U N I V E R S I T À D E G L I S T U D I D I M A C E R A T A
FACOLTÀ DI SCIENZE POLITICHE ED ECONOMIA
Laboratorio “Fausto Vicarelli”

FONDAZIONE
CASSA DI RISPARMIO
DELLA PROVINCIA DI MACERATA

Regolamentazione antitrust e strategie delle banche

Macerata 15 marzo 2001

ANTITRUST E BANCHE: IL PUNTO DI VISTA DELLE AUTORITA’
Versione preliminare

Sally Van Siclen (OCSE)

Introduction

I am Sally Van Siclen, an economist in the Competition Law and Policy Division of the OECD (the Organisation for Economic Co-operation and Development). The OECD is an inter-governmental group of 30 countries. The OECD Competition Law and Policy Committee brings together the competition authorities from those countries to talk about topics of interest and to deepen their co-operation. The *Autorita garante della concorrenza e del mercato* represents Italy. The Competition Committee has had two meetings in the past few years that are relevant for this meeting, one on “Enhancing the role of competition in the regulation of banks” and another on “Mergers in financial services.” The reports are available on our website (www.oecd.org/daf/clp).

Since I come from an international organisation, it seems appropriate that I try to bring an international perspective to the topics:

- What are the trends in mergers in the banking or financial services sectors?
- How do other countries’ authorities approach one of the most important tasks in their merger reviews—the definition of relevant antitrust markets?
- How do other countries organise their regulatory structure—what roles do the competition authorities and the banking regulatory authorities play in merger review?
- And finally, how are competition authorities co-operating?

1. Merger trends in the banking-financial sectors

There was a high level of merger and acquisition activity in the 1990s, and the level increased over time, according to the *G-10 Report on Consolidation in the Financial Sector*, just published in January. Mostly, these deals involved firms competing in the same segment of the financial services industry, and in the same country. Acquisition of banks accounted for 60% of the transactions and 70% of the value of transactions. Nevertheless, banking, as measured across nations rather than the perhaps more relevant antitrust markets, continues to be very unconcentrated in the United States[1] and Germany, but highly concentrated in about half the countries studied (Australia, Belgium, Canada, France, Netherlands, Sweden and perhaps Switzerland). Italy was at neither extreme.

In Europe, two-thirds of the deals (measured by value) of the 1990s took place in the last three years. Acquisitions of banks accounted for two-thirds of the total over the decade, but insurance was important among cross-border deals. The European Commission attributes the merger wave to removal of legal and administrative barriers within the EU, and liberalisation of capital movements under EU banking directives. Also, the introduction of the euro allows pan-European asset allocation. Consolidation in the US was attributed to changes in the regulatory framework that relaxed interstate banking and branching restrictions. In Japan, nearly half the transactions in the 1990s took place in 1999; a number of deals resulted from financial distress.

According to the G-10, the United States accounted for about 55% of M&A in financial services the 1990s. Among all notified mergers in the United States, bank or insurance mergers accounted for 8.2% of the total in FY1999, but 4.6% in FY1998, with about the same total.

In FY1997 to 1999, only one proposed bank merger in the United States was abandoned when it became apparent the Antitrust Division would oppose it (Central Savings Bank-Huntington National Bank in FY1999). And over that period, 33 mergers involved divestiture of branches, the preferred competition

[1] However, at most four or five banks in the typical urban area (and two or three in the typical rural area) will have significant market share. (OECD 2000, *Mergers in Financial Services*, p. 231)

remedy in the US for bank mergers. The European Commission reported in mid-2000 that all notified bank mergers had been cleared in the first phase investigation, and only one of these with undertakings.

2. Defining the relevant market(s) in antitrust merger reviews

The antitrust analysis of a merger begins with defining the relevant antitrust market or markets. That is, it begins with defining those goods or services that a consumer, or a group of consumers, finds to be good substitutes. The relevant antitrust market is the arena in which banks or other enterprises compete.

Antitrust markets have two (or three[2]) dimensions—product and geographic. Banks have very different groups of customers, and those different groups have access to different substitutes. The relevant antitrust markets have to be defined for each group of customers.[3]

The definition of relevant antitrust markets is specific to the particular laws, institutions, customs, and even geography of the merger.[4] It is empirical, so antitrust markets can be expected to change over time and to differ from one place to another.

While many relevant antitrust markets might, in principle, need to be examined when a merger is proposed, competition authorities often examine clustered or bundled products.

"Cluster markets," a concept from US Supreme court decisions on bank mergers in the middle of the last century, are clusters of products (including consumer loans, consumer banking services, and business loans). This approach, however, understates buyers' willingness to unbundle their purchases. Thus, it does not identify competitors who can offer only a few of the services. And it can wrongly identify as competitors banks that would not sell to all types of customers.

Today, there seems to be consensus that products should be more disaggregated in order to correctly assess the effect of bank mergers on competition.

There is also some consensus that the customers who are most likely to be hurt by bank mergers are small businesses. Large business customers usually have a wider choice of suppliers, particularly of loans. Consumers are usually able to access services like home mortgages, car loans, and credit cards from distant suppliers. Checking accounts are provided, in some countries, by non-bank financial institutions. Italy is unusual in the deposit side causing more competition concern than the loan side of the business.

The fundamental reason for bundled product markets is the cost of transmitting information. Standardised information can travel great distances: credit scoring—or totalling standardised pieces of information into a score about the riskiness of lending—allows banks to make consumer loans over a distance. And the cost

[2] The third dimension, temporal, is not often relevant.

[3] This would not be true if banks could not discriminate between groups of customers.

[4] I can give you two examples from my own experience in evaluating mergers, in Hawaii and on the east coast of the US. Hawaiian islands are volcanic—usually, you can travel only around the perimeter. Small businessmen did not travel half-way around the island to use a bank, and bank lending officers didn't make the reverse trip. No one flew to another island to use the bank. Therefore, on at least one island, we found there were two or more relevant geographic markets even though the towns were not, as the bird flies, far apart. By contrast, in another case half a decade later, on a densely populated part of the East Coast, people regularly commuted long distances. Bank lending officers travelled a few tens of miles to go visit their small business clients, and would even meet them in tiny offices at the supermarket. Credit scoring, which can be done anywhere, was being increasingly used for small business loans. In the event, some counties were nevertheless found to be relevant markets, but they were much bigger than the Hawaiian markets.

of information to make a loan or buy the debt of a large company is sufficiently low that they can be sourced globally or, at worst, nationally or regionally. But the information about the economic situation of a small business, is not standardised, and the loan amounts are too small to bear the (largely) fixed cost of the information.

Therefore, for SMEs, transaction accounts tend to be bundled with loans because the information that flows from the transactions accounts lowers the cost of monitoring businesses, and thus of lending to them. The choice of bank is yet more constrained for a bricks-and-mortar retailer, since retailers need to get cash in the morning and deposit it in the evening.

The result is that many competition authorities define a bundled product sold to SMEs, and find that the geographic extent of that market is small. They also define disaggregated products.

Australia has defined markets in a series of bank mergers. In 1995, the Trade Practices Commission found the appropriate market to be "retail banking services" (including deposits, loans, and payments) since relationship banking was important. In 1997, the successor organisation, the Australian Competition and Consumer Commission (ACCC), found that consumers increasingly unbundled their banking requirements. Recognising that there were many hundreds of differentiated banking products, but that it was impractical to examine each one for each merger, the ACCC assembled products into six groups, ensuring that close substitutes were located in the same group. These six were deposits, home loans, personal loans, small business banking, credit cards and transaction accounts.

The ACCC kept the product, "small business banking," because small businesses rarely unbundled their ongoing credit needs from their transaction accounts. A 1995 Report[5] found that 85 percent of small businesses surveyed applied to their main bank for a loan.

In 2000, the ACCC examined yet another bank merger.[6] It looked at large corporate banking, but found that loans were only one source of funds for large corporations, along with issuing debt and equity, and that in any case the market was national. It found that mortgage-backed loans were supplied nationally, and that personal loans were supplied also from non-bank financial institutions.

Again the ACCC found there was a "cluster" of banking services that small and medium-sized retailers would purchase from their main (relationship) bank. This encompasses credit provision, transaction/cash facilities, banking advice/relationship, and credit card merchant services (clearing and settling the merchant's credit card transactions). The geographic extent of these markets were local (for smaller businesses) to state (for larger SMEs). Deposits required a physical presence, thus the geographic extent of the deposits market was state. Transaction accounts were considered to be a separate market from retail investment products with payments facilities attached, largely because of their payments functionality. Since consumers require convenient, low-cost daily access to transaction accounts, this means that banks need a physical presence (branch, agency, ATM) near their customers. Thus, the geographic market for this product is state.

Many countries have found a bundled relevant product.[7] Canada has defined "business transaction accounts and related services" that has, at its core, transaction accounts. Switzerland has found a relevant product to

---

[5] *A Special Report on Finance & Banking Issues*. Yellow Pages Australia, Small Business Index. Sept 1995, p 11.

[6] See "ACCC not to oppose Commonwealth Bank/Colonial Merger," 30 May 2000 at www.accc.gov.au/media/mr2000/mr%2D109%2D00.htm on 16 February 2001.

[7] Canada finds, also, product markets such as personal transaction accounts, residential mortgages and the like. But, similarly to Australia, Canada also found a product market "business transaction accounts and related services" that had, at its core, transaction accounts, and included also other products, such as night deposit and cash and coin services, generally linked to this account. Interestingly, even though "Banks will generally not give an operating loan

be retail banking (saving accounts, current accounts, payment services, consumer loans, mortgage loans and commercial loans to SMEs). The Antitrust Division of the US uses the "business banking services" that has line-of-credit loans to small businesses at its core.

By contrast, the Bundeskartellamt defines as relevant markets those services that are separately reported in the Bundesbank statistics. Other disaggregated products that have been found by other competition authorities to be relevant products are operating loans, private banking (for individuals), asset management (for institutions), depository facilities and related services, issue business, and line-of-credit loans to middle market businesses.

Geographic markets vary from local to world wide. Canada found that markets for personal financial services and services for SMEs were local, but loans of C$1m to C$5m had regional markets. Germany found the geographic markets for sight deposits, overdraft loans and savings deposits up to DM 100 000, and for short- and medium-term loan business, to be regional, but other products to have wider geographic markets. Switzerland found retail banking, depository facilities and commercial loans under CHF2m to have regional markets. The US finds the markets for loans to SMEs to be local.

Possible competition between insurance products and bank products had been addressed in a few cases. Delcredere insurance is a particular segment of credit insurance, which basically protects suppliers against buyer insolvency. One question has been whether delcredere insurance is a substitute for factoring and

---

unless a business has its transaction account at the same bank," Canada found operating loans to be a separate product market. It found, too, that markets for personal financial services and services for SMEs were local, but that loans of C$1m to C$5m had regional markets. (*Ibid.,* p. 129)

In Germany, the Bundeskartellamt makes a fundamental distinction between deposit business and loan business. Within these categories, it defines as relevant markets those services that are separately reported in the Bundesbank statistics. Thus, for loans there are markets of overdrafts, loans with fixed repayment dates up to four years and loans for over four years. Geographic markets are regional for sight deposits, overdraft loans and savings deposits up to DM 100 000, and for short- and medium-term loan business, which is often related to a savings or current account. Other products are considered to have national or even world wide geographic markets. (*Ibid.,* p. 153)

The European Commission does not seem to have performed the investigations to allow it to develop a settled view on product market definition, since it has cleared almost all bank merger notifications without a second phase investigation. (*Ibid.,* p. 250)

Switzerland has found one product market to be retail banking (saving accounts, current accounts, payment services, consumer loans, mortgage loans and commercial loans to SMEs). Other products have been private banking (for individuals), asset management (for institutions), depository facilities and related services, and issue business. Retail banking and depository facilities were found to have regional geographic markets, but the other products to have national or international markets. Commercial loans under CHF2m had regional markets, but above that size were national or international. And consumer loans were found to be a separate market from car leasing due to the difference in size, interest rates, and specific uses to which consumers put the loans. (*Ibid.,* p. 220)

In the US, antitrust concerns about bank mergers frequently centre on line-of-credit loans to small businesses. But sometimes there are concerns about line-of-credit loans to middle market businesses (annual sales of USD10m-250m) which cannot source loans beyond their region. (*Ibid.,* p. 234-6) Whereas the Antitrust Division tends to disaggregate products in its market definitions, the banking regulators tend to use a cluster market approach. Nevertheless, the Division reports the product markets of these mergers as business banking services.

Spain has an unusual problem in that banks are large shareholders of major companies in Spain (in electricity, telecommunications, petroleum, television broadcasting, construction, insurance, etc.). Thus, mergers among banks can have significant anti-competitive effects in a large number of other markets. (*Ibid.,* p. 214) letters of credit. But in fact, they turned out to be complements.[8] However, it is predicted that there will be more cases where insurance and bank products might be seen as substitutes and therefore in the same product market.

To sum up market definition, the biggest competition concerns caused by bank mergers tend to be services sold to SMEs. However the product is defined, it is provided only over a short distance because SMEs keep their transactions accounts at banks with nearby branches. The transactions accounts provide private information that reduce the bank's cost of monitoring loans. So SMEs tend to have their loans and transactions accounts at the same bank. Occasionally, other product markets give rise to competition concerns, but many financial services are provided in national if not international markets.

3. Regulatory structures

Virtually all OECD countries appear to apply national competition law to the financial services sector without exception or exemption. In a few countries, specific rules—either in the competition law itself or in the banking law—govern how the general competition law is applied. In most countries, the two objectives of stability of the banking sector, and of not diminishing competition, are pursued. Thus, in virtually every country, financial service mergers fall under the jurisdiction of both the banking regulators and the competition authority.

In most countries, the competition authority enforces the competition law. Italy is therefore unusual in having the banking regulator enforce the competition law.

But the situation is more unusual in France, where the general competition law does not apply to bank mergers. (*Ibid.,* p. 49)

In Canada, the Competition Bureau has no regulatory authority to allow or disallow mergers between financial institutions. It reviews proposed mergers for their impact on competition and communicates its views to the Minister of Finance who has ultimate authority to approve such mergers. (*Ibid.,* p. 125)

In Germany, the federal Minister of Economics can permit a bank merger blocked by the Bundeskartellamt (although he must ask the opinion of the Monopoly Commission), but may not block a merger permitted by the Bundeskartellamt. (*Ibid.,* p. 49)

In practice, these systems have had effects opposite from what one would expect:

- In Canada, the Minister has blocked two proposed mergers between large banks on competition grounds. (*Ibid.,* p. 48)
- In Germany, the Bundeskartellamt has only rarely prohibited mergers in the bank sector because concentration is low. So Ministerial authorisation has not yet been sought in a bank merger. (*Ibid.,* p. 50)

In the United States, United Kingdom, Switzerland, Australia and Finland, the competition authorities enforce the national competition laws in financial services as they do in other markets.[9] However, in

[8] Factoring companies often seek credit insurance themselves with insurance companies. And factoring companies often ask their clients for the assignment of the indemnity of an underlying domestic and export credit insurance policy as a security. (*Ibid.,* p. 254,274-5)

[9] In the United States, the bank regulatory agencies have authority to approve or prevent mergers. Bank regulatory agencies 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." The Antitrust Division of the Department of Justice also reviews proposed mergers and reports its

Switzerland a special rule to protect the stability of the banking system allows the Swiss Federal Bank Commission to step in when a bank merger involves a bankrupt bank and decide with due regard to the "protection of creditors". In the United States, both the bank regulators and the competition authority can block a bank merger on competition grounds. The US has a "failing firm defence" of otherwise anti-competitive mergers, and performs an accelerated review when a company is bankrupt.

To summarise, the predominant model is for the competition authorities to enforce the normal competition law in financial services. Switzerland explicitly addresses the potential problems when the bank regulator arranges a "shotgun marriage" between a failing and a healthy bank. Canada and Germany have granted more power to the bank regulators. Italy is unusual in having the bank regulator apply the competition law, but that is an improvement on France where the competition law does not even apply to bank mergers.

4. What co-operation is there among competition authorities?

OECD countries' competition authorities frequently co-operate on mergers that affect markets in several countries. The OECD Council—its governing body—has made several recommendations in this area, starting in 1967. In addition to the recommendations, some countries have bilateral agreements that bear a noticeable family resemblance to the OECD Recommendation. The OECD Recommendation calls for one Member country to notify another if it thinks that an investigation or proceeding, undertaken under its competition laws, may affect important interests of another Member country. Where two or more Member countries proceed against an anti-competitive practice in international trade, they should try to co-ordinate their action--as appropriate and practicable--including in developing or applying mutually satisfactory and beneficial measures for dealing with the anti-competitive practice.

The Recommendation is actively used. Perhaps the biggest users are the United States and the European Commission (see the Table), but there is substantial co-operation between other Members. There are

---

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. (*Ibid.,* p. 232)

In the United Kingdom, the Office of Fair Trading applies the competition law, although it consults with other UK regulators, such as the Bank of England and the Financial Services Authority (FSA), on financial services mergers, and takes their comments into account in the analysis of the merger. (*Ibid.,* p. 229)

In Switzerland, the competition law is applied by the Swiss Competition Authority to financial sector mergers. 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. It supposed to be an exception and has not yet occurred. (*Ibid.,* p. 219)

The ACCC enforces the national competition act, with no special provisions for financial services mergers. 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. (*Ibid.,* p. 115)

In Finland, the Act on Competition Restrictions applies fully to acquisitions in the banking and insurance markets and, in bank mergers, the Finnish Competition Authority 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. (*Ibid.,* p. 148) moves to change legislation to enable more extensive co-operation among Nordic countries. Competition authorities can almost never share confidential information. Even where confidential information cannot be shared, officials can share public information and sometimes their developing views about the merger. When the merging parties give their permission for confidential information to be shared between the competition authorities, then closer co-operation can result because the exchanges of view can be fuller and the authorities can discuss possible remedies. The US and EC have co-operated in the past few years in investigating and devising remedies in a number of mergers--WorldCom/MCI, Dresser/Halliburton, Imetal/China Clays, Honeywell/Allied Signal--as well as co-operative investigations in Exxon/Mobil, BP Amoco/Atlantic Richfield, Ahlström/Kvaerner…and more.

OECD competition authorities are seeking ways to enhance their co-operation. The business community wishes for more co-operation and harmonisation, pointing out that some trans-national mergers require more than 20 competition authorities to be notified. They are interested in lowering the cost of notification and information provision by greater harmonisation of the categories of information required, co-ordination or even harmonisation of the triggers and time-frames for notifications and investigations, and harmonisation of remedies imposed. But issues to be resolved include how to reduce the scope for strategic behaviour by merging parties during notification and investigation, and how to ensure that no country's competition authority is powerless to act to protect domestic consumers, where larger jurisdictions might have found that their own consumers would be unharmed.

Work toward these goals is on-going at the OECD.

Conclusion

Italy is unusual as compared with many other OECD countries: First, its regulatory structure in which the bank regulator applies the competition law, and second, that competition concerns from bank mergers arise in deposits, rather than in loans.

To date, in other countries the biggest competition concerns caused by bank mergers tend to be services sold to SMEs, which tend to have local markets. Market definition is empirical, however, so varies from place to place and time to time. The keys to market definition are to identify the various types of customers and to identify what they consider to be substitutes.

The pattern of consolidation in the financial services sector, where most mergers and acquisitions have not crossed borders, means that there has been, to date, little co-operation between competition authorities on the review of bank mergers. However, if predictions of greater cross-border consolidation are correct, we can expect to see such co-operation, which may well lead to greater analytic convergence.

Annex

Table 1. Financial sector mergers and acquisitions with value greater than USD1bn

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Number	8	10	6	11	14	23	21	49	58	46
Value (USDbn)	26.5	22.1	12.4	39.7	23.7	113.0	59.0	233.0	431.0	291.0

Source: Thomson Financial, SDC Platinum in G-10 Report on Consolidation in the Financial Sector

Table 2. Financial sector deals, 1990-1999 cumulated
All countries in study*

	Within border *Number (value in USD million)*	Cross-border *Number (value in USD million)*
Within industry (classified by target firm)	Banks 3563 (957,526.6) Insurance 608 (167,598.5) Securities/other 1089 (102,000.0)	Banks 235 (50,800.1) Insurance 251 (68,657.9) Securities/other 182 (23,469.6)
Cross-industry	Banks 543 (136,027.0) Insurance 183 (31800.7) Securities/other 540 (46,372.8)	Banks 103 (22,135.0) Insurance 36 (6,618.3) Securities/other 106 (10,084.4)

European countries in study

	Within border *Number (value in USD million)*	Cross-border *Number (value in USD million)*
Within industry (classified by target)	Banks 770 (259,071.1) Insurance 223 (66,702.4) Securities/other 443 (17,535.3)	Banks 163 (13,515.1) Insurance 173 (33,207.4) Securities/other 99 (18,619.8)
Cross-industry	Banks 225 (35,842.1) Insurance 86 (22,868.2) Securities/other 208 (12,402.8)	Banks 68 (17,651.4) Insurance 25 (3,787.8) Securities/other 66 (3,111.9)

**G-10 countries plus Australia and Spain.*

Source: Tables A.1 and A.4, G-10 Report on Consolidation in the Financial Sector

Table 3. Cases Notified

Year	No. of EC Notifications	No. of US notifications		No. of merger notifications
		FTC	DOJ	
1992	26	20	20	11(EC)+31(US)
1993	44	22	18	20(EC)+20(US)
1994	29	16	19	18(EC)+20(EC)
1995	42	14	21	31(EC)+18(US)
1996	48	20	18	35(EC)+27(US)
1997	42	12	24	30(EC)+20(US)
1998	52	22	24	43(EC)+39(US)
1999	70	26	23	59(EC)+39(US)

Source: Report of the Commission to the Council and the European Parliament on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, COM(2000)618 final at http://europa.eu.int/comm/competition/international/bilateral/