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Antitrust and Bank Mergers: United States v. Phillipsburg National Bank and Trust Co.

Two small banks, Phillipsburg National Bank and Trust Co. (PNB) and Second National Bank of Phillipsburg (SNB), both located in Phillipsburg, New Jersey, sought to merge. The city of Phillipsburg was considered part of "one town," the metropolitan area of Phillipsburg and Easton, Pennsylvania. The two cities and their suburbs had a combined population of approximately 90,000, with seven commercial banks, four in Easton and three in Phillipsburg. PNB and SNB were respectively the third and fifth largest in overall banking business in "one town." They were direct competitors, oriented towards the needs of small depositors and borrowers. Both banks primarily served Phillipsburg residents. The merger would produce a bank second in size of the remaining six commercial banks in "one town."[1] Phillipsburg-Easton was located in Lehigh Valley, an area of approximately 1,000 square miles with a population of about 500,000 and a total of 38 banks. There was considerable mobility among the residents of the Lehigh Valley area for social, shopping, and employment purposes. As required by the Bank Merger Act,[2] independent reports on the competitive factors of the proposed merger were obtained from the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), and the Attorney General. All three said that the merger would have a harmful effect upon commercial banking competition in Phillipsburg-Easton. The Comptroller of Currency nevertheless approved the proposed merger, finding that the agencies had defined the product and geographic markets too narrowly. The district court upheld the proposed merger, saying that there would be minimal anticompetitive effect and, further, that any reduction in competition would be clearly outweighed by public interest.[3] The Government appealed.[4] *Held, reversed and remanded*: The relevant product is commercial banking—without consideration of competition from other sources; the relevant geographic market is Phillipsburg-Easton, and the "convenience and needs" of the community must be evaluated in the relevant geographic market. *United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350 (1970).

I. SECTION 7 OF THE CLAYTON ACT

Beginning in 1890 with the passage of the Sherman Act,[5] Congress has consistently indicated that market competition must be maintained and

[1] The resulting bank in the "one town" area would have 19.3% of total assets, 23.4% of total deposits, 19.2% of total demand deposits, and 27.3% of total loans.

[2] 12 U.S.C. § 1828(c)(4) (Supp. III, 1968).

[3] United States v. Phillipsburg Nat'l Bank & Trust Co., 306 F. Supp. 645 (D.N.J. 1969).

[4] This was a direct appeal under the Expediting Act, 15 U.S.C. § 29 (1965). Probable jurisdiction was noted at 397 U.S. 933 (1970).

[5] Act of July 2, 1890, ch. 647, §§ 1-8, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1965)).

has thus imposed restrictions on business activity through antitrust legislation. Under section 2 of the Sherman Act,[6] as construed by the Supreme Court, large firm size has not been considered illegal per se, but rather has been judged by the "rule of reason."[7] This rule first stresses the existence of an undue concentration of market power, and secondly the existence of predatory acts or illegal motives underlying the acquisition and the deployment of that power. The "rule of reason," or the Sherman Act standard, has been interpreted to mean that the acquisition of competitors may be allowed if the court finds that the competitive restraint thus created is not "unreasonable."[8]

The Clayton Act,[9] enacted in 1914, was designed to supplement the Sherman Act.[10] Mergers had been typically accomplished by acquisition of the corporate stock of competitor firms. In an effort to limit this widely used method of restricting competition, and thus to halt the formation of monopolistic power at its inception, Congress included section 7 of the Clayton Act. Section 7 prohibited any acquisition of *stock* which substantially restrained competition between corporations involved in a merger. However, it became evident that anticompetitive mergers could still be accomplished by *asset* acquisition.[11] Also, early Supreme Court decisions tended to apply to alleged section 7 violations the "rule of reason" test used for Sherman Act violations,[12] thereby approving mergers which were not "unreasonable" restraints of trade.[13]

In an attempt to provide effective antimerger legislation, section 7 was amended in 1950 by the Celler-Kefauver Act.[14] The amended section 7 prohibited the acquisition of stock or *assets* "where in any line of commerce in any section of the country, the effect of such acquisition, . . . may be substantially to lessen competition, or to tend to create a monopoly."[15] The clause banning asset acquisitions extended to all corporations under the jurisdiction of the Federal Trade Commission.[16]

The first Supreme Court interpretation of the Celler-Kefauver Act was

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[6] Section 2 of the Sherman Act is directed to unlawful monopolization of trade: "[E]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 2 (1965).

[7] Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911).

[8] *See* United States v. Columbia Steel Co., 334 U.S. 495 (1948), in which the Court permitted Columbia Steel Co., a subsidiary of the recognized price leader, United States Steel Corp., to acquire an important competitor on the ground that the acquisition did not impose an "unreasonable restraint" of trade. By its decision, the Court indicated that it still adheres to the "rule of reason" (the Sherman Act test) for judging mergers. *See also* V. MUND, GOVERNMENT AND BUSINESS 133, 134 (4th ed. 1965).

[9] Act of Oct. 15, 1914, ch. 323, §§ 2-26, 38 Stat. 730 (codified at 15 U.S.C. §§ 12-24, 44 (1964)).

[10] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355 (1922).

[11] V. MUND, *supra* note 8, at 144. *And see* Arrow-Hart & Hegerman Elec. Co. v. FTC, 291 U.S. 587 (1934); Swift & Co. v. FTC, 272 U.S. 554 (1926).

[12] *See* notes 7, 8 *supra*, and accompanying text.

[13] *See* International Shoe Co. v. FTC, 280 U.S. 291 (1930); United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935).

[14] Act of Dec. 29, 1950, ch. 1184, §§ 7, 11, 64 Stat. 1125 (codified at 15 U.S.C. § 18 (1965)).

[15] *Id.*

[16] *Id.*; *see* note 30 *infra*.

Brown Shoe Co. v. United States,[17] decided in 1962. The Court stated that the primary consideration in adopting the amendment was "a fear of what was considered to be a rising tide of economic concentration in the American economy."[18] The Court rejected Sherman Act standards as inappropriate for application to section 7 cases.[19] Thus, any merger having substantial anticompetitive effects in an "economically significant market"[20] would be invalid. To determine what was an "economically significant market" the Court defined the "product market"[21] and the "geographic market."[22] The product market was to be determined by the "reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it,"[23] while the geographic market selected for testing must both "correspond to the commercial realities of the industry and be economically significant."[24] The Court concluded that the market share which the merged company may control is one of the major factors of anticompetitiveness.[25] The Court also emphasized that it is necessary to examine market shares against the setting of a particular market.[26] The Court looked particularly at *market structure* features: the number of firms, product characteristics, conditions of entry, and the degree of concentration. *Brown Shoe* thus appeared to define the principal criterion for assessing a merger as its "qualitative substantiality" (its

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[17] 370 U.S. 294 (1962).

[18] *Id.* at 315.

[19] The amended § 7, declared the Court, was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act. *Id.* at 317, 318. *See* notes 7, 8 *supra*, and accompanying text.

[20] 370 U.S. at 335. "The 1950 amendments made plain Congress' intent that the validity of [mergers] was to be gauged on a broader scale [than that used prior to 1950]: their effect on competition generally in an economically significant market." *Id.* The concept of an "economically significant market" encompasses both product and geographical considerations. Section 7 of the Clayton Act forbids acquisition by a corporation of the stock or assets of another corporation where such acquisition may substantially lessen competition, or tend to create a monopoly "in any line of commerce" and "in any section of the country." *See* note 15 *supra*, and accompanying text. "Line of commerce" is denominated by the product market, and "section of the country" is denominated by the geographic market. The Senate Report on the 1950 amendment to § 7 stated:

> What constitutes a section [of the country] will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section [of the country], whether such definition were based on miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.

S. REP. No. 1775, 81st Cong., 2d Sess. 4, 5-6 (1950), reprinted in U.S. CODE CONG. SERV. 4293, 4297-98 (1950).

[21] *See* note 20 *supra*.

[22] *Id.*

[23] 370 U.S. at 325.

[24] *Id.* at 336-37. Mergers between companies standing in a customer-supplier relationship are characterized as "vertical" mergers, while mergers between companies performing similar functions in the production or sale of comparable goods or services are characterized as "horizontal" mergers. The Court distinguished between the horizontal and vertical aspects of the proposed merger in *Brown Shoe*. As to the geographic market for the vertical aspects of the merger, the Court held that the "relationships of product value, bulk, weight and consumer demand" made shoe manufacturing a nationwide market. *Id.* at 328. As to the horizontal aspects, the Court stated that while the geographic market may encompass the entire nation in some cases, in others it may be as small as a single metropolitan area of 10,000 population. *Id.* at 337. *See* note 20 *supra*, and accompanying text.

[25] 370 U.S. at 343.

[26] *Id.* at 321-22. The Court stated that a merger must "be functionally viewed, in the context of its particular industry." *Id.*

overall impact on competition in the particular industry), rather than its "quantitative substantiality" (the size and market share of the resulting post-merger corporation).[27] One year later, however, *United States v. Philadelphia National Bank*[28] placed this interpretation in doubt.

II. Application of Antitrust to Bank Mergers

Prior to the 1950 Celler-Kefauver Act, bank mergers had been exempt from section 7 of the Clayton Act.[29] After the 1950 amendment to section 7, bank mergers were still generally thought to be exempt, because banks were not subject to the jurisdiction of the Federal Trade Commission[30] and bank mergers were generally not accomplished through stock acquisitions.[31]

The period between 1950 and 1960 was one which the Supreme Court described as "having witnessed a definite trend towards concentration"[32] in commercial banking. To combat this trend, and to reconcile policies of state and federal regulation of banking with policies for the maintenance of competition in banking, Congress passed the 1960 Bank Merger Act.[33] Theoretically, the Act sought to achieve a balance between competitive and banking factors. The Act delegated responsibility for the administrative approval of bank mergers to three federal agencies,[34] which were directed to evaluate banking factors, including: (1) financial history and condition of the bank involved, (2) adequacy of its capital structure, (3) general character of its management, (4) the convenience and needs of the community to be served, and (5) whether its corporate powers were consistent with the purposes of the Act. Alternatively, the three agencies were to consider possible anticompetitive effects. The merger could be approved only if after considering all these factors, the appropriate agency found the transaction "to be in the public interest."[35] Thus, in theory, although the Act was designed to prevent unduly anticompetitive bank mergers, if the agencies determined that the banking factors

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[27] A. Neale, The Antitrust Laws of the United States of America 185 (2d ed. 1970).

[28] 374 U.S. 321 (1963).

[29] *See 1966 Amendment to the Bank Merger Act: Economic Perspective and Legal Analysis*, 20 Vand. L. Rev. 200, 212 (1966).

[30] 15 U.S.C. § 45(a)(b) (1965). Section 7 of the Clayton Act provides in part that no corporation subject to the Federal Trade Commission shall acquire the assets of another corporation where the effect would be substantially to lessen competition or tend to create a monopoly. 15 U.S.C. § 18 (1965). This would seem to indicate that banks could acquire the assets of other banks without being subject to § 7.

[31] *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 378 (1963) (dissenting opinion), citing S. Rep. No. 196, 86th Cong., 1st Sess. 1-2 (1959). If bank mergers are not accomplished by stock acquisition, then they are accomplished by asset acquisition, and are thus seemingly exempt from § 7. *See* note 30 *supra*, and accompanying text.

[32] United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 325 (1963).

[33] Act of May 13, 1960, Pub. L. No. 86-463, 74 Stat. 129 (codified at 12 U.S.C. § 1828(c) (1965)).

[34] The 1960 Act provided that the regulatory agency to approve bank mergers is the Comptroller of Currency when the resulting bank is a national bank; the Federal Reserve Board, when the resulting bank is a state-chartered member of the Federal Reserve System; and the FDIC, when the resulting bank is a non-member of the Federal Reserve System and is insured by the FDIC. *Id.* These same provisions are found in the 1966 Act. *See* note 42 *infra.*

[35] 12 U.S.C. § 1825(c)(2) (1965).

outweighed the anticompetitive effects, an anticompetitive merger could be approved in the "public interest."[36]

It was not long, however, before the Supreme Court rejected this theory. In *United States v. Philadelphia National Bank*,[37] decided in 1963, the Court refused to accept the contention that the Comptroller's approval under the 1960 Bank Merger Act immunized bank mergers from scrutiny under the Clayton Act. The Court held not only that section 7 of the Clayton Act was applicable to bank mergers, but that bank mergers were to be judged only by competitive factors.[38] Thus, the banking factors applied by the regulatory agencies under the 1960 Act were not considered by the Court. The relevant product market was "the cluster of products . . . and services . . . denoted by the term 'commercial banking.' "[39] The relevant geographic area "must be charted by careful selection of the market area in which the seller operates, and to which the buyer can practicably turn for supplies . . . ."[40] Since *Philadelphia Bank* made competition the only criterion of legality for bank mergers, the validity of the Bank Merger Act of 1960 was placed in doubt.

To resolve the uncertainty Congress passed the Bank Merger Act of 1966,[41] which adopted a standard of "convenience and needs." Under the standard the merger might be approved if it served the convenience and needs of the community, and if such benefit clearly outweighed the merger's anticompetitive effects. Thus, Congress was willing to allow certain mergers even if they reduced competition.

United States v. First City National Bank[42] provided the first opportunity for the Supreme Court to test a proposed merger under the 1966 Act. In an opinion seemingly reaffirming *Philadelphia Bank*, the anticompetitive effect of a bank merger was held to be actionable under the existing anti-

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[36] S. REP. No. 196, 86th Cong., 1st Sess. 19-23 (1959).

[37] 374 U.S. 321 (1963).

[38] *Id.* at 371. "A merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial . . . . Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and malignant alike . . . ." *Id.* Subsequent to *Philadelphia Bank*, the Court held that a merger which eliminated significant competition between banks constituted an unreasonable restraint of trade in violation of § 1 of the Sherman Act. United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

[39] *Id.* at 356. *See* note 20 *supra*, and accompanying text.

[40] 374 U.S. at 359, quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); *see* note 20 *supra*, and accompanying text.

[41] Act of Feb. 21, 1966, Pub. L. No. 89-356, 80 Stat. 7 (codified at 12 U.S.C. § 1828(c) (Supp. II, 1967)). The Act provides in part:

> The responsible agency shall not approve: (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize [business] . . . (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition . . . *unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.* In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Id. § 1828(c)(5) (emphasis added). Under the 1966 Act, "competitive factor" reports must be obtained from the Attorney General as well as the banking regulatory agencies (*id.* § 1828(c)(4)). As to the appropriate agency to give approval, see note 34 *supra*.

[42] 386 U.S. 361 (1967).

trust laws.[43] Additionally, the 1966 Act was held not to have changed the standards for application of section 7 of the Clayton Act. The Court stated, however, that the Act provided a new defense, *i.e.*, "convenience and needs." First, a trial court must determine the anticompetitive effects of the proposed merger, judged by antitrust standards. Second, if the merger is found to be anticompetitive, a court must determine whether the public interest (convenience and needs of the community) outweighs the anticompetitive effects. In *United States v. Third National Bank*[44] the Court restricted the "convenience and needs" test by conditioning merger approval upon a finding of the unavailability of alternative solutions to the problems of the smaller or weaker bank.

Thus, after a long battle over application *vel non* of section 7 to bank mergers, a compromise emerged. Section 7 was to be applied to bank mergers, but mergers could still be approved if the "convenience and needs of the community" outweighed the anticompetitive effects, and if no suitable alternative to merger was shown. It was against this background that *Phillipsburg* appeared.

III. UNITED STATES v. PHILLIPSBURG NATIONAL BANK & TRUST CO.

Some critics of the decisions of the United States Supreme Court in antitrust cases have complained that the Court has used a simplistic, "big is bad" rationale.[45] After the decision in *United States v. Phillipsburg National Bank & Trust Co.*,[46] however, it cannot be said that the Court looks upon smallness as a virtue. In *Phillipsburg* the Court found that "[m]ergers of directly competing small commercial banks in small communities, no less than those of large banks in large communities, are subject to scrutiny under these [same antitrust] standards."[47]

The Court, in judging the proposed merger between two small banks whose combined assets were approximately $41 million, applied the standards developed in large bank merger cases. Relying chiefly on *Philadelphia Bank*, in which the assets of the resulting bank would have totaled almost $2 billion,[48] the Court reasoned that the localization of business typical of the banking industry is particularly pronounced when small customers are involved.[49] Because of this pronounced localization, the relevant geographic area became Phillipsburg-Easton.[50]

[43] Therefore, a suit alleging anticompetitiveness did not have to be brought under the Bank Merger Act, but could be brought under the Sherman or Clayton Acts. *Id.*

[44] 390 U.S. 171 (1968).

[45] In a dissenting opinion Mr. Justice Harlan stated that "the Court's opinion amounts to an invocation of antitrust numerology and a presumption that in the antitrust field good things come usually, if not always, in small packages." United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 673-80 (1964). He then argued that the majority found no fault except bigness. *Id.* at 676.

[46] 399 U.S. 350 (1970).

[47] *Id.* at 358.

[48] The resulting bank after the merger would have had assets of $1,805.3 million. United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 373 n.1 (1970) (dissenting opinion).

[49] The Court stated that "[s]mall depositors have little reason to deal with a bank other than the one most geographically convenient to them. For such persons, geographical convenience can be a more powerful influence than the availability of a higher rate of interest and a more distant, though still nearby, bank." 399 U.S. at 363-64.

[50] The Supreme Court reasoned that Phillipsburg-Easton was the relevant geographic area be-

Regarding the relevant product market, the district court's opinion was that a distinction should be drawn between products and services involving significant anticompetitive effects and those involving widespread competition from other sources.[51] The Supreme Court agreed that the relevant product market is determined by the nature of the commercial entities involved and by the nature of the competition which they face. However, submarkets are not a basis for disregard of a broader line of commerce—commercial banking—that has economic significance. The Court concluded that the cluster of products and services denoted by the term "commercial banking" has economic significance well beyond the various products and services involved, and commercial banking is, therefore, the relevant product.[52]

The Court then directed its attention to the anticompetitive effects of the merger. Emphasizing that a merger must be judged by its tendency to spawn a firm that controls "an undue percentage share" of the relevant market and to cause a "significant increase in the concentration of firms in that market,"[53] the Court concluded that the merger would be anticompetitive. Therefore, the merger would, absent the Bank Merger Act, violate section 7 of the Clayton Act. To reach this conclusion, the Court calculated the percentage share of the relevant market that the merged bank would hold, and the resulting changes in market "concentration," as measured by the percentage of the total banking market that would be held cumulatively by the two largest and three largest banks. Perhaps in an attempt to alleviate the burdensome complexity of the determination of anticompetitive effects in antitrust bank merger cases, the Court has imposed a rigid structural test based on percentage market shares which would be held by the merged bank, and the other two largest banks in the area.[54]

cause (1) the relevant geographic area is defined by the market area "to which the purchaser can practicably turn for supplies" [*see* note 40 *supra*, and accompanying text], and (2) the localization of the banking business made the banking customers in Phillipsburg and Easton do substantially all their banking in those towns. The district court had emphasized the mobility of the residents of the Lehigh Valley and had defined the relevant geographic area as approximately four times the area of Phillipsburg-Easton with a 1960 population of 216,000 and a total of 18 banks. 306 F. Supp. at 652-53, 656-58. The appellee banks argued before the Supreme Court that Phillipsburg-Easton is not an "economically significant" market. The Court held that Phillipsburg-Easton was "economically significant," relying on *Brown Shoe*. 399 U.S. at 360. *See* note 24 *supra*, and accompanying text.

[51] 306 F. Supp. at 650-51. The district court had defined the relevant product market to include competition from other financial institutions such as savings and loan associations and pension funds. The lower court stressed the difference between the large banks in *Philadelphia Bank* and the small banks involved in *Phillipsburg*. The court expressed its view that "[i]n terms of function the defendant banks are more comparable to savings institutions than to large commercial banks." *Id.* at 648.

[52] *See* note 39 *supra*, and accompanying text. The Court declared that "[i]f commercial banking were rejected as the line of commerce for banks with the same or similar ratios of business as those of the appellee banks, the effect would likely be to deny customers of small banks—and thus residents of many small towns—the antitrust protection to which they are no less entitled than customers of large city banks." 399 U.S. at 361-62.

[53] 399 U.S. at 366.

[54] The dissent in *Phillipsburg* strongly criticized the majority's application of these figures as a "simplistic" exercise of "antitrust numerology." *Id.* at 376. The dissent declared that "[b]y treating these percentages as no different from those found in *Philadelphia Bank* the Court blithely assumes that percentages of the same order of magnitude represent the same degree of market power, irrespective of the amount of competition from neighboring markets." *Id.* at 381. To effectively evaluate the anticompetitive effects of a bank merger, stated the dissent, the Court should instead consider the *significance* of the available figures, rather than just their magnitude. The

The Court also apparently reduced significantly the magnitude of the percentages which constitute an "undue share of the market" and an undue increase in "market concentration."[55]

The Court concluded its opinion by holding that the area in which "convenience and needs" must be evaluated under the 1966 Bank Merger Act[56] is the relevant geographic area. The Court reasoned that the community to be served is, because of commercial realities, virtually always as large as or larger than the geographic market. Thus, evaluation of "convenience and needs" in an area smaller than the geographic market could result in approval of a merger which has overall anticompetitive effects when viewed throughout the relevant market, and has countervailing beneficial effects only in a segment of the market.[57] By expressly confining the consideration of "convenience and needs" to the relevant geographic area, the Court precluded its consideration in a smaller or larger area. This would seem to prevent the justification of a merger under the "convenience and needs" standard on the ground that the merged bank would be better able to compete in a national or regional market—thereby rendering those markets more competitive. Thus, the Court holds that the positive community benefits in a submarket may not be used to justify or counterbalance anticompetitive effects in other parts of the relevant market, and implies that the positive effects in a larger market (regional or national) may not be used to justify or counterbalance the negative effects in another market (relevant geographic area).[58]

IV. Conclusion

Phillipsburg has importance because it defines the market area in which to evaluate "convenience and needs."[59] Possibly the most important aspect of the Court's holding, that the "convenience and needs" must be evaluated in the relevant geographic area, is the implied preclusion of a justification of anticompetitive effects by resort to the consideration of a

Court should consider aspects of market structure, such as the interrelationship between the determination of market shares and the definition of the product market. *Id.* at 373-82.

[55] *See* note 54 *supra*, and accompanying text. As to the magnitude of the percentages, the figures in *Phillipsburg* were, on the whole, smaller than those in previous cases. For example, the percentages of total assets in the relevant market held by the merged banks were: in *Philadelphia Bank*, "at least 30%"; in *Nashville Bank*, 38.4%; and in *Phillipsburg*, 19.3%. The percentages of assets in the relevant market held by the two largest banks (after the proposed merger) were: in *Philadelphia Bank*, 59%; in *Nashville Bank*, 77%; and in *Phillipsburg*, 55%. The percentages for the three largest banks after the proposed merger were *Nashville Bank*, 98%, and *Phillipsburg*, 68%. Because *Philadelphia Bank* involved a merger between the second and third largest banks, the percentage held by the three largest banks was not used in that case. *See* 399 U.S. at 376 n.8.

[56] *See* notes 42-44 *supra*, and accompanying text.

[57] Therefore, the district court, to approve a merger, must determine that the merger would probably benefit all customers of banking services in the market, rather than merely a small minority of the customers such as those interested mainly in large loan and trust services, or possibly the customers in only one community of a multi-community relevant geographic area. 399 U.S. at 372.

[58] The Court in *Philadelphia Bank* rejected the argument that a merger can be justified, under the "convenience and needs" standard, on the ground that the resulting bank will be better able to compete in a national or regional market and might render these markets more competitive, and that the area needs a larger bank in order to attract business and stimulate economic development. 374 U.S. at 371. However, this decision was before the passage of the 1966 Bank Merger Act, which adopted the "convenience and needs" standard. *See* note 42 *supra*, and accompanying text.

[59] *See* notes 42, 43 *supra*, and accompanying text.

merger's effect on a regional or national market. Perhaps the major significance of *Phillipsburg*, however, is that it applies the same standards developed in large bank merger cases to small bank mergers. It applies the same standards for defining the relevant geographic and product markets and evaluates anticompetitive effects in the same manner for small as for large banks. It also apparently reduces significantly the percentages of market shares which establish anticompetitiveness.[60]

The Court's conclusion concerning the relevant geographic area is based upon an appreciation of the economic aspects of the market structure. The Court, however, does not seem to express consistently this appreciation in considering other aspects of the case. The major thrust of the decision is in the direction of applying standards developed in antitrust cases dealing with large banks to cases involving small banks. What is forbidden to the Goliaths of banking is equally forbidden to the Davids. The *Phillipsburg* decision seems to place in doubt the legality of every merger of two directly competing banks, no matter how small.[61]

Phillipsburg seems equitable as long as it is assumed that small banks are only miniature versions of their larger brothers. The outcome of a bank merger case is vitally affected by defining "commercial banking" as the relevant product. While this definition may be adequate for large commercial banks, it may not be adequate for small local banks, which are part of a different market structure.[62] Further, the Court does not give adequate consideration to economic factors in judging anticompetitiveness. Possibly in an attempt to provide simple rules for judging merger cases, the Court has perhaps been guilty of oversimplification, establishing apparently minimum percentage market shares of commercial banking which automatically establish anticompetitiveness. The fixed percentages should be regarded only as guidelines. Flexibility should be the rule, and the percentage should be computed after an economic analysis which properly defines the areas in which they are to be computed.[63] In short, relevant and important economic data which place any merger in a particular market structure should be considered. Fixed percentages should not be inflexible minimums, but should comply with the economic realities of the industry to which they are applied.

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[60] *See* note 55 *supra*, and accompanying text.

[61] The author of the dissent in *Phillipsburg* stated that "[m]y first reaction to this case . . . was wonderment that the Department of Justice had bothered to sue . . . . With tigers still at large in our competitive jungle, why should the Department be taking aim at such small game?" 399 U.S. at 373-74.

[62] As the district court and dissent in *Phillipsburg* emphasize, the relevant product is not necessarily the same for small banks and large banks. Since the determination of both anticompetitiveness and "convenience and needs" depends upon the definition of the relevant market, which in turn depends upon the definition of the relevant product, the economic aspects of the market structure are vitally important to judging the validity of bank mergers.

[63] Although there is, as the Court stated in *Brown Shoe*, a "need for limiting the mass of possible relevant evidence in [antitrust] cases . . . in order to avoid confusion and its concomitant increased possibility of error," Brown Shoe Co. v. United States, 370 U.S. 294, 341 n.68 (1963), there is also a need, in judging Clayton Act violations, to avoid inflexible and arbitrary standards based on a few percentage figures. Only an examination of the structure, history, and probable future of the particular market can provide the appropriate setting for judging the anticompetitive effects of a merger.