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Canada v. United States: Antitrust Review of Bank Mergers

A Case of the Tortoise and the Hare?

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Foreword

During the past decade, the banking industry in the United States and Canada has experienced significant consolidation in order to achieve efficiency and to expand service areas geographically beyond a particular city or region. At the same time, due to the expansion of alternative providers of "banking" services, the actual concentration levels for these services have decreased.

For historical reasons (not least because of a nationally integrated banking network), the Canadian banking industry is significantly more concentrated than that of the United States, particularly if alternative providers are not taken into account. What is unclear is whether the diametrically opposed outcomes in the recent banking enforcement decisions of the Untied States and Canada result from different market dynamics (including political climate) or different analytical approaches. The articles in this special issue provide the framework for exploring this question.

The articles written by David Neill and John Danforth set forth a lawyer's and an economist's views of the standards employed by the U.S. federal agencies, as well as the market dynamics and economic and non-economic factors considered, in evaluating proposed banking transactions. Both articles discuss the established higher HHI safe harbor benchmark of 1800/200 used in bank transactions — a higher benchmark than specified for general applicability in the 1992 Horizontal Merger GLU'delines due to the "leakage" to non-bank and savings institutions of the broadly defined credit, transactions, and investment services banks and savings institutions supply. Mr Danforth's article recommends the further relaxation of the safe harbor benchmarks in financial institutions transactions to a 2200/250 standard. The rationale for such a change is the continuing and increasing level of leakage to such non-financial institutions of "banking" services, which has resulted in an actual deconcentration of deposits in the vast majority of markets.

In contrast to the relaxed benchmark approach in the United States, the Canadian approach appears to single out the banking industry for harsher than usual treatment, applying industry-specific standards. Messrs. Bodrug and Crampton's article discusses two recently proposed mega-bank transactions, which combined would have resulted in the five major nationwide banks becoming two. The Canadian Minister of Finance, who has the final say over bank mergers, ultimately decided to block the transactions because they were not in the so-called "public interest," a decision driven in large part by political considerations. The approach taken by the Director of the Competition Bureau also deviated from the norm in its rigidly structuralist approach to competitive effects and its dismissive treatment of efficiencies; the Director also took a narrow view of supply-side substitutes. As Messrs. Bodrug and Crampton indicate, it remains to be seen whether the approach taken in these recent Canadian bank decisions constitutes a sui generis treatment of the specific banking transactions at issue or a harbinger of the analysis to be applied more broadly to future mega-transactions in both the banking and non-banking industries.

For the moment, Canadian financial institutions will not be taking up new waltzing partners. Ottawa has announced its intention to redefine the policy and regulatory framework for the financial sector as a whole. This will include putting in place a new review process to assess major bank merger proposals. In the interim (six months to two years), the Canadian government will not consider any merger among major banks. But even when a new framework is in place, new merger proponents, as the Minister has stated, will have to show that they can clear three hurdles—that the merger will not concentrate economic power unduly, that competition will not be reduced significantly, and that a proposed transaction does not restrict the government's flexibility to address prudential concerns.