16-20]	[16-20]	[36-40]	[56-60]	[6-10]
TI (= 1 canton)	[11-15]	[31-35]	[21-25]	[11-15]	[31-35]	[11-15]
VS ger. (German part of 1 canton)	[16-20]	[21-25]	[31-35]	[11-15]	[46-50]	[6-10]
VS fr. (French part of 1 canton)	[31-35]	[21-25]	[15-20]	[6-10]	[26-30]	[6-10]
Average Switzerland	**28**	**18**	**17**	**16**	**33**	**21**

The Commission imposed the following obligations:

- divest 25 branches (distributed over Switzerland and established in these eight heavily concentrated regional markets) as a package to one buyer who would be interested in retail banking;

- sell two subsidiary banks (the Banca della Svizzera Italiana and the Solothurner Bank SoBa) which were established in two of the eight relevant geographical markets;

- retain commercial loans - which cumulate up to CHF four million due to the merger - under the same conditions and at the same interest rates until 31 December 2004;

- maintain membership with other financial institutions in several joint ventures.

3.1 Divestiture of 25 branches and two subsidiary banks

As regards the divestiture UBS had - with the co-operation of a trust company - to draw up a list of about 35 branches for potential sales established in the three main language areas of Switzerland and in the eight heavily concentrated markets. It was expected that an interested buyer would take a package with approximately 25 branches.

An auction was provided for the divestiture of these branches. Interested parties could make their bid from the beginning of August 1998. The contracts were to have been made until 31 March 1999. In

case nobody would be interested in entering the market for retail banking, the obligation included the possibility of releasing UBS from this part of it.

The obligation also contained the sale of two subsidiary banks, the Banca della Svizzera Italiana and the Solothurner Bank SoBa, since these two banks were established in two of the eight problem markets.

By imposing these obligations, the Commission aimed to prevent a collective market dominance in the eight heavily concentrated markets and to offset the loss of a market player by giving domestic or foreign competitors a chance to enter a nation-wide market.

3.2 Retention of commercial loans

With this obligation the Commission aimed to protect the SMEs from abuse by a possible collective dominance in the commercial loans market. The Commission was especially concerned about the termination of loan contracts due to individual risks, which might possibly arise by accumulation since before the merger the enterprises kept business connections with each bank.

UBS was therefore obliged to retain commercial loans at least until 31 December 2004 under the same conditions as before the merger. The obligation referred only to enterprises, which had kept business relations with both banks and accumulated, credits which did not hit the limit of CHF four million.

Nevertheless the obligation had to avoid undesired maintenance of industrial structure and accumulation of bad credit risks. Hence the Commission granted UBS five exceptions from the obligation in the event of the following:

- if the whole or a part of the credit was already terminated at 31 March 1998 or if the contract ended 31 December 1998 due to an arrangement that was made between the parties not later than the 31 March 1998;

- if the credit standing of a customer was already rated badly before the merger took place or if the credit standing got worse thereafter and the individual risk had to be classified in the range between 11 to 14 of the rating system (high potential of loss);

- if the value of credit securities dropped more than 15 percent (in this case the UBS was only allowed to reduce the credit limit by the same proportion);

- if the debtor retained or continued to retain information necessary for the risk analysis and in case of a change of the principal of the enterprise;

- if the termination was necessary for the performance of legal duties.

Generally the Commission could release UBS from this obligation in the event of a change of competition in the market for commercial loans.

Since the Commission had taken its decision, no problems arose in applying this obligation. For those enterprises that complained about unwarranted terminations the Commission - in most cases - was able to find a solution with the UBS. This obligation is still pending.

3.3 Maintenance of membership in joint ventures

The joint ventures, founded in early days by Swiss banks, are enterprises that seek networks of infrastructure for the banking sector. The banks make use of these networks to handle their payment transactions. The banks therefore pay for the services. Small banks are shareholders too and as customers they profit from these establishments.

The Commission considered whether in the event of a withdrawal by UBS, the costs for the use of these networks would rise and would possibly affect the position of smaller banks competing. Thus the Commission obliged UBS to maintain its membership and to make use of the services offered by the joint ventures at least for the next five years.

NOTES

1. Preliminary Review

2. Examination

3. Preliminary Review

4. Examination

5. E. Homburger, B. Schmidhauser, F. Hoffet, P. Ducrey, Kommentar zum schweizerischen Kartellgesetz, Shulthess Verlag, Zurich, 1996.

6. Spar- and Leihkasse Bern/Gewerbekasse Bern/BB Bank Belp, RPW/DPC 1997/1, 48.

7. Valiant Holding/Bank in Langnau, RPW/DPC 1997/4, 515.

8. Credit Suisse Group/Winterthur Versicherungen, RPW/DPC 1997/4, 524.

9. Spar- and Leihkasse Bern/Gewerbekasse Bern/BB Bank Belp, RPW/DPC 1997/1, 48.

10. Union Bank of Switzerland/Swiss Bank Corporation, RPW/DPC 1998/2, 278.

11. General Electric Capital Corp./Bank Aufina, RPW/DPC 1997/3, 358.

12. General Electric Capital Corporation/Bank Prokredit, RPW/DPC 1999/1, 146.

13. GE Capital/Lisca, RPW/DPC 1999/4, 602.

14. Union Bank of Switzerland/Swiss Bank Corporation, RPW/DPC 1998/2, 278.

UNITED KINGDOM

The comments in this paper refer principally to the retail banking market, unless specified. Retail banking is defined as personal banking services provided to individuals and those provided to small and medium sized enterprises (SMEs).

1. Product Market Definition

The main high street branches tend to focus on retail banking, offering current and deposit accounts to the general public and SMEs. They may also offer insurance, mortgages and pension products as well as personal loans. Several of the retail banks also have specialist subsidiaries which offer services such as stock and share broking, investment and fund management, asset leasing and so on. Such services are also offered by companies not otherwise involved in the retail banking sector e.g. finance houses, merchant and investment banks.

When the Office of Fair Trading (OFT) considers mergers between retail banks, their subsidiaries and the markets in which they are active are also taken into account. It is very difficult to focus on simply one activity, e.g. taking of deposits, as conferring market share/power on a bank. The services offered tend to be inter-linked to some degree. The most important product offered by retail banks is the current account, to which can be added insurance policies, loans, credit cards and so on. Customers tend to source a number of services from one provider, although with technological developments and a younger, more computer literate, customer base, multi-sourcing of financial services is becoming increasingly popular.

Institutions which primarily offer mortgages to their personal customers typically also offer other types of banking service, such as current/deposit accounts and personal loan facilities, and as such they are often found to be in direct competition with the main retail banks. The main mortgage lenders in the UK are still the building societies, although a number of these have converted to bank status over the past few years, most notably the Halifax, Abbey National, and Alliance + Leicester (ranked fifth, sixth and seventh for the provision of “main” current accounts in 1999). Companies which provide factoring and leasing services tend to be completely separate from the banking industry or subsidiaries of the major banking institutions, for example the Lombard Companies which were part of NatWest Group but were acquired by Abbey National in late 1998. The target companies in this merger specialised in the broking of personal and business loans for asset leasing and financing. As such, in analysing the effect of the merger they could be dealt with as separate from their parent's activity (in this case NatWest).

In considering credit card networks the two main activities are the issuing of cards and the provision of merchant acquisition services. It has been argued that separate markets exist for store cards, charge cards, affinity and co-branded cards. This was considered when the OFT looked at the proposed merger between HFC Bank and Beneficial Bank in May 1998. It was concluded that whilst the different types of cards had certain different attributes and uses (e.g. savings on utility bills, or towards purchases) they were principally in competition with the mainstream credit cards, e.g. Visa and MasterCard.

2. Geographic Market Definition

The relevant geographical market varies with the banking and financial services offered. For most financial products, e.g. mortgages and insurance, the geographic market is regarded as national. However, for services where access to a branch or branch network is important, e.g. current accounts in the personal banking sectors and current account, debt and money transmission services for SMEs, the geographic market is usually regarded as local. The relationship between a SME and its local bank manager is also important, particularly in securing debt at competitive rates. However, competition also has a national dimension in these markets, e.g. advertising, terms and conditions, and pricing decisions (for personal customers). Mergers of retail banks are thus appraised against both local and national geographic market definitions.

The recent Cruickshank Report on banking in the UK (see paragraph 14 below) found a substantial amount of local variation in prices in the SMR market, suggesting that the relevant economic market is likely to be local. However, the report was unable to establish a significant causal link between the extent of local concentration (as measured by the HHI) and the price charged. One possible explanation is that markets are local, but that concentration is not the most appropriate measure of the extent of local competition. (The number of competitors in the area may be a better measure.) An alternative explanation is that variations in local prices reflect the different mix of SME customers in different areas. In particular, new customers and customers with more awareness and buyer power are more likely to be able to negotiate discounts.

The issue of foreign ownership tends not to overly affect the OFT's assessment of mergers in financial services. The OFT has, in the past, been exercised by the issue of state-aided or state-subsidised companies merging or acquiring UK businesses, (e.g. in the Kemira Oy bid for ICI in 1990) but this has not been an issue in the financial services industry.

3. Anti-competitive impact - other than barriers to entry

The failing firm defence has not been used in the financial services market, and particularly not in banking. Since 1 June 1998, the Financial Services Authority (FSA) has been responsible for authorisation and prudential supervision of banks, while the Bank of England is responsible for the overall stability of the financial system. As for regulation of commercial conduct, besides the Banking Code (which is semi-voluntary), when the Financial Services and Markets Bill receives Royal Assent (expected later this year), the FSA's draft Conduct of Business Sourcebook will apply to all firms undertaking regulated activities and hence also to banks, even though in a limited way. The OFT consults with both the Bank and the FSA when assessing the effect of a merger, but they may limit their comments to regulatory matters in the market rather than competition issues.

4. Barriers to entry (including barriers to expansion and exit)

In assessing mergers between banks, or affecting the retail banking sector, the OFT takes note of any barriers that exist to restrict banks from either entering or expanding their product portfolios. The most obvious barrier to entry/expansion into the provision of retail banking services is the regulatory requirement to be authorised by the FSA. Banks also need to have access to the money transfer systems that operate in the UK, such as: the Association of Payment Clearers - APACS, Bankers Automated Clearing System Ltd – BACS (which deals with direct debits/credits and standing orders), Clearing House Automated Payment System – CHAPS (which is generally used for high value payments), and Cheque and Credit Clearing. Such access can be via another regulated bank, as well as in its own right.

5. Remedies

Recent banking mergers in the UK have not been found to have an anti-competitive effect justifying reference to the Competition Commission for investigation and subsequent structural and/or behavioural undertakings.

6. Interaction with other regulators

The OFT consults with other UK regulators, such as the Bank of England and the Financial Services Authority (FSA), on banking mergers, and on mergers within other financial service markets e.g. investments, insurance and so on. Their comments are taken into account in the analysis of the merger.

7. Special regime for banking mergers

Under UK merger law, banking mergers are considered in a similar manner to those in any other industry. Despite the findings of the Cruickshank Report, it has not been, and is not, considered necessary to have a special regime when considering banking mergers.

8. The Cruickshank Report

The UK's Chancellor of the Exchequer commissioned Don Cruickshank to review "levels of competition, innovation and efficiency in UK banking markets". The findings of this review have recently been published, and the Executive Summary of the Report will be made available as a room document. The Report recommended that "until UK merger law is reformed: the Government should refer all mergers between financial suppliers to the Competition Commission for investigation if the merging entities have material shares of the relevant market or if each has material shares in related markets from which there is the real possibility that one might enter to compete with the other."

The Report considered that this recommendation would be of most significance to the markets for personal current accounts and for current account and debt to small business. In viewing current mergers policy as too lax, the report suggests that the banking sector is somehow different from other industries, and that competition concerns arise at lower levels of market concentration than in other industries. As mentioned above, the OFT does not agree that all mergers with the characteristics described necessarily raise sufficient concerns to warrant reference to the Competition Commission. However, the Report's analysis does not appear to differ markedly from the approach taken by the OFT in recent banking mergers. It provides strong evidence that SME markets are indeed local, most notably because of local price discretion, SME customers' need for a local branch to make cash transactions, the importance of local knowledge, and prices varying between localities.

In March 2000, following publication of the Cruickshank Report, the Secretary of State for Trade and Industry and the Chancellor of the Exchequer referred to the Competition Commission for investigation and report under the Fair Trading Act 1973, the matter of the existence, or possible existence, of a monopoly situation in relation to the supply of banking services by clearing banks to SMEs. The reference follows a recommendation in the Report that, given the high concentration levels and the number of significant entry barriers found in the market for banking services to SMEs, an investigation would be the only way of inducing a change in the market structure and achieving effective competition in the marketplace. The Commission is expected to report on its investigation within 15 months from the date of reference.

UNITED STATES

George Rozanski[1]

1. The US Banking Industry

Compared to other industrialised nations, the US has a very large number of banks: in 1997 there were more than 7000 bank holding companies and independent commercial banks. In addition, there were approximately 2000 thrifts or savings and loans institutions, and another 2000 credit unions.[2] Thrifts and credit unions accept deposits and offer a wide range of consumer, or retail banking services; they tend to be very limited providers of business banking services.

But by other measures, the US is not heavily banked: there are fewer bank branches per capita in the US than in many other countries, and the ratio of bank assets to gross domestic product is relatively low.[3] Measured either in terms of assets or deposits, only a couple of US banks are found in the ranks of the top twenty largest banks internationally.[4]

During the last fifteen years the number of commercial banking organisations has declined steadily and significantly, from about 11 000 in 1985 to about 7 000 in 1997. During this period, entry of more than 2500 newly chartered banks more than made up for the approximately 1500 banks that failed and exited.[5] The net decline is the result of a wave of merger activity among US banks which has had no parallel since the Great Depression of the 1930s. The number of bank mergers is only part of the story; equally significant is the fact that a number of individual mergers during the 1990s ranked among the largest US bank mergers ever, in terms of the real value of the assets involved, and in terms of the share of total US bank assets accounted for by the merging banks.[6]

As a result of this merger wave, concentration based on national measures has increased. In the ten year period from 1987 through 1997, the share of commercial banking assets accounted for by the ten largest banks increased from 20 percent to 34 percent, and the share of the hundred largest has increased from 62 percent to 75 percent[7] As will be seen, the analysis of likely effects on competition of mergers often focuses on very local geographic areas. Competition in local geographic markets is much more concentrated: the typical urban area may have twenty or more banks, but at most four or five will have significant market share; the typical rural area has ten or fewer banks, and most activity is concentrated in two or three. During the same period in which national concentration levels have increased, there has been little change in levels of concentration in local markets.[8]

One reason for the consolidation of banking activity in the US is the relaxation of restrictions on the geographic area that a bank can operate in. Historically, there has been strong political sentiment in the US to prevent financial power from becoming concentrated. States have restricted the ability of banks to branch since before the Great Depression, and Federal legislation followed the lead of the states. In some states, banks were limited to operating a single branch; in others, they could only establish multiple branches within a county. Beginning in the 1970s, states relaxed regulations to allow multibank holding companies to operate throughout a state, and also across states. Federal legislation passed in 1994

substantially limits remaining restrictions on the ability of banks to merge or establish branches across state lines, and permits banks to consolidate multi-state operations into the most efficient organisational structure. One effect of regulations restricting the geographic areas banks could operate in may have been to shelter inefficient banks from competition.[9]

An additional reason for the large number of mergers may be that new information processing technologies have increased the efficient scale of operation in some bank activities.

2. Regulatory framework

Bank regulatory agencies in the US have authority to approve or prevent mergers. These agencies include the Federal Reserve Board (the US central bank); the Office of the Comptroller of the Currency (OCC), which is an agency in the Treasury Department; the Federal Deposit Insurance Corporation; and the Office of Thrift Supervision. The question of which agency has authority over a given proposed merger depends on the type of institution that would result from the merger. The Federal Reserve Board and the OCC are the agencies most often involved. Bank regulatory agencies are charged by US banking laws with considering the possible competitive effects of proposed mergers, and cannot allow mergers that threaten competition unless "the 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."[10]

The Antitrust Division of the Department of Justice also reviews proposed mergers and reports its analysis of likely competitive effects to the regulatory agency. Even if a proposed merger has been approved by a bank regulatory agency, the Division can act within thirty days to file a suit under US antitrust laws to block the merger. If the Division files a suit, the merger cannot be completed until the case is heard by a court. This is different from the case of mergers in other industries, in which the Division must ask the Court for a temporary restraining order to stop firms from going ahead with a merger until the case is tried and a judgement is reached. The regulatory agency would have standing to participate in the trial. If the Division does not file a suit within this time period, the transaction receives antitrust immunity. Again, this is different from the case of mergers in other industries, which can be challenged after they are completed.

In the fiscal year ending September 30, 1999, the Antitrust Division reviewed 1,698 bank merger applications. A large number of these — close to one-third — were requests to change the organisational structure of an existing bank and presented no competition issues. In nine cases there were significant concerns about likely effects on competition. In one case, the Division issued a letter to the Federal Reserve advising that the proposed acquisition would be likely to substantially lessen competition. Prior to the Federal Reserve taking any action, the parties withdrew their application. In eight cases a proposed transaction was restructured at the Division's request. Seven of these cases involved divestiture of branches and other assets. In the remaining case the Division imposed conditions that limited agreements not to compete with former employees, and that eliminated restrictions on the use of any branches closed and sold by the merged bank from being reopened as a branch of another bank. In all cases the concerns of the Division were satisfied without litigation and before the bank regulatory agency approved the transaction.[11]

There are some differences in the ways that the Antitrust Division and the regulatory agencies analyse the competitive effects of a proposed merger, but in practice there is a lot of co-operation. Lawyers and economists at the Division meet and discuss their analysis with staff from the regulatory agencies, and information that is not provided confidentially to the Division or the agencies can be shared. There has been significant evolution of the review process over the last ten years to reach this level of co-operation. Merger enforcement activity by the Antitrust Division in the banking industry increased

beginning in the late 1980s. At that time, differences between the approach of the Division and the agencies caused some uncertainty in the industry about how mergers would be analysed and which mergers would likely be opposed. The Division in fact went to court three times between 1990 and 1993 to block mergers that had been approved by the regulators.

In 1994, the Antitrust Division, the Federal Reserve, and the OCC jointly issued Bank Merger Screening Guidelines. The purpose of these Guidelines is to reduce the burden on the private sector by making the Government's review of proposed mergers more transparent and predictable, and to achieve greater harmony of analysis between the Division and the agencies. One accomplishment of the Guidelines is that the bank merger applications required by the regulatory agencies now require banks to provide information that the Division needs for its analysis. If the Division decides it needs more information than is asked for in the merger applications or is available from detailed data on deposits and lending activity that banks must routinely provide to the agencies, then the Division asks the merging firms and possibly other banks to provide the necessary information voluntarily. The Division can also compel banks to provide documents, data, and testimony through the Civil Investigative Demand process.

3. Framework for analysing bank mergers

3.1 Overview

The Antitrust Division applies the methodology of the Horizontal Merger Guidelines to analyse the likely effect of a proposed bank merger on competition.[12] The analysis studies effects on competition to supply each product sold by each merging firm in each geographic area in which the product is sold. The purpose is to determine whether the merger could create market power, or make it easier to exercise market power. Firms have market power if they can increase the price or reduce the quality of the products and services they supply compared to competitive levels. A merger could have anticompetitive effects by making it profitable for a firm to exercise market power unilaterally, or by increasing the likelihood that firms could successfully agree upon and maintain a collusive outcome.

The analysis takes into account a number of economic factors. One factor is the possibility that prospective buyers of a product would choose to substitute to alternative products in response to a small but significant increase in the relative price of the product. If such substitution would not occur in an amount sufficient to make the price increase unprofitable then, in the language of the Merger Guidelines, the product constitutes a relevant product market. If significant substitution to alternative products would occur, then the set of products in the candidate relevant product market is expanded to include these alternatives, and the thought experiment is repeated.

A second factor is the possibility that prospective buyers could turn to alternative sources of supply, including firms that currently produce and sell the product in other geographic areas. If such switching away from firms located in a given area would not be significant, then the area constitutes the geographic market. The possibility of significant new competition from entry by firms that don't currently produce or sell the product is a third factor.

The structure of competition in the relevant product and geographic markets, including the number and relative effectiveness of current market competitors, helps to determine whether a merger would likely be anticompetitive.

Other characteristics of competition in the market also affect the likelihood of anticompetitive effects. For example, if there is significant product differentiation, and if products sold by the merging firms are perceived by customers to be relatively good substitutes, then there is a possibility of unilateral

competitive effects, meaning that the merged firm would have market power even acting independently from other firms. If firms have good information about rivals, and if competitive strategies can be changed quickly, then collusion, or co-ordinated competitive effects, is more likely.

Finally, a proposed merger may hold the promise of real efficiencies that could not reasonably be achieved through other means, and these efficiencies could reduce concerns about the total effects of the merger on competition.

3.2 Market definition: Small business loans

In the US, antitrust concerns about bank mergers most often relate to particular types of loans provided to small businesses, referred to as line of credit loans. Small businesses are businesses that have annual revenues up to the range of one to several million dollars. There are more than twenty million small businesses in the US; they employ more than one-half of the private sector work force and account for more than one-half of total business income.[13]

On average, small businesses obtain about one-half of their financing from equity. Most of that is supplied by the owner. Commercial banks are the most important source of debt financing. They supply about one-fifth of total financing. More than half of these bank loans are lines of credit. A line of credit allows the small business to borrow up to the credit limit at fixed terms. Most lines of credit are secured or guaranteed, usually by personal assets of the small business owner. The line of credit sometimes includes covenants, which allow the bank to renegotiate terms if there are significant changes in the financial condition of the borrower.[14]

The important role that banks in the US play in financing the startup and growth of small businesses may be explained by the advantages banks have in evaluating and monitoring credit risks of small businesses. Compared to larger firms that have a business history and audited financial statements that allow them access to national capital markets, the financial prospects of many small businesses are difficult to assess. Banks serve as financial intermediaries by bridging the informational gap between lenders and borrowers. Banks provide a menu of financial products and services to small businesses, including checking and savings accounts, cash management services, and real estate loans. Through their relationship as a supplier of these products, banks are able to obtain valuable private information about the credit worthiness of particular small businesses.[15]

An existing relationship with a bank has been shown to be an important determinant of the success of a small business in obtaining a loan; in addition, small businesses that have had longer relationships with a bank pay lower rates to receive a loan from that bank, and face reduced collateral requirements.[16] Smaller banks in particular appear to specialise in such relationship lending to small businesses. One reason for this may be that smaller banks are restricted in their ability to meet the credit needs of larger businesses: Federal regulations require that commercial banks limit their exposure to a single borrower to less than fifteen percent of the bank's total capital. A second reason may be that the organisational structure and business strategies of larger banks force loan officers to place more weight on objective lending criteria.

Small businesses generally obtain a variety of credit products, including mortgages on commercial property, and loans to purchase or lease vehicles, equipment, and other capital goods. Lines of credit are frequently used for startup or working capital. In many cases, businesses that need a line of credit for startup or working capital have a limited ability to use these other credit products as alternatives. In cases when the business could use other forms of credit, the owner may prefer the convenience of

drawing on a line of credit, because then they don't have to apply for and make payments on a new loan, and because, in the case of a line of credit, businesses only pay for the credit they actually use.[17]

Sometimes a small business may rely to a large extent on personal credit, such as consumer credit cards or a second mortgage on a personal residence. Compared to a line of credit from a bank, these alternatives may not seem very good, because they are relatively high cost, and because they put personal assets at greater risk. The question for antitrust analysis is whether, after a merger, banks will find it profitable to raise prices. The answer depends on whether businesses that would obtain a line of credit from a bank at prevailing prices would switch to alternatives such as personal credit in response to an anticompetitive price increase. The fact that some businesses use these alternatives at prevailing prices demonstrates the possibility of switching. But it does not prove that there would be enough switching to make an anticompetitive price increase unprofitable; the analysis must try to quantify the likely magnitude of this effect.

The next step in the analysis is to define the geographic market. The question is: Which banks are able to compete effectively to supply the product? Small businesses in the US generally obtain lines of credit and other key bank products from nearby suppliers. One reason is because there can be advantages to dealing with a single supplier, and businesses may also prefer that some services used on daily basis, such as demand deposit accounts, be quickly accessible.

A second reason why local banks are the most significant suppliers of lines of credit is that, because they know a lot about local business conditions, they have better information about the riskiness of a young firm or new business startup. Being close to local businesses also lowers the bank's cost of observing the performance of the business and updating information about credit risk. Local banks can therefore identify small businesses that are better credit risks and local banks can compete successfully to make loans to small businesses by offering relatively favourable terms.

It is true that some banks and other providers of credit to small businesses are sometimes located a great distance away. In the case of vehicle or equipment loans that are secured by the purchase being financed, the riskiness of the loan is reduced and the informational advantage of local banks is less. But for lines of credit, distant suppliers lacking a branch network or significant presence in a local market are likely to regard all but the most well-established small businesses as relatively high risks. During the last couple of years, some banks in the US have begun to market lines of credit nation-wide, either by mail, phone, or over the Internet. But these loans are usually for small amounts and they have a high rate of interest. So far, these banks do not provide significant competition to local banks for lines of credit.

3.3 Market definition: Middle market loans

The analysis of competition in markets for lines of credit to medium-sized businesses in the US is distinct from the analysis of small business lines of credit and sometimes leads to a different conclusion. Middle market loans are those made to businesses with annual sales in the range of ten million to 100 or 250 million dollars. Many of these medium-sized businesses do not have a history of performance that would allow them to access national capital markets on favourable terms, so they remain dependent on bank financing. Some small community banks that compete effectively to extend credit to small businesses lack the ability to serve the credit needs of middle market customers, because of concerns about exposure to a single creditor. Even though banks drawn from a broader geographic area compete effectively to make loans to middle market businesses, the fact that small banks are not participants in the market can sometimes mean that the structure of the market is relatively concentrated.[18]

3.4 Market definition: Consumer bank products

In the case of some important consumer bank products in the US such as home mortgages, car loans, and credit card loans and transactions services, distant banks and specialised non-bank financial firms have demonstrated their effectiveness as competitors. The analysis of consumer home mortgages and car loans bears some similarity to the analysis of asset-backed loans made to businesses: the fact that the collateral is relatively easy to evaluate explains the success of non-local suppliers. Although some consumers prefer to obtain credit cards from local banks, credit cards are marketed on a national basis by direct mail and telephone. Credit card issuers rely on credit histories assembled by third-parties and on credit-scoring software that predicts credit risk. Credit-scoring algorithms have so far proven to be more useful in this application than in the case of small business lines of credit.

Surveys of consumers reveal a preference to obtain checking account services from a conveniently located supplier.[19] Because many consumers who commute a significant distance to work consider a bank location near their workplace to be a good substitute for a bank location near home, the geographic market for consumer checking accounts is relatively large. Also, in contrast to the analysis of small business bank products, other federally insured depository institutions such as thrifts (savings and loan institutions) and credit unions are active suppliers of consumer bank products. As a result, antitrust concerns relating to consumer bank products in the US arise less often, although the Federal Reserve has sought divestitures before approving some bank mergers based in part on concerns about consumer bank products.

The advent and spread of ATMs, electronic funds transfer, and the development of home banking via computer or telephone raises the possibility that local banks with branch networks will lose their competitive advantage, and that geographic markets for consumer bank products will become much larger. During the same period that has seen a significant reduction in the number of banks and a huge increase in the number of ATMs, the number of bank branches in the US has actually increased, however.[20] In addition, survey evidence indicates that consumers are not yet ready to embrace home banking alternatives. A recent survey indicates that an increasing number of consumers access their bank using home computers, but this option may simply displace use of the telephone to make account enquiries, and not represent a good substitute for the branch office to meet other banking needs.[21]

3.5 Measures of market structure

The Merger Guidelines propose the Herfindahl-Hirschman Index (HHI) as an index of market structure. This index takes into account both the number of competitors in the market and their relative market shares. It is calculated as the sum of the squares of firms' market shares. In general, an informative measure of market share is one that predicts how effective a firm is in competing to make sales. A common measure of market share used to analyse the effect of bank mergers in markets for lines of credit to small businesses is a bank's share of deposits in the geographic market. A significant advantage of this measure is that disaggregated data on deposits are readily available in the US, and commercial bank deposits are often a fair proxy for loan activity. Alternatively, deposits can be considered to measure a bank's capacity to make loans. To the extent that the riskiness of small business loans can be assessed and portfolios of such loans can be securitised, the activity of loan origination can be separated from funding the loan, and deposits are a less meaningful measure. Given the ability to transfer loanable funds within a banking organisation, the question of how to treat a bank's out-of-market deposits is also important. Studies in the US have tended to support the view that out-of-market capacity does not make a bank a significantly more vigorous competitor.[22]

3.6 Entry

Despite significant consolidation in the banking industry in the US over the last ten or fifteen years and the large decline in the number of smaller banks, there has been considerable entry by newly chartered banks. Prior to 1980, one of the factors that the OCC considered when reviewing an application for a new bank charter was the need in the community for a new bank. In the US, it is highly unusual for the government to restrict entry on the basis of a concern that the market may not be able to support the entry of a new competitor. Instead, new business plans are put to the test of the market to determine how many firms will survive and which firms will survive. The motivation for the restriction on entry in this case was that failure of a bank imposes costs not only on the bank's stockholders, but also on creditors, uninsured depositors, and the taxpayers who ultimately pay for deposit insurance. In 1980, the OCC changed its criteria for reviewing applications for new bank charters to focus less on this factor.[23] For the next several years, new banks entered at a rate of between three hundred and four hundred per year; the rate declined to a level of about forty new banks per year by the mid 1990s, but has increased since. It is remarkable that the rate of failure of entrants is similar to that of incumbent banks. This is different from the case in other industries, in which new firms are more likely to fail than established firms. The greater relative success of entrants in banking is probably explained by the fact that regulatory agencies closely review the financial strength of applicants and actively monitor the performance of young banks.[24]

Entry into local banking markets in the US appears to be driven largely by factors such as the growth of economic activity in the area and the current density of banks and branches, rather than by the measured profitability of incumbent banks.[25] It seems unlikely that an entry decision by a bank would turn on increased profit opportunities in a relatively small activity such as small business lines of credit. In addition, because of the importance of private information and long-standing business relationships in making small business loans, new entrants may require several years to establish themselves as effective competitors. The possibility of exogenous entry is an important factor to consider, but it may not be possible to count on quick and effective entry to counter the effects of an otherwise anticompetitive merger.

3.7 An example

The merger of First Union and CoreStates provides an example of the analysis described above. When it was announced in 1997, this $17 billion transaction represented the largest bank merger ever in the US First Union, headquartered in the state of North Carolina, had 1900 branches, deposits of $90 billion, and assets of $144 billion. CoreStates, headquartered in Philadelphia, Pennsylvania, had 550 branches, deposits of $34 billion, and assets of $48 billion. The most significant competitive overlap was in the area of Philadelphia. The city of Philadelphia has a population of about 1.5 million; the Philadelphia metropolitan area is the fifth or sixth largest in the US, with a population of between five and six million. CoreStates was the largest bank in Philadelphia; First Union was ranked number four.

The geographic market defined by the Federal Reserve included five counties in the state of Pennsylvania and four in the neighbouring state of New Jersey. Based on data on deposits in this nine-county market, as a result of the merger the HHI would have increased from about 1500 to about 2000, and the merged bank would have had a share of 39 percent.

The Federal Reserve's geographic market, which took into account data on commuting patterns, may have been useful for analysing effects of the merger on retail bank products. But there were reasons to question whether this broad geographic market was appropriate for bank products supplied to small businesses. For one, the Delaware River separates the Pennsylvania counties from the New Jersey counties, and significantly increases travel time between them. The Division investigated the scope of the

geographic market by interviewing participants in the market and reviewing their business documents. In addition, data on non-real estate commercial and industrial (C&I) loans in the range of $100 thousand to $one million were analysed. Larger banks in the US are required to report these data periodically in order to permit government authorities to assess the performance of banks in providing credit in the geographic areas in which they operate. The Division concluded that the geographic market was limited to two counties in Pennsylvania, which included the City of Philadelphia plus the closest suburbs.

Consistent with the Division's geographic market definition, more than 95 percent of C&I loans in the two-county area were made by banks with branches in the area. Banks with branches in the remaining three Pennsylvania counties in the Federal Reserve market accounted for 97 percent of C&I loans in that area. Of course, this pattern in the data is not sufficient to determine the geographic market. Merger analysis is prospective, and must consider the possibility that banks outside the two-county market would become more successful in the market if there was an attempt to exercise market power after the merger. It was therefore necessary to develop information from market participants about the importance of investing in business relationships and a branch network in order to become an effective competitor, and the cost and time that this would require.

Almost thirty banks were active in commercial lending in the two-county geographic market, but few were significant competitors: the top four banks accounted for 75 percent of commercial loans. The post-merger HHI based on deposits increased from 2000 to 2700, and the merged bank would have had a deposit share of 43 percent; no bank after the top four had a deposit share of more than two percent.

The merger was approved after the parties agreed to divest twenty branches in the two- county market, with $870 million of deposits. This divestiture package compared to 140 branches that the banks had in the two-county market before the merger, with about $12 billion of deposits.

4. Evidence on the effects of mergers

The hypothesis that the pricing of small business loans is determined by competition among banks in local geographic markets in the US has been tested empirically. Although the available data are imperfect and significant methodological questions can be raised about the different approaches of various studies, measured profitability and pricing appear to be correlated with measures of market structure comparable to those described above: Banks in concentrated markets pay lower interest rates to depositors, and charge higher interest rates to small business borrowers.[26]

Mergers raise public policy concerns not only because they can create market power and result in higher prices to consumers and the misallocation of society's resources, but also because mergers that reduce competition insulate firms from the discipline of the market and make it possible for wasteful and inefficient management practices to survive. The efficiency of banks is measured by their success at transforming inputs, such as labour and physical capital, into outputs such as demand and savings deposits, and consumer and commercial loans. One recent study found that banks in the US that faced less competition were substantially less efficient. The study estimated that the costs of banks that operated in the most highly concentrated markets would have been lower by an amount in the range of eight percent to thirty two percent if they had faced the level of competition found in the least concentrated markets. On average, the cost to the US economy of inefficiency due to lack of competition in local banking markets was estimated to be in the range of 2.5 percent to five percent of banks' total costs of operation, or between three and five billion dollars per year.[27]

5. Divestitures

In cases in which the Antitrust Division believes that a proposed bank merger is likely to significantly lessen competition in markets for small business loans in a particular geographic area, the Division's concerns are usually sufficiently addressed by divestiture of a package of bank offices, branches, assets, and deposits in the area. A typical divestiture package includes specifically identified branches, including all assets and deposits of those branches, small business loans associated with those branches, and deposits of those loan customers. The Division usually prefers that a significant part of the total divestiture package go to a single purchaser. The intent is to create a new competitor, or to enhance the effectiveness of an existing competitor, by transferring a group of well-situated, profitable branches that will provide a network for gathering deposits and making loans, as well as a solid base of commercial loan relationships.[28]

6. Cluster market approach

The methodology of the Antitrust Division analyses separately the effects of a bank merger on competition to supply each bank product. An alternative approach was recommended in a series of US Supreme Court opinions from the 1960s and early 1970s, which stated that the relevant product for analysing bank mergers consists of a cluster of products and services commonly referred to as "commercial banking."[29] This cluster includes consumer loans and consumer banking services as well as business loans and products. In the US, the cluster market approach guides the decisions of the Federal Reserve and the OCC.

In some cases, these two different approaches can lead to the same conclusion about the likely effects of a merger on competition. But in other cases the cluster market approach can lead to a mistaken view about whether merging firms are significant competitors to one another and the extent of competition they face from other firms. For example, in the US some specialised financial firms do not accept deposits or offer a full range of loan products, but they are important competitors to banks for the products that they do offer. Some of these firms specialise in issuing credit cards, others specialise in residential mortgage lending, still others focus on financing the purchase of automobiles by consumers or equipment by businesses. If the analysis of the effects of a merger was restricted only to the competition provided by banks to supply these products, it would miss the important role of these specialised financial firms.

As a second example, consider the role of foreign-owned banks. They can be significant competitors in some products, such as foreign exchange services or loans and other services provided to large corporations, and they often maintain abroad the close relationships they have developed with businesses headquartered in their home market. But until foreign banks acquire or develop extensive branch networks and gain a good knowledge of the local economy, they typically provide limited competition to supply services to smaller domestic firms. When analysing the effects of a merger between domestic banks, it would be wrong to conclude that the presence of even very large international banks is sufficient to ensure a competitive outcome and prevent anticompetitive price increases for some products. Domestic banks are not constrained to raise uniformly the prices of all products they sell. After a merger, domestic banks would not be deterred from raising the price of one product, such as small business lines of credit, because of competition they face from foreign banks to supply other products or other customers.

7. Analysis of efficiencies

There are several ways in which a merger could reduce costs and increase the efficiency of the merged bank. Cost savings could result in lower prices to consumers, and result in an otherwise

anticompetitive merger being pro-competitive. The specific ways merging banks often claim they will be able to reduce cost include: closing redundant branches and reducing the number of branch employees in geographic areas that both banks serve, combining back office and administrative operations, and achieving efficiencies through integration of superior data processing systems and operations.

Mergers could allow banks to achieve greater economies of scale, meaning that they could produce the same vector of outputs using fewer resources. The evidence on economies of scale in US banks is mixed. A number of studies analysed data on the operations of US banks during the 1970s and 1980s. These studies concluded that economies of scale were fully realised at a modest scale of operation of perhaps 500 million dollars of assets, or even as small as 100 million dollars of assets. Large banks, with a scale greater than 1 billion or ten billion dollars of assets, were less efficient than smaller banks. A second observation was that the cost disadvantage of the smallest banks was not that great, and may have been no more than five percent of costs. These conclusions are consistent with the fact that, although the number of banks in the US with assets less than 100 million dollars has been falling in recent years, the number of banks in the size category of 100 to 500 million dollars has not.[30]

More recent studies which are based on data from the 1990s have found evidence of significant economies of scale up to a size of 25 billion dollars of assets.[31] If these studies are correct, then only about thirty-five banks in the US are operating at an efficient scale. One possible reason for this difference in conclusions is that deregulation of restrictions on interstate banking has made it possible for the most efficient banks to become much larger.

A second possible reason is that banks are relying on new information processing technologies, which have greatly increased the scale of efficient operation. But if this is true, it is not necessarily a reason to allow mergers that significantly increase concentration in local markets. Merger policy in the US discounts efficiencies that could be achieved in some other way. For example, if the source of the efficiency is economies of scale in a back room activity such as the electronic processing of payments and transactions, then a small bank may be able to achieve the same cost savings by combining operations with a bank operating in another geographic area, rather than merging with a close competitor. Or, the bank may be able to rely on an independent firm to perform some functions. By combining work for several banks, the independent firm could reach efficient scale and pass cost savings along in the form of low prices for its services. Joint ventures are also common in the US in some activities, such as ATMs and credit cards. Joint ventures can make it possible for banks to realise efficiencies while still preserving competition in other activities.

In practice, cost savings from staff reductions and branch closings appear to be the most important source of savings.[32] Consumers value the convenience of nearby branches, and any reduction in the quality of service would tend to offset the savings from branch closings. Even if the conclusion of the analysis is that a merger will result in substantial cost savings and there are no reasonable alternatives to the merger to achieve the same savings, in markets with few significant competitors there can be a difficult public policy choice between lower prices to consumers and greater efficiency in production.

A second way in which mergers could make banks more efficient is by allowing them to diversify their operations, either in terms of the geographic areas in which they operate, or in terms of the range of products and services they offer. Geographic expansion can reduce exposure to losses resulting from an economic downturn in a particular region or industry. The savings and loan crisis in the US in the late 1980s illustrates the importance of this point. Nine hundred savings and loan institutions failed in a five-year period. More than half of the failures, and more than 80 percent of the cost to the government of rescuing the institutions and their depositors, occurred in just three states that were hit hard by sharp declines in prices for energy or agricultural products. One of these states was Texas; nine of the ten leading banks in Texas failed or were reorganised. At the time, these states had laws that restricted the

ability of banks to operate branches throughout the state, and they did not permit banks in the state to be owned by out-of-state bank holding companies.[33]

The experience of the US since the 1970s in relaxing restrictions on the geographic scope of bank activity provides a useful experiment. Several studies report similar findings: when banks were permitted to expand their geographic operations, they significantly lowered operating costs and reduced loan losses. Most of these gains were passed on to consumers in the form of lower prices. This suggests that there are benefits from mergers between banks operating in different regions. Recent studies that have explored bank performance and the profitability of bank mergers have identified geographic diversification as contributing significantly to improved financial performance and reduced risk of bank insolvency. Greater scale of operation by itself was not found to improve bank efficiency; gains were found when banks operated in multiple states, especially if economic activities in the different states were sufficiently diversified to limit macroeconomic risk.[34]

8. Antitrust policy and the safety of the banking system

The failure of a bank or other financial institution can have widespread effects on the economy. Either because of the external costs of bank failure, or because of the costs to the government of regulating bank safety and insuring depositors against the risk of failure, the safety of the banking system is an important public policy objective. It is sometimes argued that, because mergers allow banks to reduce costs and become more profitable, they reduce the likelihood of bank failure and contribute to the safety of the banking system. This raises the question of whether there is a significant public policy trade off between the safety of the banking system and competition.

Data on the number of banking organisations in the US and national levels of concentration show that, despite an active antitrust policy, there has been significant consolidation in the banking industry over the last ten or fifteen years. To the extent that banks can achieve substantial efficiencies through merger, they have not been prevented from doing so by the enforcement of the antitrust laws. The evidence reviewed earlier suggests that some of the most significant efficiencies from mergers result from consolidation of back room operations and administrative functions, and from expanded opportunities for geographic diversification of lending and deposit gathering activities. In the US, concerns about the effects of bank mergers on competition have been focused on cases in which there is significant overlap of bank operations in local geographic areas. Intervention by the Antitrust Division and the bank regulatory agencies has resulted in divestiture of branches and other assets only in these areas of overlap. The policy of solving competitive concerns with targeted divestitures does not stop banks from realising efficiencies of greater geographic diversification, and it preserves substantial opportunity for banks to combine back office operations and consolidate administrative functions.

This point is illustrated by Table 1, which provides information on six recent enforcement actions taken in response to very large bank mergers. For the most part, the number of branches and level of deposits divested was quite small compared to the size of the transaction, and was limited to narrow geographic areas in which the proposed transaction presented competitive concerns. The divestiture in the Fleet Financial/BankBoston merger was relatively large compared to the size of the smaller of the two banks involved in the merger. The banks were the two leading competitors in the New England states; the transaction that was proposed was designed to be neutral in terms of its effects on concentration in local markets, with the merged firm swapping the weaker of the two banks' branch networks for the stronger.

Mergers between banks that do not operate in the same geographic areas have so far not raised significant competitive issues in the US, and it is possible that they could benefit consumers if the costs of the merged bank decline as it expands the scale or scope of its operations. It is sometimes suggested,

however, that at some point a bank could become large enough to put the banking system at greater risk, even if it was more efficient. The concern is that owners and executives of the bank might begin to believe that they are considered by bank regulators to be "too big to fail." If the bank believes that regulators will have no choice but to rescue the bank if it gets into difficulty, then the bank may adopt riskier lending strategies.[35] In the US, this concern has been addressed in part by statutory limits on how large a bank can be in terms of its share of national or state deposits. The same 1994 legislation that ended restrictions on the geographic scope of bank activities also prohibits mergers that would result in the merged bank controlling more that ten percent of total US insured bank deposits, or more than thirty percent of insured bank deposits in a single state.

9. The Financial Services Modernisation Act of 1999

The Financial Services Modernisation Act of 1999, also known as the Gramm-Leach-Bliley Act, significantly repealed restrictions on the ability of banks in the US to compete to sell securities, insurance, and real estate. These restrictions date back to the 1933 Glass-Steagall Act. Other countries have applied similar restrictions. One reason for such restrictions is to facilitate the task of regulators in auditing bank safety. A second reason is to restrict banks from diversifying into areas outside of their expertise in order to limit the possibility that a bank would be tempted to take greater risks in its banking activities to offset losses in non-banking activities.

As a result of the new legislation, banks in the US will be allowed to be part of financial holding companies, which can engage in insurance and securities underwriting and agency activities, merchant banking, and insurance company portfolio investment activities. Some banks will also be able to enter some aspects of the securities and insurance businesses through subsidiaries, provided the assets employed in these activities are less than 45 percent of the consolidated assets of the bank, or $50 billion. Compared to some European countries, policy in the US remains restrictive by substantially limiting the ability of banks and financial holding companies to participate in non-financial activities.[36]

The new legislation will facilitate entry into banking and other financial services by diversified firms that will be able to exploit possible economies of scope. As an example, a firm may be able to take advantage of information gained from providing one type of financial service to a customer to more effectively design and market other types of services to the same customer. Even though incumbent firms that are not diversified may now perceive themselves to be at a disadvantage, consumers could benefit.

The 1998 merger of Citicorp and Travelers is an example of the type of transaction possible in the new regulatory environment. Citicorp's activities were centered on commercial banking, whereas the business of Travelers was principally insurance, investment banking, and securities brokerage. Without the new legislation, the merged firm would have had to discontinue some of its activities by 2003. Because of the legacy of line of business restrictions, the overlaps between Citicorp and Travelers were limited to just a few activities, such as credit card issuance and some underwriting and investment advisory services. The Division concluded that the transaction raised no significant concerns about adverse effects on competition

Table 1
Bank MegaMerger Enforcement Actions

12/97 NationsBank/Barnett Bank			
NationsBank	$135B deposits	2 600 branches	17 states
Barnett Bank	$33B deposits	862 branches	2 states
Divestiture	$4B deposits	124 branches	2 states
4/98 First Union/CoreStates			
First Union	$90B deposits	1 900 branches	12 states
CoreStates	$34B deposits	550 branches	3 states
Divestiture	$1B deposits	32 branches	1 state
8/98 NationsBank/Bank of America			
NationsBank	$174B deposits	3 214 branches	17 states
Bank of America	$174B deposits	1 800 branches	12 states
Divestiture	$5B deposits	17 branches	1 state
9/98 BancOne/First Chicago			
BancOne	$77B deposits	1 300 branches	12 states
First Chicago	$68B deposits	650 branches	3 states
Divestiture	$1.5B deposits	39 branches	1 state
10/98 Norwest/Wells Fargo			
Wells Fargo	$72B deposits	1 835 branches	9 states
Norwest	$58B deposits	930 branches	16 states
Divestiture	$1B deposits	26 branches	2 states
9/99 Fleet Financial/BankBoston			
Fleet Financial	$70B deposits	1 156 branches	12 states
BankBoston	$49B deposits	473 branches	4 states
Divestiture	$13B deposits	306 branches	4 states

NOTES

1. The views expressed in this paper are my own and do not necessarily reflect the views of the Antitrust Division. Dan Rubinfeld was co-author on an earlier version of this paper. I thank Ann Plamondon for her very helpful assistance.

2. Meyer (1998)

3. Gorton and Schmid (1996)

4. Data from American Banker, August 5, 1999, 7-9.

5. Meyer (1998)

6. Rhoades (1996a, 1997)

7. Meyer (1998)

8. Meyer (1998) Between 1985 and 1997, the HHI based on commercial banks' shares of deposits declined from 1990 to 1949 in urban areas, and from 4357 to 4114 in rural areas.

9. Rhoades (1996b, 1997); Berger, Kashyap, and Scalise (1995)

10. 12 USC. 1828(c)(5)(B)

11. Kramer (1999)

12. US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, (1992)

13. US Small Business Administration (1999)

14. Berger and Udell (1998)

15. Goldberg and White (1998)

16. Berger and Udell (1995), Cole (1998)

17. The practices and preferences of small businesses in the US in obtaining credit are reported in Cole and Wolken (1995) and Cole, Wolken, and Woodburn (1996)

18. The study by Tannenwald (1994) of markets for middle market loans in the Northeastern US supports this analysis, although the heavy reliance of the study on the pattern of existing relationships between banks and firms does not capture the important forward-looking nature of merger analysis.

19. Kwast, Starr-McCluer, and Wolken, 1997

20. Meyer (1998) presents data that the number of commercial banking offices in the US increased from 57,417 in 1985 to 71,080 in 1997. Over this period, the measure of population per banking office fell from 4,145 to 3,765.

21. Rhoades (1996b), Kutler (1997)

22. Wolken and Rose (1991), Pilloff (1999)

23. Berger, Bonime, Goldberg, and White (1999)

24. Goldberg and White (1998)

25. Recent studies of the determinants of bank entry include Amel and Liang (1997), and Berger, Bonime, Goldberg, and White (1999)

26. See, for example, Hannan (1991), Hannan (1997), Prager and Hannan (1998)

27. Berger and Hannan (1998)

28. A recent study (Burke 1998) attempted to compare the effectiveness of the Antitrust Division's divestiture policy to that of the Federal Reserve, which in the past has paid little attention to which specific branches and assets are divested. The study concluded that, in cases in which the Division was involved in the selection of specific branches to be divested, the divested branches subsequently performed relatively poorly in terms of growth of share of deposits. The author of the study correctly notes that this measure of performance may not provide good information on the effectiveness of the divestiture in resolving the competitive problems identified by the Division, which were centered on small business loans. In addition, it is not clear how the study could accurately determine the Division's involvement in crafting the final divestiture package. In many cases in which parties to a merger are represented by experienced legal counsel, the initial divestiture package proposed by the parties already takes into account criteria employed by the Division.

29. US v. Philadelphia National Bank, 374 US 321 (1963); US v. Phillipsburg National Bank & Trust Co., 399 US 350 (1970)

30. Berger, Hunter, and Timme (1993) review this literature.

31. Berger and Mester (1997)

32. Rhoades (1998)

33. Litan (1992)

34. Hughes, Lang, Mester, and Moon (1999); Demsetz and Strahan (1997); Akhavein, Berger, and Humphrey (1997)

35. Mishkin (1999)

36. Barth, Brumbaugh, and Wilcox (2000); Horn, Smith, et al. (1999)

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EUROPEAN COMMISSION

1. Introduction

The banking sector is currently undergoing a thorough transformation. Merger and acquisition activity is reaching unprecedented levels with a mega or global merger being announced almost every month. Two main factors underlying this transformation are new developments in technology and, even more importantly, the increasing internationalisation of financial services markets. Mega mergers in the banking world as well as in many other economic sectors have become a distinctive feature during the past five-ten years.

The key contributors to this merger wave were the removal of legal and administrative barriers within the EU and the liberalisation of capital movements under the EU banking directives. In addition, a number of technological changes, the increasing competitive pressures and the introduction of a common European currency in 11 Member States as from 1 January last year also acted as catalysts in a process of increasing consolidation in the banking sector. The introduction of the Euro provided an important stimulus to merger activity owing to the possibility of pan European asset allocation and the ability of consumers to compare the prices of financial products between countries instantly. Other reasons why banks and credit institutions merge are the need to achieve a "critical mass" and to cut costs in a sector characterised by high staffing levels and a large number of retail outlets. Finally, the growing globalisation of markets and the need for European banks to diversify risks geographically also contributes to increasing cross-border consolidation.[1]

Naturally, this development leads to a constant and significant increase in the merger projects involving banks and financial institutions, which are notified to the Commission[2] under Article 4 of the EC Merger Regulation (ECMR[3]). Between January 1991 and 15 May 2000 the Commission adopted a total of 90 decisions on concentrations in the banking and financial services sector, representing seven percent of all decisions taken under the ECMR. Between 1991 and 1996, only 36 out of 510 decisions concerned the banking sector. Over the past two-three years in particular we observe a significant increase in banking mergers: in 1997 there were 11 decisions on banking concentrations, in 1998 the number more than doubled (23 decisions).

In 1999 the number of concentrations notified in the banking and financial sector was a bit smaller than in the years before: there were 16 decisions were taken on banking mergers as opposed to 23 decisions in 1998. This does not mean, however, that the merger wave is coming to a halt. The reason is simply that a considerable number of banking concentrations still takes place on national level, between two companies with their main activities in one and the same EU Member State. Such operations, due to turnover aspects or the application of the 2/3 rule (whereby each of the undertakings concerned achieves more than 2/3 of their respective turnover in one and the same Member State) do not have Community dimension and are therefore assessed by the competent national authorities. Important concentrations recently examined by the national authorities were for example Banco de Santander/Central Hispano in Spain, BNP/Société Générale/Paribas in France or Banca Intesa/Comit and Unicredito/BBVA in Italy.

Unlike their counterparts in the US, European banks prefer at present to grow in their national markets rather than engage in cross-border merger operations. There may be several reasons for this: Firstly, companies wanting to expand abroad need to obtain a critical mass and a firm position in their home markets. Secondly, it has to be considered that synergies and efficiencies resulting from a concentration can be achieved more quickly and more easily on the home market. This aspect is crucial for the companies concerned since it does not only enable the creation and increase of shareholder value but also strengthens the confidence of markets and investors.

The trend towards cross-border consolidation is stronger in smaller Member States, in particular in the Benelux countries. Of the 90 Commission decisions on banking mergers between January 1991 and Mid-May 2000, 20 cases concerned the Belgium and 12 the Dutch market. Numerous concentrations were notified over the past three years including, for example, case Comp/M.1359- Royale Belge/Anhyp; case Comp/M. 1122-Kredietbank/Cera/Fidelitas/ABB; case Comp/M.1089-Paribas Belgique/Paribas Nederland; etc. A similar trend can be observed in the Scandinavian countries (see, for example, cases Comp/M. 1029-Merita/Nordbanken or case Comp/M. 1910-Merita Nordbanken/Unidanmark; or Comp/M. 1714-Föreningssparbanken/FI-Holding/FIH). Credit institutions in smaller markets are more dependent on international expansion in order to achieve a critical mass. Furthermore, it can be assumed that cross-border operations between those states can be implemented more easily due to similarities in language, culture and similar business conducts.

There are, on the contrary, some Member States, which are less open to cross-border integration and transnational operations. In Germany, for example, state-owned banks, in particular the so-called "Landesbanken" (regional banks) and the smaller savings banks play an important role in the structure of the banking market. These banks, which are totally or partly owned by public authorities (such as the regional governments or the municipalities), are less flexible to engage in concentrations with foreign credit institutions.

In general, experience has shown that concentrations on a national level produce different effects than cross-border concentrations: often there are important overlapping activities in retail banking[4] and in the parties' distribution networks. These issues may give rise to more problematic competition issues.

On the other hand, not all mega mergers do necessarily produce competitive concerns. In 1998 the Commission approved the merger between the two Swiss banks "Schweizer Bank Verein" (SBV) and "Schweizerische Bankgesellschaft" (SBG)[5], who were merging into a new company, UBS. UBS at the time (1998) was the largest European bank and also one of the leading players in investment banking and Asset management on a global level. However, the merger did not result in the parties holding a dominant position due to the small overlap in activities (which were confined to M&A advice in Portugal where both parties had previously won parts of a project on the privatisation of the Portuguese Telecommunication sector). Likewise, the market share additions in equity trading did not produce competitive concerns, owing to the presence of a number of strong international players like Merill Lynch, Dresdner Kleinwort Benson, etc.

Similarly, the take-over in March 1999 of the eight largest US bank "Bankers Trust" by Deutsche Bank[6] led to the creation of the largest financial institution in the world with total assets of 780 billion Euro, although it did not create any competition problems, given that the overlap in the EEA was limited and the activities of the two companies were largely of a complementary nature.

Looking at the Commission's previous practice towards banking mergers, we find that concentrations in the banking and financial sector did not produce any substantial competitive concerns: all banking concentrations notified were cleared within the regular four weeks period following notification (in "first phase"). The only case cleared by the Commission subject to undertakings submitted by the

parties was the concentration between the two Austrian banks "Bank Austria" and "Creditanstalt"[7]. The merged entity became the leading supplier of banking services in Austria and at the same time the only bank with significant market shares in all relevant product segments. However, "Bank Austria" gave undertakings to the Commission, which eliminated the competitive concerns relating to the proposed merger (see below).

There are several reasons why concentrations in the banking and financial sector so far examined by the Commission did not give rise to competitive concerns as regards the creation or strengthening of a dominant position of the undertakings involved. To start with, European banking markets are in general not highly concentrated and market shares are rather fragmented. For several banking products, such as wholesale banking[8] or financial services related to capital markets[9], there are a large number of international suppliers. Moreover, it has to be considered that several banking concentrations assessed by the Commission involved companies which had no or only very minor activities in the EEA (as, for example, Japanese or US banks, including Kyowa/Saitama[10] or Bank Americana/Nationsbank[11]). Finally, several operations were largely of a complementary nature where the overlap in activities was minor (see, for example, the merger between Deutsche Bank and Bankers Trust).

The fact that the Commission never had to open an in-depth enquiry[12] into a notified banking merger so far may seem surprising but, as already mentioned, simply reflects the fact that there are a large number of suppliers of financial services. In addition, the Single market and the impact of the common European currency will presumably increase the geographical scope of certain banking markets, which at present are still predominantly national (for example some segments of corporate banking and investment banking). However, with the accelerating rate of mergers the Commission has to be vigilant to any possible creation of dominance at a national or European level. Furthermore, the Commission will have to look pro-actively at new developing or growth areas of bank activities, to help market players understand how competition rules apply there.

In this context, I will briefly outline the approach of the Commission to the definition of relevant product and geographic markets and then focus on some competition issues, which have been addressed in previous merger decisions and may be of interest for the Commission's evaluation in future cases. But first of all I want to summarise the special rules applying to banks and credit institutions under the present EC Merger Regime.

2. Particular provisions applying to banks and financial institutions

2.1 Concept of a concentration

Under Article 3(1)(b) ECMR a concentration will arise where "one or more persons already controlling at least one undertaking or one or more undertakings acquire, whether by purchase of …assets, ….. control of the whole or parts of one or more other undertaking(s)." Under Article 3(5)(a) of the ECMR[13], a concentration does not arise when credit institutions or other financial institutions (or insurance companies), the normal activities of which include transactions and dealing in securities for their own account and the account of others, hold securities, which they have acquired in another undertaking with a view to reselling them. The condition for the application of this exception is that these companies do not exercise their voting rights with a view to determining the competitive behaviour of the undertaking unless in preparation of the divestiture of the stakes. In 1998 the Commission on the occasion of the revised ECMR has adopted a notice[14] on the concept of concentrations thereby also determing the exact requirements for the application of the "banking clause". According to para. 42 of the Notice the acquisition of the securities must be made by a bank or financial institution; the securities must be acquired

with a view to their resale; the acquirer must not exercise the voting rights with a view to determining the strategic commercial behaviour of the target; the acquirer must dispose of its stake within one year or reduce the stake to a level which does not confer control.

Furthermore, Article 3(5)(c) ECMR provides for another exception from the concept of concentration under Article 3(1)(b) with regard to the operations carried out by certain financial holding companies, which exercise their voting rights to maintain the full value of their investments without determining the strategic conduct of the enterprise concerned.

3. Differentiated rules for turnover calculation

Article 5(3)(a) ECMR provides for a differentiated turnover calculation for banks and credit institutions: In place of turnover the sum of the following income items shall be used: interest income and similar income, income from securities, income from shares and other variable yield securities, income from participating interests, income from shares in affiliated undertakings, net profit on financial operations and other operating income. This differentiated approach was introduced with the revised merger regulation and entered into force on a March 1998[15].

The underlying reason for this amendment was that banking income is a better criterion for the purposes of turnover calculation of credit and financial institutions than the previously used criterion of ten percent of the bank's assets, because it should reflect more accurately the economic reality of the whole banking sector. The previous approach has often been criticised because it excluded certain operations, such as financial market operations.

4. Geographic allocation of turnover for credit or financial institutions

Under the old ECMR the turnover was allocated at the location of the customer. This approach proved to be problematic since the later could change during the time of the services' contract. Article 5(3)(a) of the revised ECMR now provides that the turnover of a credit or financial institution in the Community or in a Member State shall comprise the income items which are received by the branch or division of that institution established in the Community or in the Member State in question.

I will now briefly summarise the Commission's previous approach with regard to the market definition for certain banking products, thereby highlighting some special issues examined by the Commission.

5. Special focus: Product markets for banking products

5.1 A few general remarks

It has to be explained from the outset that the large number of concentrations examined by the Commission in the banking sector has contributed to a relatively consolidated and stable approach over the years. At the same time, given the absence of decisions following an in-depth investigation, the Commission has on several occasions left the exact market definition open after having considered several possible definitions. This approach is possible, provided that under any of the alternative definitions the concentration does not give rise to competitive concerns.

The main segments of banking products so far examined by the Commission are:
Retail banking;

- Corporate Banking;
- Investment Banking; and
- Financial Markets.

Retail banking is usually divided into private loans, deposits, services related to credit cards and private banking (i.e. asset management services destined for private individuals).

Corporate or wholesale banking refers to banking services to corporate clients including, for example, deposits, lending, international payments, letters of credit, cash management and asset management (see for example Case No IV/M. 342 - Fortis/CGER). Asset management services include the creation, establishment and marketing of retail pooled funds (mutual funds, unit trusts, investment trusts and open ended investment companies) and the provision of portfolio management services to pension funds, institutions, international organisations and private investors (see case No. IV/M. 1067-Meryll Lynch/Mercury).

Investment banking activities include in particular M&A advice, equity underwriting, debt underwriting, securities (equity and debt) trading and derivatives (see for example Case No IV/M.597-Swiss Bank Corporation/S.G.Warburg). M&A advice (also denominated corporate finance advice) is a service activity which consists of advising companies or public administrations. These services include advice on acquisitions/disposals by trade purchases/sales, public bids, privatisation, corporate restructuring, corporate rescues and advice on demergers.

With respect to financial markets the following activities may constitute distinct service markets: trading in equities, bonds and derivatives, foreign exchange and money markets (i.e. treasury bills and commercial paper from banks and companies).

One principle question to be answered before defining the relevant product market is the question of which products are regarded as substitutable from the consumer's viewpoint with regard to their price, product characteristics and intended use. The Commission has repeatedly been confronted with the question whether certain banking products are substitutable by certain products offered by insurance companies and vice versa.

5.2 Certain insurance products?

One of the first cases in which the Commission examined the possible substitutability between certain banking and insurance products was the concentration between the German insurers Allianz and Hermes (case Comp/M.813 - Allianz/Hermes). In this case the Commission investigated whether services offered by banks should be regarded as substitutes for credit insurance.[16] The Commission held that, although some products offered by banks are beginning to enter the market as potential competitors to credit insurance, due to their particular characteristics and prices, these products are not yet sufficiently developed to substitute credit insurance products as such but are supplementary in nature.

In its decision on the concentration between the German insurance company Allianz and the French insurer AGF[17] the Commission examined the question to which extent a certain segment of credit insurance, namely "delcredere" can be substituted by different services offered by banks such as factoring

and letters of credit. The so-called "delcredere" business is a particular segment of credit insurance including domestic and export credit insurance and capital goods insurance. Both domestic and export credit insurance protect the policy holder against the insolvency of the client, and the only difference between the two different types of insurance is the location of the risk insured. Export credit insurance can be further divided according to the kind of risk covered. Capital goods insurance covers insolvency risks deriving from the purchase of installations and factories in the home market and abroad.

In the Allianz/AGF-case the question of definition of product markets was relevant, since the combined market position of the parties in the narrower market of "delcredere" raised concerns with regard to the creation of a dominant position. The parties claimed that "delcredere" insurance products are increasingly substituted by services offered by banks in addition to their core lending activities, such as factoring and letters of credit used in particular when credit insurance is not available or credit limits are insufficient to cover orders. It was also suggested that factoring add the pre-financing element to the service rendered by credit insurers and factoring without recourse may even cover non-payment risk and provide credit protection.

The Commission acknowledged that certain banking products are increasingly entering the market as competitors of credit insurance products. Nevertheless, in line with the Allianz/Hermes decision (see above), the Commission concluded that these products by reason of their characteristics and prices are not yet sufficiently developed to substitute credit insurance products. Factoring companies concentrate on the financial side of the business. They often seek credit insurance themselves with insurance companies. In the course of their business relations with clients they often ask for the assignment of the indemnity of an underlying domestic and export credit insurance policy as a security. A policy holder may obtain financing more easily when presenting the security of a credit insurer protecting his debtor balances. Furthermore, financial guarantees like factoring and invoice discounting do not provide prevention and risk analysis nor do they provide the transfer of a whole portfolio of buyers, but the factoring company selects acceptable risks. Finally, factoring often does not cover political risks and due to the cession of claims the client loses control over the receivables. Therefore, the Commission concluded that "delcredere" and factoring are different product markets.

The Commission confirmed its position taken in Allianz/AGF in its decision on the concentration between the German credit insurer "Hermes", the Sampo wholly-owned Finish Insurance Company "ICF" and the Finnish Guarantee Board ("FGB"), a Finnish state-owned export credit agency (providing small and medium-sized domestic enterprises with export credit insurance and political risks coverage). These three companies were establishing a joint venture, the "Finnish Credit Insurance Company" ("FCIC").[18]

In the Hermes/Sampo case the parties argued that bank guarantees and credit insurance are part of the same product market because, especially on the Finnish market, the majority of the guarantees are given out by banks rather than insurers. In addition, the parties argued that factoring may increasingly substitute insurance products in "class 14" (including domestic and export credit insurance, consumer credit insurance and capital goods insurance) and is a potential competitor for credit insurance. However, the investigation carried out by the Commission in this case again confirmed that bank guarantees are not, in general, considered as direct substitutes to credit insurance.

Finally, in the case Comp/M.1661-Crédit Lyonnais/Allianz-Euler/JV[19] the parties claimed that the relevant product market was the market of factoring[20] in France, which forms a distinct market from other banking services. The main operators in this sector are subsidiaries of banks that often acquire reinsurance services with credit insurers like Euler. Again, the market investigation confirmed the earlier approach of the Commission indicating that factoring and credit insurance constitute distinct product markets in particular because credit insurance only covers the risk of insolvency of the customer. In this

case, however, the exact product market definition could be left open since the concentration did not produce any competition concerns with either approach.

In general it can be expected that the question of the exact delimitation between banking and insurance markets will turn up in future merger cases since borders between banking, insurance and securities are becoming more blurred and may disappear completely one day. The Commission already had to deal with a number of concentrations between banks and insurance companies, such as the Merita/Nordbanken case[21] and the Fortis/Meespierson case[22].

6. Special focus: Geographical markets

6.1 The Commission's approach in previous cases

Before assessing the impact of a concentration in a certain product market, the Commission with the help of the parties and their competitors/customers has to define its geographical dimension. The criteria usually applied are whether the conditions of competition are sufficiently homogenous in a given geographic area in which the parties are involved in the supply and demand of relevant products/services and whether they can be distinguished from conditions in neighbouring areas. Despite the increasing trend towards internationalisation, the Commission has so far found that most banking markets are still predominantly national, with the exception of financial markets and Asset management. Financial Markets have in principle been considered international in scope. In case M.597-Swiss Bank Corporation/S.G. Warburg[23] the Commission concluded that "money markets trading, foreign exchange trading and derivative trading are activities whose geographic scope is international." Similarly, the Commission has considered that the market for Asset management services is global in scope (see case No. IV/M.1043-B.A.T./Zurich).

For the remaining services provided within corporate banking, especially those made in connection with international exports, the Commission has found that these activities are predominantly national in scope since they usually require a close relationship between a bank and its clients in order to best taylor the funding to the particular needs of the clients (see for example Case No IV/M.596 - Mitsubishi Bank/Bank of Tokyo).

Services in connection with investment banking, which usually require a knowledge of national corporate law and the company structure as well as of accounting principles and the local market habits will presumably continue to be offered on a rather national scope[24]. The Commission was repeatedly confronted with claims by merging entities that competition for the provision of M&A advice services takes place on a European level. In general, the Commission has recognised that many M&A transactions are cross-border but has distinguished between the activity, which may be international in scope, and the service provided, which is mainly national in scope and requires that the principal advisor is physically established in the country where the target company is situated. The national character of M&A advice services also results from a number of other factors, such as the need for detailed knowledge of local corporate law and business structures, accounting rules, regulatory regimes and market prices (see for example case Comp/M. 1108-SBV/SBG).

The market for retail banking has always been considered national in scope, due to the different competitive conditions in the individual Member States and the importance of a network of branches (see for example Merita/Nordbanken M. 1029; or Swiss Bank Corporation/S.G. Warburg, M. 597). This situation is not likely to change in the future. On the contrary, the question might arise whether banking markets, especially for retail banking services, could be defined more narrowly.

6.2 Local aspects of retail banking?

It might be argued that in particular for banking services addressed to private individuals and to SMEs it would be appropriate to distinguish between the distribution-related aspects and the products and services as such, which are normally quite homogenous throughout a Member State. For many retail banking services the end consumer will turn to a bank outlet within reasonable distance from his home/office. Therefore, the question arises whether one should examine the position of banks on a regional/local level in order to assess potential competitive constraints and the possibility for the consumer to switch to a different provider.

This question so far has not been a crucial issue in the cases examined by the Commission, because the operations analysed did not produce any competitive concerns. On several occasions (see for example the concentration between Fortis and GB[25], Deutsche Bank and Banco de Madrid[26] or between Banco Santander and Banesto[27]) the Commission examined the market shares of the undertakings concerned on a national level as well as their presence in different regions/agglomerations and found that the undertakings concerned after the concentration were still exposed to a sufficiently high degree of competition exercised by national and regional challengers.

In the insurance sector for example, the Commission has repeatedly acknowledged that a dense distribution network is an important parameter for the competitive position of an insurance company. In its decision in the Generali/INA case[28] the Commission found that the principal competitors in lefe insurance were present throughout the Italian territory and their positions on a national level were more or less reflected in the respective positions in the most important regions for the supply of insurance policies. Furthermore, the Commission found that premiums for different insurance products were in general homogenous throughout Italy. Therefore, it was concluded that the relevant geographic market for the purposes of the case was Italy. Similar issues could be at stake when examining banking markets, especially retail banking services.

The question of whether markets for banking products could be narrower than national (i.e. regional or local) could also be relevant for the Commission's approach towards the referral of certain concentrations to the Member States: Under the revised ECMR the Commission has to refer the case to the competent national authorities upon their request, if markets are «non substantial parts of the Common Market», if the remaining conditions are fulfilled (the concentration has to affect competition in a distinct market). Up to now, however, the Commission has never received a referral request by a Member State in a banking merger.[29]

In this context it should be mentioned that the repartition of competencies between the Commission and the Member States ("one-stop-shop" approach) also applies to concentrations between banks and credit institutions: Article 21(2) ECMR says that no Member State shall apply its national legislation on competition to any concentration that has a Community dimension. Article 21(3), however, stipulates that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the ECMR, including the protection of public security, plurality of the media and "prudential rules". Prudential rules are measures addressed, for example, to ensure the good repute of individuals managing undertakings, the honesty of transactions and the rules of solvency, as indicated in the Notes on Council Regulation 4064/89 on Article 21.3. In the banking and insurance sector, there was one very particular case, namely the proposed take-over by Banco Santander of the group of financial companies of Mr. Champalimaud[30], where a Member State invoked the prudential rules as a justification for its interference with a merger project which had Community dimension. The Champalimaud-case is of particular importance since the Commission for the first time had to take position on the conditions and limits of the application of legitimate interests under Article 21(3) ECMR.

7. The Champalimaud case

On 3 August 1999, the Commission had approved an operation by which the leading Spanish bank Banco Santander Central Hispano (BSCH)[31] should acquire joint control over the group of financial companies of Mr. Antònio Champalimaud. Mr. Antònio Champalimaud is a Portuguese citizen, controlling companies operating in different sectors of the economy. As far as the financial sector is concerned, before the operation he owned directly or indirectly the majority of the capital of the insurance undertaking Mundial Confiança S.A., which in turn controlled several Portuguese banks (Banco Pinto & Sotto Mayor; Banco Totta & Açores; Banco Chemical Finance; Crédito Predial Português).

Despite the Commission's approval decision on the above-mentioned transaction, the Republic of Portugal by decision of 18 June 1999 opposed the planned concentration by a decree («Despacho»). This opposition also gave rise to the suspension of the exercise of voting rights by Mr. Champalimaud and the group of holding companies owning stakes in Mundial Confiança. The Portuguese Authorities based their decision on the need to protect national interests and strategic sectors of the national economy. The decision was also based on the need to ensure compliance with the national rules on prior notification of any acquisition of a qualified holding in an insurance undertaking.

The Commission was concerned that the "Despacho" was not justified on prudential grounds and therefore violated EU insurance Directives as well as EU Treaty rules on freedom of establishment and the free movement of capital. It decided therefore to open formal infringement proceedings against Portugal.

Simultaneously the Commission by two decisions (of 20 July and 20 October 1999) took action against the Portuguese measures under Article 21(3) of the ECMR, which grants the Commission exclusive powers to assess concentrations having a Community dimension. In particular, these decisions indicate that, in so far as the measures of the Portuguese authorities are based on the protection of national and strategic interests, they are contrary to Article 21 of the Merger Regulation, because the Portuguese authorities failed to notify them. With the first Article 21 decision of 20 July 1999, the Commission requested the suspension of the decision by the Portuguese Minister for Finance to oppose the operation and the measures deriving therefrom, such as the suspension of voting rights of BSCH and A. Champalimaud in Mundial Confiança. In the final decision adopted on 20 October, the Commission indicated that the measures of the Portuguese authorities could not be regarded as protecting legitimate interests within the meaning of Article 21 of the Merger Regulation. The Portuguese authorities challenged before the Court of Justice both the interim Decision of July 20th and the final Decision and did not comply with the Commission's request to suspend the opposition decision.

BSCH and Mr Antonio Champalimaud subsequently concluded a new agreement, which replaced the previous one. According to the new agreement BSCH acquired Banco Totta i Açores and Banco de Crédito Prédial Português belonging to the Champalimaud group. This new operation was notified to the Commission on 29 November 1999 and authorised by the Commission on 11 January 2000[32]. The Commission subsequently decided to open an accelerated infringement procedure against Portugal for not suspending the measures against the BSCH/Champalimaud operation. This decision was necessary in order to reach a prompt solution. The operation between BSCH and A. Champalimaud, although approved under the EC merger rules, could not be put in place. Moreover, Banco Comercial Português had announced its intention to launch bids over the companies of the Champalimaud group, which required that the legal situation concerning the control of these companies be clarified quickly.

Finally, by decision of 19 January 2000 the Portugese authorities declared that they were not opposed to the new operation and revoked their decision of 18 June 1999. The Commission subsequently decided to withdraw both infringement procedures mentioned above against the Portuguese Authorities pending before the European Court of Justice.

The Champalimaud- case is very important for Community law and the business community, as it shows that the Commission can act speedily and with determination to reaffirm its exclusive competence in merger matters. In addition, the case underlines the importance of transnational operations in the financial and banking sectors. If national champions are further strengthened by governmental intervention there may be a risk that the reduction of players and the strong position of the few remaining ones will discourage potential market entrants. Such a situation could foster market segmentation and present an obstacle to the opening up of banking markets.

The question of the application and interpretation of "prudential rules" might again be raised in future concentrations in the banking sector. Under the Second Council Directive 89/646/EEC of 15 December 1989 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions a potential buyer of a qualifying holding in a credit institution has to inform the competent authorities of the Member State (Article 11). The competent authorities have three months to oppose such a plan if, in view of the need to ensure sound and prudent management of the credit institution, they are not satisfied as to the suitability of the potential acquirer. In the Champalimaud-Case, however, the Commission has made it clear that any such measures concerning concentrations of a Community dimension have to be notified to the Commission and have to be based on one of the recognised "legitimate interests" mentioned in Article 21 of the ECMR.

8. Other aspects of interest in the examination of concentrations in the banking sector

Amongst several aspects which will increasingly turn up in the examination of banking mergers one is of particular relevance: The continuing consolidation between banks and insurance companies and its impact on competition.

8.1 The relationship between banking and insurance markets and its significance for merger control

Mergers involving undertakings active in banking and insurance services are indicative of the growing links between the banking and insurance sectors, prompting the Commission to look more closely at conglomerate aspects. This trend began years ago (see for example the Belgo-Dutch group Fortis acquiring from ABN-AMRO the merchant bank MeesPierson, Fortis/ASLK[33] or Crédit Suisse Group/Winterthur[34]).

In the Crédit Suisse/Winterthur case, the Commission had to examine the creation of a large conglomerate offering financial services and insurance products with important market positions in Switzerland but also in some Member States of the Community. The concentration did not present any competition concerns because of the small overlap in the EU and the modest presence of the parties in the retail business. But this concentration is of interest because it was taking place in the context of the continuing structural changes in the financial services sector bringing about the narrowing of differences between banking and insurance services. Three competition issues were examined by the Commission in this case.

First, the Commission examined whether conglomerate effects would arise from a combination of the financial resources of the parties. Second, the Commission verified whether conglomerate effects on competition would arise from the development of new "all-finance"- products, that is taylor-made individualised products and services created by the combination of the specific know-how of the parties in the finance and insurance sector. Finally, it was asked whether the new company would achieve decisive

competitive advantages from the distribution of different products (insurance policies and banking products) through the newly acquired distribution channels, thereby strengthening its distribution network.

On the financial resources issue the Commission found that the combined entity would definitely enjoy advantages concerning the access to financial markets (i.e. reinsurance). However, the Commission considered that this advantage, given the low market shares of Winterthur and Crédit Suisse in the relevant product markets, would not lead to the creation of dominant positions. The Commission also found that the most important competitors in the sector possessed comparable financial resources.

On the question of "all-finance products" i.e. the supply of taylor-made integrated allfinance-solutions, for example, in the field of risk management the Commission concluded that these integrated products would be of increasing importance in the overall "portfolio" of banks and insurers. Such a portfolio would enable conglomerates, for example, to provide integrated financing schemes to private customers consisting in a combination of life-insurance policies with investment funds. Similarly, in the field of risk management, new products are developed with the help of which risks which could not be insured can be transferred to market participants or can be covered at least to a certain extent. These products are destined to meet the individual needs of the customer and require a combination of know how in banking and insurance business (especially insurance statistics and insurance mathematics). The Commission found that the main competitors of Crédit Suisse/Winterthur have the know-how needed for these products/solutions (like for example Allianz/Dresdner Bank, Zudrigo/Banco di Napoli, Banca Roma/Toro Assicurazioni, AXA/UAP/Banco Bilbao Vizcaya, UBS/Rentenanstalt/Swiss Life, SBC/Zürich) and concluded that the competitive behaviour of the parties would be sufficiently controlled. Nevertheless, it can be expected that the issue of "all-finance products" will turn up in future inter-sectorial concentrations between large banks and insurance companies.

On the possibility to distribute and sell banking and insurance products using joint distribution channels, the Commission concluded that this constituted a competitive advantage but did not lead to the creation of dominance of the parties, since their combined position in retail banking in the Community was relatively small. Nevertheless, in previous decisions the Commission has taken the view that a strong network of sales outlets is a very important asset in the provision of banking and related services.

8.2 The "network effect"

The Commission has in its previous decisions on banking mergers examined the effects on competition at a national level. Nevertheless, certain assets of merging companies, like the strength of their distribution network, have to be analysed at a narrower scale, that is, on a regional or local level. The Commission has in several cases looked at the density of the distribution network of the companies involved, examining the possible alternatives available to the consumer.

In the concentration between Fortis and GB, Deutsche Bank/Banco de Madrid and Banco Santander/Banesto the Commission examined the market shares of the undertakings concerned on a national level as well as their local presence in the different regions. The Commission found that Fortis by taking over GB would acquire 24-28 percent of the total outlets in Western Flanders and would also own between 35 and 39 percent of total outlets in the province of Hainaut/Namur. As a result of the concentration, Fortis would acquire the most dense network of local banking outlest in Belgiun. The Commission decided, however, that these circumstances did not lead to a dominant position of Fortis/GB, since consumers would still have within their reach a number of alternative suppliers. In addition, the Commission was referring to the increasing significance of modern distribution channels, which are not requiring local presence such as electronic banking, telephone banking or cash points.

In the Deutsche Bank/Banco de Madrid- case the Commission found that Deutsche Bank would own four times as many sales points after the proposed transaction than before. However, this fact did not give rise to competition concerns because the parties were active in different geographic areas. In the Banco Santander/Banesto- case the Commission found several overlaps of the distribution network of the two companies in Spain on both regional and local levels but concluded that in most cases their competitors were also represented in these regions and there were also a number of regional challengers (savings banks).

The significance of a dense network of retail outlets will have to be carefully assessed in the future. In particular it will have to be examined in detail to what extent competitors without a strong retail network could nevertheless enter the market and be competitive, for example via internet banking or home-banking.

Finally, I want to consider the main issues examined in the Bank Austria/Creditanstalt-case. In this case it was the combination of high combined market shares in several banking markets of the undertakings concerned as well as their structural links with two specialised banks that led to serious doubts with regard to the compatibility of the operation with the Common market. The operation was finally cleared subject to commitments offered by the parties.

8.3 The "Bank Austria"- case

On 10 February 1997 Bank Austria Aktiengesellschaft, Vienna (Bank Austria) notified its intention to acquire sole control of Creditanstalt-Bankverein, Vienna (Creditanstalt). The project was linked to the privatisation of Creditanstalt by the Republic of Austria.[35]

Bank Austria is a universal bank, which is principally active in Austria and carries out all essential banking business either direct or through subsidiaries. Creditanstalt is a universal bank, which is likewise principally active in Austria. Measured by balance sheet total, the new entity will be approximately five times larger than the next largest Austrian bank.

The Commission found that, after the merger, the two undertakings would not only be the leading supplier of banking services in Austria but would also be the only bank with significant market shares in all relevant product segments. The Commission also found that both in private and company customer banking services in Austria the parties together with GiroCredit would reach significant market shares, which are several times higher than those of the next largest competitor, in a number of product segments (e.g. credit business, stocks and shares and deposits). In addition to the high market shares, the Commission considered that the Austrian banking markets are characterised by market access barriers, which in retail banking in particular result from the need to be present locally through an extensive network of branches. It held that private customers usually maintained a link with only one bank, because they incurred both information and transaction costs when changing banks. The mobility of bank customers was considered to be further reduced by the fact that maintaining several banking links, and dividing deposits between banks reduces the chances of raising a loan. The Commission held that, for these reasons, competitors could be expected to take over traditional business ties that had existed for years on a significant scale even in the long term. It was further considered that the foreign banks active in Austria had, despite many years' presence in some cases, achieved only very small market shares and were collectively too insignificant to be able to exert a decisive competitive influence in the medium term.

The Commission thought therefore that there was a risk of the creation or reinforcement of a dominant position.

Further competition concerns stemmed from the addition of participation's which Bank Austria and Creditanstalt each held in the specialised banks "Österreichische Kontrollbank" (OeKB) and "Österreichische Investitionskredit AG", two institutions active in the public interest. OeKB is active in the area of export insurance and financing, Investkredit in the unwinding and award of subsidised credits. Several competitors, when interviewed by the Commission, expressed serious doubts that the combination of the holdings of Bank Austria, Creditanstalt and GiroCredit in OeKB might lead in practice to the export insurance procedure being influenced by the future majority shareholder. It was feared that the intensity and the duration of the bank's processing of the requests for liability acceptance would be carried out in a discriminatory manner to the detriment of applicants who did not finance their transactions through the parties to the merger. This was particularly conceivable in those cases where there was scope for influencing the granting of export guarantees by the OeKB. In addition, it was possible that Bank Austria might influence OeKB's capital market transactions and stock exchange dealings in a way, which suited its own interests.

In order to meet the competition concerns expressed by the Commission, the parties offered certain commitments. Bank Austria committed itself *vis à vis* the Commission to sell its stake in GiroCredit. This eliminates the links between Bank Austria and GiroCredit. In addition, Bank Austria undertook to reduce the calculated participation of Bank Austria and Creditanstalt in OeKB to the level of participation which Bank Austria and GiroCredit currently hold together. Furthermore, Bank Austria committed itself not to extend its influence in Investkredit beyond the level of influence, which it had, together with GiroCredit, prior to the concentration. These undertakings were considered appropriate to completely resolve the serious competition concerns raised by the Commission and led to the approval of the proposed operation in its modified form.

9. Conclusion

Having given a very brief overview on the Commissions approach to some of the issues which are at present discussed within the Commission and its services, it is clear that the real challenges for merger control and European competition policy are yet to come. In the banking and financial sector the Commission has never opposed an operation or opened an in-depth inquiry to a proposed concentration.

Mergers in the banking industry have until now predominantly taken place at national level. It can be expected that mergers of European dimension will increasingly take place in the future, given the impact of the Common European currency offering incentives for banks to broaden the traditional scope of activities. Crossborder mergers reflect to a certain extent the restructuring of the industry moving away from a single focus on domestic markets and taking advantage of the benefits of the single market. In this environment smaller banks may concentrate on niche markets (certain products and countries) but larger players have to extend their home market to a wider scope: European or even global. Crossborder mergers are in a way providing a useful vehicle to facilitate the move towards a single EU-wide industry structure. However, because the record number and size of bank mergers are dramatically restructuring the industry, competitive control issues will inevitably be raised.

In this quite complex scenario the Commission and the Member States will increasingly be called to take a position on several issues, which are already widely debated and will certainly influence the development of European banks and the financial services sector as a whole, such as the impact of modern technologies like internet or home banking, the growing links between banking and insurance markets, the attitude of the Community towards the position of state-owned banks, and many more.

NOTES

1. Cross-border mergers between US banks are more frequent than between European banks. It can be expected that this will change due to the introduction of the Euro and the increasing need for European banks to be present globally in order to be able to avoid heavy risks in particular areas. The first large transatlantic merger was the take-over by Deutsche Bank of the US bank Bankers Trust in 1999 (see below).

2. Inside DG Competition The Merger Task Force, established in 1990, is responsible for the examination of concentrations with Community dimension.

3. Council Regulation 4069/89 (OJ 395, 30.12.1989), amended by Council Regulation 1310/97 (OJ 180, 9.7.1997)

4. Retail banking refers to the provision of banking services to individuals, such as obtention of deposits and concession of credit to individuals.

5. Case Comp/M.1108-SBG/SBV; OJ C 149/4; 15.5. 1998

6. Case Comp/M.1384-Deutsche Bank/Bankers Trust; OJ C 143/7; 21.5.1999

7. Case Comp/M.873-Bank Austria/CA; OJ C 160/4; 27.5. 1997

8. Provision of banking services to companies, financial institutions and public sector like M&A and specialised financing.

9. Including investment operations in different types of assets such as shares, bonds or derivatives.

10. Case Comp/M.69-Kyowa/Saitama

11. Case Comp/M.1244-Bank Americana/Nationsbank

12. Meaning an extended examination period of five months in total, socalled «second phase inquiry».

13. So-called «banking clause».

14. Notice on the concept of concentration under Council Regulation 4064/89; OJ C 66, 2.3. 1998

15. Council Regulation (EC) No 1310/97 (OJ 180, 9.7.1997)

16. Credit insurance can be subdivided into delcredere, consumer credit insurance, fidelity insurance and guarantee insurance.

17. Case Comp/M. 1082- Allianz/AGF; OJ C 246/4; 6.8. 1998

18. Case Comp/M. 1101- Hermes/Sampo; OJ C 212/6, 8.7. 1998

19. OJ C 285/6, 7.10. 1999

20. Market definition applied by the Commission: "L’affacturage peut être défini comme une opération de gestion financière par laquelle un organisme spécialisé (le factor) gère les comptes clients d’entreprises en acquérant leurs créances, en garantissant éventuellement la couverture du risque acheteur et en effectuant, le cas échéant, le recouvrement pour son propre compte".

21. Case Comp/M. 1029-Merita/Nordbanken; OJ C 44/5, 10.2. 1998

22. Case Comp/M. 850 – Fortis/Meespierson

23. OJ C 180, 14.7. 1995

24. See case Comp/M. 319 - BHF/CCF/Charterhouse, para. 6 and 9.

25. Case Comp/M.1172 – Fortis/GB, OJ C 44/5 10.2. 1998

26. Case Comp/M.341-Deutsche/Banco de Madrid, OJ C 175, 26.6. 1993

27. Case Comp/M. 455- Banco Santander/Banesto, OJ C 178, 30.6. 1994

28. OJ C 58/6, 1.3. 2000

29. Please note that the Commission can in principle also refer the analysis of national markets, if the competent authorities of the Member State are better placed to assess the impact on competition. On the contrary, the Commission cannot refer the analysis of markets wider than national.

30. Case Comp/ M.1616-BSCH/Champalimaud

31. Banco Santander Central Hispano is the leading Spanish bank. It was created through the merger of Banco Santander and Banco Central Hispano at the beginning of 1999.

32. Case Comp/M. 1799

33. Case Comp/M. 981-Fortis/Alsk-CGER, OJ C 323/7, 24.10. 1997

34. Case Comp/M. 985-Crédit Suisse/Winterthur ; OJ C 341/8, 11.11. 1997

35. The Austrian Republic had offered for sale its ordinary shares in Creditanstalt, which accounted for 69.45 percent of all voting rights. On 12 January 1997 the Austrian Federal Minister for Finance accepted the binding offer submitted by Bank Austria on 14 December 1996.

ROOM DOCUMENT

THE MERGER ENFORCEMENT GUIDELINES AS APPLIED TO A BANK MERGER

CANADA

This document is available at the Canadian Competition Bureau's Web Site at:
http://strategis.ic.gc.ca/SSG/ct01280e.html

DOCUMENT DE SÉANCE

LIGNES DIRECTRICES POUR L'APPLICATION DE LA LOI : FUSIONNEMENTS DE BANQUES

CANADA

Ce document est disponible sur le site Web du Bureau de la concurrence, Canada :
http://strategis.ic.gc.ca/SSGF/ct01280f.html

ROOM DOCUMENT

COMPETITION IN UK BANKING

A Report of the Chancellor of the Exchequer

This document is available at the following Web Site: http://www.bankreview.org.uk

AIDE-MEMOIRE OF THE DISCUSSION

The Chairman began by noting that a lot of very interesting contributions were received for this roundtable reflecting a great deal of experience with mergers in the banking sector in many jurisdictions. He stated that it would be impossible to refer in the course of discussion to all the points covered in the written submissions and urged the delegates to read those documents if they had not already done so.

The Chairman decided to focus on bank mergers and organised the roundtable into six sections: context (i.e. the banking sector in perspective); market definition; barriers to entry; competitive impact assessment; efficiencies assessment; and remedies.

1. Context

After remarking that many of the submissions either discussed context or referenced contextual reports, the Chairman opened this section of the roundtable by calling on the Italian delegation. Its submission discusses at some length the specificity of the Italian banking industry and offers some general views on an alleged inverse relationship between the degree of competition and the level of stability of the banking sector. The Chairman reminded delegates that the Bank of Italy is responsible for enforcing competition rules in the Italian banking sector, but it does so in close co-operation with the Italian Competition Authority ("Autorita"). This is formalised through a Memorandum of Understanding between the two institutions. The Italian delegation was invited to present its views regarding the relationship between competition policy and stability in the banking sector, and to inform delegates whether the "division of labour" between the Bank and the Autorita is motivated by that vision.

An Italian delegate (from the Bank of Italy) began by noting that as with all other banking supervisors, the Bank of Italy wants stability in the overall banking system as well as in individual banks. A necessary condition for long run stability is that banks be efficient and this requires competition. In that sense, stability and competition are complementary.

In the 1980s, 90 percent of Italy's banking sector was publicly owned, and efficiency was not a prime concern. Italy had a very regulated banking system. A strong de-regulation wave began in the 1980s. Currently, only 13 percent of the banking sector is subject to public or quasi-public control. This was a big change that involved some 58 mergers primarily motivated by a desire to enhance efficiency in order to cope with greater competition. Sixteen of the mergers were subjected to formal investigation, and the Bank of Italy imposed conditions on ten of those.

The delegate contrasted the Italian and US experience stating that problems in relation to mergers have always involved the deposit rather than loan side of the business. This probably reflects differences in the two banking systems, but in any case it calls for very different remedies.

Concerning institutional matters, the delegate noted that competition policy decision making is conducted in a separate department of the Bank, but the Bank's general experience and enormous database are nevertheless available to assist in resolving competition cases. Data are also supplemented through close, sometimes daily, co-operation with the Autorita. The Bank of Italy is also active in enforcing competition policy across the board. In addition to the sixteen merger reviews, there have been twelve

formal investigations into agreements and five concerning abuse of dominance. This level of investigation compares favourably with competition enforcement in other sectors of the Italian economy and with levels of investigation found in other countries' banking sectors.

The Chairman asked the delegate for further detail as to why competition law is enforced by the Bank rather than the Autorita, and specifically if there were reasons why the Autorita could not undertake such enforcement itself. The response was that there would be no problem today with the Autorita having the enforcement function, but ten years ago when the division of labour was established, the banking system was different and also the banking products were changing very rapidly. Presently there is a need for very close co-operation with the Autorita because there is considerable overlap in financial service products (e.g. insurance and banking).

The Chairman turned to the US for further views regarding the trade-off between stability and competition in banking, plus comments on what Italy had stated about this.

A United States delegate noted that US experience does not support the existence of a trade-off between enforcing competition laws and bank stability. As the Italian delegate pointed out, enforcing competition laws tends to induce efficiency in the banking system, as in other sectors, and that enhances the performance of the banking sector. He also confirmed what the Italian delegate had said by noting that when bank mergers present problems in the US, these tend to be focused on loans to small and medium sized businesses. Such customers' ability to raise capital seems to depend most upon personal relationships that overcome what might otherwise be a disadvantage in terms of persuading potential lenders of their creditworthiness. These are the customers most potentially at risk in highly concentrated local markets. There is no reason to believe that local concentration in the provision of banking services to small and medium sized customers could in any way contribute to capital maintenance and the like for banks, hence to the stability of the banking system. In sum, it has not been US experience that there is any kind of tension between sound and vigorous competition enforcement on the one hand and stability of the banking system on the other hand.

The Chairman next noted that UK contribution refers to a study commissioned by the Chancellor of the Exchequer [the Cruickshank report], looking at levels of competition, innovation and efficiency in the UK banking market. That report pointed to the specificity of the banking sector, to a particular concern with competition and concentration in that sector, and suggested that UK merger policy in the banking sector has been somewhat lax. The Chairman called on the UK delegation to comment on those aspects of the study.

A United Kingdom delegate began by rejecting the study's criticism and added that, in any case, the urge to merge has largely by-passed the UK banking sector. The UK has had only two significant retail banking mergers in the last five years. The second, occurring last year, was between the Royal Bank of Scotland and the National Westminster Bank, a merger between a predominantly Scottish bank and a predominantly English or English/Welsh bank. There was relatively little overlap between the merging parties. No problems were found in the retail-banking sector. The competition authority was more concerned about small and medium enterprise banking (i.e. SME banking).

Although building societies have entered the retail-banking sector in recent years, they have not entered SME banking. There are still only a few banks providing SME banking services and the Royal Bank of Scotland and National Westminster accounted for a particularly large share of these in the Northwest of England. In the end, no difficulty with SME banking services was found despite the high concentration because all the traditional players were present in the Northwest.

The delegate noted that although the Cruickshank report identified some price differences in SME banking across certain areas, this could not be attributed to variations in local concentration levels. He mentioned, however, that the competition authorities do not differ with the Cruickshank report's view that in a sense banking services are special. They are not very special, however. In any retail sector, competition authorities become concerned at lower threshold levels of concentration if they find an absence of buyer power plus the presence of information asymmetries and the like.

Another United Kingdom delegate highlighted the Cruickshank report's view that many of the competition problems in the industry seem to stem from high switching costs, both as regards changing branches and banks. There are survey results showing that 50 percent of customers rate services from their bank as poor or very poor, yet only three to four percent of customers switch each year.

The delegate also noted that in the UK geographic markets for SME banking may be widening. Although SMEs still require a local depository for their cash, increasingly bank managers are taking on a regional orientation, servicing customers over a wider area.

The Chairman opined that that consumer inertia could be a very powerful barrier to entry into banking and should perhaps considerably increase concern about high levels of concentration. It also raises difficult issues about appropriate remedies for problem mergers. If switching costs are high enough, then whether there is only one bank or there are ten, there will not be much difference from the point of view of competition. The Chairman proposed returning later to this issue if delegates so wished. In the meantime, he turned to Australia.

The Australian submission refers to a string of reports and a number of different market definitions. The contribution states, for example, that the Wallis Report emphasised the global nature of banking and as a result, the Australian Competition & Consumer Commission (ACCC) changed its market definition. The Chairman acknowledged that it was probably not that simple and asked the Australian delegate to comment further on the Wallis Report and on market definition in particular.

An Australian delegate responded that it may be an over generalisation to suggest that that the ACCC has endlessly changed its market definitions. As for the Wallis Report, which has been beneficial to the ACCC, this report was commissioned by the Australian Government in 1997. It examined all elements of Australian financial market regulation. It was written in the context of a general microeconomic reform process that has been going on in Australia for the past decade. Although the report examined mergers, its main emphasis was on deregulation as regards interest rates, prudential regulation, etc. The report recommended, for example, the establishment of a new prudential regulator separate from the central bank.

Besides having standard competition law applying to banks, Australia has, or had, a very specific merger restriction, i.e. "the six pillars policy". The six pillars policy specified that the four major banks and two major life insurance companies could not merge under any circumstances. The Wallis Report recommended abolishing the six pillars policy. The government responded by allowing insurance companies and banks to merge, but continued to prohibit mergers among the four main banks.

Australia had and still has four major banks. Those banks had around 80 percent of the Australian banking market.

Australian bank mergers are concurrently reviewed by the ACCC and the prudential regulator. Both organisations report their findings to the Treasurer. The Treasurer lacks the power to approve mergers, which have been rejected by the ACCC, but he can reject mergers, which have been approved by the ACCC. The ACCC analyses bank mergers strictly on competition grounds, just the same as in any

other industry. The Treasurer, in contrast, looks at whether or not a bank merger is contrary to the national interest.

As in the UK, Australia has had just two bank mergers in the past five years (the latest completed in May 2000), but the ACCC considered these to be very important transactions since Australia has so few banks. The ACCC applies a substantial lessening of competition test to bank mergers and if that test is breached, the merger is rejected. The parties can apply for authorisation of a merger on public benefit grounds. This is a very public process, however, and experience shows that banks are very unwilling to go through it.

2. Market definition

The Chairman remarked that market definition was extensively discussed in many of the contributions. There seems to be general agreement that the lending and borrowing sides of bank activities are in separate product markets, but there are considerable differences in the categories actually used in various countries. This appears to be owing to perfectly understandable differences in local circumstances. About the only generalisation the Chairman could make was that countries define geographic markets roughly according to what one would expect based on transaction costs. As a result, the closer the banking service is to the final consumer, the narrower the geographic market tends to be.

Instead of getting deeper into the empirical questions posed by market definition, the Chairman drew attention to a particular issue featured in a number of contributions. This was the extent to which banking products compete with insurance products. He called on the European Commission to begin the discussion and to focus on the substitutability between bank services and credit insurance.

A delegate from the European Commission (EC) predicted that the question of substitutability between banking and insurance products will turn up in many future cases, including with regard to the joint provision of banking and insurance services.

In the vast majority of cases where the issue of substitutability of banking and insurance products could have arisen, the EC actually was not obliged to make a formal market definition because there was no competition problem regardless of the definition chosen. There were, however, four cases, all involving credit insurance or more specifically "delcredere" insurance, where the issue had to be squarely faced. The delegate described one of those cases, i.e. the takoever of *Assurance Générale de France* by the German insurance company, *Allianz*.

Delcredere insurance is a particular segment of credit insurance, which basically protects suppliers against buyer insolvency. It is a very narrow field of credit insurance. In the *Allianz* case, the EC focused on the demand side (there was a clear supply side separation since banking services and delcredere insurance were offered by different institutions). The EC asked whether delcredere insurance buyers could alternatively turn to banking services including core lending, factoring and letters of credit. Its investigation revealed that the products were more complements than substitutes. This conclusion was reached because factoring companies were themselves asking clients for guarantees in the form of assigning various insurance policies. In addition, the factoring companies themselves purchase credit insurance, and there is a difference in the services provided by the factoring companies and by credit insurance. The factoring companies and other providers of financial guarantees do not offer risk analysis prevention services. Finally, factoring companies exercise choice in which specific risks they will accept, i.e. there is no portfolio transferred.

The delegate also noted that for a number of other insurance and banking products there might be substitutability in the future. She specifically mentioned the *Crédit Suisse Winterthur* case where the EC considered packages of insurance and banking products tailor made to meet the needs of individual customers.

The Chairman then turned to Korea whose submission also touched on the substitutability of banking and insurance products. He noted that the Korean Fair Trade Commission had reviewed five major bank mergers since 1997. Citing Korea's submission, the Chairman read: "...similar products offered by non-bank financial institutions have low demand/supply elasticity and thus are not in competition." He asked the Korean delegate to expand on that.

A Korean delegate explained that this conclusion was based on investigations which revealed important differences between banking and non-banking institutions, namely: banking services are much greater in total size; non-banks do not offer the same full range of services offered by banks; non-banking institutions invest in much higher risks; and deposit insurance (limited to about $20 000 per depositor) does not extend to deposits in non-banks. In addition, it was found that customers tend to concentrate bank service purchases in a single bank, and are highly loyal to that bank. During a crisis, depositors may abandon their bank, but they return once stability is restored.

3. Barriers to entry

After pointing out that some other contributions also supported the view that there is low substitutability between banking and insurance services, the Chairman advanced to barriers to entry. He noted the attention paid in the submissions to consumer inertia and to regulatory barriers, but drew attention to the impact of electronic banking developments. There was a mix of views in the submissions concerning whether electronic banking increased or lowered barriers to entry or had a differential impact of various individual barriers to entry. The Finnish contribution appeared to support the view that electronic banking simultaneously lowered some barriers to entry while raising others. The Chairman called on Finland for further detail.

A Finnish delegate began by noting that there are three general types of barriers to entry. First, there are legal or regulatory barriers, which are nearly non-existent in Finland. Second, there are classic economies of scope and scale. Finally, there are strategic barriers to entry arising when incumbents seek to make new entrants' lives difficult. He also noted that large corporate customers can source services internationally. However, the situation is different as regards small and medium sized enterprises and households.

With specific reference to electronic banking, its effects on barriers to entry depend heavily on the stage or technological level of electronic banking being examined and on the customer class. As regards ATMs and Internet banking, one can say that barriers to entry are reduced to the extent there is less need to build extensive branch networks to reach customers. This is especially important in sparsely settled countries like Finland.

At later stages, electronic banking moves in the direction of transactions over mobile phones and banks begin to enter joint ventures with telephone companies as well as Internet and IT companies. At this stage, electronic banking could raise barriers to entry.

Although the Finnish Competition Authority generally welcomes electronic banking and Finland features among the top three countries in the world in its development, caution is required as regards competition issues especially in the longer run.

The Chairman stated that the Australian contribution also has mixed views concerning electronic banking and its effect on barriers to entry. It focuses particularly on one possible barrier to entry, i.e. interchange fees which are access charges in regard to private networks set up by incumbent banks. He turned to Australia to provide further information on this point.

An Australian delegate began by commenting that the ACCC's view so far has been that branch networks are still very important with regard transactions accounts and deposit services. Australian banks with extensive branch networks have significantly lower costs of obtaining funds than banks without such networks. This is possibly due to customers keeping funds in low interest paying accounts at their local banks. The ACCC also found that branch networks are very important to SMEs. Such enterprises typically rely very much on some form of relationship banking requiring a local presence.

At first sight, automatic teller machines (ATM) and electronic funds transfer at point of sale (EFTPOS) appear to reduce the need for branch networks. However, due to the network characteristics of electronic banking, barriers to entry may in fact be raised. Consumers apparently need and demand fairly extensive ATM and EFTPOS networks. A significant barrier to entry arises if a new entrant cannot get access to somebody else's ATM machines in a commercial arrangement and that brings up the issue of interchange fees. In Australia, such fees are affected by the relative bargaining strength of the two parties, which is linked to the relative size of their electronic networks. A new entrant typically pays much higher interchange fees than an incumbent bank that already has an extensive network. Where two of the major banks decide to enter into some sort of arrangement to allow their customers to use each other's ATM machines the interchange fees are typically much lower than either would charge a small bank for the same access.

The ACCC is currently conducting a major inquiry together with Australia's central bank into interchange fees in the context of looking at recent bank mergers and has started to have some reservations about existing interchange fee arrangements. Its tentative view is that the arrangements between Australia's major banks may in fact be in breach of the Trade Practices Act.

Concerning the notion of inertia as a barrier to entry, the delegate believed these words have been used as a catch phrase to cover a number of different things. One obviously is transaction costs, which may be quite substantial for consumers shopping around for the lowest prices and fees. The ACCC also found that SMEs attached a high importance to maintaining some form of credit standing. They are very concerned that if they change banks, they will have a lot of difficulties getting an appropriate credit standing and this makes them quite immobile. This is not to suggest, however, that they are inert or indifferent to change.

The Chairman commented that the issue of interchange commission fees has also been addressed at the European Union level and in France. He also noted that whereas Australia appears to see some problems associated with differences in these fees, in some other jurisdictions uniform fees were suspected of causing competition problems. [Delegates returned to this issue in the general discussion - see below.]

Canada was the next country the Chairman called on. He invited discussion of some empirical evidence relating to consumer inertia as well as Canada's view that technological developments may have raised rather than lowered barriers to entry.

A Canadian delegate stated that in two merger reviews conducted in 1998 relating to four of Canada's six largest banks, the parties argued that Internet and telephone banking would lower barriers to entry by eliminating or reducing the need for an extensive and expansive branch network. The Canadian Competition Bureau found, however, that this was not the case. Branches remain very important to customers who have come to expect that banks would offer both distribution channels. So electronic

banking has become a complement as opposed to a substitute for branches, thus increasing a new entrant's sunk costs.

Interestingly, the banks' technology expert also expressed the view that although people are using it, the new technology would not replace bank branches at least for another five to ten years. Another expert added that it would take ten to 15 years before technology really infiltrated the market place. An interesting connected point is that electronic banking developments might make customers less willing to split their banking services among several banks. Many customers prefer to concentrate their transactions accounts with one bank, and related services, including those electronically based, are located in the same bank in order to lower administrative burdens etc.

The Chairman next turned to the European Commission to describe governmental barriers to entry by a foreign bank as illustrated in the *Champalimaud* case.

A European Commission delegate expressed the hope that this will prove to be an exceptional case. She also stated that there are no EU legal or administrative barriers to the acquisition of holdings in banks by foreign acquirers. EU banking directives merely require acquirers of qualified holdings in a financial institution to notify the national authorities.

The *Champalimaud* case concerned an attempt by the Portuguese government to oppose by decree (i.e. "Despacho") an acquisition of some bank interests owned by a Portuguese citizen, Mr. Antonio Champalimaud, by Spanish based *Banco Santander Central Hispano*. This cross border takeover was planned for Spring 1999. The Portuguese government opposed it based on alleged prudential concerns having to do with the viability and soundness of the acquirer. The EC took countermeasures under the insurance directives and the EU Treaty rules concerning freedom of establishment and free movement of capital. It also took action, and here is the novelty of the case, under the Merger Regulation.

In the first of two decisions related to the case, the EC stated that the Portuguese government failed to notify its prudential rules, hence had to suspend the measures taken. In a second decision, the EC took the position that the Portuguese Despacho was not justified under the Merger Regulation, Article 21(3) [granting the EC exclusive powers to assess concentrations having a Community dimension]. This was the first time in ten years of merger control that the EC had applied Article 21(3). Perhaps this should be taken as a signal that further such actions might be taken in the future.

The Chairman rounded out the discussion of barriers to entry by calling on Poland to explain how its bank guarantee fund simultaneously raises barriers to exit and lowers barriers to entry. He also requested information about any special *de jure* or *de facto* barriers inhibiting takeovers by foreign owned banks, and invited comment on what the competition office is doing about such barriers.

A Polish delegate began with the question of the bank guarantee fund stating that it effectively lowered barriers to entry into the financial services sector, which is 90 percent, composed of the banking sector. The fund does not seek to protect incumbent banks. Instead, operating with rules similar to those found in the EU, the fund is merely designed to lower depositor risk and thereby to stabilise the very important banking sector.

As for *de jure* or *de facto* barriers to foreign takeovers in the banking sector, neither exists in Poland. It should be noted that most Polish banks are now privately owned and close to 60 percent of the necessary private capital came from abroad. Concerning the authorisation required from Poland's banking supervisor, this is administered without discrimination as to country of ownership.

At this point, the Chairman opened the floor to general discussion and a Canadian delegate began by commenting on consumer inertia, stating that the Competition Bureau found corporate documents showing that no financial institution had gained more than one percent market share other than through acquisition. This of course supported the idea that there is considerable customer inertia.

The Chairman picked up on that point and asked what implication customer inertia should have on merger review, i.e. does it make mergers more or less problematic. He conceded that such inertia means greater consumer vulnerability to abuse by banks, but if customers are truly inert, what difference does the number of banks make?

The same Canadian delegate basically agreed with the thrust of the Chairman's comment and noted that when divestments have been proposed to reduce a merger's anti-competitive effects, some customers have complained about their branch being sold to another bank. These customers seem less concerned about preventing possible price increases since they prefer to remain with their current bank. The delegate opined that customer inertia will only be reduced by new entrants offering truly new services, including those connected with electronic banking.

A Mexican delegate put a question to the European Union about product substitutability. He noted that some substitutability is based on changes in relative prices and some may be related to long term trends. It is the first that is most relevant to anti-trust market definition, but relative price changes are difficult to measure in the financial services sector because of the wide diversity of products offered. The delegate wished to know the degree to which the European Commission based its market definition in financial services cases on substitutability in response to relative price changes.

A European Commission delegate responded that in the earlier described *Allianz* case, as regards the substitutability of delcredere insurance with factoring as well as with other forms of credit insurance, the EC sent out its usual questionnaire to customers and competitors. Customers clearly responded that delcredere insurance did not have substitutes. In addition the EC found that the prices for delcredere insurance were higher than for other forms of credit insurance and the barriers to entry appeared to be higher as well. Given this information, it was not necessary to go into an in-depth inquiry into price correlations. This would certainly be done however, in a similar future case if a second phase analysis were required.

At this point, an Australian delegate returned to the Chairman's earlier remarks about interchange fees noting that although these are equal among Australia's largest four banks, they are substantially higher as between large and small banks. The real issue from Australia's point of view is whether the similarities and differences are cost justified.

The Chairman called on an observer from Israel for his thoughts about interchange fees.

The Israeli observer addressed this issue in the context of credit card systems, explaining that in such systems, the business selling goods on credit pays a "merchant commission" to the merchant acquirer who actually processes the payment. The merchant acquirer turns around and pays most of this commission to the card issuer as an interchange fee. So the interchange fee is an expense for the merchant acquirer and becomes the floor for what are often quite high merchant commissions.

The observer mentioned several reasons why interchange fees should concern everyone. First of all, such fees are often non-transparent constituting a hidden cost ultimately paid by the consumer. Second, they are set in a way that ordinarily would be unacceptable to antitrust officials, i.e. by agreement among banks. This is permitted because it ostensibly confers certain advantages particularly when systems are first being set up. Thirdly, in the context of competing credit card systems, interchange fees tend to be

raised as a means of attracting card issuers. For further information about such concerns, the observer referred delegates to a recent article on interchange fees by David Balto of the [US] FTC.

The observer questioned the need for interchange fees in banking systems where there are only a few rather than many banks. He referred to an investigation by the Israeli competition office that focused on the entire credit card market and included a look at interchange fees. The investigation showed that interchange fees were being set in a way that did not encourage efficiency. It also revealed that where there are few processors, or limited competition between processors, interchange fees tend to be broken up by categories in a way that enhances the power of the processors and does not necessarily benefit the merchant or the public.

A Canadian delegate continued on the point of interchange fees noting that Canada had a "non-dual" credit card system in which members must choose to be either with Visa or with Mastercard. This has resulted in different interchange fees, i.e. Visa members pay a higher interchange fee and consequently charge a higher merchant discount rate (i.e. commission). Mastercard was the second credit card network to be set up in Canada and it has constantly struggled to gain market share against the generally larger Visa banks. The delegate also asked other delegations what their experience has been concerning whether dual or multiple card membership has had any effects on interchange fees, but no one volunteered an answer.

An Italian delegate asked the United States whether its greater concern for the effects of bank mergers on small business borrowers as contrasted with effects on depositors is influenced by the fact that the latter, through the Internet and other technological developments, have better options than the former. A United Sta**tes** delegate responded that such was indeed the heart of the matter.

4. Competitive impact assessment

The Chairman noted that this topic is well covered in the written submissions and the ideas are very difficult to summarise. Obviously, concentration ratios are a screen used by most competition agencies to decide whether there is the likelihood of competitive problems. This analysis is usually carried out at the level of each banking service or relevant market, but the US submission raises an interesting question about that. The current practice of the Department of Justice is indeed to look at each separate banking service market to decide whether or not there is a likelihood of reduction of competition in it. At the same time, there is a line of US Supreme Court decisions espousing what has been described as a "cluster approach", i.e. commercial banking is identified as a relevant market and a merger is assessed by its competitive effects on that composite market. He asked the United States to describe the current status of the cluster market approach.

A United States delegate began by noting that the Supreme Court will naturally have the final word in this matter. But this may be one of several instances in which contemporary anti-trust analysis used by the agencies and by the courts, when called upon to engage in it, is more rigorous, empirical, and focused on sound economic analysis today than were some of the Supreme Court cases in the 60s and 70s. The Department of Justice applies the same kind of economic analysis for banking that it uses in other sectors to the economy. It defines markets by starting from the customer and asking what are the products it acquires and what are good substitutes for them.

Although ultimately an empirical question, the Department's best sense is that looking at clusters of services is likely to be misguided. Firms providing a certain cluster might not be offering the particular products sought by the customer, i.e. a cluster market approach could produce a misleadingly wide market. In some other instances, specialised providers offering certain products of interest to a customer might wrongly be excluded from a cluster market if they do not offer the entire cluster of services.

It is possible that when the Supreme Court made the decisions 30 or 40 years ago featuring cluster markets, it was applying a correct intuition about the nature of banking relationships. At the time, these might have been more geographically local, relationship based and might have involved a greater instance of clusters of products and services than is the case today.

The delegate went on to note that banking agencies in the US often continue to apply the cluster approach. That may reflect a kind of regulatory rigidity and failure of the regulators to adapt the more progressive modern ways of thinking. It may also reflect, however, the fact that the regulators do not have the fact gathering and compulsory process tools available to anti-trust agencies. They may find it convenient, perhaps even necessary, to use a short hand market definition in relation to which they do have reliable data. In contrast, the Department is convinced that its desegregated approach is consistent with contemporary anti-trust analysis and that the Supreme Court, if called on in an appropriate case, would at least review the question *de novo*, rather than simply recite its earlier decisions about clusters of banking services.

The Chairman, who admitted to never having dealt with a banking merger, stated that he found distinctions between, for example, short and long term consumer loans, to be somewhat counter-intuitive. The idea of there being so many separate markets runs counter to the idea that most customers appear to seek a bundle of products from their banks and display considerable inertia in changing banks, i.e. would presumably be reluctant to change banks in order to obtain better terms on one particular product. The same United States delegate agreed with that observation, but reiterated that the question is ultimately empirical, i.e. depends on actual consumer behaviour.

The Chairman opined that in assessing the competitive impact of banking mergers, one first examines how they affect the relevant markets for banking services. Sometimes, however, the analysis goes into whether the mergers affect some other activity. For example, if the merging banks have extensive industrial holdings their transaction could have an effect on "real" markets. This appears to have happened in Spain, which the Chairman called on to develop this point.

A Spanish delegate explained how the Spanish competition authorities have approached two large bank mergers notified in 1990. The first, *Banco Santander/Banco Central Hispano*, involved the first and third biggest banks in the country. The second merger, *Banco Bilbao Vizcaya/Argentaria*, involved what were then the second and third biggest banks. In both cases, the competition authorities analysed possible effects on the non-financial sector of the economy, especially the electricity, telecommunications and broadcasting industries.

In the first merger, both banks had equity stakes in major undertakings in the electricity and telecommunications sectors. Both those industries have oligopolistic structures and were recently liberalised. The competition authorities feared that the new bank with its stock holdings in competing companies would be in a position to reduce the independence of those competitors and this could produce anti-competitive practices. The case was ultimately resolved by the Minister limiting what the new bank could hold in the stocks of competing electricity and telecommunications companies. Specifically, the new bank was restricted to just three percent of the stocks of one of the competing companies in the affected sectors. The parties were therefore required to make divestitures and had two months to present their plan to the competition authorities. This was the first time that such a remedy had been applied in a Spanish merger.

The second merger turned out to be considerably more complicated because while it was being analysed, the merged entity reached agreement with *Telefonica* to develop Internet services and electronic commerce and this also involved each buying stock in the other, i.e. *BBVA* was slated to buy ten percent of *Telefhonica* and *Telephonica* five percent of *BBVA*. The Competition Tribunal recommended that the

government approve the merger subject to the condition that *BBVA* be prohibited from having significant stakes in the stocks of competing undertakings in the media, telecommunications or electricity sectors, i.e. they were restricted to no more than three percent of the shares of just one major competitor in each of the affected sectors which included electricity, hydrocarbons, cable operators, fixed telephones, and local loop services. Again the parties had two months to present their divestiture program.

The Chairman mentioned that Germany also had to face cases where cross-holdings between banks and other enterprises, insurance companies in particular, may have been an issue in assessing the impact of a merger and asked the German delegation for comment.

A German delegate noted that bank holdings in other industries are indeed a special feature of the German banking system. Such holdings are not limited by law. But given the high degree of competition in German banking system, these holdings are always far below market dominance.

Contrary to earlier expectations that globalisation pressures might lead to the emergence of a large conglomerate financial firm, there is now a clear tendency towards separation of banks and insurance companies. There was one insurance merger case, which caused some problems because of the parties' participation in a particular bank. This was resolved by requiring divestment of the affected bank.

The delegate pointed out that in Germany, it is often stakeholders rather than management's which are the driving force behind mergers. In particular, banks have often promoted industrial mergers and sometimes the reverse has also occurred. For example, in the recently aborted *Deutsche/Dresdner Bank* merger, it is no secret that *Allianz* was one of the forces promoting the merger.

In concluding his remarks, the delegate described a curious case where the Bundeskartellamt moved to block a major construction merger. The parties responded by widening the merger to include a bank in order to transfer jurisdiction to Brussels. The strategy failed when Brussels sent the case back to Berlin. The bank subsequently withdrew from the merger.

The Chairman turned next to the Japanese delegation seeking information about the Fair Trade Commission's review of the Dai-Ichi Kangyo/Fuji Bank/Industrial Bank merger and further comments about the effects of cross-holdings between banks and other firms.

A Japanese delegate noted that the Japan Fair Trade Commission (JFTC) received a request for prior consultation from the Dai-Ichi Kangyo Bank, the Fuji Bank and the Industrial Bank of Japan, regarding the establishment of a common holding company, i.e. the Mizuho financial group. The three banks plan to establish by October, 2000 a common holding company. At the same time their subsidiaries, including three securities companies and two trust banks are to be merged. The group's total assets would exceed those of any existing bank in the world. The JFTC examined the request and replied in June 2000. Before providing more detail concerning this case, the delegate described three important developments in the Japanese financial sector.

First, in recent years deregulation has been promoted in Japan with the aim of developing the capital market to facilitate companies financing through issuing stocks, bonds and so forth. As a result, large corporations have becoming increasingly less dependent on banks. City banks, whose main clients used to be large corporations, now must turn to medium and small enterprises and households. City banks eventually will be faced with vigorous competition from local financial institutions such as regional banks. In dealing with large corporations, City banks are now expected to place greater emphasis on underwriting stocks and bonds, offering financial services and products such as securitisation of corporate assets, and acting as intermediaries in mergers and acquisitions. This makes fierce competition with foreign financial institutions and major domestic securities companies inevitable.

Second, advanced information technology and improved communication infrastructures are helping the banking industry to exploit new media such as the Internet. Also information technology related businesses, such as construction of customer databases are now essential for banks to remain competitive. IT and communication industry developments are simultaneously providing an opening for companies in other industries to enter banking in various innovative ways.

Third, banks holding huge amounts of bad debts in the wake of the collapse of the so-called bubble economy, are now being forced to restructure their businesses in order to improve their profitability, write-off bad debts and restore the soundness of their assets.

Returning to the Mizuho case, the JFTC has assessed competitive effects by first identifying five distinct relevant markets: deposit activities; lending activities; foreign exchange; securities business; and trust banking business. The overall conclusion was that in light of the three developments outlined above, the proposed consolidation does not substantially restrain competition. However, upon completion of the proposed consolidation, the three banks will be providing loans to 1 600 companies out of the 2 300 companies listed on stock exchanges, excluding banks and insurance companies.

The Mizuho financial group will become the top lender for nearly 700 of the 2 300 listed companies. The JFTC decided that this warranted conducting a survey by way of questionnaires and hearings involving 500 businesses of various sizes currently financed by the three banks. The survey unearthed two issues that the JFTC has discussed with the three banks. Companies whose dependence on the three banks will rise because of the merger expressed concern that the new bank may interfere with their management's by attempting to tie loans and other services, or by requesting borrowers to employ certain securities companies as bond underwriters. Such conduct may constitute unfair trade practices violating section 19 of the Anti-monopoly Act. The JFTC has therefore required the banks to take steps to ensure this does not happen. The other difficulty concerns corporate groups.

Both Fuji Bank and Dai-Ichi Kangyo Bank have corporate groups for which they host regular meetings. The earlier mentioned survey revealed that many companies within and outside the groups foresee no changes in transactions. However, some companies are concerned that relationships among group member companies may be strengthened. The JFTC concluded that certain measures needed to be taken to prevent business relationships from becoming exclusive and closed.

The three banks have proposed to deal with the JFTC's concerns by stating that the new holding company will ensure compliance with the Anti-monopoly Act by executive officers and staffs of the group as a whole. In addition, the Mizuho financial group assured the JFTC that it does not intend to form any particular exclusive corporate groups. The delegate noted in passing that the operation of corporate groups centred on banks will be reviewed by the Spring of 2002. Even dissolution of the groups is not excluded in the review.

The JFTC has decided to accept the three banks' proposals, but will carefully monitor their execution and deal strictly with violations of the Anti-monopoly Act. When the planned further restructuring of the three banks takes place in Spring 2002, the FTC will examine the case as necessary.

5. Efficiencies assessment

The Chairman initiated the discussion of efficiencies by calling on the United States. He noted that its written contribution contained a rather extensive discussion of different types of efficiencies that can come from bank mergers and, unique among the submissions, also included some empirical estimates of efficiencies.

A United States delegate stated that there are two basic types of efficiencies that appear to be realised in US bank mergers. The first is a simple efficiency of scale. Some years ago the data seemed to suggest that scale efficiencies were realised at relatively small scales, and indeed above $100 million in assets, banks became less efficient. More recent data indicate instead that the very large banks are the most efficient. It may be, of course, that efficiency does not increase monotonically with size and that there are certain opportunities to realise efficiencies at an enormous scale that cannot be realised in the mid-range.

There is some reason to believe that some efficiencies of scale in banking might be reaped through joint venturing and collaboration among banks particularly as regards information sharing and the use of certain information technologies. If this is true, such efficiencies are not merger specific and should not be considered when deciding whether to prohibit a bank merger.

The second kind of efficiency arising in US bank mergers is one which, until recently, bank regulations prohibited banks from taking advantage of. It derives from diversification through geographic market extension. Banks that were previously confined to individual states or individual localities are now able to be multi-state banks and this enables them to diversify their portfolio of loans and deposits, particularly loans. That in turn could reduce their risk and increase efficiency. Recent empirical studies show that it is indeed geographic diversity more than scale that seems to account for increased efficiency among the very largest US banks.

The Chairman next referred to an intriguing statement in connection with the Mexican contribution's discussion of two mergers: the *HSBC* take-over of *Grupo Serfin* and the *Bank of Montreal's* acquisition of *Grupo Financiero Bancomer*. The Mexican contribution states that perhaps the acquisition of an under-capitalised bank by a strongly capitalised bank could be counted as an efficiency gain from the merger. Of course, this raises the question of whether there might be a less anti-competitive way to re-capitalise an under capitalised bank.

A Mexican delegate responded that maybe the contribution used the wrong word. Perhaps it is not an efficiency, but rather a difficulty with under-capitalisation of a number of Mexican banks that was eased not by take-overs *per se*, but instead by an injection of foreign capital. For example, the *Serfin* case was not a take-over. The bank only received an injection of capital. Similarly, *Bancomer* was not taken over by the *Bank of Montreal*, but it too received an injection of capital. Recently things changed. *Serfin* was taken over by a Spanish bank, *Santander*. For several reasons, Mexican authorities thought this would strengthen *Serfin*'s position and thereby improve competition. This would obviously be the case if, absent the acquisition, *Serfin* would have had to exit the market with the result of further increasing concentration in the Mexican bank market.

The delegate next turned to the FCC's recent review and approval of the proposed acquisition by Spain's *Banco Bilbao Viscaya-Arentaria (BBVA)* of 40 percent of the shares of *Bancomer*, the second biggest bank in Mexico. While the review was underway there was a hostile offer by *Banamex*, the largest bank in Mexico, for *Bancomer*. This presented a much more controversial case because *Bancomer* is the largest bank in Mexico. That transaction was still under review at the time of the roundtable.

6. Remedies

The Chairman noted that there were extensive discussions in the various contributions of both structural remedies and behavioural remedies. Despite an evident preference for structural remedies, there were several examples of behavioural remedies being imposed. One arose in Australia's *Westpac/Bank of Melbourne* case about which the Chairman sought further detail.

The Australian delegate began by affirming the ACCC's preference for structural remedies, but with only four large banks in Australia, divestiture remedies themselves usually generate antitrust concerns.

In the *Westpac/Bank of Melbourne* case, a national bank was acquiring a bank operating in just one city in which it had a large market share. The Bank of Melbourne was considered quite unique in that it provided a range of services not offered by other Australian banks. There was not a great deal of difference, however, in terms of prices, interest rates and so on. The ACCC considered structural remedies but, given the fact that the acquired bank operated in just one city, the options for breaking up the assets and trying to sell some to one purchaser and others to another was simply not possible. The ACCC then looked at what seemed to be the principle issue here, i.e. that the bank was seen as being a local bank, and decided that the appropriate solution was to obtain behavioural undertakings designed to ensure local autonomy.

This case has provided the ACCC with a very useful, although not particularly successful example. It underlines the need for caution in terms of accepting behavioural undertakings. The undertakings generated a high degree of consumer expectation, but in practice it proved difficult to deliver on that. Monitoring of elements of these behavioural undertakings proved to be difficult and over time the Bank of Melbourne's local autonomy appeared to erode.

A week before the roundtable, the ACCC completed its review of Australia's largest banking merger. This one also required behavioural undertakings, but the ACCC certainly did not consider undertakings regarding management autonomy.

The Chairman next called on Switzerland to discuss its UBS merger where conditions were imposed concerning maintaining existing loans on pre-merger conditions. The Chairman was especially interested in learning what the competitive problem was and how the condition has worked out, including any monitoring burden it has imposed.

A Swiss delegate explained that in the UBS case, the market the Competition Commission focused on was commercial credits below two million Swiss francs, i.e. credit extended to small and medium sized businesses. Twenty-five regional markets were identified. Among those twenty-five geographic markets, eight were judged to present some competition problems. The primary risk was one of collective dominance but there were also unilateral dominance issues. The Competition Commission permitted the merger but required UBS to accept certain structural and behavioural obligations.

Among the structural conditions was the divestment of a network of a minimum of twenty-five banking points around the country as well as a divestment of some specific branches identified by the Competition Commission. Concerning the behavioural conditions, the Competition Commission required UBS to freeze for six years the terms and conditions applying to existing commercial credits below a threshold of four million Swiss francs. This threshold was chosen on the assumption that a small or medium sized business might have obtained credits amounting to two million Swiss francs from both of the merging banks.

The purpose of the behavioural conditions was to protect small and medium sized businesses already borrowing from one of the merging banks from subsequent abuse by UBS. The condition was limited to six years because this was believed to be the time necessary for the borrowing firms to find alternative competing suppliers.

As for monitoring the behavioural condition, the UBS must furnish the Competition Commission every three months with a detailed report on outstanding credits below the four million-franc threshold. A

year and a half later, the Competition Commission has received only three complaints in connection with the obligation. One emanated from a failing firm hence was unfounded. Nevertheless, despite this reasonably good experience it must be conceded that behavioural obligations impose a heavy, practically daily, monitoring task and that it is indeed wise to prefer structural remedies.

The Chairman asked for clarification as to whether the obligation on UBS attached solely to existing credits, or to all credits below the four million-franc threshold. The Swiss delegate responded that it applied only to existing credits. The Chairman then enquired why the Competition Commission was not concerned about potential ill effects of abuse of dominance on new as well as old borrowers. The Swiss delegate noted that the prime concern was about a possible collective abuse of dominance but he basically conceded the validity of the Chairman's implied critique.

At this point the Chairman turned to Italy which he noted not only requires divestitures in certain bank merger cases, but sometimes even requires closure of branches. He then quoted from the Italian submission as follows:

> Branch closures can have different effects according to the competitive dynamic of the specific market; if the bank has other branches in the same market, the redistribution of the market share to other banks may be limited and the market power of the bank, resulting from the merger, could be substantially unchanged; but, if the bank has no other branches, the competitive impact of closures can be very effective.

The Chairman noted that if the bank has no other branch in the market, requiring closure of its single branch causes a decrease in the number of banks in that particular market and this would not seem to be good for competition. He wondered in what kind of cases it would be good to require an exit from a market with respect to a banking merger.

An Italian delegate (from the Bank of Italy) explained that perhaps the English of the paper leaves something to be desired and went on to note that the Bank of Italy uses various remedies. The first and most effective is branch divestiture. The second is branch closures, and the third is restricting the merged bank from opening new branches in the market. He mentioned in passing that geographic market definitions are very small. There are basically 100 geographic markets as regards deposits meaning that ones needs to travel no more than 15 or 20 minutes to change market.

As concerns what constitutes a dominant market, the delegate noted that, for example, one can find a dominant position in the market when a bank has 50 percent of the market. One can also find a dominant position where there are two contiguous markets and a bank has 45 percent of the single market, or in three or four contiguous markets where a bank has about 40 percent of the market.

The Italian submission clearly says branch divestiture is the best remedy to use. This was the point of the sentence immediately preceding the passage the Chairman quoted, i.e. the passage was intended to explain why branch divestiture is generally preferable. The submission merely was trying to say that if a merged bank has several branches in a particular market and the competition agency requires one of them to be closed, there is a risk that some of the clients will move to other branches of the same bank. If you want to be more effective in a case where a bank has a dominant positions in three or four contiguous markets, the competition agency can close all branches or only one. That was what was meant by the phrase "...to close all branches in one market to make less strong the position in a market in wider market". The delegate admitted that this might still not be clear. He conceded that closing a branch could mean that a competitor is lost, but to some extent that disadvantage is offset by the advantage of not having to find a suitable buyer.

Finding an appropriate buyer, except in the more prosperous north of Italy, can sometimes be a real problem. In Sardinia, the Bank of Italy ordered a limited number of branch closures because it was very difficult to find suitable buyers. Finding appropriate buyers also seems to be a problem in Sicily, particularly in cases where banks have a lot of non-performing loans.

The Chairman enquired as to the frequency with which branch closure is employed in Italian merger cases. The Italian delegate answered that in ten of the sixteen formal investigations [into bank mergers] conditions were imposed. In five of those divestiture was required. The Bank of Italy does not yet have clear information concerning how effective those have been but there is some evidence that the remedies employed have led to reductions in deposit concentrations.

The Chairman suggested that the Italian delegate may have been referring to a cluster of geographic markets as a single market when seeking to explain the passage that the Chairman had earlier cited. He then turned to Hungary whose submission touched on international co-operation arising out of a merger involving *Creditanstalt-bankverein.*

A Hungarian delegate regretted having to disappoint but noted that there was no formal co-operation between the Austrian and Hungarian competition authorities in that case. Instead the case provides a good example of the extraterritorial reach of the Hungarian competition statute. The Office of Economic Competition ("OEC") supervises not just cases stemming from decisions taken in Hungary, but as well mergers arising abroad which have actual or potential effects on Hungarian markets. This is why the implicated banks sought authorisation from the OEC. Both had subsidiaries in Hungary. No competition problems were found in the relevant markets, and the merger was cleared.

The delegate added that the OEC is very willing to co-operate with other countries' competition offices as well as to benefit from their experiences in merger cases.

The roundtable was concluded with a general discussion time led off by an Italian delegate (from the competition authority). The delegate asked Spain for more information about how stock holdings falling short of control positions by merging banks in other companies could present competition problems in the cases the Spanish delegate had presented. He conceded that there could be difficulties where stock holdings confer some degree of control. The answer provided by a Spanish delegate underlined the fact that the sectors concerned featured a very small number of formerly regulated competitors. Also the intent of the three percent restriction was to ensure against a bank being able to nominate members of the boards of directors of a small number of competing companies and to be able to bring about an exchange of confidential information among them.

A Dutch delegate followed up on Italy's point by noting that that there could be a problem if two banks together gained control of a company after they merged and wondered what kind of remedy could be applied in such a case. Related to that, he also asked what competition authorities should do when a merged bank ends up having members on the board of two competing companies causing a risk that they start co-ordinating their behaviour, and what kind of remedy could be applied in such a case. An Italian delegate responded that he had earlier been referring to a different situation. He noted that there can be a situation where three banks together acquire the capital of another bank. All three together control it. Such a situation may not be subject to merger review, and it is difficult as well to remedy. The case the Dutch delegate is referring to is logically one where the company the merged bank gains control of should be analysed as part of the merger, i.e. applying the normal dominance or substantial lessening of competition tests.

A Canadian delegate remarked that while she could not envisage imposing a branch closure as part of a merger remedy, she could see imposing restrictions on who would be allowed to buy branches

where a divestment has been ordered. In particular she could see the need to restrict purchases by banks already having branches in the area which, after acquiring the divested branch, would raise its own competition issues. She asked the Swiss delegation whether it imposed conditions as to who could purchase divested branches in the UBS case. A Swiss delegate answered that as regards the twenty-five banking points intended to constitute a network, UBS was obliged to submit to the competition authority a list of points that are spread throughout Switzerland and located close to the centre of cities etc., i.e. the idea is to have a network that is commercially viable. The Canadian delegate then refined her question to focus on the situation where a purchaser has an existing branch network and then proposes to close its own branch or the branch that it is acquiring. Would Switzerland condition purchases of divested assets to prevent either event from occurring? The same Swiss delegate answered that it did not impose particular conditions on potential buyers.

A Mexican delegate asked the Canadian delegation about what, if anything is done to ensure that branch divestitures succeed in transferring clients as well as assets. Did Canada impose limitations on the merging banks about, for example, restricting communication with transferred clients, or engaging in various forms of cream skimming designed to keep the best clients? He also wished to know whether Canada had done any analysis concerning the degree to which clients undo divestitures by opting to remain with their original bank.

A Canadian delegate responded that the question was somewhat premature since the Competition Bureau had just undergone its first ever branch divestiture process following the merger of two financial institutions [Toronto Dominion/Canada Trust]. The Bureau did impose some non-solicitation conditions to prevent transferred customers from being targeted by communication from their former bank, and restricted the transfer of data concerning such customers. But of course the clients are free to move as they wish. The case is further complicated by the fact that the acquired trust company was an innovator and a lot of its clients were people who were turned off by banks and had gone to the trust company because of its allegedly more friendly and personal service, and because it was not a bank. The purchaser of the divested branches was another bank, and it will be interesting to see whether the clients remain with it or go to another trust company.

A Finnish delegate posed two questions to the Italian delegation. He recalled that the Bank of Italy plays a key role in competition surveillance. He also remarked that competition authorities in other countries sometimes have difficulty getting branch level data and presumably the Bank of Italy has direct access to such information. His first question was whether the Bank of Italy monitors the competition situation using annual reports etc. He also asked whether there are any legal obstacles prohibiting an Italian bank or some foreign bank from extending its branch network or otherwise expanding its banking operations.

An Italian delegate (from the Bank of Italy) confirmed that the Bank has a great deal of data, plus it has about 100 branches throughout the territory. As to legal barriers to entry into Italy, these are very low. Banks from any European Union member are free to enter the market with or without branches. He also noted that although the number of banks declined in the last ten years from 1 200 to 800, clients are now able to choose on average among 30 different branches. As concerns monitoring competitive conditions, the delegate confirmed that the Bank uses its data to do so, keeping track of Herfindahl indexes in separate geographic markets and watching various interest rates. Moreover, the Bank of Italy publishes a great deal of statistical information allowing others to monitor the situation and publishes an important report each May which contains a chapter on competition.

At this point the Chairman called on a BIAC representative who remarked that the roundtable showed that the competition authorities are struggling in defining markets, remedies and the likelihood of barriers to entry disappearing as a consequence of technological developments. He was somewhat puzzled

by a remark he attributed to Canada to that effect that it will take ten years before there is a notable change in market conditions or at least a reduction in market barriers as a consequence of current technological changes. He thought this might be based on past more than current experience.

The delegate also drew attention to a joint ICC and BIAC paper distributed the day before to the CLP. He reviewed three of its general points concerning the disciplines that should govern merger review processes. First, jurisdictions should apply their laws in a non-discriminatory matter, without reference to firms' nationalities. Second, non-competition factors should not be applied in anti-trust merger review. He made specific reference to national security exemptions but noted the same applies to national interest or prudential rules factors. Exemptions to that general principle should be limited and made using a very transparent process. The third general remark was that political concerns should not play a role in the merger review process.

The Chairman wished to clarify that the fact the CLP is holding a discussion of mergers in the banking sector does not mean that competition offices are struggling with the definition of relevant markets. As a matter of fact, on that particular issue, there was considerable commonality in the contributions received. There may be other areas where things are more difficult, but defining relevant markets is probably not one of them.

A delegate from the European Commission wished to pose a question about automated HHI assessment, but withdrew it given that time had run out.

AIDE-MÉMOIRE DE LA DISCUSSION

Le Président souligne d'abord qu'un grand nombre de contributions très intéressantes ont été reçues à l'occasion de cette table ronde, ce qui témoigne de la grande expérience qu'ont de nombreuses juridictions dans le domaine des fusions dans le secteur bancaire. Il précise néanmoins qu'il sera impossible d'aborder tous les points soulevés dans les contributions écrites et donc invite les délégués à lire ces dernières si ce n'est déjà fait.

Le Président décide de centrer les débats sur les fusions de banques et organise la table ronde en six parties : contexte (le secteur bancaire en perpective) ; définition du marché ; obstacles à l'entrée ; évaluation de l'impact concurrentiel ; évaluation des gains d'efficience ; et mesures correctrices.

1. Contexte

Après avoir remarqué que plusieurs contributions se référaient au contexte ou à des rapports contextuels, le Président ouvre cette partie de la table ronde en invitant la délégation italienne à s'exprimer. La contribution italienne évoque longuement la spécificité du secteur bancaire italien et présente le point de vue suivant : le degré de concurrence serait inversement proportionnel au degré de stabilité du secteur bancaire. Le Président rappelle aux délégués que c'est la Banque d'Italie qui est chargée de faire appliquer le droit de la concurrence dans le secteur bancaire italien, mais qu'elle assure cette fonction en coopération étroite avec l'autorité italienne de la concurrence (« Autorita »), par le biais d'un protocole d'accord entre les deux institutions. La délégation italienne est invitée à présenter son point de vue sur la relation entre la politique de la concurrence et la stabilité dans le secteur bancaire, et à expliquer aux délégués si cette « division du travail » entre la banque et l'Autorita est motivée par ce point de vue.

Un délégué italien (de la Banque d'Italie) fait d'abord observer que la Banque d'Italie, comme toutes les autres autorités de tutelle bancaires, a pour objectif de préserver la stabilité de l'ensemble du secteur financier et celle de chaque banque. Pour assurer une stabilité à long terme, les banques doivent être efficientes, ce qui exige un certain degré de concurrence. En ce sens, la stabilité et la concurrence sont complémentaires.

Pendant les années 80, le secteur bancaire italien était détenu à hauteur de 90 pour cent par l'État, et l'efficience n'était pas une considération primordiale. L'Italie avait un système bancaire très réglementé. Une forte vague de déréglementation s'est amorcée pendant les années 80. A l'heure actuelle, il n'y a plus que 13 pour cent du secteur bancaire sous contrôle public ou para-public. C'est un grand changement, qui a entraîné environ 58 opérations de fusion, essentiellement motivées par une volonté d'accroître l'efficience afin de soutenir une concurrence plus intense. Seize de ces opérations de fusion ont fait l'objet d'une enquête officielle, et dix d'entre elles ont été soumises à des conditions imposées par la Banque d'Italie.

Le délégué italien estime que l'expérience italienne s'oppose à celle des États Unis, car lorsque les fusions posent des problèmes en Italie, ces derniers concernent davantage les dépôts que les prêts des entreprises concernées. Cette situation a sans doute trait aux différences entre les deux systèmes bancaires, et en tout état de cause les mesures qui s'imposent sont très différentes.

Concernant les aspects institutionnels, le délégué fait observer que le processus de prise de décision en matière de politique de la concurrence se déroule dans un département distinct de la Banque d'Italie, mais que les experts de ce département ont à leur disposition les données d'expérience et les énormes bases de données gigantesques de la Banque pour les aider à résoudre les problèmes de concurrence. L'Autorité italienne de la concurrence apporte également son concours sous forme de données et coopère étroitement, parfois quotidiennement. La Banque d'Italie fait appliquer le droit de la concurrence dans tous les domaines. Outre les enquêtes sur les seize fusions mentionnées ci-dessus, elle a procédé à douze enquêtes officielles sur des accords et à cinq sur des cas d'abus de position dominante. Ce niveau d'investigation soutient avantageusement la comparaison avec les autres secteurs de l'économie italienne et avec le degré de contrôle des secteurs bancaires des autres pays.

Le Président demande au délégué de fournir davantage de détails sur la raison pour laquelle l'application du droit de la concurrence relève de la compétence de la Banque centrale et non de celle de l'Autorité italienne de la concurrence (Autorita), et souhaite être informé des raisons pour lesquelles l'Autorita ne peut pas se charger elle-même de cette tâche. Le délégué répond qu'aujourd'hui, l'Autorita pourrait en effet assurer cette fonction de contrôle de l'application du droit, mais qu'il y a dix ans, lorsque cette répartition des compétences a été instaurée, le système bancaire était différent et les produits bancaires évoluaient très rapidement. A l'heure actuelle, une coopération très étroite avec l'Autorita est indispensable en raison du chevauchement croissant des produits et services financiers (assurance et banque, par exemple).

Le Président se tourne vers le délégué américain pour lui demander son point de vue sur la mise en balance de la stabilité et de la concurrence dans le secteur bancaire, et obtenir ses commentaires sur les déclarations de l'Italie.

Un délégué des États-Unis fait observer que, d'après l'expérience américaine, rien ne porte à mettre en balance l'application du droit de la concurrence et la stabilité du système bancaire. Comme le note le délégué italien, faire appliquer le droit de la concurrence tend à améliorer l'efficience, dans le système bancaire comme dans les autres secteurs, et à accroître les performances du secteur bancaire. Aux États Unis, confirme le délégué, les problèmes qui peuvent se poser dans le cadre de fusions de banque portent davantage sur les prêts aux petites et moyennes entreprises, ces dernières dépendant essentiellement de leurs relations personnelles pour lever des capitaux, ce qui les dispense d'avoir à démontrer à des créanciers bancaires potentiels qu'elles sont véritablement solvables. Il s'agit en général des clients qui présentent le plus de risques sur des marchés locaux très concentrés. Il n'y a pas de raison de penser que la concentration locale en matière de prestations de services bancaires à des petites et moyennes entreprises contribue de quelque manière à la préservation des fonds propres des banques, et donc à la stabilité du système bancaire. En résumé, d'après l'expérience américaine, il n'y a aucune opposition fondamentale entre l'application rigoureuse du droit de la concurrence et la stabilité du système bancaire.

Le Président observe que la contribution du Royaume-Uni se réfère à une étude demandée par le Chancelier de l'Échiquier (le rapport Cruickshank), portant sur les degrés de concurrence, d'innovation et d'efficience sur le marché bancaire au Royaume-Uni. Ce rapport met l'accent sur la spécificité du secteur bancaire, s'intéresse notamment à la concurrence et à la concentration dans ce secteur, et conclut que la politique suivie par le Royaume-Uni en matière de fusions dans le secteur bancaire a été relativement laxiste. Le Président demande à la délégation du Royaume-Uni de commenter ces aspects de l'étude.

Un délégué du Royaume-Uni s'oppose d'abord au point de vue présenté dans le rapport et ajoute que, en tout état de cause, la « fusionite » n'a guère touché le secteur bancaire au Royaume-Uni. Le Royaume-Uni n'a connu que deux fusions de banques de détail importantes depuis cinq ans. La deuxième, qui a eu lieu l'année dernière, était celle de la Royal Bank of Scotland et de la National Westminster Bank,

soit une fusion entre banque essentiellement écossaise et une banque essentiellement anglaise ou anglo/galloise. Il y a eu relativement peu de chevauchement des activités des parties à la fusion. Le secteur de la banque de détail n'a pas connu de difficultés particulières. L'autorité de la concurrence craignait davantage que des problèmes se posent vis à vis des opérations de banque avec les petites et moyennes entreprises.

Les sociétés de crédit immobilier ont fait leur arrivée dans le secteur de la banque de détail ces dernières années, mais elles n'ont pas commencé à traiter avec les PME. Seul un petit nombre de banques assure des services bancaires aux PME. La Royal Bank of Scotland et la National Westminster avaient une part importante de ce marché dans le Nord-Ouest de l'Angleterre. En définitive, les services bancaires aux PME n'ont pas posé de problème particulier en dépit de la forte concentration parce que tous les intervenants traditionnels étaient présents dans le Nord-Ouest.

Le délégué note que le rapport Cruickshank recense certaines différences de prix des opérations de banque vis-à-vis des PME entre certaines régions, mais ajoute que ces différences ne sont pas imputables aux variations du niveau de concentration à l'échelle locale. Il mentionne toutefois que les autorités de la concurrence ne contestent pas l'opinion exprimée dans le rapport Cruickshank, selon laquelle les services bancaires sont relativement à part, ce qui n'est pas tout à fait exact. Comme dans tout secteur de détail, les autorités de la concurrence sont préoccupées lorsque le niveau de concentration est faible, que les clients n'ont guère de pouvoir et que les informations sont assymétriques.

Un autre délégué du Royaume-Uni souligne que d'après le rapport Cruickshank, bien des problèmes de concurrence dans le secteur bancaire ont pour origine les frais élevés de changement de fournisseur, qu'il s'agisse de succursales ou de banques. Selon certaines enquêtes, 50 pour cent des clients jugent les services de leur banque médiocres ou très médiocres, mais trois à quatre pour cent seulement de ces clients changent de fournisseur chaque année.

Le délégué observe aussi qu'au Royaume uni, les marchés géographiques des opérations bancaires avec les PME s'élargissent. Les PME ont toujours besoin d'un dépositaire local pour leur trésorerie, mais les gestionnaires de banque adoptent de plus en plus une approche régionale et leurs clients sont moins concentrés géographiquement.

Le Président estime que l'inertie des consommateurs pourrait être un obstacle très puissant à l'entrée dans le secteur bancaire et qu'il faudrait peut-être se préoccuper davantage des niveaux élevés de concentration. Cette inertie pose également des problèmes quant aux mesures qui s'imposent lorsqu'une opération de fusion se passe mal. Si les frais de changement de fournisseurs sont assez élevés, la présence d'une ou de dix banques importe peu du point de vue de la concurrence. Le Président propose de revenir sur ce point plus tard si les délégués le souhaitent. Il se tourne vers la délégation australienne.

La contribution australienne se réfère à une série de rapports et à plusieurs définitions de marché différentes. Elle précise par exemple que le rapport Wallis met l'accent sur le caractère global des opérations de banque et, que de ce fait, la Commission australienne de la concurrence et de la consommation (ACCC) a modifié sa définition du marché. Le Président reconnaît que le problème de la définition n'est pas simple et demande au délégué australien de faire davantage de commentaires sur le rapport Wallis, notamment à propos de la définition du marché.

Un délégué australien estime qu'il est peut-être un peu exagéré de considérer que l'autorité de la concurrence australienne modifie sans cesse ses définitions du marché. Quant au rapport Wallis, dont la Commission australienne de la concurrence a tiré grand profit, il a été demandé par le gouvernement australien en 1997. Il examine tous les éléments de la réglementation du marché financier australien. Il a été écrit dans le contexte d'un processus de réforme micro-économique engagé en Australie depuis dix ans.

Il se penche sur la question des fusions, mais met surtout l'accent sur la déréglementation concernant les taux d'intérêt, la réglementation prudentielle, etc. Le rapport préconise, par exemple, la création d'un nouvel organisme de réglementation prudentielle distinct de la banque centrale.

Le droit de la concurrence s'applique au secteur bancaire mais l'Australie a, ou avait, une politique restrictive très spéciale en matière de fusions, appelée « politique des six piliers ». La politique des six piliers précisait que les quatre principales banques et deux grandes compagnies d'assurance vie ne seraient pas autorisées à fusionner en toutes circonstances. Le rapport Wallace préconisait d'abandonner cette politique des six piliers. Le gouvernement a répondu en permettant les fusions de compagnies d'assurance et de banques, mais a continué à interdire la fusion des quatre principales banques.

L'Australie avait et a toujours quatre banques principales. Ces banques détiennent environ 80 pour cent du marché des opérations de banque en Australie.

Les fusions de banques australiennes sont soumises au double examen de la Commission de la concurrence et de l'organisme de réglementation prudentielle. Ces deux organismes présentent leurs conclusions au Ministre des Finances. Le Ministre des Finances n'a pas le pouvoir d'approuver des fusions refusées par la Commission de la concurrence, mais il peut rejeter des fusions approuvées par cette Commission. La Commission analyse les fusions bancaires uniquement sur le plan de la concurrence, comme dans tout autre secteur. Le Ministère des Finances, en revanche, s'assure que la fusion bancaire n'est pas contraire à l'intérêt national.

Comme au Royaume-Uni, l'Australie n'a connu que deux fusions bancaires au cours des cinq dernières années (la dernière a été réalisée en mai 2000), mais la Commission de la concurrence les a jugées très importantes étant donné le petit nombre de banques australiennes. L'autorité de la concurrence applique un test visant déterminer si la concurrence est sensiblement réduite et si tel est le cas, la fusion est rejetée. Les parties à la fusion peuvent se porter candidates à une autorisation de fusion au titre de considérations relatives au bien public. Il s'agit cependant d'un processus public, et l'expérience montre que les banques sont réticentes à choisir ce recours.

2. Définition du marché

Le Président remarque que la définition du marché est largement évoquée dans de nombreuses contributions. On s'accorde semble-t-il à reconnaître que dans les activités bancaires, les prêts et les emprunts relèvent de marchés de produits séparés, mais les catégories utilisées sont en fait considérables d'un pays à l'autre, ce qui s'explique par des variations bien compréhensibles des conditions locales. La seule généralisation à laquelle le Président peut se hasarder est que les pays définissent des marchés géographiques selon des critères correspondant peu ou prou à une analyse des coûts de transaction. En conséquence, plus le service bancaire est proche du consommateur final, plus le marché géographique est étroit.

Au lieu d'approfondir les questions empiriques que pose la définition du marché, le Président met l'accent sur un problème particulier soulevé dans plusieurs contributions. Il s'agit du degré de concurrence entre les produits bancaires et les produits d'assurance. Le Président s'adresse à la Commission européenne pour entamer le débat et analyser la substituabilité des services bancaires et des produits d'assurance.

Un délégué de la Commission européenne estime que la question de la substituabilité des produits bancaires et des produits d'assurance va se poser dans de nombreux cas à l'avenir, notamment en ce qui concerne la prestation conjointe de services bancaires et de services d'assurance.

Dans la grande majorité des cas où le problème de la substituabilité des produits bancaires et des produits d'assurance aurait pu se poser, la CE n'a pas réellement été obligée de formuler une définition officielle du marché parce qu'il n'y avait pas de problème de concurrence, quelle que soit la définition considérée. Il y a cependant eu quatre cas, tous liés aux produits d'assurance, plus spécifiquement dans les assurances de la solvabilité (ducroire), où il a fallu regarder le problème en face : le délégué décrit l'un de ces cas, la prise de contrôle de l'assurance générale de France par la compagnie d'assurance allemande Allianz.

L'assurance de la solvabilité (ducroire) est un compartiment particulier de l'assurance crédit, qui protège essentiellement les fournisseurs contre l'insolvabilité de l'acheteur. C'est un domaine très étroit de l'assurance crédit. Dans le cas d'Allianz, la CE s'est concentrée sur le coté de la demande (du côté l'offre, les services bancaires et de l'assurance de la solvabilité (ducroire) étaient clairement distincts parce que proposés par des institutions différentes). La CE a cherché à savoir si les acquéreurs d'assurance de la solvabilité pouvaient se tourner vers les services bancaires, notamment les prêts classiques, l'affacturage et des lettres de crédit. Son enquête a fait ressortir que ces produits étaient davantage des compléments que des produits de substitution. La CE est arrivée à cette conclusion parce que les sociétés d'affacturage demandaient elles-mêmes aux clients des garanties sous forme de polices d'assurance diverses. En outre, les compagnies d'affacturage achètent elles-mêmes de l'assurance crédit, et sont prestataires de services qui ne sont pas les mêmes que ceux de l'assurance crédit. Les compagnies d'affacturage et les autres fournisseurs de garanties financières ne proposent pas de services d'analyse des risques. Enfin, les compagnies d'affacturage exercent un choix au niveau des risques spécifiques qu'elles sont disposées à prendre, c'est-à-dire qu'il n'y a pas de transfert de portefeuille.

La déléguée note également que pour bon nombre d'autres produits bancaires et d'assurance, la substituabilité pourrait se concrétiser à l'avenir. Elle cite notamment le cas de Crédit suisse Winterthur où la CE a procédé à l'examen d'offres globales spécifiques de produits d'assurance et de produits bancaires conçus spécialement pour répondre aux besoins des clients.

Le Président se tourne alors vers les délégués de la Corée dont la contribution traite également de la substituabilité des produits bancaires et des produits d'assurance. Il note que l'Autorité de la concurrence coréenne a enquêté sur cinq grandes opérations de fusion de banques depuis 1997. Le Président cite une partie du texte soumis par la Corée : « …les produits similaires offerts par des institutions financières non bancaires ont une faible élasticité demande/offre et ne sont donc pas en concurrence. » Le Président invite le délégué de la Corée à commenter.

Un délégué de la Corée explique que cette conclusion se fonde sur des enquêtes qui ont révélé des différences importantes entre les institutions bancaires et les institutions non bancaires, à savoir : les services bancaires sont beaucoup plus importants en terme de taille ; les institutions non bancaires n'offrent pas la même gamme complète de services que celle proposée par les banques ; les institutions non bancaires prennent des risques beaucoup plus élevés ; et l'assurance des dépôts (limitée à environ 20 000 dollars par déposant) ne s'applique pas aux dépôts dans les institutions non bancaires. En outre, les clients ont tendance à concentrer leurs achats de services bancaires sur une seule banque et font preuve d'une grande loyauté envers cette banque. En cas de crise, les déposants peuvent délaisser leur banque, mais ils y reviennent lorsque la stabilité est restaurée.

3. Obstacles à l'entrée

Le Président fait observer que d'autres contributions confortent également l'opinion selon laquelle il existe un faible degré de substituabilité entre les produits bancaires et les produits d'assurance, puis passe au sujet des obstacles à l'entrée. Il note que les contributions évoquent l'inertie des

consommateurs et les obstacles réglementaires, mais appelle les participants à se pencher sur l'incidence de l'évolution des services bancaires électroniques. Dans les contributions, les avis sont partagés lorsqu'il s'agit de déterminer si les services bancaires électroniques augmentent ou diminuent les obstacles à l'entrée ou si leur impact varie en fonction des divers obstacles. D'après la contribution de la Finlande, les services bancaires électroniques diminuent certains obstacles à l'entrée alors même qu'ils en augmentent d'autres. Le Président invite le délégué de la Finlande à commenter.

Un délégué de la Finlande note tout d'abord qu'il existe trois catégories générales d'obstacles à l'entrée : les obstacles juridiques ou réglementaires, qui n'existent quasiment pas en Finlande ; les économies classiques d'échelle et de champ ; et les obstacles stratégiques à l'entrée qui se dressent lorsque les entreprises en place cherchent à compliquer la vie des nouveaux entrants. Il note également que les grandes entreprises peuvent faire appel à des services internationaux, ce qui n'est pas le cas des PME et des ménages.

Quant aux services bancaires électroniques, leur incidence sur les obstacles à l'entrée dépend fortement du stade ou du niveau technologique des services bancaires électroniques et de la catégorie de consommateurs. Pour ce qui concerne les guichets automatiques de banque et les services sur Internet, on peut dire que les obstacles à l'entrée sont réduits dans la mesure où il y a moins d'obligations de constituer des réseaux étendus de succursales pour atteindre les consommateurs. Ce point revêt une importance particulière dans des pays à population dispersée comme la Finlande.

A des stades ultérieurs, les services bancaires électroniques se font par téléphone mobile et les banques commencent à constituer des co-entreprises avec les entreprises de télécommunication et des sociétés spécialisées dans l'Internet et dans les technologies de l'information. C'est à ce stade que les services bancaires électroniques peuvent accroître les obstacles à l'entrée.

Bien que l'Autorité finlandaise de la concurrence de Finlande se réjouisse du développement des services bancaires électroniques, que la Finlande fasse partie des trois pays au monde les plus avancés dans ce domaine, il convient de prêter attention aux problèmes de concurrence, surtout à long terme.

Le Président déclare que les auteurs de la contribution australienne ont également des avis partagés sur l'incidence des services bancaires électroniques sur les obstacles à l'entrée. La contribution australienne évoque surtout l'un des obstacles éventuels à l'entrée, les frais de mise à disposition des réseaux privés créés par les banques déjà en place. Les délégués de l'Australie sont invités à commenter.

Un délégué australien précise que de l'avis de la Commission australienne de la concurrence, les réseaux de succursales ont encore un rôle très important à jouer en ce qui concerne les comptes de transactions et les dépôts. Les banques australiennes qui ont de vastes réseaux de succursales obtiennent des coûts de financement bien inférieurs à ceux des banques qui n'ont pas de tels réseaux. Cette situation s'explique peut-être par le fait que les clients gardent des fonds sur des comptes faiblement rémunérés auprès de leur banque locale. La Commission de la concurrence considère également que les réseaux de succursales sont très importants pour les PME. Ces entreprises dépendent en général beaucoup d'une forme ou une autre de relation bancaire qui suppose une présence locale.

A priori, les guichets automatiques de banque (DAB) et les transferts électroniques de fonds au point de vente devraient réduire les besoins de réseaux de succursales. Toutefois, étant donné les caractéristiques de réseau des services bancaires électroniques, il peut y avoir en fait une augmentation des obstacles à l'entrée. Les consommateurs ont apparemment besoin et exigent des réseaux relativement développés de guichets automatiques de banque (DAB) et de transferts électroniques de fonds au point de vente. Il y a un obstacle important à l'entrée lorsqu'un nouveau venu sur le marché ne peut pas accéder aux guichets automatiques de banque de ses concurrents par le biais d'un accord commercial, ce qui pose le

problème des frais de mise à disposition. En Australie, ces frais divergent en fonction de la marge de manœuvre des deux parties, qui dépend elle-même de la taille relative de leurs réseaux électroniques. Un nouvel entrant paie en général des frais de mise à disposition beaucoup plus importants qu'une banque déjà en place disposant déjà d'un réseau étendu. Lorsque deux des principales banques décident de conclure un accord permettant à leurs clients respectifs d'utiliser leurs guichets automatiques de banque, les frais de mise à disposition sont en général beaucoup plus faibles que ceux applicables à une petite banque pour le même accès.

La Commission australienne de la concurrence mène une grande enquête en coopération avec la banque centrale d'Australie sur les frais de mise à disposition dans le contexte des fusions bancaires récentes et a commencé à émettre des réserves à propos des accords existants sur les frais de mise à disposition. Elle estime à priori que ces accords entre les grandes banques d'Australie sont contraires aux dispositions de la loi sur les pratiques commerciales.

Concernant la notion d'inertie en tant qu'obstacle à l'entrée, le délégué pense que le terme d'inertie recouvre en fait de nombreux éléments différents. L'un de ces éléments est à l'évidence les coûts de transaction qui peuvent être très importants pour les consommateurs qui vont d'une banque à l'autre pour trouver les prix et les honoraires les plus bas possibles. La Commission de la concurrence estime également que les PME attachent beaucoup d'importance à leur réputation de solvabilité. Si les PME changent de banque, elles auront beaucoup de mal à rétablir cette réputation, ce qui les rend très immobiles. Cela ne veut pas dire pour autant que les PME sont inertes ou indifférentes au changement.

Le Président fait observer que le problème des frais de mise à disposition a été également soulevé au niveau de l'Union européenne et en France. Il note également qu'en Australie, on se préoccupe des différences recensées au niveau des frais de mise à disposition, alors que dans d'autres pays, c'est le niveau uniforme de ces frais qui posent des problèmes de concurrence. [Les délégués reviendront sur ce point dans la discussion générale, voir ci-après.]

Le Président s'adresse ensuite aux délégués du Canada. Il propose un débat sur des données empiriques liées à l'inertie des consommateurs et invite le Canada à défendre son opinion selon laquelle l'évolution technologique est plutôt à l'origine d'une hausse que d'une baisse des obstacles à l'entrée.

Un délégué canadien relate qu'au cours de deux enquêtes sur des fusions réalisées en 1998 et concernant quatre des six plus grandes banques du Canada, les parties à la fusion soutenaient que l'Internet et les opérations de banque par téléphone permettraient de diminuer les obstacles à l'entrée en éliminant ou en réduisant la nécessité d'établir un réseau de succursales étendu et coûteux. L'Autorité de la concurrence canadienne a cependant conclu que ce n'était pas le cas. Les succursales restent très importantes pour les consommateurs qui attendent de leurs banques qu'elles leur proposent les deux modes de distribution. Les services bancaires électronique sont donc devenus un complément et non un produit de substitution des succursales, ce qui augmente les frais fixes pour un nouvel entrant.

Paradoxalement, l'expert en technologie bancaire considère également que même si les clients utilisent ces nouvelles technologies, ces dernières ne vont pas remplacer les succursales de banque pendant les cinq à dix années à venir. Un autre expert estime qu'il faudra dix à 15 ans pour que la technologie pénètre réellement le marché. Autre point connexe intéressant, l'évolution des services bancaires électroniques pourrait rendre les clients plus réticents à répartir leurs opérations bancaires entre plusieurs banques. De nombreux clients préféreront concentrer leurs comptes auprès d'une seule banque et s'adresser à cette même banque pour les services connexes, y compris les services électroniques, afin de réduire leurs charges administratives, etc.

Le Président se tourne vers la Commission européenne pour lui demander de décrire les obstacles dressés par les pouvoirs publics à l'entrée d'une banque étrangère, notamment le cas Champalimaud.

Une déléguée de la Commission européenne exprime le souhait que ce cas reste exceptionnel. Elle précise aussi qu'il n'existe pas d'obstacles juridiques ou administratifs de l'Union européenne à l'acquisition de participations bancaires par des acquéreurs étrangers. Les directives bancaires de l'Union européenne se contentent d'exiger des acquéreurs de participations dans une institution financière d'en notifier les autorités nationales.

Le cas Champalimaud concerne une tentative du gouvernement portugais de s'opposer par décret (« Despacho ») à l'acquisition de participations bancaires détenues par un citoyen portugais, M. Antonio Champalimaud, par la banque espagnole Banco Santander Central Hispano. Cette prise de contrôle transnationale était prévue pour le printemps 1999. Le gouvernement portugais s'est opposé à cette transaction au motif de considérations prudentielles ayant trait à la viabilité et à la solidité financière de l'acquéreur. La CE a pris des mesures correctives en vertu des directives sur l'assurance et de la Convention de l'Union européenne concernant la liberté d'établissement et la libre circulation des capitaux. Elle a également pris des mesures, ce qui est nouveau, prévues par le Règlement sur les concentrations.

Dans les deux premières décisions liées à ce cas, la CE a établi que le gouvernement portugais n'ayant pas notifié ses règles prudentielles, il devait donc suspendre les mesures prises. Dans une deuxième décision, la CE a estimé que le décret portugais n'était pas justifié en vertu du Règlement sur les concentrations, article 21(3) [qui confère à la CE la compétence exclusive pour évaluer les opérations de concentration de dimension communautaire]. C'est la première fois en dix ans de contrôle des fusions que la CE applique l'article 21(3), ce qui peut être considéré le signe qu'elle se tient prête à l'appliquer à nouveau.

Le Président complète le débat sur les obstacles à l'entrée en demandant à la Pologne d'expliquer de quelle manière son fonds de garantie bancaire augmente les obstacles à la sortie tout en diminuant les obstacles à l'entrée. Il demande également des précisions sur tout obstacle spécifique *de jure* ou *de facto* aux prises de contrôle par des banques à capitaux étrangers, et invite les délégués de la Pologne à faire des commentaires la réaction de l'Autorité polonaise de la concurrence face à ces obstacles.

Un délégué de la Pologne précise d'abord que ce fonds de garantie bancaire a effectivement permis d'abaisser les obstacles à l'entrée dans le secteur des services financiers, qui se compose à 90 pour cent du secteur bancaire. Le fonds ne cherche pas à protéger les banques en place. Il fonctionne sur la base de règlements semblables à ceux que l'on trouve dans l'Union européenne, et son seul objectif est de diminuer les risques pour les déposants et de stabiliser par là même le secteur bancaire qui est très important.

Pour ce qui concerne les obstacles *de jure* ou *de facto* aux prises de contrôle étrangères dans le secteur bancaire, il n'y en a pas en Pologne. Il convient d'observer que la plupart des banques polonaises sont désormais à capitaux privés et que près de 60 pour cent de ces capitaux privés sont venus de l'étranger. Concernant l'autorisation exigée des autorités de tutelle bancaire polonaises, elle est accordée sans discrimination relative au pays d'origine.

Le Président invite les participants à entamer une discussion générale et un délégué canadien évoque l'inertie des consommateurs, relatant que l'Autorité canadienne de la concurrence a pris connaissance de documents démontrant qu'aucune institution financière n'avait gagné plus de 1 pour cent de part de marché par un autre biais que celui de l'acquisition. Ceci tend à démontrer que l'inertie des consommateurs est considérable.

Le Président rebondit sur ce point et demande quelle devrait être l'incidence de l'inertie des consommateurs dans le cadre d'une enquête sur les fusions et cette inertie rend les fusions plus difficiles ou pas. Il reconnaît que cette inertie implique que les consommateurs sont plus vulnérables en cas d'abus de la part des banques, mais si les consommateurs sont véritablement inertes, le nombre de banques revêt-il la même importance ?

Le même délégué canadien se déclare fondamentalement d'accord avec les commentaires du Président et observe que lorsque des cessions ont été proposées dans le but de réduire l'incidence anticoncurrentielle d'une fusion, certains consommateurs se sont plaints que leur succursale était vendue à une autre banque. Ces consommateurs ne semblent guère se soucier d'empêcher d'éventuelles hausses de prix, puisqu'ils préfèrent rester dans leur banque d'origine. Le délégué estime que l'inertie des consommateurs ne diminuera que sous l'influence de nouveaux entrants proposant des services véritablement novateurs, notamment ceux liés aux services bancaires électroniques.

Un délégué mexicain pose une question au délégué de l'Union européenne à propos de la substituabilité des produits. Il note qu'un certain degré de substituabilité est fondé sur les changements des prix relatifs mais qu'une autre partie peut être liée à des tendances à long terme. C'est la première relation qui concerne le plus la définition du marché antitrust, mais les changements de prix relatifs sont difficiles à évaluer dans le secteur des services financiers en raison de la grande diversité des produits proposés. Le délégué souhaite savoir dans quelle mesure la Commission européenne fonde sa définition du marché sur la substituabilité face à l'évolution des prix relatifs dans les cas concernant les services financiers.

Une délégué de la Commission européenne répond que dans le cas d'Allianz décrit plus haut, la substituabilité de l'assurance de la solvabilité et de l'affacturage et autres formes d'assurance crédit a fait l'objet d'une enquête par la CE par le biais de son questionnaire habituel aux consommateurs et aux concurrents. Les consommateurs ont répondu clairement qu'ils n'y avait pas de produit de substitution de l'assurance de la solvabilité. En outre, la CE a établi que les prix de l'assurance de la solvabilité étaient plus élevés que ceux d'autres produits d'assurance-crédit et que les obstacles à l'entrée semblaient également plus importants. Sur la base de ces informations, la CE n'a pas jugé nécessaire d'approfondir son enquête sur les corrélations de prix. Elle n'hésiterait cependant pas à le faire dans un cas analogue où cette enquête s'imposerait.

A ce point de la discussion, un délégué **a**ustralien revient sur les remarques du Président sur les frais de mise à disposition en faisant observer qu'en Australie, ces frais sont équivalents entre les quatre grandes banques, mais qu'ils sont beaucoup plus élevés entre les grandes banques et les petites banques. Le vraie question, du point de vue australien, consiste à justifier les similarités et les différences par rapport aux coûts.

Le Président demande à un observateur d'Israël d'exprimer son opinion sur ses frais de mise à disposition.

L'observateur israélien aborde cette question dans le contexte des systèmes de cartes de crédit, expliquant que dans ces systèmes, l'entreprise qui vend des biens à crédit paie une commission à l'acquéreur qui réalise véritablement le paiement. L'acquéreur reverse la majeure partie de cette commission à l'émetteur de cartes au titre des frais de mise à disposition. Les frais de mise à disposition constituent donc une dépense pour l'acquéreur et lui servent de référence pour déterminer ses commissions qui sont souvent très élevées.

L'observateur évoque plusieurs raisons pour lesquelles les frais de mise à disposition devraient concerner tout le monde. D'abord, ces commissions manquent souvent de transparence et constituent un coût caché qui en définitive payé par le consommateur. Deuxièmement, ces commissions sont fixées d'une

manière qui serait normalement inacceptable pour les responsables antitrust, c'est-à-dire par le biais d'un accord entre banques. Ce système est autorisé parce qu'il confère à l'évidence certains avantages surtout en phase de démarrage des systèmes. Troisièmement, dans le contexte de systèmes de cartes de crédit concurrents, les frais de mise à disposition sont souvent relevés pour attirer les émetteurs de cartes. L'observateur invite les participants qui souhaitent avoir davantage d'informations sur ces problèmes à se référer à un article récent sur les frais de mise à disposition, rédigé par David Balto de la FTC américaine.

L'observateur s'interroge sur le bien-fondé de ces frais de mise à disposition dans les systèmes bancaires lorsque les banques ne sont pas très nombreuses. Il se réfère à une enquête réalisée par l'Autorité israélienne de la concurrence, portant sur l'ensemble du marché des cartes de crédit et comprenant une analyse de ces commissions de mise à disposition. L'enquête a démontré que ces commissions étaient fixées d'une manière qui n'encourageait pas l'efficience. Par ailleurs, alors qu'il y a peu de sociétés de traitement, ou que la concurrence entre ces sociétés est limitée, les frais de mise à disposition sont souvent ventilés par catégories d'une manière qui renforce le pouvoir des sociétés de traitement et ne sert pas nécessairement les intérêts des commerçants ou du public.

Un délégué canadien intervient et fait observer que le Canada a un réseau de cartes de crédit spécifique au sens où les institutions doivent choisir entre Visa et Mastercard. Il en résulte des frais des mise à disposition différents, c'est-à-dire que les membres de Visa paient des frais de mise à disposition plus élevés et facturent donc des commissions plus élevées. Mastercard est le deuxième réseau de cartes de crédit installé au Canada et s'est constamment battu pour augmenter sa part de marché vis-à-vis des banques Visa généralement plus importantes. Le délégué demande aux autres délégations de faire part de leur expérience et de leur point de vue sur l'incidence des systèmes de cartes sur le niveau des commissions de mise à disposition, mais aucun participant ne se porte volontaire pour répondre.

Un délégué italien demande aux délégués des États-Unis si la raison pour laquelle on se préoccupe davantage de l'incidence des fusions bancaires sur les petites sociétés emprunteuses que sur les déposants tient au fait que les déposants, grâce à l'Internet et aux nouvelles technologies, ont un choix plus étendu que les petites entreprises. Un délégué des États-Unis répond que c'est en effet le cœur du problème.

4. Évaluation de l'impact concurrentiel

Le Président note que ce sujet est beaucoup abordé dans les contributions écrites et qu'il est très difficile de résumer tous les points de vue. A l'évidence, les coefficients de concentration sont un moyen utilisé par la plupart des autorités de la concurrence pour juger si des problèmes concurrentiels sont susceptibles de se produire. Cette analyse est ordinairement menée au niveau de chaque service bancaire ou marché concerné, mais la contribution américaine soulève un point intéressant dans ce domaine. La pratique courante du Département américain de la justice consiste en effet à examiner chaque marché de service bancaire de façon distincte afin de décider s'il y a ou non probabilité d'une diminution de la concurrence. Parallèlement, la jurisprudence de la Cour suprême privilégie ce que l'on décrit comme une approche par regroupements, c'est-à-dire que les opérations de banque commerciale sont considérées comme un marché pertinent et qu'on évalue une fusion en fonction de son incidence concurrentielle sur ce marché composite. Les délégués des États-Unis sont invités à décrire l'état actuel de l'approche de marché par regroupements.

Un délégué des États-Unis déclare d'abord que la Cour suprême a évidemment le dernier mot dans ce domaine. Mais il peut s'agir d'un des cas où l'analyse contemporaine de l'antitrust auquel ont recours les agences et les tribunaux, lorsqu'ils sont appelés à l'effectuer, est plus rigoureuse, empirique et fondée sur une analyse économique plus saine que celle des cas examinés par la Cour Suprême pendant les

années 60 et 70. Le Département de la justice applique aux services bancaires la même analyse qu'aux autres secteurs de l'économie. Il définit les marchés en partant du client, en demandant quels sont les produits qu'il achète, et quels sont les éventuels produits de substitution.

Bien qu'il s'agisse en définitive d'une question empirique, le Département de la justice estime que l'examen des services par regroupements peut prêter à confusion. Les entreprises qui offrent des services groupés peuvent ne pas offrir les produits que recherche le consommateur, et l'approche par regroupements peut donc conduire à considérer un marché anormalement élargi. Dans d'autres cas, les prestataires spécialisés de certains produits intéressant un consommateur pourraient être exclus à tort d'un marché regroupé s'ils n'offrent pas tout le groupe des services concernés.

Il est possible que lorsque la Cour Suprême a pris des décisions il y a 30 ou 40 ans concernant des marchés par regroupements, elle ait eu une bonne intuition de la véritable nature des relations bancaires. A l'époque, ces relations étaient plus ancrées sur le plan géographique, plus personnelles et comportaient peut-être une plus grande proportion de regroupements de produits et de services que ce n'est le cas aujourd'hui.

Le délégué remarque que les organismes de réglementation bancaire aux États-Unis continuent souvent à adopter une approche par regroupements. Cette attitude est peut-être imputable à une rigidité réglementaire et à l'incapacité des responsables de la réglementation d'adapter les modes de pensée les plus modernes. Elle tient peut-être aussi au fait que les responsables de la réglementation n'ont pas les outils de collecte de données et les moyens d'action dont disposent les agences antitrust. Ils peuvent trouver pratique, et même nécessaire, d'utiliser une définition de marché abrégée pour laquelle ils disposent de données fiables. En revanche, le Département est convaincu que son approche « désagrégée » correspond à l'analyse contemporaine antitrust et que la Cour suprême, si elle est saisie d'un cas approprié, réexaminera l'ensemble de la question au lieu de s'inspirer de sa propre jurisprudence en matière de regroupements de services bancaires.

Le Président, qui admet n'avoir jamais traité un cas de fusion de banque, déclare qu'il trouve les distinctions faites entre, par exemple, les prêts à la consommation à court et long terme quelque peu contraires au bon sens. L'idée qu'il y a tant de marchés distincts va à l'encontre de l'opinion selon laquelle la plupart des consommateurs recherchent auprès de leurs banques un groupe de produits et font preuve d'une inertie assez considérable quand il s'agit de changer de banque, c'est-à-dire qu'ils seraient a priori réticents à changer de banque pour obtenir des conditions meilleures sur un produit particulier. Le délégué des États-Unis approuve cette observation, mais réitère que la question est en définitive empirique, et dépend du comportement réel du consommateur.

Le Président convient qu'en évaluant l'impact concurrentiel des fusions de banques, on examine d'abord la manière dont ils affectent les marchés pertinents de services bancaires. Quelquefois, cependant, on cherche à savoir si les fusions ont un impact sur une autre activité. Si les banques faisant l'objet de la fusion ont des participations industrielles importantes, cette fusion peut avoir une incidence sur des marchés « réels ». C'est ce qui semble s'être produit en Espagne, et c'est pourquoi le Président demande au délégué de l'Espagne de commenter ce point.

Un délégué de l'Espagn**e** explique la méthode adoptée par les autorités espagnoles de la concurrence dans l'examen de deux grosses opérations de fusion de banque notifiées en 1990. La première, Banco Santander/Banco Central Hispano, concernait la première et la troisième banques du pays. La deuxième fusion, Banco Bilbao Vizcaya/Argentaria, portait sur la deuxième et la troisième banques à l'époque. Dans les deux cas, les autorités de la concurrence ont analysé les effets éventuels sur le secteur non financier de l'économie, notamment le secteur de l'électricité, des télécommunications et de la radio-télévision.

Dans le cas de la première fusion, les deux banques avaient des participations au capital de grandes entreprises d'électricité et de télécommunications. Ces deux secteurs ont des structures oligopolistiques et ont été récemment libéralisés. Les autorités de la concurrence craignaient que la nouvelle banque issue de la fusion, du fait de ses participations dans des entreprises concurrentes serait en position de réduire l'indépendance de ces concurrents, ce qui donnerait lieu à des pratiques anticoncurrentielles. Le cas a été finalement résolu par le Ministre qui a plafonné les participations de la nouvelle banque au capital de sociétés concurrentielles d'électricité et de télécommunications à trois pour cent. Les parties à la fusion ont donc été obligées de céder le reste et disposaient de deux mois pour présenter leur plan aux autorités de la concurrence. C'est la première fois qu'une telle mesure a été prise dans le cadre d'une opération de fusion en Espagne.

La deuxième fusion a été beaucoup plus compliquée parce qu'au moment même où elle faisait l'objet d'une enquête, la nouvelle entité issue de la fusion a conclu un accord avec Telefonica pour développer des services Internet et de commerce électronique, ce qui impliquait des prises de participation croisées dans ces deux entreprises, c'est-à-dire que BBVA s'engageait à acheter dix pour cent de Telefonica et Telefonica cinq pour cent de BBVA. Le Tribunal de la concurrence a recommandé au gouvernement d'approuver la fusion à condition que BBVA n'ait pas le droit d'avoir des participations importantes au capital d'entreprises concurrentes dans les médias, les télécommunications ou l'électricité, c'est-à-dire que les participations soient plafonnées à trois pour cent dans chaque société concurrente des différents secteurs concernés qui comprenaient l'électricité, les hydrocarbures, les opérateurs de câble, les services téléphoniques fixes et les services de la boucle locale. Là aussi les parties avaient deux mois pour présenter leur programme de cession.

Le Président observe que l'Allemagne a également été confrontée à des cas où les participations croisées entre des banques et d'autres entreprises, notamment des compagnies d'assurance, peuvent influencer l'évaluation de l'impact d'une fusion et demande à la délégation allemande de faire des commentaires à cet égard.

Un délégué allemand note que les prises de participation des banques dans les autres secteurs sont en effet une caractéristique du secteur bancaire allemand. Ces participations ne sont pas limitées en droit. Mais étant donné le degré élevé de concurrence du secteur bancaire allemand, ces participations sont toujours inférieures à une position dominante sur le marché.

Contrairement aux anticipations, selon lesquelles les pressions de la mondialisation pourraient conduire à l'émergence de grands conglomérats financiers, il y a désormais une tendance claire à la séparation entre les activités de banque et les activités d'assurance. Il y a eu un cas de fusion de compagnies d'assurance qui a posé quelques problèmes en raison des participations des parties au capital d'une banque. Ce problème a été résolu en exigeant des parties qu'elles cèdent leurs participations dans la banque concernée.

Le délégué fait observer qu'en Allemagne, ce sont souvent des parties prenantes plutôt que des dirigeants qui sont le moteur des fusions. Les banques en particulier ont souvent encouragé des fusions industrielles et l'inverse s'est parfois produit. Dans le cas de l'opération récente entre Deutsche/Dresdner Bank, qui n'a pas abouti, il est bien connu qu'Allianz était l'un des moteurs de cette opération.

Dans ses remarques de conclusion, le délégué évoque un cas curieux où la Bundeskartellamt s'est opposée à une fusion importante dans le secteur de la construction. Les parties ont réagi en élargissant l'opération de fusion et en y incluant une banque afin de pouvoir transférer la juridiction à Bruxelles. Cette stratégie a échoué lorsque Bruxelles a renvoyé le cas à Berlin. La banque s'est ensuite retirée de l'opération de fusion.

Le Président s'adresse à la délégation japonaise pour lui demander des informations sur l'examen par les autorités de la concurrence de la fusion bancaire entre Dai-Ichi Kangyo/Fuji Bank et Industrial Bank et des commentaires sur l'incidence des participations croisées entre les banques et les autres entreprises.

Un délégué japonais fait observer que l'autorité japonaise de la concurrence a reçu une demande de consultation préalable de la part de la banque Dai-Ichi Kangyo, de la Fuji Bank et de la Industrial Bank of Japan concernant la mise en place d'une société holding commune, le groupe financier Mizuho. Les trois banques prévoient de créer avant octobre 2000 une société holding commune. Parallèlement leurs filiales, notamment trois maisons de titres et deux banques de gestion de patrimoine, seront fusionnées. Le total des actifs du groupe sera supérieur à toute autre banque dans le monde. L'autorité de la concurrence a examiné la demande et a répondu en juin 2000. Avant de donner davantage de détails sur ce cas, le délégué a fait part de trois évolutions importantes dans le secteur financier japonais.

Premièrement, la déréglementation a été encouragée au Japon ces dernières années dans le but de développer le marché des capitaux et de faciliter le financement des entreprises par émission d'actions, d'obligations, etc. En conséquence, les grandes entreprises sont de moins en moins dépendantes des banques. Les grandes banques, qui avaient pour principaux clients les grandes entreprises, doivent maintenant se tourner vers les petites et moyennes entreprises et les ménages. Ces grandes banques vont sans doute être confrontées à une concurrence féroce de la part des institutions financières locales telles que les banques régionales. Elles devraient, pour maintenir leurs relations avec les grandes entreprises, accorder davantage d'importance à la prise ferme d'actions et d'obligations, à l'offre de services et produits financiers tels que la titrisation d'actifs d'entreprise, et à l'intermédiation dans les fusions et acquisitions. La concurrence avec les institutions financières étrangères et les maisons de titres nationales sera inévitablement rude.

Deuxièmement, les progrès des technologies de l'information et l'amélioration des infrastructures de communication permettent au secteur bancaire d'exploiter les nouveaux médias tels que l'Internet. Les entreprises liées aux technologies de l'information, qui construisent par exemple des bases de données pour les clients sont maintenant indispensables aux banques qui veulent rester concurrentielles. L'évolution de l'industrie de la communication et des technologies de l'information est aussi une occasion pour les entreprises d'autres secteurs d'offrir des services bancaires par divers moyens innovants.

Troisièmement, les banques qui détiennent des montants importants de créances non performantes depuis l'éclatement de la « bulle » spéculative sont maintenant obligées de se restructurer pour améliorer leur rentabilité, de se débarrasser de ces créances et de renforcer la solidité de leurs actifs.

Revenant au cas Mizuho, l'Autorité japonaise de la concurrence a évalué l'impact concurrentiel en identifiant tout d'abord cinq marchés pertinents distincts : les activités de dépôt ; les activités de prêt ; les opérations de change ; les activités sur titres ; et la gestion de patrimoine. En définitive, et à la lumière des trois tendances décrites plus haut, l'Autorité a conclu que la fusion proposée ne risque pas d'exercer un effet de restriction important sur la concurrence. Toutefois, une l'opération menée à son terme, les trois banques financeront 1 600 sociétés sur un total de 2 300 sociétés cotées en bourse, à l'exclusion des banques et des compagnies d'assurance.

Le groupe financier Mizuho deviendra le principal bailleur de fonds de 700 sociétés sur un total de 2 300 sociétés cotées. L'Autorité de la concurrence a donc décidé qu'il convenait de faire une enquête sous forme de questionnaires et d'audiences portant sur 500 entreprises de tailles différentes actuellement financées par les trois banques. L'enquête a fait ressortir deux préoccupations que l'Autorité de la concurrence avait évoquées avec les trois banques. Les entreprises dont la dépendance vis-à-vis des trois banques allait augmenter du fait de l'opération de fusion ont exprimé leurs craintes que la nouvelle banque

interfère dans leur gestion en essayant de lier les prêts aux autres services, ou en exigeant de leurs emprunteurs qu'ils fassent appel à certaines maisons de titres pour la prise ferme d'obligations. Un tel comportement équivaudrait à des pratiques commerciales déloyales, et serait contraire à l'article 19 de la loi anti-monopole. L'Autorité japonaise de la concurrence a donc exigé des banques qu'elles prennent des mesures pour éviter que ce scénario se concrétise. L'autre difficulté concerne les groupes d'entreprise.

La banque Fuji et la banque Dai Ichi Kangyo ont toutes les deux des groupes de sociétés pour lesquels elles tiennent des réunions régulières. L'enquête mentionnée plus haut a fait ressortir que de nombreuses entreprises à l'intérieur et à l'extérieur du groupe ne s'attendent pas à un changement de leur mode d'exploitation. Toutefois, certaines entreprises s'inquiètent d'un renforcement éventuel des relations entre les sociétés membres du groupe. L'Autorité de la concurrence a donc conclu qu'il fallait prendre des mesures pour empêcher que les relations inter-entreprises deviennent exclusives et fermées.

Les trois banques ont proposé de répondre aux préoccupations de l'Autorité de la concurrence en déclarant que la nouvelle société holding se conformerait aux dispositions de la loi anti-monopole par le biais de ses dirigeants et de l'ensemble du personnel du groupe. En outre, le groupe financier Mizuho a assuré l'Autorité de la concurrence qu'elle n'avait pas l'intention de former des groupes exclusifs de sociétés. Le délégué fait observer que l'enquête portant sur l'exploitation de groupes d'entreprises centrés sur les banques se déroulera au printemps 2002. Il n'est pas exclu de recourir à la dissolution des groupes.

L'Autorité de la concurrence a décidé d'accepter les propositions des trois banques, mais assurera un suivi attentif de leur exécution et réagira promptement en cas de violation de la loi anti-monopole. Lorsque la nouvelle restructuration des trois banques aura lieu comme prévu au printemps 2002, l'Autorité de la concurrence réexaminera le cas s'il y a lieu.

5. Évaluation des gains d'efficience

Le Président entame le débat sur les gains d'efficience en invitant les délégués des États-Unis à s'exprimer. La contribution écrite des États-Unis évoque de façon exhaustive les différents types de gains d'efficience imputables aux opérations de fusion de banques et c'est la seule contribution où l'on trouve des estimations empiriques des gains d'efficience.

Le délégué des États-Unis déclare qu'il y a deux grandes catégories de gains d'efficience imputables aux opérations de fusion de banque aux États-Unis. La première est tout simplement l'économie d'échelle. Il y a quelques années, on pensait d'après les statistiques que l'on pouvait réaliser des économies d'échelle à un niveau relativement modeste, et qu'en fait, au delà de 100 millions d'actifs, les banques devenaient moins efficientes. Des statistiques plus récentes indiquent au contraire que les très grandes banques sont les plus efficientes. Cette divergence est peut-être due au fait que l'efficience n'augmente pas de façon linéaire avec la taille et qu'il y a certaines opportunités de réaliser des gains d'efficience à une échelle énorme qui ne se présentent pas à une taille plus modeste.

Il y a des raisons de penser qu'on peut faire des gains d'efficience en formant des co-entreprises ou en collaborant entre banques, notamment en ce qui concerne le partage de l'information et l'utilisation de certaines technologies de l'information. Mais alors ces gains d'efficience ne sont pas spécifiques aux opérations de fusion, et il convient de ne pas en tenir compte lors des décisions d'autorisation d'une fusion de banque.

La deuxième catégorie de gains d'efficience réalisés dans le cadre de fusions bancaires aux États-Unis était jusqu'à une date récente soumise à une réglementation qui empêchait les banques d'en profiter. Ce gain découle d'une diversification par extension du marché géographique. Les banques qui étaient

auparavant confinées à l'intérieur d'États ou de localités peuvent désormais être des banques multi-états, ce qui leur permet de diversifier leurs portefeuilles de prêts et de dépôts, et surtout de prêts. Cette évolution leur permet de réduire leurs risques et d'augmenter leur efficience. De récentes études empiriques montrent que c'est en effet la diversité géographique davantage que l'échelle qui semble être à l'origine des gains d'efficience des plus grandes banques américaines.

Le Président se réfère ensuite à la contribution mexicaine au sujet de deux fusions, dont les termes l'intriguent : la prise par *HSBC* de *Grupo Serfin* et l'acquisition par la *Banque de Montréal de Grupo Financiero Bancomer*. D'après la contribution mexicaine, l'acquisition d'une banque sous-capitalisée par une banque fortement capitalisée peut être considérée comme un gain d'efficience découlant d'une fusion. Il s'agit bien sûr de déterminer s'il existe un moyen moins anti-concurrentiel de recapitaliser une banque sous-capitalisée.

Un délégué mexicain précise que les termes choisis par les auteurs de la contribution ne sont peut-être pas adaptés. Ils n'ont sans doute pas voulu parler de gains d'efficience, mais plutôt du problème de sous-capitalisation auquel sont confrontées plusieurs banques mexicaines, qui n'est pas résolu grâce aux prises de contrôle en elles-mêmes, mais plutôt grâce à l'injection de capitaux étrangers. Le cas Serfin, par exemple, n'était pas une OPA. La banque a seulement bénéficié d'un apport en capital. De même, la Bancomer n'a pas fait l'objet d'une OPA par la Banque de Montréal, mais elle a aussi bénéficié d'une injection de capitaux. La situation a évolué récemment. La Serfin a été acquise par une banque espagnole, Santander. Pour plusieurs raisons, les autorités mexicaines pensaient que cela renforcerait la position de Serfin et améliorerait la concurrence. Ce serait évidemment le cas si faute d'acquisition, la Serfin était obligée de sortir du marché, ce qui aurait pour effet d'accroître encore la concentration sur le marché bancaire mexicain.

Le délégué évoque alors l'examen récemment réalisé par l'Autorité mexicaine de la concurrence qui a approuvé la proposition d'acquisition par la Banco de Bilbao Viscaya-Arentiaria d'Espagne (BBVA) de 40 pour cent du capital de Bancomer, la deuxième banque du Mexique. Au cours de l'examen, Banamex, la plus grande banque du Mexique, a fait une tentative d'OPA inamicale vis-à-vis de Bancomer, ce qui a posé des problèmes parce que Bancomer est la plus grande banque du Mexique. La transaction était encore à l'examen au moment de la table ronde.

6. Mesures correctrices

Le Président note que les différentes contributions des pays évoquent largement les mesures structurelles et les mesures comportementales. En dépit d'une préférence évidente pour les mesures structurelles, il arrive souvent que l'on impose des mesures comportementales. C'est notamment ce qui s'est passé dans le cas *Wespac/Bank of Melbourne* en Australie, et le Président cherche à en savoir plus.

Le délégué de l'Australie précise d'abord que la Commission australienne de la concurrence préfère les mesures structurelles, mais étant donné qu'il n'y a que quatre grandes banques en Australie, les mesures de cession posent en général des problèmes de réglementation de la concurrence.

Dans le cas *Wespac/Bank of Melbourne*, une banque nationale faisait l'acquisition d'une banque n'opérant que dans une seule ville, dans laquelle elle avait une large part de marché. La Banque de Melbourne était jugée unique en son genre au sens où elle proposait une gamme de services qui n'étaient pas offertes par les autres banques australiennes. Mais il n'y avait pas de grandes différences au niveau des prix, des taux d'intérêt, etc. La Commission australienne de la concurrence a envisagé de prendre des mesures structurelles, mais comme la banque faisant l'objet de l'acquisition n'opérait que dans une seule ville, les possibilités de répartition des actifs et de cession de ces actifs à divers acheteurs n'existaient tout

simplement pas. La Commission s'est ensuite penchée sur ce qui semblait être la principale question, à savoir que la banque était considérée comme une banque locale, et a conclu qu'il convenait de prendre des mesures comportementales afin de préserver l'autonomie locale.

Cet exemple a été très utile pour la Commission australienne de la concurrence, d'autant que la solution adoptée n'a pas été très satisfaisante. Il démontre qu'il faut faire preuve de prudence sur le terrain comportemental. Les engagements pris suscitent une forte attente de la part des consommateurs, mais dans la pratique, ils ne sont pas toujours tenus. La surveillance des éléments de ces mesures comportementales s'est avérée difficile et avec le temps, l'autonomie locale de la banque de Melbourne a semblé s'éroder.

Une semaine avant la table ronde, la Commission australienne de la concurrence a mené à son terme son enquête sur la plus grande fusion bancaire en Australie. Il convenait là aussi de prendre des mesures comportementales, mais la Commission n'a certes pas envisagé de prendre des mesures concernant l'autonomie de la direction.

Le Président s'adresse au délégué de la Suisse pour évoquer la fusion de l'UBS à l'occasion de laquelle les autorités suisses ont imposé le maintien des prêts existants aux conditions en vigueur avant la fusion. Le Président souhaite savoir de quelle nature étaient les problèmes concurrentiels, comment ces conditions ont été fixées et si des problèmes de suivi se sont posés.

Un délégué de la Suisse explique que dans le cas de l'UBS, la Commission de la concurrence a ciblé le marché des crédits commerciaux inférieurs à deux millions de Francs suisses, c'est-à-dire les crédits aux petites et moyennes entreprises. Elle a identifié 25 marchés régionaux. Sur ces 25 marchés géographiques, huit ont été considérés comme présentant quelques problèmes de concurrence. Le principal risque était celui d'une position dominante collective, mais il y avait aussi quelques problèmes de position dominante unilatérale. La Commission de la concurrence a autorisé la fusion mais a imposé à l'UBS certaines obligations structurelles et comportementales.

Parmi les obligations structurelles figuraient la cession d'un réseau d'un minimum de 25 points de banque dans le pays et la cession de certaines succursales identifiées par la Commission de la concurrence. Quant aux conditions comportementales, l'autorité de la concurrence a exigé d'UBS qu'elle applique un gel pendant six ans sur les termes et conditions s'appliquant aux crédits commerciaux existants inférieurs à un seuil de quatre millions de francs suisses. Ce seuil a été choisi dans l'hypothèse où les petites et moyennes entreprises auraient obtenu des crédits se montant à deux millions de FS auprès de chacune des deux banques parties à la fusion.

L'objectif de ces conditions comportementales était de protéger les petites et moyennes entreprises déjà débitrices d'une des banques parties à la fusion d'abus éventuels ultérieurs. Cette obligation a été limitée dans la durée à six ans, période considérée comme suffisante pour les PME trouvent d'autres fournisseurs concurrents.

Pour ce qui est du suivi de l'application des conditions comportementales, l'UBS doit fournir à la Commission de la concurrence tous les trois mois un rapport détaillé sur l'encours des crédits se situant en deçà des seuils de quatre millions de francs suisses. Un an et demi plus tard, la Commission n'a reçu que trois plaintes liées à l'application de ces conditions. L'une émanait d'une entreprise en faillite, et n'était donc pas fondée. Néanmoins, en dépit de ces résultats plutôt satisfaisants, il est reconnu que des obligations comportementales entraînent un gros travail quasi-quotidien de suivi et qu'il est à l'évidence préférable d'avoir recours à des mesures structurelles.

Le Président demande au délégué de la Suisse de préciser si l'obligation faite à l'UBS s'applique seulement aux crédits en cours, ou à l'ensemble des crédits se situant en deçà du seuil de quatre millions de francs suisses. Le délégué de la Suisse précise cette condition ne s'applique qu'aux crédits déjà existants. Le Président cherche alors à savoir pourquoi la Commission de la concurrence ne s'est pas souciée de l'incidence potentiellement négative d'un abus de position dominante pour les nouveaux emprunteurs et pas seulement pour les anciens. Le délégué de la Suisse admet le bien fondé de la critique implicite du président, mais déclare que l Commission se préoccupait surtout d'un abus collectif éventuel de position dominante.

Le Président s'adresse alors à l'Italie, qui non seulement impose des cessions dans certains cas de fusions de banques, mais parfois également la fermeture de succursales. Il cite une partie de la contribution italienne :

> Les fermetures de succursales peuvent avoir différents effets selon la dynamique concurrentielle du marché concerné. Si la banque a d'autres succursales sur le même marché, la redistribution de la part de marché entre les autres banques peut être limitée et le pouvoir de marché de la banque issue de la fusion peut rester en grande partie inchangé. Et si la banque n'a pas d'autres succursales, l'incidence des fermetures sur la concurrence peut être tout à fait réelle.

Le Président note que si la banque n'a pas d'autres succursales sur le marché, exiger la fermeture de la seule succursale qu'elle possède entraîne une diminution du nombre de banques sur le marché et que ce n'est pas de bon augure du point de vue de la concurrence. Il demande dans quel cas il apparaît nécessaire d'exiger une sortie du marché dans le cadre d'une fusion de banque.

Un délégué italien (de la Banque d'Italie) pense que l'anglais de l'auteur de la contribution laisse sans doute un peu à désirer et fait observer que la Banque d'Italie utilise différentes mesures. La première et la plus efficace est la cession de succursales. La deuxième est la fermeture de succursales, et la troisième consiste à empêcher la banque issue de la fusion d'ouvrir une nouvelle succursale sur le marché. Il mentionne au passage que les définitions de marché géographique sont très étroites en Italie. Il y a environ 100 marchés géographiques pour ce qui concerne les dépôts, ce qui veut dire qu'il n'est pas nécessaire de voyager plus de 15 ou 20 minutes pour changer de marché.

Pour ce qui concerne ce qui constitue une position dominante sur le marché, le délégué note que, par exemple, on peut trouver une position dominante sur le marché lorsque la banque a 50 pour cent du marché. On peut trouver également une position dominante lorsqu'il y a deux marchés contigus et qu'une des banques a 45 pour cent de l'ensemble, ou dans trois ou quatre marchés contigus, lorsqu'une banque a environ 40 pour cent de l'ensemble.

La contribution italienne établit clairement que la cession de succursales est la meilleure mesure à prendre. Cette déclaration figure immédiatement avant le passage cité par le Président, qui a pour objectif d'expliquer pourquoi les cessions de succursales sont en général préférables. En fait si une banque fusionnée a plusieurs succursales dans un marché donné et que l'Autorité de la concurrence exige la fermeture de l'une de ses succursales, il y a le risque que certains clients se reportent sur d'autres succursales de la même banque. Pour être plus efficace dans un cas où une banque a une position dominante dans trois ou quatre marchés contigus, l'Autorité de la concurrence peut fermer toutes les succursales, ou n'en fermer qu'une. C'était le sens de la phrase « pour fermer toutes les succursales sur un marché afin d'affaiblir la position dominante dans un marché élargi ». Le délégué admet que ce n'est toujours pas très clair. Il concède que la fermeture d'une succursale peut entraîner la perte d'un concurrent, mais que dans une certaine mesure, cet inconvénient est compensé par l'avantage de ne pas avoir à trouver un acheteur approprié.

Trouver un acheteur approprié, sauf dans la partie nord de l'Italie, plus prospère, peut poser quelquefois de réels problèmes. En Sardaigne, la Banque d'Italie a exigé la fermeture d'un nombre limité de succursales parce qu'il était très difficile de trouver des acheteurs adéquats. Trouver des acheteurs adéquats pose également problème en Sicile, notamment dans le cas de banques ayant beaucoup de créances non performantes.

Le Président demande avec quelle fréquence les fermetures de succursales ont lieu dans les cas de fusions bancaires en Italie. Le délégué de l'Italie répond que sur un total de 16 enquêtes officielles sur des fusions de banques, il y a eu dans dix cas des mesures imposées. Dans cinq de ces cas, il s'agissait de cessions. La Banque d'Italie n'a pas d'information précise sur l'efficacité de ces mesures mais il semble que les actions prises aient eu pour résultat de réduire la concentration des dépôts.

Le Président suggère que le délégué italien se réfère peut-être à un regroupement de marchés géographiques qu'il appelle « marché élargi » lorsqu'il essaie d'expliquer le passage cité. Il se tourne vers la délégation hongroise, dont la contribution porte sur la coopération internationale résultant d'une fusion impliquant *Creditanstalt-bankverein.*

Un délégué hongrois regrette de décevoir le Président mais fait observer qu'il n'y a pas de coopération officielle entre les autorités de la concurrence autrichiennes et hongroises dans ce cas. Ce cas est en revanche un bon exemple de la portée extra-territoriale du droit de la concurrence hongrois. L'Autorité hongroise de la concurrence examine non seulement les cas découlant de décisions prises en Hongrie, mais également les opérations de fusion effectuées à l'étranger qui ont des effets réels ou potentiels sur les marchés hongrois. C'est pourquoi les banques concernées ont demandé l'autorisation de l'Autorité hongroise de la concurrence. Ces deux banques avaient des filiales en Hongrie. Aucun problème de concurrence n'a été recensé dans les marchés pertinents, et l'autorisation de fusion a été accordée.

Le délégué ajoute que l'Autorité hongroise de la concurrence hongroise est tout à fait désireuse de coopérer avec les autorités de la concurrence des autres pays et de bénéficier de l'expérience de ces pays dans les cas de fusion.

La table ronde se conclut par une discussion générale animée par un délégué italien (de l'Autorité italienne de la concurrence). Le délégué demande à l'Espagne de préciser la manière dont les participations en actions ne donnant pas de pouvoir de contrôle aux banques parties à la fusion dans d'autres entreprises peuvent poser des problèmes de concurrence dans les cas présentés par le délégué de l'Espagne. Il suggère qu'il pourrait y avoir des difficultés lorsque les avoirs en action confèrent un certain degré de contrôle. Le délégué de l'Espagne souligne que les secteurs concernés comportent un très petit nombre de concurrents officiellement réglementés. Cette restriction de trois pour cent a pour objectif de s 'assurer que les banques ne pourront pas nommer à leur conseil d'administration les dirigeants d'un petit nombre de sociétés concurrentes dans le but d'obtenir des échanges d'informations confidentielles.

Un délégué des Pays-Bas poursuit le raisonnement du délégué italien en notant qu'il pourrait y avoir un problème si les deux banques issues de la fusion prennent le contrôle d'une société après leur fusion et s'interroge sur les mesures à prendre dans ce cas. Dans le même esprit, il s'interroge sur les moyens d'action dont disposent les autorités de la concurrence lorsqu'une banque issue d'une fusion nomme à son conseil d'administration des membres de deux entreprises concurrentes, ce qui entraîne le risque que ces entreprises commencent à coordonner leurs stratégies. Le délégué italien répond que la situation qu'il a évoquée est différente. Il note qu'il peut y avoir le cas où trois banques font l'acquisition ensemble du capital d'une autre banque. Ces trois banques contrôlent donc la quatrième. Cette situation peut ne pas donner lieu à une enquête sur les fusions, et il est difficile de prendre des mesures correctrices. Le cas auquel se réfère le délégué des Pays-Bas est logiquement celui où l'entreprise dont la banque issue

de la fusion prend le contrôle doit également être analysée comme faisant partie de la fusion, c'est-à-dire être soumise aux tests de position dominante ou de diminution substantielle de la concurrence.

Une déléguée canadienne remarque que tout en ne pouvant pas envisager au Canada d'imposer la fermeture d'une succursale dans le cadre de mesures correctrices suite à une enquête sur les fusions, on pourrait envisager d'imposer des restrictions sur le choix de l'acquéreur des succursales dont la cession a été imposée. Il est justifié de limiter les acquisitions par les banques qui ont déjà des succursales dans la région et qui, après avoir acquis la succursale cédée, poseraient des problèmes de concurrence. La déléguée demande à la délégation suisse si la Suisse a imposé des conditions sur le choix de l'acquéreur des succursales cédées dans le cas de l'UBS. Le délégué de la Suisse répond que pour ce qui concerne les 25 points de banque constituant un réseau, l'UBS a été du soumettre à la Commission suisse de la concurrence une liste de ces points répartis dans toute la Suisse et situés près du centre des villes, l'idée étant d'avoir un réseau commercialement viable. La déléguée canadienne précise alors sa question pour la centrer sur le cas où un acquéreur a un réseau existant de succursales, puis propose de fermer sa succursale ou la succursale dont il fait l'acquisition. La Suisse imposerait-elle des conditions aux achats des actifs cédés pour empêcher ce type d'acquisition ? Le même délégué suisse répond que la Suisse n'impose pas de conditions particulières aux acquéreurs potentiels.

Un délégué mexicain demande à la délégation canadienne les moyens utilisés, s'il y en a, pour faire en sorte que lors d'une cession de succursale, il y ait non seulement transfert d'actifs mais aussi de clients. Le Canada a-t-il imposé des restrictions aux banques issues de fusions en limitant par exemple les communications avec les clients transférés, ou les possibilités d'« écrémage » destiné à garder les meilleurs clients ? Il souhaite également savoir si le Canada analysé dans quelle mesure les clients peuvent s'opposer à une cession en choisissant de rester avec leur banque d'origine.

Un délégué du Canada répond que la question est un peu prématurée puisque le Bureau canadien de la concurrence vient juste de mener à bien son tout premier processus de cession de succursales suite à la fusion de deux institutions financières (Toronto Dominion/Canada Trust). Le Bureau de la concurrence a imposé certaines clauses de non-sollicitation afin d'empêcher les clients transférés d'être la cible des commerciaux de leur banque précédente, et à limiter le transfert de données concernant ces clients. Mais bien sûr, les clients sont libres de circuler comme ils le souhaitent. Le cas est d'autant plus compliqué que la société de fiducie acquise était innovante et qu'une grande partie de ses clients étaient des personnes déçues par les banques qui avaient rejoint la société de fiducie en raison de sa réputation de prestataire de services plus personnels et amicaux, et parce qu'il ne s'agissait pas d'une banque. L'acquéreur des succursales cédées était une autre banque, et il sera intéressant de voir si les clients restent avec cette banque ou vont dans une autre société de fiducie.

Un délégué de la Finlande pose deux questions à la délégation italienne. Il rappelle que la Banque d'Italie joue un rôle crucial en matière de surveillance de la concurrence. Il remarque également que les autorités de la concurrence d'autres pays ont quelquefois des difficultés à obtenir des statistiques au niveau des succursales et qu'a priori la banque d'Italie a un accès direct à ces informations. Sa première question est de savoir si la Banque d'Italie assure le suivi de la concurrence sur la base de rapports annuels etc. Sa deuxième question est s'il y a des obstacles juridiques interdisant à une banque italienne ou à une banque étrangère d'élargir son réseau de succursales ou d'accroître ses opérations de banque d'une autre manière.

Un délégué italien (de la Banque d'Italie) confirme que la Banque d'Italie dispose d'un grand nombre de statistiques et qu'elle a en outre 100 succursales sur tout le territoire italien. Quant aux obstacles juridiques à l'entrée en Italie, ils sont très faibles. Les banques de tout pays membre de l'Union européenne sont libres d'entrer sur le marché avec ou sans succursales. Il note également que le nombre de banques a diminué ces dix dernières années, passant de 1 200 à 800, et que les clients ont désormais un choix d'environ 30 succursales différentes. Pour ce qui concerne les conditions du suivi de la concurrence, le

délégué confirme que la Banque d'Italie se sert des statistiques, surveille les indices Herfindahl sur les différents marchés géographiques ainsi que les différents taux d'intérêt. En outre, la Banque d'Italie publie un grand nombre d'informations statistiques permettant de suivre l'évolution et publie chaque année au mois de mai un rapport important qui contient un chapitre sur la concurrence.

Le Président s'adresse alors à un représentant du BIAC qui estime, à la lumière de cette table ronde, que les autorités de la concurrence ont du mal à définir les marchés et les mesures correctrices et à se persuader que les progrès technologiques vont sans doute entraîner la disparition des obstacles à l'entrée. Il est un peu étonné par une remarque qu'il attribue au Canada dans ce domaine, selon laquelle il faudra attendre 10 ans pour observer un changement notable des conditions de marché ou au moins une réduction des obstacles au marché du fait de l'évolution technologique actuelle. Il pense que cette observation repose davantage sur une expérience passée que sur l'expérience actuelle.

Le délégué appelle également l'attention des participants sur une note conjointe ICC / BIAC remise la veille au Comité du droit et de la politique concurrence. Il rappelle les trois thèmes principaux de ce document à propos les disciplines qui devraient être observées lors des processus d'examen des fusions. Premièrement les juridictions devraient appliquer leurs lois d'une manière non discriminatoire, sans considération de nationalité des entreprises concernées. Deuxièmement, il convient de ne pas tenir compte de facteurs non concurrentiels lors des examens de fusion relevant de la législation antitrust. Il s'agit notamment des exemptions relatives à la sécurité nationale, mais aussi des considérations relatives à l'intérêt national ou à des facteurs prudentiels. Les exemptions au principe général devraient être limitées et faire l'objet d'un processus tout à fait transparent. La troisième remarque générale est que les considérations politiques ne devraient jouer aucun rôle dans le processus d'examen des fusions.

Le Président souhaite préciser que si le Comité du droit et de la politique de la concurrence organise un débat sur les fusions dans le secteur bancaire, ce n'est pas parce que les autorités de la concurrence ont du mal à définir les marchés pertinents. En fait, dans ce domaine particulier, il ressort des contributions un degré considérable de convergence des points de vue. Il peut y avoir d'autres domaines où les choses sont plus difficiles, mais la définition des marchés pertinents n'est probablement pas l'un d'eux.

Un délégué de la Commission européenne souhaite poser une question sur l'évaluation HHI automatisée, mais y renonce faute de temps.