St. John's Law Review

Volume 44
Number 5 *Volume 44, Spring 1970, Special Edition*

Article 46

December 2012

Conglomerates Under the Microscope: The Search for Uncertainty in an Uncertain World

William L. McGovern

CONGLOMERATES UNDER THE MICROSCOPE: THE SEARCH FOR CERTAINTY IN AN UNCERTAIN WORLD

WILLIAM L. MCGOVERN*

INTRODUCTION

Numerous solutions have recently been offered to change the course of present-day conglomerate activity. Some have suggested guidelines aimed at either directing conglomerate mergers away from concentrated areas into deconcentrated areas, or hopefully, encouraging conglomerate interest in smaller companies in concentrated areas, in an effort to achieve a measure of deconcentration. Others have suggested that conglomerates are sinful and should be prohibited by statute under circumstances where their influence, even potentially, could be more than de minimis. Some have said not enough is known about conglomerates to inform any antitrust action and that, for all we know, conglomerates might be a blessing in disguise. Still others have wearily pursued investigations in depth to discover what conglomerates are and whether they are good or bad. The net contribution to an intelligent evaluation of conglomerates in our competitive system scarcely justifies the reams of paper consumed by the various reports and guidelines.

I. ANTITRUST DIVISION GUIDELINES

On May 30, 1968, under the aegis of former Assistant Attorney General Turner, the Antitrust Division of the Department of Justice issued a number of merger guidelines.[1] Insofar as conglomerate mergers are concerned, these *Guidelines* have been described as non-guidelines because of the tentative nature of their recommendations.[2]

Having described a conglomerate merger as neither horizontal nor vertical, the Justice *Guidelines* go on to indicate that the Department will look with suspicion upon (1) conglomerate mergers involving *potential entrants;* (2) mergers creating a *danger* of reciprocal buying; and (3) mergers which for one or more of several reasons *threaten to entrench or enhance* the market power of the acquired firm.

Respecting potential entrants, the Department indicated it would ordinarily challenge any merger between *one of the most likely entrants* and

> (i) any firm with approximately 25% or more of the market; (ii) one of the two largest firms in a market in which the shares of the two largest firms

* B.A., Yale University, 1935; LL.B., Yale University, 1938. Formerly Special Assistant to Attorney General of the United States.

[1] U.S. DEPARTMENT OF JUSTICE, MERGER GUIDELINES (1968).

[2] *See generally Symposium*, 37 ANTITRUST L.J. (1969) for a thorough discussion of the *Merger Guidelines.*

> amount to approximately 50% or more; (iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75% or more, provided the merging firm's share of the market amounts to approximately 10% or more; or (iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75% or more, provided either (A) the merging firm's share of the market is *not insubstantial* and there are no more than *one or two likely entrants* into the market, or (B) the merging firm is a rapidly growing firm.[3]

While the foregoing criteria refer repeatedly to "likely entrants," the Justice *Guidelines* maintain an eloquent silence as to what constitutes a "likely entrant." Presumably, any company which seeks to acquire a firm in some other market will, by that act alone, be stigmatized as a "likely entrant."

II. Federal Trade Commission Guidelines

From time to time the Federal Trade Commission (FTC) has issued specific industry guidelines, *e.g.*, Vertical Mergers in the Cement Industry;[4] Mergers in Food Distribution Industries;[5] Product Extension Mergers in Grocery Products Manufacturing;[6] and Mergers in Textile Mill Products.[7] In general, the FTC's guidelines tend to be more severe than the Department of Justice *Guidelines*, and place much more significance on the absolute size (independent of market share) of merging firms. The Statement of Enforcement Policy With Respect to the Cement Industry is a representative model:

> The Commission *will challenge any* acquisition of a ready-mixed concrete company by *any* cement company in any local market where the cement company is an actual or potential supplier, and where the acquired concrete company is one of the top four concrete producers in the market or purchases more than 50,000 barrels of cement annually.[8]

III. The Johnson Task Force

The Johnson Task Force (*Neal Report*)[9] recommends specific legislation which would, in effect, prohibit a merger between any corporation with sales exceeding $500 million per year and any leading firm in any market. A "leading firm" is defined in the *Report* as a firm whose market share is more than 10 percent in a market where the aggregate share of any four or fewer firms is more than 50 percent, excluding, however, any firm whose market share is not among the four largest in such market.

---

[3] Merger Guidelines, *supra* note 1 (emphasis added).
[4] Trade Reg. Rep. ¶ 4510, at 6801 (1967).
[5] Trade Reg. Rep. ¶ 4520, at 6804 (1967).
[6] Trade Reg. Rep. ¶ 4530, at 6808 (1968).
[7] Trade Reg. Rep. ¶ 4540, at 6814 (1968).
[8] Trade Reg. Rep. ¶ 4510, at 6803 (1967).
[9] 1968 Presidential Task Force Report on Antitrust [hereinafter cited as Neal Task Force Report], 115 Cong. Rec. 5642 (daily ed. May 27, 1969).

This lethal proposal was advanced despite the fact that the *Neal Report* itself also stated that:

> Preliminary FTC data show that the share of total corporate manufacturing assets held by the 100 largest manufacturing firms has grown from 45.8% in 1957 to 47.7% in 1967; the share of the 200 largest has increased from 55.0% to 58.7% in the same period. Thus, *it is clear that mergers are not solely responsible for the continued growth of the largest units in the economy, and have accounted for only a minor portion of such growth.* Indeed, among the largest firms, the net effect of mergers has been to expand the size of smaller large firms relative to the top few.[10]

IV. The Nixon Task Force

The Nixon Task Force (*Stigler Report*)[11] rushed into print on June 10, 1969 with a paper that was largely a diatribe against both the Justice Department *Guidelines* and the *Neal Report.* The basic thrust of the *Stigler Report* is that not enough is really known about the impact of conglomerates to justify any intelligent guidelines or legislation. The *Stigler Report* recommended a number of conferences be held to investigate conglomerates to the end that:

> If there is a real political threat in giant mergers, then the critical dimensions should be estimated. If there is no threat, the fears entertained by critics of the conglomerate enterprises should be allayed.[12]

V. Attorney General Mitchell's Warning

The *Stigler Report* had scarcely seen the light of day when Attorney General Mitchell unburdened himself of some astringent views. In a speech before the Georgia Bar Association in Savannah, Georgia, on June 6, 1969, he warned that "The Department of Justice may very well oppose any merger among the top 200 manufacturing firms or firms of comparable size in other industries."[13] And he added that the Department of Justice will *probably* "oppose any merger by one of the top 200 manufacturing firms of any leading producer in any concentrated industry."[14]

VI. Economic Report of The Federal Trade Commission

An interim economic report of the Federal Trade Commission was presented to Congress on November 4, 1969.[15] By employing different time intervals than those adopted by the *Neal Report,* the Commission contended that by the end of 1968, the 200 largest industrial corporations controlled

---

10 Neal Task Force Report 5646.

11 1969 Presidential Task Force Report on Productivity and Competition [hereinafter cited as Stigler Task Force Report], 115 Cong. Rec. 6472 (daily ed. June 16, 1969).

12 Stigler Task Force Report 6476.

13 Address by John N. Mitchell, Attorney General of the United States, in 115 Cong. Rec. 6659-61 (daily ed. June 18, 1969).

14 *Id.*

15 Bureau of Economics, FTC, Economic Report on Corporate Mergers (1969) [hereinafter cited as FTC Report].

over 60 percent of the total assets held by all manufacturing corporations.[16] Specifically, the share of manufacturing assets held by the hundred largest corporations in 1968 was greater than the share of manufacturing assets held by the 200 largest manufacturing corporations in 1950.[17] The 200 largest manufacturing corporations in 1968 controlled a share of assets equal to that held by the thousand largest in 1941.[18] Since World War II practically all of the increases in the share of industrial assets held by the 200 largest corporations were directly attributable to mergers.[19]

In essence, the FTC *Report* recommended that the Commission and the Antitrust Division announce forthwith the following mergers as likely to violate the law:

1. When the acquiring corporation is a large enterprise having a substantial volume of sales in one or more concentrated industries. (For this purpose a large firm is defined as having annual sales or assets in excess of $250 million.)
2. When the acquired company is one of the leading firms in at least one concentrated industry. (A concentrated industry is defined as one in which the 4 leading firms account for 40 percent or more of sales. A leading firm is one included among the 4 to 6 largest sellers in an industry.)[20]

In transmitting the *Report* to Congress, Chairman Dixon described it as merely the first phase of the Commission's study and emphasized, "the Commission as a whole and the individual Commissioners neither necessarily endorse nor adopt the report or its recommendations."[21]

Commissioner Elman, who is on record for the proposition that not enough is yet known about the baleful economic effects of conglomerates,[22] indicated the *Report* constituted a useful first step. However, he expressed agreement with the view of Assistant Attorney General McLaren that the present enforcement policy of the responsible government agencies "rejects any notions of *per se* illegality. . . . [A] merger, even of large firms, which does not pose a substantial competitive danger on reciprocity or other grounds is not subject to antitrust attack."[23]

Commissioner Jones opposed the transmission of the *Report* to Congress last November because:

> In my opinion, the staff recommendations and many of their conclusions are premature and not supported by the type of hard empirical data which

[16] FTC REPORT 173, table 3-3.

[17] *Id.*

[18] *Compare* FTC REPORT 167, table 3-3 *with* table 3-2.

[19] *See generally* FTC REPORT 191-98, specifically figure 3-5, at 195.

[20] FTC REPORT 17.

[21] Letter from Chairman Paul Rand Dixon to Hon. Phillip A. Hart, in FTC REPORT IX.

[22] *Conglomerate Mergers, The Need for Investigation of the Obscure,* Address by Commissioner Elman before the ABA Nat'l Inst., New York City, Oct. 23, 1969.

[23] *Id.*

> is potentially available to the Commission and indeed which the Commission intends to assemble and analyze. While the report sets out a factual description of the structural dimensions of the current conglomerate merger movement, it relies essentially on hypothesis and theorization for its conclusions respecting the anticompetitive effects—reciprocity, cross-subsidization, intimidation of new entrants and the like—which it sees as flowing from conglomerate market structure. The staff work to date as reflected in this report adds little supporting evidence for these hypotheses. Indeed staff's conclusions and recommendations could have been made before this study was initiated. In making its conclusions and recommendation, staff is asking the Commission and the public to share its faith in the anticompetitiveness of conglomerate mergers, and to substitute that faith for hard data.[24]

VII. The Pursuit of Certainty in an Uncertain World

Since the turn of the century we have been caught up in a schizophrenic conflict between a fear of bigness, on the one hand, and conversely, an admiration, a secret pride, and most importantly, an overwhelming desire for what it can produce. While we all have cursed bigness, still we are gratified to have our huge industrial complex put us on the moon ahead of the Russians.

However, the recent rash of proposed guidelines and legislative remedies reach new heights of irrationality. Our objective is supposed to be competition, but all of our efforts have been focused upon concentration without regard to competition. Instead of confronting the hard competitive realities of the marketplace, we embroider upon the old symbols to produce a new book of legal shorthand, while sidestepping the difficult task of determining whether a particular transaction did in fact substantially diminish competition.

In 1911, the Supreme Court saved us from never-never land by pointing out that the antitrust laws forbid only unreasonable restraints;[25] curiously, the same Court today informs us that nearly everything that is not de minimis is bad per se.[26]

Putting to one side the thought that we are rushing into an abyss of darkness and ignorance where even angels would fear to tread, many of the proposals with which we have been recently deluged may well be inviting disaster rather than preserving a dynamic competitive economy.

It will be noted that all of the suggested criteria are preoccupied with structure, almost to the exclusion of competition which is, after all, the statutory test.[27] Structure usually provides a facile handle to gain a quick statistical picture of an industry. But structure and competition are not necessarily proportionate. Many instances can be cited of industries that

---

[24] Jones, *Separate Statement*, in FTC Report XIII.
[25] *See* United States v. Standard Oil Co., 221 U.S. 1 (1911).
[26] *See* United States v. Von's Grocery Co., 384 U.S. 270 (1966).
[27] *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

appear oligopolistic on the surface, but upon examination disclose a competitive behavior pattern that is almost suicidal. For example, a structural test alone, would have barred the Lever Brothers-Monsanto arrangement for the transference of the "All" trademark, even though the district court found the transaction definitely enhanced competition in the "highly concentrated" soap and detergent industry.[28]

United States v. Lever Brothers Co.[29] demonstrates the terrible danger of indulging uncritically in gross sales figures or of structure of the market, or of any of the customary shibboleths of which the enforcement agencies are so fond. In *Lever* it was shown that the soap and detergent industry was highly concentrated among Procter, Colgate and Lever, the so-called "Big-Three," but that Lever had an historically sharply declining share which amounted to no more than 15 percent at the time of the transaction under challenge. Monsanto, a new and reluctant entrant in the market had acquired 5 percent. Accordingly, the Government told Judge Dawson that 15 percent and 5 percent equal 20 percent and that was that — too much. The Judge, in effect, replied that he had learned long ago that 15 percent and 5 percent totaled 20 percent — but 20 percent of what?

Structurally, soaps and detergents was a highly concentrated industry. But once one examined the constituent parts of the structure and how competition was actually waged in the industry, it became quite apparent that it was not an industry of the "Big Three" but rather of the "Big One" and, despite this fact, the competition could scarcely be more intense. While structure, of course, is important, *Lever* demonstrates that it is only the starting point for the searching inquiry which is incidental to the serious appraisal of competitive strategies at work in a market that despite its static structural appearance may be dynamic to its core.[30]

It would seem obvious that if we permit industry's existing structure to foreclose the possibility of any acquisition in that industry, we automatically freeze the status quo and assure the present occupants of the structure that they need not worry about competitive forays from the outside. This is the principal vice of the Attorney General's threat to forbid any acquisition by one of the top 200 corporations. In effect, the top 200 are assured insulation against any other major company moving in on them. This is the necessary effect, for example, of the Department of Justice challenging Ling-Temco-Vought's attempt to acquire Jones & Laughlin Steel Corp.[31] Steel has long

[28] *See* United States v. Lever Bros. Co., 216 F. Supp. 887 (S.D.N.Y. 1963) (the author's firm represented Lever Bros. in this case).

[29] *Id.*

[30] This type of competitive analysis does not entail a return to trial by ordeal in the protracted case. *Lever* took five court days to try, but entailed a tremendous amount of pre-trial homework by both sides under the whiplash of an able judge who insisted upon both sides stipulating the most controversial data.

[31] United States v. Ling-Temco-Vought, Inc., Civil No. 69-438 (W. D. Pa., filed April 14, 1969).

The Department of Justice has four other such cases pending: United States v. In-been regarded as a status quo industry, suffering from hardening of the economic arteries. Yet, apparently no company with the capability of doing so will be allowed to move into steel with the blessing of the Antitrust Division.

The remarkable thing about the Attorney General's top 200 corporation test is that, while it purports to preserve "potential entrants," it actually seems to ignore the test. It would seem obvious that if, in accordance with Attorney General Mitchell's view, any one of the 200 or more top corporations is a potential entrant into any field, then, of course, any one of the remaining 199 corporations is equally a potential entrant. But why worry about a situation where there are, by definition, at least 199 bridesmaids waiting in the wings?[32] Similarly, if, in terms of the *Neal Report*, any corporation enjoying more than $500 million in sales is a likely entrant, then, as has been noted,[33] there are at least 160 such firms with the same potentiality — again, by arbitrary fiat of the definition used.

Perhaps the most serious defect in the top 200 test or the $250 million gross sales test, is the utter violence such uncritical yardsticks do to the statutory test. Since 1914, the Clayton Act has forbidden acquisitions only "where in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition . . . ."[34]

To measure the validity of a conglomerate acquisition by the acquiring company's total sales, or its ranking among the top 200 corporations, is to aggregate the acquiring company's total (and probably very diverse) activities in a number of fields in defiance of the statutory standard of section 7 of the Clayton Act. For example, the Federal Trade Commission's recent attack on Bendix' acquisition of Fram,[35] which emphasized Bendix' total sales of $1 billion, concealed the fact that in the principal *relevant* line of commerce, the automotive after-market, Bendix' sales were only $20 million. Such commingling of sales and assets in the whole spectrum of different businesses necessarily renders it impossible to analyze the impact of the acquisition on competition in a particular line of commerce.

At one time, before *United States v. Philadelphia National Bank*[36] and

---

ternational Tel. & Tel. and Grinnell Corp., Civil No. 13-319 (D. Conn., filed Aug. 1, 1969); United States v. International Tel. & Tel. and Hartford Fire Ins. Corp., Civil No. 13-320 (D. Conn., filed Aug. 1, 1969); United States v. Northwest Indus. Inc. and B. F. Goodrich Co., Civil No. 69C-1102 (N.D. Ill., filed May 21, 1969); United States v. International Tel. & Tel. Corp., Civil No. 69C-924 (N.D. Ill., filed Apr. 28, 1969).

32 One likes to think that even the Supreme Court would be overwhelmed by such a wealth of potential entrants. For a discussion of "potential entrants," see, *e.g.*, United States v. Penn-Olin Chem. Co., 378 U.S. 158, 173 (1964).

33 Address by Lionel Kestenbaum, before Antitrust Section, ABA, in Dallas, Texas, Aug. 12, 1969.

34 Clayton Act § 7, 15 U.S.C. § 18 (1964).

35 *In re* Bendix Corp., No. 8739 (FTC, Sept. 12, 1969). I should note, in passing, that the law firm of which I am a partner is counsel in this case to Bendix and Fram.

36 374 U.S. 321 (1963).

Albrech v. Herald Co.[37] — and before Messrs. Neal, Stigler and Mitchell — the Supreme Court regarded each antitrust case as sui generis; each case was decided on its own facts, and precedents afforded, at best, very little guidance to the proper solution of the immediate problem before the Court.[38]

Conclusion

In the end, we are forced back, I suggest, to the proposition that there is no easy path to a dynamic, competitive society. A superficial look at sales and asset statistics and market structure, is no substitute for getting out in the marketplace and trying to find out how competition is actually waged within an industry.

Invariably, competition has more than one dimension; there is certain to be not only a selling side, but also a buying side, which may provide a strong, countervailing influence. For example, however concentrated the soap and detergent industry may appear to be, the fact of economic life is that the industry members must sell nearly all their production through the chain grocery field. For all of Procter & Gamble's acknowledged power in the industry, its salesmen enter the central buying offices of the chain supermarkets on a one-to-one basis with the competition. Then, the competitive question is simply resolved, not by what position the company occupies in its industry, but by how fast the particular products it sells move off the precious shelf facings for which it competes. The stark fact of economic life is that Procter needs the chain supermarkets more than the latter need Procter.

Thus, upon stepping into the marketplace, we may find that even in an apparently concentrated industry, the behavioral pattern is anything but noncompetitive; we may find, even in the pundits' sense, that the woods are full of potential entrants, and that reciprocity potentials are more than offset by countervailing influences. We may even find that the world's largest corporation, General Motors, with $22 billion of sales, trembles when Ralph Nader whistles.

Such findings may well assuage our fear of bigness, per se, which seems to be the only motivating force behind antitrust enforcement policy today. Such findings may even serve to remind the enforcement agencies that the preeminent object of their solicitude *should* be the consumer and his need and desire for the best quality goods at the lowest possible prices. Structure — whether in production, distribution, or retailing — is merely a means to that end. God help us, if it should become an end in itself!

---

[37] 390 U.S. 145 (1968).

[38] *See* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 562, 579 (1925). For a welcome return to this old principle, see Judge Duniway's thoughtful opinion in Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Inc., 416 F.2d 71 (9th Cir. 1969).