Volume 72 | Issue 3 Article 1

1984

The Justice Department Merger Guidelines: Impact on Horizontal Mergers Between Commercial Banks

Marc W. Joseph
Rain Harrell Emery Young & Doke

Timothy W. Mountz
Rain Harrell Emery Young & Doke

The Justice Department Merger Guidelines: Impact on Horizontal Mergers Between Commercial Banks

BY MARC W. JOSEPH* AND TIMOTHY W. MOUNTZ**

INTRODUCTION

Banks merge because it is profitable for them to do so.[1] They may expect to realize profits from merging for a number of reasons: (1) an expansion of capital assets raising the resulting bank's loan limit may make that bank more attractive to larger borrowers and more competitive with those banks previously servicing those borrowers; (2) the resulting bank may be able to realize economies of scale not available to a smaller bank or may be able to provide a solution to the management problems encountered by one of the banks; or (3) perhaps the resulting bank may be able to offer a more complete range of banking services.[2] This list is not exhaustive, but whatever the reason, one can assume that the bank seeking merger has concluded that it is less costly or more profitable to accomplish its goals by merging with another bank than by expanding internally or by de novo branching.[3]

If the merging banks conduct their business within the same geographic market, then the merger is "horizontal."[4] Horizontal mergers eliminate existing competition within a geographic market.

---

* Associate, Rain Harrell Emery Young & Doke, Dallas, Texas. B.S. 1975, United States Naval Academy; J.D. 1983, Vanderbilt University.

** Associate, Rain Harrell Emery Young & Doke, Dallas, Texas. B.A. 1976, Southern Methodist University; J.D. 1979, Duke University.

Although the opinions expressed and any errors made in this Article are the authors' own, Mr. Joseph gratefully acknowledges the guidance and encouragement offered by Mr. Terry Calvani (Commissioner, Federal Trade Commission) during Mr. Calvani's tenure as a Professor of Law at Vanderbilt University.

[1] Mitchell, *Mergers Among Commercial Banks*, in MONETARY ECONOMICS 63 (1971).

[2] E. KINTNER, PRIMER ON THE LAW OF MERGERS 413 (1973) [hereinafter cited as KINTNER—MERGERS]; Mitchell, *supra* note 1, at 63.

[3] Mitchell, *supra* note 1, at 63-64.

[4] *See Merger Guidelines of Department of Justice*—1982, 2 TRADE REG. REP. (CCH) ¶ 4503 (June 14, 1982) [hereinafter cited as 1982 Guidelines].

For example, after a horizontal merger between two banks, there will be one less bank competing for bank customers. Thus, the market is more concentrated and generally is viewed as less competitive.[5]

Congress has expressed its concern about the anticompetitive effects of over-concentration through the enactment of various federal statutes, including the Sherman Act,[6] Clayton Act,[7] Bank Merger Act,[8] and Bank Holding Company Act.[9] These laws are enforced by the Department of Justice (Department) and the several bank regulatory agencies.[10] In the event that a merger, either proposed or consummated, appears to result in a restraint of trade or a monopoly, or creates a substantial probability of a substantial lessening of competition or a tendency to restrain trade, the affected product and geographic markets must be defined in order to determine whether such probabilities exist, prior to the initiation of any enforcement proceedings.

The Supreme Court has defined "commercial banking," a unique "cluster" of banking products and services, as the relevant product market to be considered in the event that a merger between two commercial banks is challenged by the Department or one of the regulatory agencies.[11] The Supreme Court has drawn a distinction between "commercial banking" and the relevant product market comprising thrifts[12] and other nonbanking financial institu-

---

[5] *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 602, at 836-37 (3d ed. 1981).

[6] *See* 15 U.S.C. §§ 1-7 (1982).

[7] *See* 15 U.S.C. §§ 12-27 (1982).

[8] *See* 12 U.S.C. § 1828 (1982).

[9] *See* 12 U.S.C. §§ 1841-44, 1846-49 (1982).

[10] See notes 136-50 *infra* and accompanying text for discussion of federal regulation of banking under the Bank Merger Act. Although the Federal Trade Commission has an important role in antitrust enforcement, it has no jurisdiction over banks, due to a specific statutory exemption. *See* 15 U.S.C. § 45(a)(2) (1982).

[11] *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 324-27, 326 n.5 (1963). See also notes 201-02 *infra* and accompanying text for discussion of the Court's general description of "commercial banking" in *Philadelphia Nat'l Bank.*

[12] "Thrifts" are savings and loan associations, mutual savings banks and credit unions. 1 W. SCHLICHTING, T. RICE & J. COOPER, BANKING LAW § 1.03[2] (1982). For a list of other nonbanking financial institutions which offer some competition to commercial banks, see Yesley, *Defining the Product Market in Commercial Banking*, FED. RESERVE BANK OF CLEV. ECON. REV., June-July 1972, at 17. See also note 202 *infra* for a list of nonbanking institutions described as "more or less" competitors of commercial banks by the Supreme Court in *Philadelphia Nat'l Bank.*

tions. Nevertheless, "commercial banking" may no longer be a realistic definition for the product market competitively affected when two commercial banks merge. Various state and federal laws, including the Depository Institutions Deregulation and Monetary Control Act of 1980,[13] have changed the competitive complexion of the banking industry. Thrifts are now authorized to participate in numerous banking activities previously engaged in only by commercial banks.[14] The Supreme Court, however, has steadfastly declined to include thrifts in the same product market as commercial banks until those thrifts become "significant participants" in the commercial banking industry.[15]

Numerous lower federal court and bank regulatory agency opinions reflect a belief that thrifts exert a real competitive influence on the commercial banking line of commerce, even if those thrifts are not "significant participants" in the same line of commerce.[16] There is a trend among those agencies, economists and legal scholars to recognize thrifts as full competitors and to include thrifts and commercial banks in the same line of commerce when analyzing the competitive effects of a merger between two commercial banks.[17]

On June 14, 1982, the Department promulgated its *Merger Guidelines of Department of Justice*—1982 (1982 Guidelines).[18] The 1982 Guidelines established new standards, emphasizing the economist's approach, for defining product and geographic markets and measuring concentration in merger cases.[19] Although these guidelines were written to apply to any merger subject to scrutiny under section 1 of the Sherman Act or section 7 of the Clayton Act,[20] the Department may use them to analyze the competitive

[13] Pub. L. No. 96-221, 94 Stat. 132 (1980) (codified as amended in scattered sections of 12 U.S.C.).

[14] See note 205 *infra* for a discussion of the expansion of thrift powers under the Depository Institutions Deregulation and Monetary Control Act of 1980.

[15] *See* United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974). For a discussion of *Connecticut Nat'l Bank*, see notes 209-18 *infra* and accompanying text.

[16] See note 197 *infra* for a discussion of court opinions. See notes 219-31 *infra* and accompanying text for a discussion of agency opinions.

[17] *See* notes 226-31 *infra* and accompanying text.

[18] *See* 1982 Guidelines, *supra* note 4, at ¶¶ 4500-05.

[19] *See* notes 104, 117-21 *infra* and accompanying text.

[20] 1982 Guidelines, *supra* note 4, at ¶ 4501.

effects of a horizontal merger between commercial banks.[21] Thus, how the new standards differ from those previously established by the Department or developed in case law merits attention.

This Article first discusses the changes the 1982 Guidelines have made in measuring market concentration and defining product markets. Next, the Article surveys case law standards for defining product markets. Finally, while recognizing that the courts are not bound by the 1982 Guidelines, this Article will analyze the likely effects those guidelines will have on bank merger antitrust cases.

I. MEASURING CONCENTRATION: THE EFFECT OF NEW GUIDELINES

A. *Introduction*

A significant effect of the 1982 Guidelines was to replace the four-firm concentration ratio, used in the Department guidelines issued in 1968,[22] with the Herfindahl-Hirschman Index (HHI) as the method of measuring market concentration.[23] The significance of the Department's change to the HHI and how that change affects the Department's review of applications for horizontal mergers is best understood when set against the background of debates giving rise to that change.

B. *The Economic Debates*

Two distinct levels of debate continue to rage in the economic background of the process leading to the Department's selection of the HHI as the method of measuring market concentration: (1) whether there is a relationship between competition and concentration; and (2) once it is accepted that such a relationship exists, which method of measuring concentration yields the most accurate results.

---

[21] *See* notes 236-39 *infra* and accompanying text.

[22] *Merger Guidelines of Department of Justice*—1968, 2 TRADE REG. REP. (CCH) ¶ 4510 [hereinafter cited as 1968 Guidelines]. For a discussion of the four-firm concentration ratio, see notes 33-45 *infra* and accompanying text.

[23] *See* 1982 Guidelines, *supra* note 4, at ¶ 4503. *See also Justice Department Unveils Long-Awaited Revisions to Merger Guidelines: FTC Issues Statement on Mergers*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1069, at 1251 (June 17, 1982) [hereinafter cited as *Justice Department Unveils*].

1. *The Relationship Between Competition and Concentration*

a. *The Argument That Such a Relationship Does Not Exist*

In a nutshell, the proponents of this argument contend "that industry concentration implies little or nothing about the competitiveness of the industry and that deconcentration by legal action would be a very bad public policy mistake."[24] Rather than hamper the greater economies of scale resulting from larger firm size, these proponents insist that the focus of inquiry should be upon collusion and the likelihood of its occurrence.[25] Furthermore, according to Professor Yale Brozen, collusion is more likely to occur in unconcentrated than in concentrated markets.[26]

b. *The Argument That Such a Relationship Does Exist*

The proponents of this argument contend that competitive vigor is "related positively to the *number of firms* in the relevant market."[27] Viewed another way, one such proponent postulates that a concentrated market is more likely to suffer from monopolistic practices.[28] Economists place these concepts within the mold of their Structure - Conduct - Performance (SCP) paradigm: "[T]he *structure* of the market significantly affects the *conduct* of buyers and especially sellers in such activities as price-setting and product policy, and . . . their conduct in turn determines the ultimate economic *performance*—good, bad, or indifferent—of the market."[29]

"The most frequently articulated . . . prediction of the [SCP] paradigm," according to Professor Scherer, states "that high [market] concentration leads in various ways to a greater elevation

---

[24] *Is There a Relationship Between Concentration and Competition?*, in INDUSTRIAL CONCENTRATION AND THE MARKET SYSTEM 79 (E. Fox & J. Halverson ed. 1979) [hereinafter cited as INDUSTRIAL CONCENTRATION].

[25] *Id.*

[26] *Id.*

[27] F. SCHERER, INDUSTRIAL MARKET STRUCTURES AND ECONOMIC PERFORMANCE 56 (2d ed. 1980) [hereinafter cited as SCHERER] (emphasis in original).

[28] *See* Marfels, *A Bird's Eye View to Measures of Concentration*, 20 ANTITRUST BULL. 485, 485 (1975).

[29] Scherer, *Structure-Performance Relationships and Antitrust Policy*, in INDUSTRIAL CONCENTRATION, *supra* note 24, at 128 (emphasis in original).

of prices above unit costs and hence to higher profit returns."[30] Thus, in effect, there is a causal link between concentration and profitability. Professor Posner has stated that one of these ways is collusion: "[T]he more highly concentrated a market is, the likelier it is that an exchange of information will foster collusion rather than simply help to equilibrate demand and supply . . . ."[31]

Professor Fox has described the relationship between concentration and competition as a continuum: (1) at one end the "structuralists" sacrifice scale economies in favor of the dispersion of power which results from market fragmentation; (2) at the other end the "free market school" views competition as the means for achieving the most efficient allocation of market resources, with largeness reflecting efficiency; and (3) between those two camps reside those realists who believe a relationship exists between concentration and competition only where concentration reaches high levels at which market power exists to control price and output.[32]

Although it is not certain which of these characterizations most accurately describes the relationship existing between concentration and competition, one thing is clear: the Department has adopted the argument that a relationship does exist between concentration and competition. Thus, the issue left for debate is which method of measuring concentration should be applied.

2. *Methods for Measuring Concentration*

a. *The Four-Firm Concentration Ratio*

The Department's 1968 Guidelines adopted the four-firm concentration ratio as the method for measuring market concentration.[33] The concentration ratio, generally for four firms,

---

[30] *Id.*

[31] R. POSNER, ANTITRUST LAW 145 (1976).

[32] Fox, *Economic Concentration, Efficiencies and Competition: Social Goals and Political Choices*, in INDUSTRIAL CONCENTRATION, *supra* note 24, at 138-39.

[33] 1968 Guidelines, *supra* note 22, at ¶ 6884. Those guidelines state that in a highly concentrated market, such as a market in which the four largest firms hold approximately 75% or more of the market, "the Department [would] ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

Acquiring Firm	*Acquired Firm*
4%	4% or more
10%	2% or more
15% or more	1% or more

can be derived from the concentration curve.[34] The curve, drawn for a specific market, "describes the cumulative percentage of *total* industry size accounted for by its largest firms,"[35] thus graphically representing the total percentage of market sales or assets for a varying number of leading firms in that market.[36] For example, a concentration ratio for four firms is only a single point on the curve.[37] A curve, however, graphically depicting combined market shares for three, four, eight or more leading firms in an industry, provides the viewer with a more complete picture of the concentration of that market. Although the concentration ratio suffers the disadvantage of concealing the full structure of the industry by using perhaps only a single point on the curve,[38] it nevertheless fulfills "the analytic needs of those interested in the 'phenomena of big business' "[39] or those who are trying to show how a small number of firms fit into the economy.[40]

Professor Adelman has suggested that "fewness" in the market, adequately represented by the concentration ratio, is the proper object of study in defining concentration[41] and is essential

---

Id.

In a less concentrated market, like a market in which the four largest firms hold less than 75% of the market, the Department would challenge a merger between firms holding the following approximate shares:

Acquiring Firm	*Acquired Firm*
5%	5% or more
10%	4% or more
15%	3% or more
20%	2% or more
25%	1% or more

Id.

[34] *See* Marfels, *supra* note 28, at 486. *See also* E. SINGER, ANTITRUST ECONOMICS 139-40 (1968).

[35] Marfels, *supra* note 28, at 486 (emphasis added).

[36] E. SINGER, *supra* note 34, at 139 (citing FEDERAL TRADE COMMISSION, CONCENTRATION OF PRODUCTIVE FACILITIES, 1947 (1949)).

[37] Marfels, *supra* note 28, at 486. *See also* F. SCHERER, *supra* note 27, at 56-57.

[38] E. SINGER, *supra* note 34, at 140. Use of the concentration ratio, as opposed to the graphic representation provided by the curve, prevents meaningful comparisons of concentration between particular industries where one industry may comprise many more firms than the other. *Id.*

[39] *Id.* at 137 (quoting Adelman, *The Measurement of Industrial Concentration*, 33 REV. ECON. & STATISTICS 269, 270 (1951)).

[40] *Id.*

[41] *See id.* at 138 (quoting Adelman, *Differential Rates and Changes in Concentration*, 41 REV. ECON. & STATISTICS 68 (1959)).

to the understanding of competition and monopoly.[42] Others, however, have contended that, rather than fewness, size disparity or dispersion between the largest and smallest firms in a market is the key to understanding competition.[43] Proponents of the latter view equate size disparity with concentration so that, as the size disparity increases between the largest and smallest firms in the market, the degree of concentration increases.[44] Those same supporters of the size disparity theory of concentration also believe that because the change in size disparity "can have significant repercussions on competition," the study of market structure should not be confined to the top few firms.[45]

b. *The Herfindahl-Hirschman Index*

The HHI is a summary measure of concentration;[46] by including in its calculation all firms on the concentration curve, it provides a more complete picture of that market.[47] The HHI also can "be viewed as a measure of dispersion."[48] Thus, the HHI satisfies the two disadvantages of the four-firm concentration ratio: it provides an overall picture of a given market and more fully satisfies those economists who equate size disparity with concentration.[49] Developed independently during the late 1940's by two noted economists, O. C. Herfindahl and A. O. Hirschman,[50] the HHI should be used "when concentration is a function of both unequal distribution *and fewness*."[51]

The HHI is calculated by summing the squares of the percent-

---

[42] *Id.*

[43] *Id.* at 137. *See, e.g.*, Prais, *The Statistical Conditions for a Change in Business Concentration*, 40 REV. ECON. & STATISTICS 268 (1958).

[44] E. SINGER, *supra* note 34, at 137.

[45] *Id.*

[46] *See* Marfels, *supra* note 28, at 488.

[47] *See* Weinstock, *Using the Herfindahl Index to Measure Concentration*, 27 ANTITRUST BULL. 285, 285, 287 (1982).

[48] E. SINGER, *supra* note 34, at 153. The summary measure concentration index "is normally related to various statistical concepts of dispersion." *Id.* at 136-37.

[49] *See* Weinstock, *supra* note 47, at 285-87.

[50] *See* Adelman, *Comment on the "H" Concentration Measure as Numbers-Equivalent*, 51 REV. ECON. & STATISTICS 99, 99 (1969); Hirschman, *The Paternity of an Index*, 54 AM. ECON. REV. 761, 761 (1964); Weinstock, *supra* note 47, at 286 n.2.

[51] Hirschman, *supra* note 50, at 761 (emphasis in original).

age market shares of all firms within the relevant market.[52] In a pure monopoly the HHI equals 10,000.[53] In a completely fragmented market, the HHI approaches zero.[54] In a market of *n* firms, all with equal market shares, the HHI would equal the fraction 10,000/n.[55] As the total number of firms (*n*) increases, the value of the HHI decreases.[56] Because squaring results in giving greater weight in the HHI to the market shares of larger firms, the value of the HHI increases as the size disparity between firms increases.[57] Thus, according to Professor Scherer, "to the extent that monopoly power is correlated positively with both fewness of sellers and inequality in their sizes, the [HHI] comes close to being an ideal composite measure."[58] Stated slightly differently, the HHI, because of its weighting effect, is a better index than the concentration ratio for those wishing "to stress the dominance of the largest firms."[59]

The Department's Antitrust Division had those principles in mind when it replaced the four-firm concentration ratio with the HHI for measuring market concentration.[60] Specifically, the Antitrust Division expressed its belief that because the HHI squared the percentage market shares of all firms in a given market, it is

---

[52] *See* Weinstock, *supra* note 47, at 286. For variations of the precise mathematical equation describing this calculation, compare *id.* at 300 with E. SINGER, *supra* note 34, at 153. *See also* note 53 *infra.*

[53] 1982 Guidelines, *supra* note 4, at 6881-11 n.29. Although most economists calculate the HHI using fractional rather than percentage market share, the Justice Department suggests calculating the HHI by summing the squares of the percentage of the market held by each firm in the market. *Id.* at 6881-11. Thus, in a perfect monopoly where one firm held 100% of the market, the HHI would equal $(100)^2$ or 10,000. *Id.* at 6881-11 n.29.

[54] Weinstock, *supra* note 47, at 286-87.

[55] Under the economists' method of calculation, the HHI would equal 1/n. *See supra* note 53. *See also* E. SINGER, *supra* note 34, at 153; Weinstock, *supra* note 47, at 290.

[56] F. SCHERER, *supra* note 27, at 58.

[57] *See* Weinstock, *supra* note 47, at 290 (Table 2a).

[58] F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 51-52 (1970). It should be noted that Professor Scherer deleted this passage from his most recent edition of the same work. *See* F. SCHERER, *supra* note 27, at 58.

[59] Marfels, *supra* note 28, at 488-90.

[60] *See* Comments of the U.S. Department of Justice, *In re* Statement of Policy on Bank Acquisition (of the Board of Governors of the Federal Reserve System), No. R-0386, at 24 (filed Apr. 9, 1982) [hereinafter cited as Justice Comments]. *Cf.* Werden, *Market Delineation and the Justice Department's Merger Guidelines*, 1983 DUKE L.J. 514, 517 ("The Guidelines recognize that the size distribution of sellers in a market is the primary, but not the exclusive, indicator of the likelihood of collusion.").

"a more sensitive barometer" of market structure and is "particularly sensitive to the relative magnitudes of market shares."[61] Thus, the Antitrust Division commentators concluded that the HHI provided a means with which "to predict which markets may be prone to collusion."[62]

The HHI has certain disadvantages. The calculation encompasses the market shares of all firms within a market, and such information is often difficult to acquire, depending upon the industry involved.[63] The HHI is also somewhat insensitive to the contribution of the market shares of the smallest firms,[64] as squaring results in overweighting the market share significance of the largest firms.[65] Of course, such overweighting may be desirable if the relevant SCP paradigm stresses dominance.[66] The overweighting, however, makes accuracy in the measurement of the largest firms' market shares crucial.[67]

If one accepts the theory that competitive vigor is a function of firm numerosity and, thus, that there is a difference in the competitive behavior between a market comprising 100 firms with nearly equal shares and another market in which four firms control eighty percent and the remaining twenty percent is shared by ninety-six other firms,[68] then the HHI may be the best suited method for measuring concentration and describing the competitive environment.[69] Nevertheless, studies indicate that concentration measurement with the four-firm concentration ratio closely correlates with that of the HHI.[70] Those or similar studies may have prompted Professor Scherer to state, upon learning that the Department had adopted the HHI as its concentration measurement method, that no empirical evidence exists demonstrating the HHI

---

[61] Justice Comments, *supra* note 60, at 24.

[62] *Id.*

[63] F. SCHERER, *supra* note 27, at 58; Weinstock, *supra* note 47, at 287.

[64] Weinstock, *supra* note 47, at 287 n.6.

[65] F. SCHERER, *supra* note 27, at 58; E. SINGER, *supra* note 34, at 153-54 (quoting W. WOYTINSKY, EARNINGS AND SOCIAL SECURITY IN THE UNITED STATES 15 (1943)).

[66] *See* F. SCHERER, *supra* note 58, at 51-52 & n.38; Marfels, *supra* note 28, at 488-90.

[67] F. SCHERER, *supra* note 27, at 58.

[68] *See id.* at 56-58.

[69] *See* text accompanying notes 58-59 *supra*.

[70] F. SCHERER, *supra* note 27, at 58.

to be a superior method for explaining the relationship between concentration and profitability or competitive behavior.[71]

In addition, the four-firm concentration ratio and the HHI share a common weakness in that their statistical accuracy depends upon the successful accomplishment of the difficult task of properly defining the relevant product and geographic markets.[72] Perhaps it is this common weakness which caused Professor Scherer's further remark that the Department's selection of the HHI was "like picking a sharp scalpel to do surgery on something [they] don't understand."[73]

Nearly two decades after the invention of the HHI, Professor Adelman remarked that the HHI had not been widely used.[74] The HHI has enjoyed a checkered career since that remark was made, with lower federal courts either rejecting[75] or accepting but not utilizing[76] the HHI as the relevant method for measuring market concentration.[77] The HHI has not fared much better in administrative proceedings. Although used in one recent proceeding before a Federal Trade Commission (FTC) administrative law judge,[78] the HHI has been rejected in the past by the full FTC because "it had never been used before."[79]

---

[71] *See Antitrust Practitioners React Favorably to New Merger Guidelines*, [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1017, at 1317 (June 24, 1982) [hereinafter cited as *Practitioners*].

[72] Weinstock, *supra* note 47, at 287 n.5.

[73] *Practitioners*, *supra* note 71, at 1317.

[74] Adelman, *supra* note 50, at 99.

[75] *See, e.g.,* United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976). The court rejected the HHI as the applicable measure of market concentration because other courts uniformly used the concentration ratio and, thus, there was a "lack of comparability to data from earlier authority." *Id.* at 748 n.38. See Weinstock, *supra* note 47, at 292-93 & n.13 for a discussion of *Black & Decker.*

[76] *See, e.g.,* Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 323 n.15 (N.D. Ohio 1981), *aff'd*, 669 F.2d 378 (6th Cir. 1981). See Weinstock, *supra* note 47, at 293 for a brief discussion of *Marathon Oil.*

[77] *See* Weinstock, *supra* note 47, at 292-95.

[78] *See In re* Kellogg Co., 99 F.T.C. 8 (1981) (initial decision). The administrative law judge held that despite an HHI increase from 2,230 in 1945 to 2,760 in 1970, the three largest ready-to-eat cereal manufacturers did not share a monopoly. *Id.* at 77, 269. See Weinstock, *supra* note 47, at 295 for a discussion of *Kellogg Co.*

[79] Weinstock, *supra* note 47, at 294 & n.18 (discussing *In re* Litton Indus., 82 F.T.C. 793, 1010 (1973)).

C. *Use of the Herfindahl-Hirschman Index in the 1982 Department of Justice Merger Guidelines*

The Department replaced the four-firm concentration ratio used in its 1968 Guidelines with the HHI in the 1982 Guidelines for two reasons: (1) the HHI, as a summary measure, reflects distribution of market shares not only for the leading firms, but throughout the relevant market; and (2) the proportionately greater weight given to the larger firms by squaring their market shares "probably accords with their relative importance in any collusive interaction."[80]

In its 1982 Guidelines for horizontal mergers, the Department established three levels of market concentration as measured by the HHI: (1) the unconcentrated market would be reflected by post-merger HHI below 1,000, which would approximate a market comprised of at least ten equally sized firms; (2) a post-merger HHI between 1,000 and 1,800 would indicate a moderately concentrated market; and (3) a post-merger HHI above 1,800 would indicate a highly concentrated market.[81] In deciding whether to challenge a merger, the Department will evaluate "both the post-merger market concentration and the increase in concentration resulting from the merger."[82]

The post-merger HHI is calculated by squaring the sum of the market shares of the merged firms and adding that number to the individual squared market shares of the remaining firms in the market.[83] The merger-induced increase in concentration, however, as measured by the HHI, can be calculated independently of the total post-merger concentration by doubling the product of the market shares of the merging firms.[84] Thus, as shown in an ex-

---

[80] 1982 Guidelines, *supra* note 4, at ¶ 4503.10. In other comments, the Department has stated that the HHI "gives a more accurate measure of market structure than the four-firm concentration ratio"; although the four-firm concentration ratio would be the same for two markets, one with four firms, each holding 15%, and 40 other firms holding 1% each, and another market in which one firm held 57% and the remaining 43 firms held only 1% each, the HHI for the two markets would be 940 and 3,292, respectively. *Id.* ¶ 4500, at 6881-2.

[81] *Id.* at ¶¶ 4503.10-4503.101.

[82] *Id.* at ¶ 4503.101.

[83] *See id.* at ¶ 4503.10 n.29.

[84] *Id.* at ¶ 4503.10 n.30.

ample provided in the 1982 Guidelines, for a merger of two firms holding five and ten percent shares, the increase in concentration as measured by the HHI would be 2(5x10) or 100.[85]

The Department generally will not challenge mergers in an unconcentrated market.[86] The Department announced, however, that it "more likely than not" will challenge mergers increasing concentration more than 100 points in a moderately concentrated market.[87] Thus, mergers which increase concentration less than 100 points in moderately concentrated markets are likely to go unchallenged. In a highly concentrated market, a resultant increase of 100 points or more will likely precipitate a challenge, but a merger producing an increase of less than fifty points probably will go unchallenged.[88]

In deciding whether to challenge a merger in a moderately concentrated market or a highly concentrated market when the concentration increase is between fifty and 100 points, the Department will consider not only the post-merger concentration and the concentration increase but also several subjective factors, including ease of entry into the market, product differentiations, the probability of collusion, and the conduct of firms in the market.[89]

Herfindahl-Hirschman Indexes totalling 1,000 and 1,800 points roughly correspond to four-firm concentrations of fifty and seventy percent.[90] Under the 1968 Guidelines, a merger in a highly concentrated market between two firms, each holding four percent market shares, ordinarily would have been subject to challenge.[91] Pursuant to the 1982 Guidelines, however, such a merger, resulting in an HHI increase of thirty-two points,[92] probably would not trigger a Department challenge.[93] Thus, although both guidelines

---

[85] *Id.*

[86] *Id.* at ¶ 4503.101(a).

[87] *Id.* at ¶ 4503.101(b).

[88] *Id.* at ¶ 4503.101(c).

[89] *Id.* at ¶¶ 4503.20B, 4503.20C, 4503.101(c).

[90] *Id.* at ¶ 4503.10.

[91] *Justice Department Unveils, supra* note 23, at 1253. Pursuant to the 1968 Guidelines, a highly concentrated market was one in which the four largest firms held approximately 75% or more of the total market share. *Id.* The 1968 Guidelines are set out in relevant part at note 33 *supra.*

[92] *Justice Department Unveils, supra* note 23, at 1253. Calculation of HHI increases is discussed at text accompanying notes 84-85 *supra.*

[93] *Justice Department Unveils, supra* note 23, at 1253. In a highly concentrated

similarly define a highly concentrated market, the 1982 Guidelines appear to be "somewhat more permissive."[94]

D. *The Federal Reserve Board's Use of the HHI*

The Federal Reserve Board (Board) recently began to use the HHI, in conjunction with the four-firm concentration ratio, to measure concentration in commercial banking markets.[95] The Board's use of the HHI initially appeared to be for the purpose of familiarizing the commercial banking industry with the new method of measurement, because the Board neither consistently used it nor used it in a manner consistent with the 1982 Guidelines.

The HHI was first used in *First Bancorp, Inc.*[96] In the next appropriate case, however, only Governor Teeters, who had dissented in *First Bancorp*, measured concentration with the HHI.[97] In *Hartford National Corp.*, the majority of the Board approved a horizontal merger in an already highly concentrated market. The merger resulted in increases in the four-firm concentration ratio from 93.3 percent to 96.8 percent and in the HHI from 4,460 to 4,526, an increase of sixty-six points.[98] Currently, however, the

market, the Department generally will not challenge a merger resulting in an HHI increase of less than 50 points. 1982 Guidelines, *supra* note 4, at ¶ 4503.101(c).

[94] *See Justice Department Unveils*, *supra* note 23, at 1251.

[95] In a meeting held on Jan. 27, 1982, the staff of the Federal Reserve Board proposed a policy statement for measuring the competitive effects of bank market-extension acquisitions. Statement of Policy on Bank Acquisitions, 47 Fed. Reg. 9017 (1982) (proposed Jan. 27, 1982); Hawke, *Fed Competition Regs May Make Acquisitions Easier*, Legal Times of Wash., Feb. 8, 1982, at 12, col. 1. That statement suggested continued reliance upon the 1968 Guidelines, which used the four-firm concentration ratio, for evaluations of horizontal mergers. *See* 47 Fed. Reg. 9017. The staff recognized at the time of issuing the proposed statement, however, that the Justice Department was then in the process of reformulating its merger guidelines. *Id.*; Carlson, *Justice Merger Guidelines Will Influence Feds*, Legal Times of Wash., June 21, 1982, at 4, col. 1. The statement has not yet been approved by the Board of Governors of the Federal Reserve System. *See, e.g.*, General Bancshares Corp., 69 Fed. Res. Bull. 802, 803 n.6 (1983).

[96] 68 Fed. Res. Bull. 769 (1982).

[97] *See* Hartford Nat'l Corp., 69 Fed. Res. Bull. 32, 33 (1983).

[98] *Id.* The Board held that since relevant state law prohibited commercial bank branching into the city of Waterbury and divestiture of certain assets by the acquiring holding company to another bank located outside the city (but serving the Waterbury market), thereby allowing continued representation in that city by four, rather than three banks, the merger would actually facilitate more effective competitive efforts by the bank acquiring the divested assets. Thus, the Board found that the merger would not adversely affect existing competition. *Id.* at 32, 33. See text accompanying note 89 *supra* for a list of factors other than concentration increase considered in deciding whether to challenge a merger.

Board regularly refers to the 1982 Guidelines when analyzing the competitive effects of proposed mergers.[99]

II. DEFINING PRODUCT MARKETS PURSUANT TO THE NEW GUIDELINES

Both the 1968 Guidelines and the 1982 Guidelines begin with the same principle of economic theory: market structure affects market conduct and ultimately affects market performance. The 1968 Guidelines focus on market structure;[100] the 1982 Guidelines focus more specifically on inhibiting the creation or enhancement of market power through mergers.[101] In addition, the 1982 Guidelines emphasize the use of economic evidence to show that a merger, unless challenged, will result in actual or potential harm to competition.[102]

Definition of the relevant market is generally the major issue in any merger challenge.[103] Thus, how the product market is defined is crucial to a proper result.[104] The 1968 Guidelines took a general approach to product market definition.[105] Those guidelines sought to define a line of commerce "distinguishable as a matter of commercial practice" from other products which, although reasonably interchangeable, were not *perfectly interchangeable* with the subject product in terms of price, quality, and use.[106]

---

[99] *See, e.g.*, Comerica Inc., 69 Fed. Res. Bull. 797, 798 & n.4 (1983); Pennbancorp, 69 Fed. Res. Bull. 548, 551 & n.23 (1983); Fidelcor, Inc., 69 Fed. Res. Bull. 445, 446 & n.5 (1983); InterFirst Corp., 69 Fed. Res. Bull. 383, 385 & n.7 (1983).

[100] *See* 1968 Guidelines, *supra* note 22, ¶ 4510(2), at 6882.

[101] *See* 1982 Guidelines, *supra* note 4, at ¶ 4501; Werden, *supra* note 60, at 516 & n.8.

[102] *See* 1982 Guidelines, *supra* note 4, ¶ 4500, at 6881-2.

[103] E. KINTNER, AN ANTITRUST PRIMER 92 (2d ed. 1973).

[104] *See id.* at 92-93. The relevant market comprises both a "product" and a "geographic" market. Although both must be delineated to define an antitrust market, the 1982 Guidelines follow the traditional approach by defining each separately. Werden, *supra* note 60, at 552-53. Moreover, pursuant to the 1982 Guidelines, the product market is defined first, then the geographic market is established for that product. *Id.* at 553. For a discussion of the pitfalls resulting from delineating a product market while ignoring the geographic market, see *id.* at 553-55.

[105] *See* 1982 Guidelines, *supra* note 4, ¶ 4500, at 6881-2.

[106] 1968 Guidelines, *supra* note 22, ¶ 4510(2), at 6882. Judge Posner criticized this formulation stating: "I find untenable the notion . . . that only producers of *perfect* substitutes must be included in the market." R. POSNER, *supra* note 31, at 131 (emphasis in original). Posner declared that it would be better to include " 'good' substitutes" in the market and treat products as outside that market only if they are "substantially different in design, physical composition, and other technical characteristics." *Id.* at 131-32.

The goal of the product market definition techniques in the 1982 Guidelines, however, is to include in the market all firms which, through the exercise of market power, could raise and keep the prices of the subject products[107] above their competitive levels.[108] Thus, although the Department admits that the result of its use of the 1982 Guidelines may be to allow the consummation of some horizontal mergers which would have been previously challenged,[109] the relevant product market "will include . . . those products that the merging firm's customers view as *good substitutes* at prevailing prices."[110]

The 1982 Guidelines, therefore, set a standard for defining the relevant product market:[111] "[T]he Department seeks to identify a group of products such that a hypothetical firm that was the only present and future seller of those products could raise price profitably."[112] To test this standard the Department will hypothesize a five percent increase in the firm's prices,[113] assum-

[107] The 1982 Guidelines define "products" as including products and services. 1982 Guidelines, *supra* note 4, ¶ 4502, at 6881-2.

[108] *Id.*, ¶ 4500, at 6881-3. *See* Werden, *supra* note 60, at 516-17 & nn.8 & 9. For further discussion of differences between the 1968 Guidelines and the 1982 Guidelines regarding delineation of relevant markets, see *id.* at 570-72.

[109] 1982 Guidelines, *supra* note 4, ¶ 4500, at 6881-2. Changes in Justice Department enforcement policies evident in its 1982 Guidelines include the requirement of showing economic evidence of actual or potential harm to competition. These changes reflect not only trends in judicial decisions and Justice Department enforcement actions since 1968, but also changes in emphasis by the Reagan Administration. *Id.*

[110] *Id.* ¶ 4502, at 6881-8 & n.9 (emphasis added). *See generally* Werden, *supra* note 60, at 524-35. It appears that Judge Posner's views were at least partially, if not completely, adopted by the authors of the 1982 Guidelines.

[111] The 1982 Guidelines set forth the Department's enforcement policy concerning acquisitions and mergers subject to the Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (1982)), and the Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 1 (1982)). *See* 1982 Guidelines, *supra* note 4, at ¶ 4501. In addition, the 1982 Guidelines reflect congressional intent that "merger enforcement should interdict competitive problems in their incipiency." *Id.* Those guidelines, however, are not binding on the Department. The Department reserved the right not to remove the exercise of its judgment from the evaluation of mergers under the antitrust laws. *Id.* Finally, the 1982 Guidelines are only a business planning device in that the provisions of the guidelines merely indicate when and under what circumstances the Department is likely to challenge a merger, and "not how it will conduct the litigation of cases that it decides to bring." *Id.*

[112] *Id.* at ¶ 4502.10.

[113] The "Department will define and measure the market for *each product or service* . . . of each of the merging firms." *Id.* ¶ 4502, at 6881-7 (emphasis added).

ing that customers will shift to reasonable and available substitutes, and will "ask how many buyers would be likely to shift to other products within one year."[114] The Department will then add to the market those products to which a "significant percentage" of buyers would likely shift.[115] The product market will be expanded until the profitability standard is met.[116]

Methods used for defining relevant product markets prior to the 1982 Guidelines were the offspring of "a lot of seat-of-the-pants feelings."[117] While this new approach will encourage both the Department and the private sector to look harder for econometric evidence to support their conclusions regarding market definition,[118] the provisional mapping of the market through hypothetical five percent price increases is a proper starting point for determining whether market power could be exercised in a given market.[119] Stated differently, this provisional mapping method could be viewed as a "foiling standard." If a firm can be "foiled" in its efforts to raise prices, then the market has been defined too narrowly and the "foilers" must be brought into the market definition.[120] This form of mapping continues "until you've got a group that can't be foiled."[121]

Product substitutability will be evaluated by the Department using any relevant evidence in combination with the following criteria: (1) buyers' and sellers' perceptions of substitutability; and (2) similarities or differences between the products in usage, design, physical composition, and price movements.[122]

---

[114] *Id.* at ¶ 4502.10.

[115] *Id.*

[116] *Id.*

[117] *See Antitrust Division's Chief Economist Defends Value of New Merger Guidelines,* [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1070, at 1302 (June 24, 1982) [hereinafter cited as *Chief Economist*].

[118] *Id.* at 1304. One practitioner, in criticism, referred to the 1982 Guidelines as the " 'The Economists' Relief Act of 1982.' " *See Antitrust Practitioners React Favorably to New Merger Guidelines,* [Jan.-June] ANTITRUST & TRADE REG. REP. (BNA) No. 1070, at 1317 (June 24, 1982) (comment of Mr. Ronald Dolan).

[119] *Chief Economist*, *supra* note 117, at 1302. *See* text accompanying notes 113-16 *supra.*

[120] *Chief Economist*, *supra* note 117, at 1303.

[121] *Id.*

[122] 1982 Guidelines, *supra* note 4, at ¶ 4502.10. *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (practical indicia). The evidence necessary to conduct this

Once the relevant market is defined, the Department will calculate market shares. Although the Department normally will use the total sales or capacity of all firms identified as falling within the market's boundaries,[123] it also recognizes that the competitive significance of a firm may be overstated by such calculations.[124] Thus, in appropriate cases the Department will include only that amount of sales or capacity likely to be made or used in the geographic market.[125] Similarly, the Department may reduce the market share of a firm whose capacity "may be so committed elsewhere that it would not be available to respond to an increase in price in the market."[126]

III. CASE LAW STANDARDS FOR DEFINING PRODUCT MARKETS

A. *Applicable Law*

1. *Clayton Act*

In 1914, Congress responded to public pressure to protect small competitors from the menace of unrestrained corporate growth, stemming from the failures of the Sherman Act, by enacting the Clayton Act.[127] The Clayton Act[128] proscribes anticompetitive trade practices, including price discrimination,[129] exclusive dealing and tying arrangements,[130] and certain interlocking directorates.[131]

Section 7 of the Clayton Act,[132] the provision with the greatest relevance to this discussion of competition in the banking context,

---

evaluation may be difficult to obtain, if it exists at all. Werden, *supra* note 60, at 565-66. Furthermore, the results of such an evaluation should be viewed with a fair amount of skepticism, because such evidence is difficult to interpret meaningfully. *Id.*

[123] 1982 Guidelines, *supra* note 4, at ¶ 4502.40.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] KINTNER—MERGERS, *supra* note 2, at 154. For additional discussion of the Clayton Act, see Note, *Banking Mergers and "Line of Commerce" After the Monetary Control Act: A Submarket Approach*, 1982 U. ILL. L. REV. 731, 736.

[128] 15 U.S.C. §§ 12-27.

[129] *See* 15 U.S.C. § 13.

[130] *See* 15 U.S.C. § 14.

[131] *See* 15 U.S.C. § 19.

[132] 15 U.S.C. § 18.

was designed to thwart economic concentration in its incipiency.[133] Section 7 proscribes mergers substantially tending to lessen competition or create a monopoly.[134] Thus, rather than prove actual anticompetitive effect, the section 7 plaintiff must only show that consummation of a merger will raise a substantial probability of an anticompetitive effect.[135]

2. *Bank Merger Act*

Because of lessons learned in the aftermath of numerous bank failures during the Great Depression, the banking industry is heavily regulated.[136] The primary federal statute applicable to mergers in the banking industry is the Bank Merger Act.[137] That act requires that banks insured by the Federal Deposit Insurance Corporation (FDIC) receive the written approval of their responsible regulatory

---

[133] KINTNER—MERGERS, *supra* note 2, at 154. Section 7 provides, in relevant part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or . . . the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

In United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 342 (1963), the Supreme Court read together the stock and asset acquisition portions and held that § 7, as amended in 1950, applied to bank mergers. KINTNER—MERGERS, *supra* note 2, at 421; Note, *supra* note 127, at 736 n.35.

[134] *See* 15 U.S.C. § 18.

[135] *See* KINTNER—MERGERS, *supra* note 2, at 154-55.

[136] *Id.* at 412. *See, e.g.*, 12 U.S.C. §§ 1811-1832 (1982) (creation and administration of the Federal Deposit Insurance Corporation). *See also* 112 CONG. REC. 2440, 2446 (1966) ("Banking services, furnishing the very lifeblood of the economy of any community, stand on a somewhat different footing from other forms of economic activity.") (statement of Rep. Ashley concerning the purpose of the then proposed Bank Merger Act of 1966).

[137] 12 U.S.C. § 1828. The Bank Holding Company Act, 12 U.S.C. §§ 1841-1850, generally regulates acquisitions by and mergers between bank holding companies. The Act provides, *inter alia*, that an acquisition by a holding company must be approved by the Board prior to consummation of the transaction. The Board must advise the Comptroller of the Currency if either bank is a national banking association, or its appropriate state agency if either bank is a state bank, and consider the recommendation of the appropriate agency. *See* 12 U.S.C. § 1842(b). *See generally* P. HELLER, HANDBOOK OF FEDERAL BANK HOLDING COMPANY LAW (1976).

agency before consummating a proposed merger.[138] The petitioned agency may not approve any merger resulting in a monopoly or raising a substantial probability of lessened competition or a restraint of trade,[139] unless the probable anticompetitive effects are clearly outweighed by the merger's benefits to the community to be served.[140]

The responsible agency, however, must notify the Attorney General if a merger has been approved.[141] The Department then has thirty days to challenge the merger under the antitrust laws.[142] In the event that an antitrust action ensues, federal regulatory approval is automatically stayed pending the outcome of the judicial proceedings, unless the presiding district court orders otherwise.[143] Furthermore, although it must conduct a de novo review,[144] the reviewing court must apply the same competitive effects standards applied by the approving agency.[145]

---

[138] *See* 12 U.S.C. § 1828(c)(2). The responsible agency may be the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation (FDIC), depending upon whether the acquiring or resulting bank is a national bank, a state member bank, or an insured nonmember bank. *Id.*

[139] 12 U.S.C. § 1828(c)(5). The Bank Merger Act's proscription of monopolization, 12 U.S.C. § 1828(c)(5)(A), is taken from § 2 of the Sherman Act, 15 U.S.C. § 2. County Nat'l Bancorporation v. Board of Governors, 654 F.2d 1253, 1256 (8th Cir. 1981); H.R. REP. No. 1221, 89th Cong. 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 1860, 1862.

The "substantially to lessen competition, or to tend to create a monopoly" language of 12 U.S.C. § 1828(c)(5)(B) is quoted from § 7 of the Clayton Act, 15 U.S.C. § 18. The "restraint of trade" language in 12 U.S.C. § 1828(c)(5)(B) is taken directly from § 1 of the Sherman Act, 15 U.S.C. § 1. *See* United States v. Third Nat'l Bank, 390 U.S. 171, 181-82 (1968); County Nat'l Bancorporation v. Board of Governors, 654 F.2d at 1256.

[140] Those legislators favoring the exemption of the banking industry from the antitrust laws were partially appeased by the Bank Merger Act's provisions ensuring both regulatory agency review, and judicial recognition of the need to consider "competitive factors," including the "convenience and needs of the community to be served." 112 CONG. REC. 2440, 2441 (1966) (statement of Rep. Patman).

[141] 12 U.S.C. § 1828(c)(6) (Bank Merger Act); 12 U.S.C. § 1849(b) (Bank Holding Company Act).

[142] 12 U.S.C. § 1828(c)(6), (7)(A) (Bank Merger Act); 12 U.S.C. § 1849(b) (Bank Holding Company Act). Under both statutes, the "antitrust laws" include the Sherman Act and the Clayton Act. *See* 12 U.S.C. § 1828(c)(8) (Bank Merger Act); 12 U.S.C. § 1849(f) (Bank Holding Company Act).

[143] 12 U.S.C. § 1828(c)(7)(A) (Bank Merger Act); 12 U.S.C. § 1849(b) (Bank Holding Company Act).

[144] 12 U.S.C. § 1828(c)(7)(A) (Bank Merger Act); 12 U.S.C. § 1849(b) (Bank Holding Company Act).

[145] 12 U.S.C. § 1828(c)(7)(B) (Bank Merger Act); 12 U.S.C. § 1849(b) (Bank Holding Company Act).

It is quite clear that federal antitrust laws are to be applied by the regulatory agencies and reviewing courts when considering proposed mergers in the banking industry.[146] Although at least two federal district courts have suggested that the competitive effects standards of the Bank Merger Act are less stringent than the antitrust standards established by the Sherman and Clayton Acts,[147] the legislative history,[148] the Supreme Court's interpretation of the Act,[149] and other cases[150] compel the conclusion that Congress incorporated the antitrust principles of the Sherman Act and section 7 of the Clayton Act into the Bank Merger Act. Because the regulatory agencies and reviewing courts must apply conventional

---

[146] This was not the case prior to the amendments of the Bank Merger Act and the Bank Holding Company Act in 1966. Prior to the amendments, both acts provided that competition was only one of the several factors to be considered by the agencies in their review of proposed transactons, and Congress was reluctant to apply § 7 of the Clayton Act to bank mergers. *See, e.g.*, S. REP. No. 196, 86th Cong., 1st Sess. 19-20 (1959); 106 CONG. REC. 9711 ("Section 7 of the Clayton Act should continue to be inapplicable to bank mergers.") (remarks of Sen. Fulbright). The Supreme Court's subsequent decisions holding that the antitrust laws do apply to the banking industry, and that the public interest could not be considered in the antitrust analysis, precipitated the 1966 amendments to the federal banking legislation. 112 CONG. REC. 2653 (1966) (The amendments "will end the confusion and controversy which has surrounded the bank merger situation since the ill-advised and unfortunate decisions of the Supreme Court in the *Philadelphia* and *Lexington* cases.") (statement of Sen. Robertson). *See* United States v. First Nat'l Bank & Trust Co. of Lexington, 376 U.S. 665, 668-73 (1964); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 352-55 (1963).

[147] *See* United States v. Provident Nat'l Bank, 280 F. Supp. 1, 20-22 (E.D. Pa. 1968); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. 133, 142-44 (N.D. Cal. 1967).

[148] *See* 112 CONG. REC. 2441 ("This bill, in contrast [to the Bank Merger Act of 1960], makes the competitive factor preeminent. And the competitive standard to be applied is clearly that of the Sherman and Clayton Acts.") (statement of Rep. Patman, Chairman of Comm. on Banking and Currency); *Id.* at 2444 ("[T]he antitrust standards which have been developed on the basis of these statutory definitions [in the Clayton and Sherman Acts] are to be incorporated in the application of the proposed act.") (statement of Rep. Reuss); *Id.* at 2451 ("It should also be clear . . . that the competitive standard to be used is drawn directly from Clayton Act section 7 and Sherman Act section 1.") (remarks of Rep. Minish).

[149] *See* United States v. Third Nat'l Bank, 390 U.S. at 182 ("Only one conclusion can be drawn from the exhaustive legislative deliberations that preceded passage of the [Bank Merger] Act: Congress intended bank mergers first to be subject to the usual antitrust analysis . . . ."). *See also* United States v. First City Nat'l Bank, 386 U.S. 361, 364 (1967).

[150] *See, e.g.*, Republic of Tex. Corp. v. Board of Governors of Fed. Reserve Sys., 649 F.2d 1026, 1043 (5th Cir. 1981) (Board may not prohibit proposed acquisition on competitive grounds under Bank Holding Company Act unless it concludes the antitrust standards contained in that Act have been violated); Mercantile Tex. Corp. v. Board of Governors of Fed. Reserve Sys., 638 F.2d 1255, 1261-62 (5th Cir. 1981) (same holding); Washington Mut. Sav. Bank v. FDIC, 482 F.2d 459, 464-65 (9th Cir. 1973) (similar holding under Bank Merger Act).

antitrust analysis to a proposed bank merger, the threshold step for both tribunals is to define the relevant product market in accordance with principles developed in antitrust cases arising under the Clayton and Sherman Acts.

B. *Supreme Court: Defining Product Market in Nonbanking Cases*

The Supreme Court has defined the relevant product market in a number of nonbanking cases[151] for actions pursuant to provisions of both the Sherman Act[152] and the Clayton Act.[153] In *United States v. E. I. duPont de Nemours & Co.*,[154] Justice Reed, writing for a plurality, stated that, at least for Sherman Act section 2 purposes, the tests for defining a relevant product market are constant:[155] the "market is composed of products that have *reasonable interchangeability* for the purposes for which they are produced—price, use and qualities considered."[156] Thus, substitute products having a high degree of "functional interchangeability,"[157] without requiring fungibility,[158] and with a high cross-elasticity of demand[159] should be included in the relevant product market considered in determining whether a firm exercised monopoly power[160] over that market.[161]

---

[151] For a recent discussion of these cases, see Note, *supra* note 127, at 744-46.

[152] 15 U.S.C. § 2.

[153] 15 U.S.C. § 18.

[154] 351 U.S. 377 (1956) (The Government charged that duPont had monopolized interstate commerce in violation of § 2 of the Sherman Act by producing almost 75% of the cellophane sold in the U.S.).

[155] *Id.* at 395-96.

[156] *Id.* at 404 (emphasis added).

[157] *Id.* at 399.

[158] *Id.* at 394.

[159] *Id.* at 400. Cross-elasticity of demand has been defined as the percentage change in quantity demanded of product X for a small change in the price of product Y, when all other things, such as quality, remain equal. E. SINGER, *supra* note 34, at 56.

[160] The *duPont* Court defined monopoly power as "the power to control prices or exclude competition." 351 U.S. at 391.

[161] At least one commentator agreed with the Court that reasonable interchangeability, a multivariable test, rather than just cross-elasticity of demand, a price test, was the proper method for determining the scope of the relevant product market. *See* E. SINGER, *supra* note 34, at 56. According to Dr. Singer, cross-elasticity of demand alone is not an equivalent to competition. *Id.* at 58-59. Judge Posner, however, has contended that the importance attached by courts to market definition reflected "the law's failure to have developed a

Less than a year later, in a separate action, the Supreme Court found that duPont had violated section 7 of the Clayton Act by acquiring a substantial portion of General Motors common stock.[162] Although this was a vertical acquisition case, the Court had to define the relevant product market in order to find that the acquisition's effect may have "substantially lessen[ed] competition . . . or tend[ed] to create a monopoly" of "any line of commerce."[163] Writing for the majority, Justice Brennan found that automotive finishes and fabrics, as opposed to a grouping of all finishes and fabrics, composed the relevant product market because the "peculiar characteristics" of those automotive products rendered them "sufficiently distinct" to make them a "line of commerce."[164]

---

genuinely economic approach to the problem of monopoly." R. POSNER, *supra* note 31, at 125. He further asserted that elasticity of demand, if known, would make market definition redundant. *Id.*

Alternatively, Judge Posner would use a "good substitutes" test. If the courts are unable to determine reasonable interchangeability at the competitive price of the product (i.e., the cross-elasticity of demand), then those courts must "assume that products whose design, physical composition, and other technical characteristics are substantially different are not good substitutes." *Id.* at 128.

Despite their differences, which do not appear to be great, both Dr. Singer and Judge Posner disagreed with the plurality's conclusion that cellophane exhibited a high cross-elasticity of demand. *See* R. POSNER, *supra* note 31, at 128; E. SINGER, *supra* note 34, at 57-58. *Cf.* 351 U.S. at 416-18 (maintaining that cellophane had a low cross-elasticity of demand because, while it had a higher price than its substitutes, producers of these other materials failed to respond to duPont's reductions of the price of cellophane) (Warren, C.J., dissenting). According to Judge Posner, applying the interchangeability test at the current and not the competitive price level of cellophane resulted in a product market defined to include even poor substitutes, rather than products which were reasonably interchangeable, because "at a high enough price even poor substitutes look good to the consumer." R. POSNER, *supra* note 31, at 128.

According to Dr. Singer, who stated his viewpoint somewhat differently than Judge Posner, it was inaccurate for the *duPont* Court to conclude that a high cross-elasticity existed at cellophane prices which resulted in unnaturally high profits when cross-elasticity may actually have been quite low if it had been measured at a competitive price. There are two reasons for Dr. Singer's conclusion: (1) the assumption that "other things remain equal" is implicit to the main consideration in cross-elasticity of demand—that price change in one product results in a corresponding change in demand for another product; and (2) cross-elasticity varies with price. *See* E. SINGER, *supra* note 34, at 58.

[162] *See* United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 607 (1957).

[163] *See id.* The Court stated that "[s]ubstantiality can be determined only in terms of the market affected." *Id.* at 593.

[164] *Id.* at 593-94.

In the subsequent case of *Brown Shoe Co. v. United States,*[165] the Court combined the "reasonable interchangeability" and "peculiar characteristics" tests in a single setting. Chief Justice Warren, writing for the *Brown Shoe* majority, stated that although the outer boundaries of a product market would be "determined by the reasonable interchangeability of use or the cross-elasticity of demand" between the product and its substitutes, the boundaries of the individual submarkets within this broad product market, each alone constituting a product market for antitrust purposes, would be determined by practical indicia, including: peculiar characteristics and uses of the product; public and industry recognition of each submarket as an economic entity; distinct customers and prices; and sensitivity to price changes.[166]

In *United States v. Continental Can Co.*,[167] the Supreme Court elaborated upon the applicability of its *Brown Shoe* market-submarket tests. The Government had challenged the merger of a metal can producer[168] and a glass jar manufacturer[169] and sought divestiture pursuant to the Clayton Act.[170] The district court dismissed the Government's complaint, finding that the Government had failed to prove reasonable probability of anticompetitive effect in any line of commerce.[171] The Government had urged the district court to recognize that although the metal and glass container industries were distinct lines of commerce, the end uses for such containers comprised other lines of commerce evidenced by

---

[165] 370 U.S. 294 (1962).

[166] *Id.* at 325. *See also* KINTNER—MERGERS, *supra* note 2, at 227 ("the courts have been reluctant to recognize anything but narrow submarkets").

Commenting on *Brown Shoe,* Judge Posner stated that a submarket approach is unsound "[i]f the 'outer boundaries' of the market include only the product's good substitutes . . . then a submarket would be a group of sellers from which sellers of good substitutes . . . had been excluded, and these exclusions would deprive any market-share statistics of their economic significance." R. POSNER, *supra* note 31, at 129.

[167] 378 U.S. 441 (1964).

[168] Continental Can occupied a dominant position in the metal can industry. The company shipped 33% of all metal cans and accounted for 31.4% of the metal can industry's total sales. *Id.* at 458-59.

[169] Hazel-Atlas was the third largest glass container manufacturer, accounting for 9.6% of the total market share in an industry in which the three largest manufacturers held 55.4% of the total market share. *Id.* at 460.

[170] *Id.* at 443-44.

[171] *Id.* at 444. *See also* 15 U.S.C. § 18.

strong interindustry competition; since, for example, both glass and metal containers were used in the beer, soft drink, cosmetic, health and chemical industries.[172] The district court declined to find, with the exception of the beer container industry, that existing interindustry competition had resulted in product submarkets delineated by end use.[173]

Following the *duPont* guidelines that substitutes need not be fungible to be included in the relevant product market,[174] the Supreme Court in *Continental Can* rejected the district court's conclusions as unduly restrictive.[175] First, the Court noted that certain characteristics prevented the metal and glass container industries from being a single line of commerce. The Court recognized that the differing physical characteristics of metal and glass containers and the necessity of different machinery for packing in glass or metal containers prevented fungibility in all end uses.[176] Nevertheless, the Court stated, the trial court record reflected intense end use competition between metal and glass containers.[177] Justice White, writing for the majority, further noted that both industries had attempted to expand their respective market shares at the expense of each other.[178] The Court then held that although interchangeability of use and cross-elasticity of demand were still the tests to be applied in defining the relevant product market in an interindustry merger, the interchangeability need "not be so complete and the cross-elasticity of demand not so immediate as in the case of most intra-industry mergers."[179] The Court also held that price was "only one factor in a user's choice between one container or the other."[180] The packager's use of glass or metal ultimately would depend upon the consumers' preferences, and although that may not be price competition, it was "nevertheless

[172] 378 U.S. at 447.

[173] *Id.* at 448.

[174] *Id.* at 449 (quoting United States v. E. I. duPont de Nemours & Co., 351 U.S. at 394). *See* text accompanying notes 154-61 *supra.*

[175] *See* 378 U.S. at 449. The Court stated that they "must recognize meaningful competition where it is found to exist." *Id.*

[176] *Id.* at 450.

[177] *Id.* at 450-52.

[178] *Id.* at 453.

[179] *Id.* at 455.

[180] *Id.*

meaningful competition between interchangeable containers."[181] Thus, the Court concluded that although the glass and metal containers were two separate lines of commerce, the interindustry competition between those two lines gave rise to submarkets[182] "which, in themselves, constitute[d] product markets for antitrust purposes."[183]

The Supreme Court again applied the *duPont* reasonable interchangeability test[184] when it held that the Grinnell Corporation and its affiliated subsidiaries had monopolized the accredited central station protective service nationwide, in violation of section 2 of the Sherman Act.[185] The Court recognized that in section 2 cases, as in Clayton Act section 7 cases, "there may be submarkets that are separate economic entities."[186] The Court rejected the notion of submarkets as irrelevant to this case, however, and instead found the relevant product market to be confined to accredited central station protective services.[187] The Court asserted two reasons for its product market definition: first, because the accredited central station service was unique and provided a single basic service, the protection of property, it reflected commercial realities to group the individual services performed by such stations into a single "part of the trade or commerce" as the relevant product market, rather than to evaluate the price control or competitive effects of

---

[181] *Id.* at 456.

[182] The Court held that "[w]here the area of effective competition cuts across industry lines, so must the relevant line of commerce; otherwise an adequate determination of the merger's true impact cannot be made." *Id.* at 457.

[183] *Id.* at 458 (quoting Brown Shoe Co. v. United States, 370 U.S. at 325). The Court further held that "[t]here may be some end uses for which glass and metal do not and could not compete, *but complete interindustry competitive overlap need not be shown.*" *Id.* at 457 (emphasis added).

[184] *See* text accompanying notes 154-61 *supra.*

[185] United States v. Grinnell Corp., 384 U.S. 563, 576 (1966). *See also* E. SINGER, *supra* note 34, at 61-62.

[186] 384 U.S. at 572. *See also* Brown Shoe Co. v. United States, 370 U.S. at 325 (citing United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 593-95). The Court further asserted that in defining the relevant product market, there was "no reason to differentiate between 'line' of commerce in the context of the Clayton Act and 'part' of commerce for purposes of the Sherman Act." 384 U.S. at 573 (citing United States v. First Nat'l Bank, 376 U.S. at 667-68). *See also* 15 U.S.C. §§ 1, 18. In *First Nat'l Bank*, the Court adopted commercial banking, the product market for purposes of the Clayton Act, as the product market for determining the Sherman Act § 1 issue in that case. 376 U.S. at 667.

[187] 384 U.S. at 572.

each individual service as a separate submarket;[188] and second, unlike *Brown Shoe*, the relevant product market in *Grinnell* was composed of services and not products.[189]

The *Grinnell* Court admitted there were substitutes for accredited central station services and that those substitutes, through fringe competition, prevented the defendants from exercising "unfettered power to control the price" of their accredited central station services.[190] Nevertheless, the Court refused to include those substitutes in the relevant product market or to evaluate their effects as submarkets of those individual services performed by central stations, because "none of them appear[ed] to operate on the same level as the central station service so as to meet the interchangeability test of the *duPont* case."[191] The Court further stated that because of their marked differences with central station services, local alarm systems did not have "the low degree of differentiation required of substitute services as well as substitute articles."[192]

---

[188] *Id.* at 572-73. The Court noted that like commercial banking, which comprised a cluster of services, the relevant product market in *Grinnell*, the accredited central station service, also comprised a cluster of services. *Id.* at 573 (citing United States v. Philadelphia Nat'l Bank, 374 U.S. at 356).

The Court's definition of the product market as a cluster of services resulted from the following line of analysis: Central station protective services offered a wide range of separate services; local uncentralized protective services offered fewer of those separate services, and thus, did not meet the low level of product or service differentiation required to pass the *duPont* reasonable interchangeability test; the breadth of the range of services offered by central station services made them unique; and, to compete effectively, central station services had to offer all or nearly all of the several separate services. Thus, because all of the separate services served a single use, the protection of property, and because the grouping of many services was required for effective competition and resulted in a unique service, it made commercial sense to define the product market as the cluster of those services. *Id.* at 572-74.

Furthermore, and perhaps most importantly, Justice Douglas, writing for the majority, twice emphasized that the insurance industry recognized accredited central station protective services as distinct from all other types of protective services by noting that insurance underwriters required lower premiums than those businesses using central station services. *Id.* at 567, 574. The Court did leave an open door to rebuttal of its cluster definition, however, stating that the *Grinnell* defendants simply had "not made out a case for fragmentizing the types of services into lesser units." *Id.* at 572.

[189] *Id.* The Court did not explain this distinction.

[190] *Id.* at 573-74 (quoting United States v. Grinnell Corp., 236 F. Supp. 244, 254 (D.R.I. 1964)).

[191] *Id.* at 573.

[192] *Id.*

C. *Supreme Court: Defining Product Market in Banking Cases*

The most recent United States Supreme Court case to define the tests for the relevant product market in bank merger cases occurred almost ten years ago.[193] Only two other Supreme Court cases have dealt with the situation.[194] These three cases, discussed below in very abbreviated form,[195] met immediate and continuing criticism from legal scholars.[196] The lower federal courts which have confronted the issue,[197] and the Federal Reserve Board, continue to

---

[193] *See* United States v. Connecticut Nat'l Bank, 418 U.S. 656 (1974).

[194] *See* United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350 (1970); United States v. Philadelphia Nat'l Bank, 374 U.S. at 321.

[195] For a more extensive discussion of these cases, see Note, *supra* note 127, at 746-52.

[196] *See, e.g.*, Bleier & Eisenbeis, *Commercial Banking as the "Line of Commerce" and the Role of Thrifts*, 98 BANKING L.J. 374, 375-78 (1981); Cairns, *Retail and Wholesale Banking: Diverging Markets and Lines of Commerce*, 32 SYRACUSE L. REV. 713, 733-34 (1981); Friedlander & Slayton, *Determination of the Relevant Product Market in Bank Mergers: A Time for Reassessment?*, 36 BUS. LAW. 1537, 1538-40 (1981); Note, *supra* note 127, at 746-52.

[197] *See, e.g.*, United States v. Idaho First Nat'l Bank, 315 F. Supp. 261, 267 (D. Idaho 1970) (rejected "clustering" products and services of commercial banks in a single line of commerce and asserted that competitive effects analysis should be conducted for those subproduct markets exhibiting cross-elasticities of demand between commercial banks, thrifts and other financial institutions (such as interest-bearing deposits, agricultural production loans, farm real estate loans, residential and commercial real estate loans, student loans, automobile and other consumer loans)); United States v. First Nat'l Bank, 310 F. Supp. 157, 168 (D. Md. 1970) (commercial banking was the line of commerce but court "considered" activities of nonbanking financial institutions) (dictum); United States v. First Nat'l Bank, 301 F. Supp. 1161, 1180-81 (S.D. Miss. 1969) (meaningful competition existed between commercial banks and various nonbanking institutions such as savings and loans, land bank association, finance companies, and cotton market financing association and corporation, indicating existence of reasonable interchangeability between them; court concluded that all should be included in the same line of commerce) (dictum); United States v. Provident Nat'l Bank, 280 F. Supp. at 7-11 (mutual savings banks and savings and loans offered direct and meaningful competition for savings dollars and mortgage loans; thus the line of commerce was divided between wholesale and retail accounts); United States v. Crocker-Anglo Nat'l Bank, 277 F. Supp. at 154-64 (presence of nonbanking financial institutions such as savings and loans, General Motors Acceptance Corp., finance companies, credit unions and insurance companies should be considered when estimating competitive effects of a merger; the court "shaded" concentration ratios to reflect those competitive effects); United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 895-96 (S.D.N.Y. 1965) (rejected *Brown Shoe*-type subproduct market analysis based upon "practical indicia," but adopted analysis based upon two other court-perceived subproduct markets: wholesale and retail accounts).

The Depository Institutions Deregulation and Monetary Control Act of 1980 (MCA) expanded thrift powers into areas which previously were within the exclusive province of follow the letter of the Supreme Court's decisions, but have on occasion circumvented those aspects considered to be economically unrealistic.[198] The Comptroller of the Currency and the FDIC, however, have chosen on occasion to ignore the Supreme Court's definition of the relevant product market and have included thrifts in the relevant product market when they found them to be direct competitors of commercial banks.[199]

In *United States v. Philadelphia National Bank*,[200] the Supreme Court concluded that the "cluster of products . . . and services

---

commercial banks and promoted limited parity between thrifts and commercial banks. *See* Pub. L. No. 96-221, 94 Stat. 132 (1980). For example, pursuant to the MCA all federally insured depository institutions may offer NOW accounts for personal checking and not-for-profit customers. *See* 12 U.S.C. § 1832a (1982). Thus, thrifts and commercial banks have attained parity on the retail side of this significant individual product market. In addition, federally chartered savings and loan associations may now commit 20% of their assets to consumer loans, commercial paper, commercial real estate loans, and corporate debt securities. 12 U.S.C. § 1464(c)(2)(B) (1982). Furthermore, not only may those same savings and loans now offer credit card and trust services, but the MCA also liberalized standards pertaining to their investment opportunities by allowing investments in certain open ended investment companies. *See* 12 U.S.C. § 1464(b)(4), (c)(1). Also pursuant to the MCA, federal mutual savings banks may commit five percent of their assets to commercial, corporate, and business loans to borrowers within the same state or within 75 miles of the home office of the lending bank. McNeill, *The Depository Institutions Deregulation and Monetary Control Act of 1980*, 66 Fed. Res. Bull. 444, 450 (1980). Additionally, those savings banks may accept commercial demand deposits from those businesses receiving such commercial loans. Cairns, *supra* note 196, at 726-30 & n.73 (several savings and loans, given their new commercial powers, have launched aggressive campaigns to lure customers away from commercial banks, protraying themselves as capable of providing one-stop banking services); Friedlander & Slayton, *supra* note 196, at 1541-43. *See also* Note, *supra* note 127, at 757-58. *But see* United States v. First Nat'l State Bancorporation, 499 F. Supp. 793, 800 (D.N.J. 1980) (refused to include thrifts in same line of commerce with commercial banks, although it found competition in several subproduct markets, including demand deposit and savings accounts, mortgage and home improvement loans, installment loans, safe-deposit boxes, trust services, drive-in facilities, 24-hour cash dispensing, and travelers' checks, because those thrifts were not yet actual or significant participants in the marketing of bank services to locally limited wholesale or business accounts). *But cf.* Bleier & Eisenbeis, *supra* note 196, at 382-83 (the MCA may not raise thrifts to a level of full competitiveness with commercial banks).

The Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97-320, 96 Stat. 1469 (codified in scattered sections throughout titles 11, 12, 15, 20, 22, 26 and 42 U.S.C.) further expands and accelerates the deregulatory trend which began with the enactment of the Depository Institutions Deregulation and Monetary Control Act of 1980. Note, *supra* note 127, at 758-60. For a list of the provisions of this Act, see [1982-1983 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 99,318 (Oct. 8, 1982).

[198] *See* notes 218-25 *infra* and accompanying text.

[199] *See* notes 226-31 *infra* and accompanying text.

[200] 374 U.S. at 321.

. . . denoted by the term 'commercial banking,' . . . compose[d] a distinct line of commerce."[201] Although admitting that certain nonbanking financial institutions competed with commercial banks by offering similar products and services,[202] the Court chose to set apart commercial banking as a line of commerce distinct from those other financial institutions for three reasons: (1) some commercial bank products or services, for example, the checking account, were found to be "so distinctive that they are entirely free of effective competition from products or services of other financial institutions"; (2) certain commercial bank products or services, for example, loans, enjoyed cost advantages over similar products and services offered by nonbanking financial institutions because those nonbanking institutions depended upon commercial bank loans for at least part of their working capital; and (3) certain other products or services, for example, savings deposits, enjoyed "a settled consumer preference, insulating them, to a marked degree, from competition."[203]

In *United States v. Phillipsburg National Bank & Trust Co.*,[204] Justice Brennan, writing again for the majority, reaffirmed his conclusion in *Philadelphia National Bank* that commercial banking formed a distinct line of commerce. The Court rejected the

[201] *Id.* at 356. The Court listed banking products or various types of credit as including "unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, [and] revolving credit funds." *Id.* at 326 n.5.

Included in the Court's list of banking services were "acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety-deposit boxes; account reconciliation services; foreign department services (acceptances and letters of credit); correspondent services; [and] investment advice." *Id.*

[202] The Court listed the following credit-supplying nonbanking institutions as "more or less" competitors of commercial banks: "mutual savings banks, savings and loan associations, credit unions, personal-finance companies, sales-finance companies, private businessmen (through the furnishing of trade credit), factors, direct-lending government agencies, the Post Office, Small Business Investment Corporations, [and] life insurance companies." *Id.* at 327 n.5.

[203] *Id.* at 356-57. One witness testifying before the trial court, perplexed by the consumer preference shown commercial banks despite payment of higher interest rates on savings deposits by certain thrifts, stated: "Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level." *Id.* at 357 n.34.

[204] 399 U.S. at 350.

district court's use of subproduct market analysis[205] on two grounds:[206] (1) the broader line of commerce represented by the clustering of banking products and services had economic significance as a matter of trade reality because clustering facilitated one-stop banking convenience for customers;[207] and (2) the failure to analyze as a cluster would result in a dilution of concentration ratios with the probable effect that customers of small banks and residents of small towns would be deprived of antitrust protection.[208]

---

[205] *Id.* at 360. The district court had found that the small commercial banks in the relevant geographic market more closely resembled thrifts than the commercial banks which were the subject of the *Philadelphia National Bank* litigation. Thus, the district court felt more comfortable analyzing the competitive aspects of the contested merger along subproduct market lines. By doing so the district court hoped to separate "those products and services where absence of competition may be significant from those in which competition from many sources is so widespread that no question of significant diminution of competition by the merger could be raised." *Id.* at 359-60 (quoting United States v. Phillipsburg Nat'l Bank & Trust Co., 306 F. Supp. 645, 650-51 (D.N.J. 1969)).

[206] In his concurring and dissenting opinion, Justice Harlan suggested that the majority's rejection of the district court's subproduct market ignored the mitigating effect nonbanking financial institution competition had on the market power held by the relevant commercial banks. Justice Harlan preferred the subproduct market analysis suggested by the district court, particularly in light of the similarities between the small commercial banks involved and thrifts. 399 U.S. at 379-81 (Harlan, J., dissenting). Justice Harlan stated:

> [T]he Court's mode of analysis makes too much turn on the all-or-nothing determination that the relevant product market either includes or does not include products and services of savings and loan companies, and other competition. A far better approach would be to recognize the fact that a product or geographic market *is at best an approximation*—necessary to calculate some percentage figures. In evaluating such figures, however, the Court should not decide the case simply by the magnitude of the numbers alone—it should give the appellees on remand an opportunity to *demonstrate that the numbers here significantly "overstate" the competitive effects* of this merger *because of the approximate nature of the assumptions underlying the Court's definition of the relevant market.*

Id. at 382 (emphasis added).

[207] In rejecting the district court's subproduct method of analysis, the Court stated that splitting of the cluster "would be clearly relevant . . . in analyzing the effect on competition of a merger between a commercial bank and another type of financial institution. But submarkets are not a basis for the disregard of a broader line of commerce that has economic significance." *Id.* at 360 (citing Brown Shoe Co. v. United States, 370 U.S. at 326). *Cf.* United States v. Continental Can Co., 378 U.S. at 456-57 (merger between metal can and glass container producers, wherein the two containers were recognized as separate lines of commerce, but where interindustry competition was sufficient to warrant treating the combined industries as the relevant product market).

[208] 399 U.S. at 361.

In *United States v. Connecticut National Bank*,[209] the Court's most recent consideration of the relevant product market definition in the context of a commercial bank horizontal merger, the Court continued its adherence to its earlier conclusion that commercial banking composed a distinct line of commerce.[210] The Court rejected the district court's findings that thrifts located in the same geographic market as the two merging commercial banks should be included in the same relevant product market as those banks.[211] The Court recognized that the thrifts had moved closer to parity with commercial banks in several distinct product and service submarkets and were imbued with limited state powers to make commercial loans.[212] Nevertheless, the Court held that the cluster of products represented by the term "commercial banking" remained competitively distinct from all other financial institutions, because those nonbanking financial institutions were not yet "significant participants" in the commercial banking market.[213] Stated differently, the Court found that the district court had "overestimated the degree of competitive overlap" existing between commercial banks and the nonbanking financial institutions.[214] Thus, although nonbanking financial institutions competed with commercial banks in several financial services submarkets, following the standards promulgated in *Phillipsburg*, the Court in *Connecticut National Bank* held that commercial banking constituted a distinct line of commerce, because commercial banks offered a cluster of products and services which thrifts could not, "particularly with regard to commercial customers."[215] The Court, however, left the door open to those seeking to modify its definition of the relevant product market in commercial bank mergers. Recognizing that certain thrifts in Connecticut were approaching parity with

---

[209] 418 U.S. at 656.

[210] *Id.* at 664.

[211] *Id.* at 663-65.

[212] *Id.* at 663 & n.3.

[213] *Id.* at 665-66. The Court based its assertion that thrifts doing business in the relevant geographic market were not "significant participants" on evidence that commercial banks "almost exclusively" controlled the commercial bank loan business in Connecticut. At the close of 1971, Connecticut commercial banks held $1.03 billion in outstanding commercial loans, while Connecticut thrifts held only $26 million in similar loans. *Id.* at 665.

[214] *Id.* at 663.

[215] *Id.* at 663-64 & n.3.

commercial banks, the Court stated that at some future time it may become economically unrealistic to distinguish thrifts from commercial banks "for purposes of the Clayton Act."[216] The Court suggested that the time might be reached when thrifts will become "significant participants in the marketing of bank services to commercial enterprises," but the facts as presented persuaded the Court that thrifts had not yet reached that level of participation in the commercial market.[217]

D. *Regulatory Agencies: Defining Product Market in Banking Cases*

The Board of Governors of the Federal Reserve System (Board) and the district courts have remained faithful to the edict of *Connecticut National Bank.*[218] To date, the Board has not found any thrift to be such a "significant participant" in the offering of those products and services composing the "cluster" distinct to commercial banking that it would or could include it in the commercial banking line of commerce.[219] Nevertheless, through a not so subtle evolutionary process, the Board has developed a technique for mitigating[220] those anticompetitive effects which result from a

[216] *Id.* at 666.

[217] *Id.* The Court stated:

> We do not say . . . that in a case involving a merger of commercial banks a court may never consider savings banks and commercial banks as operating in the same line of commerce, no matter how similar their services and economic behavior. At some stage in the development of savings banks it will be unrealistic to distinguish them from commercial banks for purposes of the Clayton Act. . . . [T]hat point may well be reached when and if savings banks become *significant participants* in the marketing of bank services to commercial enterprises.

Id. (emphasis added).

[218] See note 197 *supra* for a discussion of post-*Connecticut Nat'l Bank* cases in the district courts.

[219] *See, e.g.,* First Bancorporation, 68 Fed. Res. Bull. 769 (1982); Hartford Nat'l Corp., 68 Fed. Res. Bull. 242 (1982); United Bank Corp., 67 Fed. Res. Bull. 358 (1981); Key Banks, Inc., 66 Fed. Res. Bull. 781 (1980); Fidelity Union Bancorporation, 66 Fed. Res. Bull. 576 (1980); First Bancorporation, 64 Fed. Res. Bull. 967 (1978); Northeast Bancorporation, 60 Fed. Res. Bull. 375 (1974).

[220] The concept of mitigating or shading the anticompetitive effects of a bank merger arose in United States v. Philadelphia Nat'l Bank, 374 U.S. at 321. The Court stated:

> We note three factors that cause us to shade the percentages given earlier in this opinion, in seeking to calculate market share. (1) The percentages took

merger between commercial banks by considering in its antitrust analysis the competitive impact generated by a substantial thrift[221] presence in the relevant geographic market.

Currently, the Board looks at three general criteria when deciding whether to exercise its discretion to shade[222] the market shares resulting from a horizontal merger of commercial banks: (1) the "absolute size"; (2) the "significant deposit-taking role"; and (3) the "expanded powers" of thrift institutions in the relevant geographic market.[223] Additionally, using a more specific test in a very recent case, the Board stated it would give weight to the competitive impact of thrifts on a commercial banking market when thrifts "are among the largest depository institutions in the market, control a substantial amount of the market's NOW or other transaction accounts, have substantial commercial and nonresidential mortgage lending authority, and actively engage in the business of commercial lending."[224] The Board is unlikely to shade,

---

> no account of banks which do business in the four-county area but have no offices there; . . . (2) [t]he percentages took no account of banks which have offices in the four-county area but not their home offices there; . . . [and] (3) there are no percentages for the amount of business of banks located in the area, other than appellees, which originates in the area.

Id. at 364 n.40.

Shading, according to the *Philadelphia National Bank* Court, did not require mathematical precision:

> No evidence was introduced as to the quantitative significance of these three factors, and appellees do not contend that as a practical matter such evidence could have been obtained. Under the circumstances, we think a downward correction of the percentages to 30% produces a conservative estimate of appellees' market share.

Id. The Court did not offer any further explanation of its method for deriving "a conservative estimate" of market share.

[221] For purposes of shading, the Board has included only federal or state savings and loan associations and mutual savings banks in its definition of thrifts. *See, e.g.*, Fidelity Union Bancorporation, 66 Fed. Res. Bull. at 577.

[222] Shading takes "into consideration *direct competition* from thrifts in *specific areas* when evaluating various competitive influences." United Bank Corp., 67 Fed. Res. Bull. 861, 862 (1981) (emphasis added). In effect, when evaluating the competitive effect thrifts have in the relevant geographic market, the Board looks to those subproduct markets in which thrifts and commercial banks directly compete.

[223] *Id.*

[224] First Bancorporation, 68 Fed. Res. Bull. at 770. In this case the Board noted that several state mutual savings banks serving the relevant geographic market held nearly twice the amount of deposits held by all nine commercial banks in the market. *Id.* at 770. The Board further noted that those thrifts competed directly with commercial banks for sav-

however, if the merger eliminates substantial existing competition.[225]

Other bank regulatory agencies have also included thrifts in their competitive analysis of commercial bank mergers.[226] For ex-

ings deposits, demand deposits and other transaction accounts, and consumer and mortgage loans. *Id.* In addition, the relevant thrifts had been granted authority by state law to dedicate up to 15% of their total deposits to unsecured commercial and industrial loans and to accept demand deposits from commercial customers. *Id.* at 770-71. Finally, the Board noted that the two largest mutual savings banks were actively engaged in commercial lending activities. For example, those thrifts had established commercial lending departments, hired commercial lending officers, were actively advertising the availability of commercial loans, and had made a number of such loans. *Id.* at 771 & n.8. Despite these signs of substantial direct competition the Board did not include the thrifts in the same line of commerce with the commercial banks because the total commercial loans held by the two largest thrifts represented less than one percent of their total deposits. *Id.* at 771 n.9. Thus, although the thrifts could not be included as significant participants in the commercial banking line of commerce, the Board did consider their competitive impact when it shaded the market shares held by the relevant commercial banks. As a result, the Board approved a merger which might otherwise have been disapproved. *Id.* at 771.

In several more recent cases, the Board "has considered the presence of thrift institutions" when assessing the competitive effects of proposed transactions. *See, e.g.*, Comerica Inc., 69 Fed. Res. Bull. 797, 798-99 & nn.5-6, 8 (1983) (accorded "considerable weight" to presence of 21 thrifts which held deposits of $7.4 billion, representing 25% of total deposits, when approving merger resulting in an increase in HHI of 125 points and a post merger HHI of 1,570 because those thrifts "exert a significant competitive influence"); Fidelcor, Inc., 69 Fed. Res. Bull. 445, 446 & n.6 (1983) (although commercial banking market was unconcentrated, the Board noted that thrifts numbering 125 institutions, controlling deposits representing 49.3% of total deposits, including those held by commercial banks, providing NOW accounts, other transaction accounts, consumer loans and commercial loans had been "considered").

[225] *See* United Bank Corp., 66 Fed. Res. Bull. 61, 63 (1980). For other discussions on Board treatment of thrifts in the competitive analysis of commercial bank mergers, see Bleier & Eisenbeis, *supra* note 196, at 378-80; Cairns, *supra* note 191, at 732-33; Friedlander & Slayton, *supra* note 196, at 1543-47; Note, *supra* note 127, at 755-56.

[226] The Federal Home Loan Bank Board (FHLBB) has provided an interesting twist for consideration. In its review of proposed mergers between savings and loans, that agency considered commercial banks to be direct competitors for deposits; "commercial bank deposits less than $100,000 are used in calculating market shares." Bleier & Eisenbeis, *supra* note 196, at 381 n.15.

Several commentators have suggested that the banking regulatory agencies have all but rejected commercial banking as a unique line of commerce. *See, e.g.*, Bleier & Eisenbeis, *supra* note 196, at 380-81 (both the Comptroller and the FDIC expanded the "line of commerce" in Maine where they have included thrift institutions as full competitors); Cairns, *supra* note 196, at 732-33; Friedlander & Slayton, *supra* note 196, at 1547-48; Note, *supra* note 127, at 755-56 n.147 (the Comptroller "has explicitly rejected the traditional definition of the 'line of commerce' for bank merger purposes") (citing Decision of the Comptroller of the Currency on the Application to Merge Merchants Nat'l Bank, Bangor, Me., into Northern Nat'l Bank, Presque Isle, Me., 8 n.12 (Dec. 12, 1980)).

ample, in a recent decision the Comptroller of the Currency (Comptroller) included four mutual savings banks in its analysis of a merger between two commercial banks in the Bangor, Maine geographic market.[227] The Comptroller, however, adopted a unique appoach. It neither suggested consideration of "*all* thrifts with *all* commercial banks for *all* services in the same markets," nor did it merely shade the percentage market shares of the merging banks.[228] Instead, the Comptroller advocated a subproduct market analysis. By analyzing competition for "precisely defined clusters of products and services," or even specific products,[229] the Comptroller hoped to "avoid an arbitrary increase in market participants since it would simply redefine the market to include some or none of the various financial institutions in the market."[230] In effect, by using the more complex subproduct market analysis the Comptroller expected to reveal competition where it in fact existed, while avoiding the arbitrariness of shading which might prevent discovery of anticompetitive effects.[231]

IV. APPLICATION OF THE 1982 GUIDELINES TO COMMERCIAL BANK MERGERS

The 1982 Guidelines are not binding on either the courts or the Department. The courts may continue to follow those precedents established in the case law.[232] The Department has reserved the right to exercise its judgment in lieu of strict adherence to its own guidelines.[233] Nevertheless, the 1982 Guidelines will have at least an indirect effect on Department antitrust challenges to agency ap-

---

[227] Decision of the Comptroller, *supra* note 226, at 5.

[228] *Id.* at 8-9 n.12. *See also* Friedlander & Slayton, *supra* note 196, at 1547; Note, *supra* note 127, at 756 n.147.

[229] Decision of the Comptroller, *supra* note 226, at 9 n.12. *See also* Friedlander & Slayton, *supra* note 196, at 1547.

[230] Decision of the Comptroller, *supra* note 226, at 9 n.12.

[231] *See* Friedlander & Slayton, *supra* note 196, at 1547-48. For listings of decisions by the FDIC including thrifts in the competitive analysis of commercial bank mergers, see Bleier & Eisenbeis, *supra* note 196, at 380 n.14; Note, *supra* note 127, at 756 n.147.

[232] "[T]he Guidelines are designed primarily to indicate when the Department is likely to challenge mergers. . . ." 1982 Guidelines, *supra* note 4, at ¶ 4501. The Guidelines are not a regulatory expression of statutes. *See id.* at ¶ 4501 n.3 (the Guidelines are subject to amendment in response to judicial decisions and evolving economic theory).

[233] *See* note 111 *supra.*

proved commercial bank mergers, because these guidelines embody the procedures which will guide the Department in its merger enforcement policy.[234] Thus, it is inevitable that the methods used in that decision making process will find their way into actual litigation, perhaps through exhibits, testimony, or other offers of proof of anticompetitive effects.[235]

A. *Applicability of the 1982 Guidelines to Commercial Bank Mergers*

The Department intends to apply its 1982 Guidelines when deciding whether to challenge acquisitions or mergers subject to section 7 of the Clayton Act or section 1 of the Sherman Act.[236] In addition, those guidelines were written to ensure enforcement of section 7 of the Clayton Act in a manner consistent with congressional intent to interdict anticompetitive developments in their incipiency, such as a merger exhibiting a substantial probability of anticompetitive effect.[237] Pursuant to the Bank Merger Act and the Bank Holding Company Act,[238] mergers between insured commercial banks and bank holding companies are subject to Department challenge under the antitrust laws, including section 7 of the Clayton Act and section 1 of the Sherman Act.[239] Thus, the 1982 Guidelines were written broadly enough to embrace commercial bank mergers.

B. *Impact of the 1982 Guidelines on Tests Developed Through Antitrust Litigation*

Pursuant to its 1982 Guidelines, when analyzing a bank merger, the Department will first define a relevant market for each product or service for which the merging firms compete.[240] Commer-

---

[234] *Id.*

[235] The Department has stated, however, that the factors set forth in the Guidelines "do not exhaust the range of evidence that the Department may introduce in court." 1982 Guidelines, *supra* note 4, at ¶ 4502.

[236] *Id.*

[237] *Id.*

[238] 12 U.S.C. §§ 1828, 1841. *See* text accompanying notes 136-40 *supra.*

[239] *See* notes 146-50 *supra* and accompanying text.

[240] Werden, *supra* note 60, at 526-27 & n.48. *See* notes 107-26 *supra* and accompanying text.

cial banks may be characterized as providing either commercial banking services, where all financial services offered by such banks are aggregated into a single line of commerce, or separate financial services.[241] Thus, the guidelines provide the Department with the flexibility to conduct product market analysis by delineating either a single market comprising a cluster of various financial services or separate markets for each distinct service offered by the merging banks.[242]

Second, the Department abandoned the "perfect substitutability" requirement of its 1968 Guidelines for defining the boundaries of a relevant product market.[243] Instead, the Department proposed in its 1982 Guidelines that, as a first step in defining a relevant product market, the Department would establish a provisional market comprising those products or services constituting "good substitutes *at prevailing prices*" for those products or services offered by the merging firms to their consumers.[244] The Department will determine product substitutability by following criteria reminiscent of those practical indicia used by the *Brown Shoe* Court for determining submarket boundaries.[245] The Department, therefore, apparently recognizes that it is unable to determine the "reasonable interchangeability" of a product at that product's competitive price.[246] Thus, rather than pursue the difficult task of defining the relevant product market in terms of cross-elasticities,[247] the Depart-

[241] *See generally* Yesley, *supra* note 12, at 17 (explaining arguments for both characterizations). *See also* Werden, *supra* note 60, at 527, 531 & nn.50, 63-64.

[242] However, the Guidelines specify that "unless it is convinced that independent competitive concerns exist in a larger market," the Department will adopt the smallest market meeting its criteria. 1982 Guidelines, *supra* note 4, ¶ 4502.10, at 6881-8 n.11. *See* Werden, *supra* note 60, at 532.

[243] *See* 1982 Guidelines, *supra* note 4, at ¶ 4502.18. *See also* notes 105-10 *supra* and accompanying text.

[244] *See* text accompanying notes 109-10 *supra*.

[245] *See* text accompanying notes 122 & 166 *supra*. *See also* R. POSNER, *supra* note 31, at 131-32 (products and services meeting the "practical indicia" criteria are "good substitutes"). *But see* Werden, *supra* note 60, at 575 (markets, as opposed to submarkets, are not delineated using *Brown Shoe*-type "practical indicia"; the 1982 Guidelines, however, use market criteria similar to the more simplistic "practical indicia").

[246] *Compare* E. SINGER, *supra* note 34, at 56 (supports defining the market by using "reasonable interchangeability at the competitive price") *with* R. POSNER, *supra* note 31, at 131-32 (supporting the apparent pragmatic approach of the 1982 Guidelines).

[247] Because "it is only the notion of cross-elasticity that is useful [and] not the measure itself," the 1982 Guidelines implicitly reject cross-elasticity as a market boundary test. Werden, *supra* note 60, at 572-73 & n.149.

ment chose to define product markets (not submarkets) according to "functional interchangeability" and practical indicia, without requiring fungibility.[248]

Third, the Department placed an emphasis on the necessity of producing economic evidence to prove or disprove that a merger demonstrates a substantial probability of anticompetitive effects.[249] According to the Chief Economist of the Department's Antitrust Division, the use of hypothetical five percent price increases encourages the use of econometrics and discourages the use of those "seat-of-the-pants" methods previously used to define relevant product markets.[250] Although probably willing to admit that any definition of a relevant product market is at best an approximation,[251] the Department is clearly encouraging statistical accuracy to dispel the previously inherent guesswork aspects of product market definition.[252] Thus, it seems the Department has targeted shading for extinction because shading is mathematically crude and reflects guesswork.[253] In addition, the Department will be unable to utilize its hypothetical five percent price increases for defining the relevant product market unless it first disaggregates a product market represented as a "cluster" into separate markets comprising individually priced products and services.[254]

---

[248] *See* 1982 Guidelines, *supra* note 4, at ¶ 4502.

[249] *Id.*

[250] *See* notes 117-21 *supra* and accompanying text.

[251] *See Chief Economist, supra* note 117, at 1302 ("While Justice will be looking for as much quantitative information as possible, it will recognize the limitations of the exercises prescribed by the merger guidelines."). See also note 206 *supra* for statement of Justice Harlan's view that market definitions are necessarily approximations.

[252] *See* notes 117-19 *supra* and accompanying text.

[253] *Cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364 n.40 (1963) (noting the lack of precision in shading).

[254] *See* 1982 Guidelines, *supra* note 4, at ¶ 4501. *See also* text accompanying notes 118-21 *supra.* "Interest-sensitive" customers can shop around because many banks separately price their individual services. Note, *supra* note 127, at 753-54. "Separately priced [services] cannot be typified as 'clustered.' " *Id.* at 753 n.135.

The 1982 Guidelines reject the idea that *Brown Shoe*-type submarkets are valuable for antitrust analysis. Instead, those guidelines only consider a market defined as a group of products and an area "such that a hypothetical monopolist of those products in that area would increase price significantly" to be significant. Werden, *supra* note 60, at 575.

"[T]he [1982] Guidelines recognize that there may be markets within markets; the Guidelines' definition of a market generally implies an infinite number of concentric markets." *Id.* Antitrust analysis pursuant to those guidelines considers "only the smallest of these markets to be relevant." *Id.* The "smallest market" is that market comprising "the smallest [geographic] area and group of products that clearly constitute a market." *Id.* at 578.

A literal reading of the 1982 Guidelines also suggests that thrifts may be included in the same line of commerce with commercial banks without requiring those thrifts to become "significant participants" or to display actual "competitive overlap" in the marketing of assets to commercial enterprises.[255] Recent federal and state legislation, including the Depository Institutions Deregulation and Monetary Control Act of 1980, authorize certain thrifts to participate in banking markets previously occupied only by commercial banks.[256] As a result, case law and agency opinions reflect a belief that certain thrifts are approaching parity with commercial banks in many aspects of the banking business.[257] Although those thrifts generally have not actually committed their assets to the full extent of their authorized participation in those banking markets,[258] the 1982 Guidelines suggest that those thrifts authorized to engage in commercial banking activities may be included in the same product market with commercial banks if a five percent increase in

---

[255] *See* 1982 Guidelines, *supra* note 4, at ¶ 4502.

> The potential weakness of . . . a market based solely on existing patterns of supply and demand is that those patterns might change substantially if the prices of the products included in the . . . market were to increase. . . . The Department will add additional products to the market if a significant percentage of the buyers of products already included would be likely to shift to those other products in response to a small but significant and non-transitory increase in price.

Id. at ¶ 4502.10

> [P]roduction substitution may allow firms that do not currently produce the relevant product to respond effectively to an increase in the price of that product.
>
> If a firm has existing productive and distributive facilities that could easily and economically be used to produce and sell the relevant product within six months in response to a small but significant and nontransitory increase in price, the Department will include those facilities in the market.

Id. at ¶ 4502.201. *See also* Werden, *supra* note 60, at 523 & n.32 (assigned market shares may include firms not actually competing currently).

The courts and the Board have required actual and significant participation in commercial banking activities before thrifts can and will be included in the same product market with commercial banks. *See* United States v. Connecticut Nat'l Bank, 418 U.S. 656, 663-66 (1974). See also note 197 *supra* for a list of district court cases. *But see* First Bancorporation, 68 Fed. Res. Bull. 769 (1982).

[256] *See* note 197 *supra.*

[257] *See, e.g.,* United States v. Connecticut Nat'l Bank, 418 U.S. at 666; United Bank Corp., 67 Fed. Res. Bull. 861 (1981).

[258] *Cf.* United States v. Connecticut National Bank, 418 U.S. at 665-66 (Court observed practical impediment to thrift participation in the commercial loan market and the consequent slight participation).

prices of products and services offered by commercial banks would cause a significant percentage of consumers of those products and services to substitute the functional equivalents offered by thrifts within one year of the price increase.[259]

The 1982 Guidelines further provide that the Department will include in the relevant line of commerce with commercial banks only that thrift capacity, represented by market share, likely to be used in response to a hypothetical price increase by commercial banks in products and services for which thrifts offer good substitutes.[260] Thus, if a mutual savings bank is authorized to dedicate only five percent of its assets to commercial loans, the Department may include that five percent, to the extent those assets are not otherwise committed, in the relevant product market.[261]

Finally, fragmentation of the cluster of products and services into individual product markets pursuant to the 1982 Guidelines is more consistent with the Clayton Act section 7 incipiency standard.[262] Individual product market analysis focuses upon those points where two related industries, commercial banks and thrifts, are attempting to expand their respective shares at the expense of each other through demand deposits and commercial loans, and thus recognizes "meaningful competition where it is found to exist."[263] Moreover, the distinctions between commercial banks and thrifts have become blurred as a result of recent trends in legislation,[264] judicial opinions,[265] and agency decisions.[266] Thus,

---

[259] The 1982 Guidelines do not require actual or present participation. The product market is defined, after first postulating a provisional market comprising "good substitutes," by expanding that product market to include all "good substitutes," a significant percentage of which consumers would use within one year after a nontransitory five percent increase in price of the product or service. Thus, if commercial banks increasing commercial loan prices by five percent would cause a significant percentage of the consumers of those loans to take their business to a mutual savings bank or a savings and loan in the same geographic market, the Department would include that thrift's market share of commercial loans in its antitrust analysis. *See* 1982 Guidelines, *supra* note 4, ¶ 4510(2), at 6882.

[260] *See* 1982 Guidelines, *supra* note 4, at ¶¶ 4502.10, .40.

[261] Under the MCA such a 5% limit is imposed on federal mutual savings banks. *See* note 197 *supra*.

[262] *See* notes 127-50, 167-92 *supra* and accompanying text.

[263] *Cf.* United States v. Continental Can Co., 378 U.S. 441 (1964) (Court used submarkets in its analysis).

[264] *See* note 197 *supra*.

[265] *Id.*

[266] *See, e.g.*, Northeast Bancorporation, 60 Fed. Res. Bull. 375 (1974).

industry recognition of uniqueness, so important to the determination in *Grinnell* that a cluster of services constituted the relevant product market,[267] no longer exists in the banking and thrift industries.

C. *The Herfindahl-Hirschman Index*

It is too early to pass judgment on the efficacy of the Department's use of the HHI in the 1982 Guidelines. The HHI theoretically exhibits two advantages over the four-firm concentration ratio previously used in the 1968 Guidelines: the HHI is both a summary measure of the entire market and a measure of size disparity between the individual firms within that market.[268] Both the HHI and the four-firm concentration ratio share a common weakness: neither method can reliably relate its characteristic measurements unless the product and geographic markets surveyed are accurately defined.[269] Because of its overweighting feature, the HHI may provide more distorted information than the four-firm concentration ratio if the relevant market is inaccurately defined.[270] Thus, given the uncertainty inherent in defining the relevant product market in banking mergers and the close correlation existing between the HHI and the four-firm concentration ratio,[271] it is questionable whether the HHI provides any distinct benefit.

CONCLUSION

An attorney advising a commercial bank about a proposed merger or arguing the merits of that merger before a regulatory agency or a court must recognize that the Department of Justice, through the promulgation of the 1982 Guidelines, has joined the ranks of those courts, agencies, and legal scholars suggesting a reevaluation of the product market definition relevant to the antitrust analysis of commercial bank mergers.

More importantly, that attorney must recognize that the

---

[267] *See* United States v. Grinnell Corp., 384 U.S. 563, 572-74 (1963).

[268] *See* text accompanying notes 46-49 *supra*.

[269] *See* text accompanying note 72 *supra*.

[270] *See* text accompanying notes 63-67 *supra*.

[271] *See* text accompanying note 70 *supra*.

Department, pursuant to the Guidelines, may evaluate a proposed merger by analzying anticompetitive effects on the individual product markets comprising the cluster of products and services referred to as "commercial banking," which previously had been the focus of market analysis. That method of analysis may appear to be less stringent, given the allowance for the competition represented by those thrifts present in the geographic market. Nevertheless, individual product market analysis is a sword that cuts both ways: a bank merger may be challenged by the Department because of a substantial probability of anticompetitive effect on one or more of the individual product markets represented, even though the "cluster" of products and services heretofore known as "commercial banking" remains competitive. Furthermore, section 7 of the Clayton Act provides adequate justification for the Department, utilizing the 1982 Guidelines, to look beyond the cluster by conducting antitrust analysis on those individual product markets: enforcement actions pursuant to section 7 are designed to thwart in its incipiency economic concentration and the possibility of collusion. Banking institutions considering a merger, therefore, should be prepared to demonstrate that the merger does not violate the antitrust laws when using either the "cluster" product market definition or individual product market analysis.