

1981

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Recommended Citation

Thomas E. Kauper, *Introduction: Transnational Corporate Concentration-The Issues*, 2 MICH. J. INT'L L. 1 (1981).

Available at: <https://repository.law.umich.edu/mjil/vol2/iss1/1>

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Introduction: Transnational Corporate Concentration—The Issues

THOMAS E. KAUPER

Competition policy in the United States, particularly reflected in antitrust policy, in recent years has focused on corporate structure. To some, this emphasis simply reflects a belief in a close correlation between corporate structure and behavior. A single firm monopoly inevitably will restrict output and raise prices above levels that would prevail under competition conditions, distorting allocative efficiency. The behavioral pattern is a direct consequence of structure.¹ Many believe that high corporate concentration, even short of single firm monopoly, is at least conducive to, if not a cause of, monopolistic behavior.² Some also view high corporate concentration, and the aggregation of economic as well as political and social power identified with it, as a threat to democratic institutions and individual liberty.³ Not surprisingly, there are dissenters who view high corporate concentration in particular markets as facilitating successful collusive behavior, but of no necessary competitive consequence.⁴ The latter view focuses simply on behavior. The relationship between corporate concentration and behavior is thus not clearly understood, and is the subject of vigorous debate in the United States. Of course, this debate is directly relevant to the need for, and contours of, government policy directed toward control of concentration. Antitrust policy directed toward concentration, and particularly mergers that directly increase concentration, is at the heart of the controversy.

The articles in this volume carry the debate a step further. As corporate enterprises extend their activities across international boundaries, so too, problems of corporate concentration take on an international quality. New issues come to the fore. Is transnational corporate concentration an identifiable problem that presents policy issues beyond those posed by concentration measured in particular national markets? If there is a separate problem, can it be sufficiently defined to formulate an intelligent public policy response? And are there now, or in the future likely to be, national or international control mechanisms capable of implementing any such policy initiatives?

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This volume presents the views of scholars, government and international organization officials, and private practitioners, on these questions. The reader will not find a consensus, either on the nature of the problem or on any proposed solution. But hopefully the exchange will contribute to the public discussion which is already well under way, and provide valuable insights to those who must bear the responsibility for policy formulation.

Many of the issues to be discussed in this volume are unresolved. This is not because they are unimportant, for it is abundantly clear that they are of extraordinary significance. But they are issues on the frontier of both legal development and international relations. They are also issues which tend to provoke emotional responses and assertions of very strong national interests. The very word *multinational*, a word that we now manage to avoid to some extent, tends to evoke images of corporate giants operating on such a large international scale that they are for all practical purposes beyond the control of any national authority. The *multinational problem*, as some describe this absence of unified control, relates, to the extent that we can define any problem at all, to a number of public policy concerns ranging from formulation of tax policy to concerns about full employment. The focus in this volume will be primarily upon competition policy and the need to preserve free and open markets.

Within the context of corporate enterprises operating across one or more national boundaries, the initial issues will relate to the degree of danger to competition such enterprises create. Do they pose a peculiar threat to competition in national markets? Indeed, is it even realistic to think in terms of national markets? If such a threat can be identified, what remedies might presently be available? If these remedies are inadequate, for jurisdictional or other reasons, what sort of mechanisms might be capable of assuring an adequate measure of international control? These questions are all obviously interrelated. If multinational enterprises pose a particular danger to free markets, it is either because they have a power not common to domestic businesses, or because national policies, implemented in a variety of ways, are not capable of checking the exercise of that power because it transcends national boundaries. An assessment of the effectiveness of national control mechanisms in dealing with multinational enterprises thus is central to the determination that such enterprises pose a peculiar competitive problem calling for additional national or international control mechanisms. This conference focused on the competitive threat, if any, caused by the enterprises operating on a large international scale and on the need for additional means to assure their control.

Several articles in this volume focus on national efforts to deal with corporate concentration in terms of competition policy. An examination of such efforts is useful both in determining whether there is any broad-scale consensus on the competitive effects of concentration, and in evaluating the need for further national or international remedies. In the United States, for example, antitrust control of mergers under Section 7 of the Clayton Act has been sufficiently severe that significant mergers between competing firms,

the category of mergers which most directly increase concentration, seldom occur.⁵ Merger policy clearly reflects a direct concern with concentration in purely structural terms. But other nations view concentration within their domestic markets differently, and may go so far as to promote mergers which, while significantly increasing concentration, are thought to promote efficiency. The French policy, for example, seems far more in accord with the latter approach than with that followed in the United States. The long-standing effort within the European Economic Community to develop a merger control guideline acceptable to member nations, an effort still largely unsuccessful, reflects the difficulty of accommodating such divergent views.⁶

It will readily become apparent that there is little consensus over the nature of the problem or the need for, or nature of, a solution. Empirical data on concentration and its effects, both in national markets and internationally, is lacking. Different nations start, therefore, with different data bases, making comparisons difficult. More importantly, the international community lacks consensus not only over what competition is, but also over its desirability. Aggressive competition to one nation is ruinous to another. Competition policy may, to some, include what to others are trade policy concerns. The concern of underdeveloped nations with the need for "antitrust" rules to govern parent-subsidiary relationships is but one example. Concerns over national sovereignty may dictate noncompetitive results, particularly where state-owned enterprises are involved. There is thus no consensus over the standards by which the problems, if any, can be identified and measured. The same lack of consensus causes different national authorities to focus on different problems. Conflict necessarily results. This absence of consensus today makes any international solution difficult, if not impossible.

Related to the identification of competitive concerns about transnational concentration is an assessment of the adequacy of existing national remedies. National antitrust authorities in some countries, particularly in the United States, have not been wanting, at least for effort, in protecting their own interests and markets from conduct undertaken outside their own boundaries. But how far can such authorities reach? The application of extraterritorial principles has resulted in increasingly vocal protest, both from affected business enterprises and from sovereigns who view their own interests quite differently. This simply reflects, in part, the lack of consensus alluded to earlier. It also reflects concern over national sovereignty and a nation's need to control conduct within its own geographic boundaries. Assuming a nation's ability to apply extraterritorial principles to specific conduct, how relevant are those principles to matters of structure if structure is in fact the ultimate determinant of behavior? The difficulty of dealing with structure in one or more countries in order to eliminate concomitant behavioral effects in another is obvious. The result may well be that the country in which effects are felt has little real choice but to deal only with the behavioral symptoms.

Mergers might afford the best example. Mergers can affect structure, and thus competition, on an international scale. But how far may any national

authority go in dealing with mergers beyond its own boundary? Sovereigns in whose territory one or more of the merging partners is located may view the merger as procompetitive within their own national markets. Or the merger may be viewed as serving some other public need, such as full employment or technological growth, which in the view of that nation makes the transaction desirable, even if anticompetitive. Not all nations, after all, value competition as highly as the United States. An attempt on an extraterritorial basis to prohibit the merger thus provokes sovereign conflict, conflict which might mean either that no action is taken, or that the nation whose policy is offended can at best regulate the behavior of the merged firm within its own territory. This conflict in national interests may manifest itself in a variety of ways. Nations objecting to the extraterritorial application of the antitrust laws of others may take steps to block investigative efforts by antitrust authorities of other nations within their territory or of their nationals, perhaps even to the point of legislatively directing noncooperation.⁷ Judicial relief orders that require action or attempt to regulate behavior in another nation can be obstructed or even formally blocked by the latter. The relief problem is particularly acute in dealing with mergers, where implementation of a decree requiring divestiture abroad would be at issue. Several articles in this volume consider such practical questions.

To a substantial degree, conflicts of this sort reflect a lack of consensus over the desirability of competition, and over the competitive consequences of particular behavior. This gives the outsider the perception that multinational enterprises are beyond the control of authorities who would like, but are unable, to exert some degree of control. In reality, however, the fundamental issue is a lack of agreement on the need for such control in the first instance. Yet it is also true that where there is international agreement on the need to deal with a particular act, or pattern of behavior, the ability of the affected enterprise to use the multiplicity of interested national authorities to its own advantage can operate to obstruct such efforts. From a national perspective, an inability to reach such enterprises can also pose significant domestic issues. Firms operating within a local market peopled in part by multinational enterprises, and thus directly competitive with them, may perceive what is in reality an inability to deal with these competitors as a form of conscious favoritism. Political pressure may then be exerted to lessen the severity of the antitrust rules applicable within the domestic market to permit local firms to compete more effectively with multinational enterprises that are thought, rightly or wrongly, not to be subject to the same rules.

For these reasons, among others, consideration is now being given to a variety of international solutions, solutions predicated on the ineffectiveness of piecemeal and often inconsistent national efforts. Guidelines, standards, and even international enforcement mechanisms have been proposed. So far, such efforts have been directed solely toward anticompetitive behavior. Can the national interests of states with fundamentally different economic policies and concerns, some of whom deal through state-owned enterprises,

some of whom do not, and some of whom are far less developed than others, reach a sufficiently precise consensus on both the nature of the problem and substantive remedial standards sufficiently precise to afford any promise of workability? If no consensus can be reached with respect to behavior, how less likely is it that concentration can ever be dealt with on an international basis in structural terms? Standards which do reflect a consensus may be so generalized as to be of little value. The discussion in this volume of the efforts of the OECD⁸ and the United Nations Conference on Trade and Development (UNCTAD)⁹ to prepare international guidelines and standards will focus on this kind of question, as well as on the utility of a voluntary guideline approach which contains no real obligation and no enforcement mechanism. To some, voluntary guidelines for corporate behavior are a cynical illusion, designed to alleviate pressure from underdeveloped nations without in fact offering any real prospect of change. But conversely, if consensus on a relatively specific set of guidelines can be achieved, the accomplishment of the consensus alone may make the exercise meaningful.

Ultimately, however, the question of some new type of international antitrust cooperation or even enforcement authority, must be addressed. These questions themselves make the complexity of the answers obvious. Clearly we do not know the answers. We are not sure we even know the problem. Thus, the only realistic response may well be one of "time will tell." Certainly, however, the issues to be discussed in this volume are both contemporary and evocative of controversy. The uranium cartel investigation,¹⁰ the Organization of Petroleum Exporting Countries (OPEC) case,¹¹ the indictment of Atlantic shipping companies,¹² the proposed removal of the International Air Transport Association's (IATA) U.S. antitrust immunity,¹³ all actions under United States antitrust laws, have provoked strong international protests. American firms doing business abroad continue to press for antitrust immunity under our own antitrust laws for conduct abroad. They also occasionally assert that competition policy of other sovereigns has been applied against them in a discriminatory manner. At the same time, the Congress of the United States continues to press for more far-reaching application of our own statutes, and the Justice Department always seems to find itself caught in the middle. Careful analysis and reflection outside the political arena is necessary before new courses can be set. This volume is intended to aid such deliberations.

NOTES

1. See R. POSNER, *ANTITRUST LAW* 8-18 (1976); F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (1980).
2. Areeda and Turner, *Conglomerate Mergers: Extended Interdependence and Effects on Interindustry Competition as Grounds for Condemnation*, 127 U. PA. L. REV. 1082 (1979).

3. *Brown Shoe v. United States*, 370 U.S. 294, 344 (1962).
It is competition, not competitors, which [the Clayton] Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher cost and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.
 Blake & Jones, *In Defense of Antitrust*, 65 COLUM L. REV. 377, 382-84 (1965); Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191 (1977).
4. R. POSNER, *supra* note 1, at 78-95.
5. 15 U.S.C. § 18 (1976).
6. Temple Lang, *Regulating Transnational Corporate Concentration—The European Economic Community*, *post*.
7. *See, e.g.*, Business Records Protection Act, 1947, ONT. REV. STAT. c. 54 (1970); Great Britain's Protection of Trading Interest Bill, 1979, ANTITRUST & TRADE REG. REP. (BNA) F-1.
8. Stockmann, *Reflections on Recent OECD Activities: Regulation of Multinational Corporate Conduct and Structure*, *post*.
9. Kurek, *Supranational Regulation of Transnational Corporations: The UNCTAD and CTC Efforts*, *post*.
10. *See, e.g.*, *United States v. Gulf Oil Corp.* [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078.
11. *International Association of Machinist and Aerospace Workers v. Organization of Petroleum Exporting Countries* [1979] TRADE REG. REP. (CCH) ¶62,868.
12. *United States v. Atlantic Container Line, Ltd.* [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079.
13. 44 Fed. Reg. 29,509 (1979).