Nebraska Law Review

Volume 50 | Issue 1 Article 3

1970

The Conglomerate Merger Tangle

Wallace M. Rudolph
University of Nebraska College of Law, wrudolph@thefortinlawfirm.com

THE CONGLOMERATE MERGER TANGLE

*Wallace M. Rudolph**

Conglomerates such as L.T.V., I.T.T., Gulf and Western, and Litton Industries have become widely known during the sixties. Whatever else may have happened during this decade, a fundamental change has occurred in the nature of mergers. In a base period of 1948 to 1951, 38.1 percent of all mergers were conglomerate whereas in 1968, 91 percent of all mergers were conglomerate.[1] What caused this change and what are the effects of this change for antitrust have been the subjects of much concern and analysis.

The conglomerate merger movement may simply be the result of the Celler-Kefauver Amendment to section seven of the Clayton Act. Basically, this amendment has made all vertical and horizontal mergers involving substantial market percentages illegal. Thus the rise in the percentage of conglomerate mergers may simply result from the decline in horizontal mergers.

Nevertheless, the Justice Department has decided that conglomerate mergers must be stopped. The Attorney General has suggested that such mergers violate one of the basic policies of the antitrust laws. In a speech in Savannah, Georgia, he said:

> The Department of Justice may very well oppose any merger among the top 200 manufacturing firms or firms of comparable size in other industries.
>
> 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.
>
> And, of course, the Department will continue to challenge mergers which may substantially lessen potential competition or develop a substantial potential for reciprocity.
>
> Some may regard these three probabilities as something of an expansion of the published antimerger Guidelines of the Department.
>
> But we believe that, under today's circumstances, these probabilities are clearly authorized by present antitrust law.[2]

The Federal Trade Commission Staff has also issued an "Economic Report on Corporate Mergers" wherein they concluded:

---

* B.A., 1950, University of Chicago; J.D., 1953, University of Chicago. Member of the Nebraska, Illinois, and American Bar Associations. Instructor, University of Chicago College of Law 1957-58, Professor of Law, University of Nebraska.

1 Address by John Mitchell, United States Attorney General, in Savannah, Ga., June 6, 1969.

2 *Id.*

> These interrelated developments pose a serious threat to Amercia's democratic and social institutions by creating a degree of centralized private decision-making that is incompatible with a free enterprise system, a system relying upon market forces to discipline private economic power.[3]

The Commission recommends that action be taken to stop mergers in the following situations:

> (1) [W]hen 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) [W]hen 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 per cent or more of sales. A leading firm is one included among the 4 to 6 largest sellers in an industry.)[4]

Clearly the Justice Department and the Federal Trade Commission intend to forbid the mergers of any corporations in which one of the partners is among the top 200 firms or has assets in excess of 250 million dollars if the other partner is also one of the top 200 firms or is a leading firm in a concentrated industry, *i.e.*, one of the top six companies in an industry in which the top four companies have at least forty percent of the assets. This would exclude entry by merger into most industries[5] and would forbid to these top companies, for merger purposes, over sixty percent[6] of the total manufacturing assets.

Under such a policy, mergers are to be forbidden practically on a per se basis without any actual showing that competition has been lessened in any section of the country, that reciprocal buying will occur, that potential competition is excluded, or that the new merged entity will engage in cross-subsidization of price wars.

Obviously the Attorney General believes that one purpose of the Sherman Act is to prevent undue concentration of assets in any section of the country without regard to market control. He evinces a belief that undue concentration of assets will in some way lead to more market restraint than now exists. This same belief is expressed by the staff of the Federal Trade Commission:

> The Congress regarded monopoly and incipient monopoly as a danger to the competitive system but also as a threat to the Nation's political and social system. Indeed, a basic premise of the American antitrust policy is the array of virtues believed to flow from a decentralized economic system.[7]

---

[3] 1969 FTC STAFF, ECONOMIC REPORT ON CORPORATE MERGERS 5.

[4] *Id.* at 17.

[5] C. KAYSEN & D. TURNER, ANTITRUST POLICY (1959).

[6] FTC REPORT, *supra* note 3, at 192.

[7] *Id.* at 10.

The courts have also recognized that the Sherman Act had a special political bias toward decentralization.[8] Thus Judge Hand in *Alcoa* said:

> We have been speaking only of economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. . . . Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.[9]

This same position was reiterated by Justice Warren when he wrote:

> [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[10]

Notwithstanding this agreement between the Attorney General, the staff of the F.T.C., and the courts, no one has articulated a theory with which judges may decide actual cases based on the premise that some kind of concentration other than market control may be stopped by the antitrust laws. The F.T.C. did refer, however, to a statement by Professors Blake and Jones which presents that position. Blake and Jones stated:

> The overriding purpose of antitrust policy, we believe, is to maintain an economy capable of functioning effectively without creating an abundance of supervisory political machinery. Moreover, the political machinery to be avoided is not limited to state ownership. It also includes formal government management of privately owned facilities and private administrative powers subjected to varying degrees of informal governmental supervision—through congressional investigations, government-industry consultations, and executive pressure.
>
> In short, antitrust operates to forestall concentrations of economic power which, if allowed to develop unhindered, would call for much more intrusive government supervision of the economy. Reliance on competitive markets accommodates our interest in material well-being with our distrust of concentrations of political and economic power in private or governmental hands.[11]

Thus we could conclude that one goal of antitrust is to prevent the development of countervailing power, price guidelines, calls

---

8 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
9 *Id.* at 428.
10 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).
11 Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy, In Defense of Antitrust,* 65 COLUM. L. REV. 377, 383 (1965).

for industrial statesmanship, etc. If this is all that is desired then all we need consider is economic factors in deciding cases. Thus the courts are called upon only to stop undue concentrations of economic power, not undue concentrations of wealth, legal services, corporate headquarters, and the like. The Government will still be required to prove an increase in market power. It will not be sufficient for the Government to claim that the leading 200 firms now control sixty percent instead of fifty percent of all manufacturing assets. The function of the political bias set out in the decisions is to negate the defense of efficiency. Thus even if the merged partners could claim that they could produce more cheaply than before, the Government might still resist the merger if it could show that the merged corporation would not be subject to market control and would need extra market regulation. Such a situation is unusual and it is very doubtful that such political decisions are necessary. Their use in *Brown Shoe*[12] best illustrates how political restrictions operate. In that case the claim was made that vertical integration would improve efficiency. The Court rejected the claim because the possibly more efficient organizations of the industry in three out of four major vertically integrated units would mean that the market would no longer control the production, pricing, and distribution of shoes. This is the meaning of the political language in the opinions, and therefore the antitrust laws still require the Government to show, by acceptable economic theory, that some new market power has or will come into existence as the result of a merger.

From the foregoing analysis, it is clear that the Government must allege some sort of market control arising from conglomerate mergers if it has any hope of stopping them. The Government contends that there are three kinds of market maladjustments that occur in a large conglomerate merger: first is reciprocity, second is the curtailment of potential competition, third is cross-subsidization by the divisions of the conglomerate.[13] Both legal and economic theories exist to support enjoining a merger though it is not clear how the mere existence of a merger would result in any of the suggested activities. This article will examine the economic and legal theories behind reciprocity, curtailment of potential competition, and cross-subsidization and apply them to the guidelines set out by the Justice Department and the staff of the Federal Trade Commission.

---

[12] 370 U.S. 294 (1962).

[13] FTC Report, *supra* note 3, at 338-490.

RECIPROCITY

Reciprocity means that one corporation will buy goods from another corporation if the other corporation will buy goods from the first corporation. Reciprocity would seem to reduce trade to barter, a notably inefficient method of exchange. The staff of the Federal Trade Commission gives a number of examples of such reciprocity.[14] The staff first mentions the *Waugh Equipment Co.* case.[15] In that case Armour Incorporated officers were given stocks in Waugh to help promote the Waugh Company. The Waugh Company made draft gears for railroads. Officers of the Armour Company then solicited railroads to buy the Waugh Company gears. Since Armour was a large shipper, their solicitation allowed Waugh to move from seventh place to first in draft gears between 1924 and 1929.

The staff's second case involved General Dynamics. Liquid Carbonic, the largest domestic producer of carbon dioxide, was acquired by General Dynamics in 1957. The carbon dioxide market was concentrated. Liquid Carbonic had about thirty-five to forty percent of the market, with Air Reduction the second producer. These top two had sixty percent of the market and the top four had seventy-five percent. Seventy-five percent of General Dynamics Corporation's suppliers used carbon dioxide and only sixty-five percent of Liquid Carbonic's capacity was being used at the time of acquisition. Action was taken at the highest corporate levels to inform General Dynamics' suppliers that they should buy from Liquid Carbonic. The district court held in that case that reciprocal purchasing was substantial and dissolved the merger.[16]

The staff's third case is *Consolidated Foods.*[17] Consolidated acquired Gentry which is a producer of dried onions and garlic. The normal customers of Gentry were the companies selling to Consolidated. The Supreme Court held that the actuality and possibility of reciprocal purchasing made the merger illegal.

The F.T.C. mentions other cases of reciprocal buying but they in no way explain why reciprocity comes into existence. The Commission assumes that any time reciprocal buying is possible it will exist. On the other hand, if we understand when reciprocal purchasing is profitable, then we can distinguish between conglomerate mergers that will result in reciprocal purchases and those that will not.

---

[14] *Id.* at 323.

[15] Waugh Equipment Co., 15 F.T.C. 232, 242-45 (1931).

[16] United States v. General Dynamics Corp., 246 F. Supp. 156 (S.D.N.Y. 1965) and 258 F. Supp. 36 (S.D.N.Y. 1966).

[17] FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965).

In the *Waugh* case, Armour was dealing with railroads during a time when the railway rates were fixed by railroad conferences and approved by the I.C.C.[18] Although Armour was paying a premium to a railroad cartel, there was no way in which Armour could get a lower price for shipping goods. Nonetheless, Armour could help a particular railroad by giving it business. Thus the alliance with Waugh permitted Armour (or its officers, at least) to obtain something for giving business to particular railroads at prices over competitive market prices. Hence Waugh received business from the railroads at no extra cost to Armour.

The reciprocal buying in the Liquid Carbonic case also resulted because the parties were prohibited from using price competition. Liquid Carbonic could not successfully cut prices to increase sales, for if it did its competitors would respond and would more than likely keep their share of the market.[19] We must also assume that lower prices for carbon dioxide would not appreciably affect the total amount of the gas used. Thus Liquid Carbonic was left with thirty-five percent unused capacity. The officers of Liquid Carbonic must have asked themselves what kind of non-price competition would allow them to increase their utilization of their plant. Clearly, reciprocal purchasing through merger would work for Liquid Carbonic since its competitors could not immediately match Carbonic's actions. Certain reciprocal buyers could be persuaded (with pressure) because prices from Liquid Carbonic were the same as its competitors' and, as sellers to General Dynamics, the reciprocal buyers might be charging more than a competitive price, either because they already belonged to a cartel or because section 2(f) of the Robinson-Patman Act prevented them from granting a discriminatory price concession.[20]

The case of Consolidated Foods again illustrates that reciprocal buying may result in a hidden price cut forbidden by the Robinson-Patman Act. Consolidated Foods, a large food processor, bought a small dry onion and garlic processor. Under classic economic analysis, we would expect that Consolidated would have demanded and received the lowest price from its suppliers and therefore would not be in a position to demand additional concessions from these suppliers. On the other hand, there was no way for Gentry to increase its market. Dried garlic and onion prices are inelastic; the market was concentrated. Gentry needed a non-price method

---

18 49 U.S.C. § 1(5) (1920).

19 We can expect each seller will react to a price cut to retain its share of the market in a concentrated market. Robinson-Patman Act § 2(f), 15 U.S.C. § 13(f) (1964).

20 *Id.*

of competition in order to succeed. Hence it would benefit Consolidated to purchase Gentry only if Consolidated were not receiving all the possible concessions from its suppliers, which was undoubtedly the case.

From this analysis, we can see when reciprocal purchasing will occur. It will occur when a major purchaser deals with suppliers who are in a concentrated industry or who are prevented from giving concessions to the major producer because of section 2 (f) of the Robinson-Patman Act. Such a purchaser can buy a company that sells to these suppliers. One might argue that if this is all that is involved in reciprocal purchases then they are harmless since reciprocal purchasing will allow some sort of competition where none existed previously. Reciprocal purchasing is wrong, however, because it does in fact foreclose the market. One seller has an advantage that no one else has, for under such circumstances it will not pay for anyone else either to start price competition or to enter the market. On the other hand, if such special circumstances do not exist, we would not expect reciprocal buying to occur and thus we should not stop mergers merely on the possibility of such purchases.

CURTAILMENT OF POTENTIAL COMPETITION

The second reason given for prohibiting conglomerate mergers is that they eliminate potential competitors. This elimination of potential competitors occurs only with a special kind of conglomerate merger called a product extension merger.[21] For example, it is inappropriate to claim that the acquisition by L.T.V. of Jones and Laughlin eliminated potential competition in the steel industry. On the other hand, the acquisition by Procter and Gamble of Clorox was properly held to have eliminated potential competition. Certainly potential competition is an important factor in the behavior of a market. In a competitive market where there are no barriers to entry, existing competitors cannot charge prices substantially higher than market without encouraging entry. On the other hand, in an industry where specialized resources and know-how are important, the members of an industry could effectively charge above market price if no potential competitor existed. Thus if it were known that no such competitors existed, the members of the industry could assume that a certain period of time would be necessary before someone could be in the position to enter the market. If potential competitors, such as companies selling the same prod-

---

[21] A product extension merger is the merger of a company into a closely related field. The Proctor & Gamble-Clorox merger is a good example.

uct in different geographic markets or companies selling similar but different products in the same market, did exist, however, the members would have to assume that such companies would enter when the price in the industry was substantially above cost. We would expect, therefore, that the members of the industry would act with discretion and not invite such entry. The fact that potential competitors exist, however, does not stop the members of the industry from charging prices above cost. The extent of freedom enjoyed by members of the industry depends upon the scale of entry. If the scale of entry must be large, either because national advertising is involved or because the plant must be large to be efficient, then entry by a new competitor will not occur until demand in the industry can justify the additional production. Thus if new entry must be on a scale involving twenty percent of the market, entry will not occur until the existing producers are producing less than eighty percent of the demand, since entry on such a large scale would impose losses both on the entrant and on the industry as a whole. The necessary scale of entry probably explains why merger is the only certain way to enter industries. The necessary scale also explains why members of existing oligopolistically organized industries can safely ignore potential competition when potential entrants must enter on a large scale. From this analysis it would seem that new entry would occur only in an expanding industry where existing firms would not be able to keep up with production or where the scale of entry was small enough so that a potential competitor would not increase the total product of the industry so as to impose losses on all members of the industry. Entry by merger would occur when the opposite conditions exist. The only difficult case involves the product extension merger. For example, an existing oil company might enter a new geographic market by using only slight increases in outlets or advertising without imposing losses on the whole industry. Conversely, a completely new oil company might, because of the necessary advertising and outlets, have to enter on a grand scale and cause losses. Thus we can justify the prohibition of a merger involving geographically related companies because they are potential competitors. Furthermore, potential competitors with know-how and the capability of new entry can be induced by an attractive merger offer not to enter when the market conditions would warrant new entry whereas others without these qualifications would be disregarded entirely. This may have occurred in the Proctor and Gamble-Clorox case.

One could conclude, therefore, that most conglomerate mergers do not take the place of new entries and that when such mergers do replace a new entrant, it is in the product extension field. One could also conclude that the potential competitors who most effectively control an existing market are those competitors that have the finances, personnel, and know-how immediately to enter the field, and that such competitors are likely to be companies in the same or closely related fields. The Justice Department and the F.T.C. are wrong when they attack unrelated conglomerate mergers because such mergers eliminate potential competitors; they are right when they attack product and geographic extension mergers.

CROSS-SUBSIDIZATION

The last reason given by the staff of the F.T.C. for stopping conglomerate mergers is to stop cross-subsidization—that is, to stop a large company from subsidizing its losses in one division by profits from another. Such cross-subsidization is not peculiar to conglomerates. In fact the examples the F.T.C. uses do not involve conglomerates at all. The F.T.C. points to the attempt by Safeway in its Dallas and El Paso divisions to take twenty-five percent of the market in large cities and fifty percent of the market in small towns, by the use of sales near or below cost. The staff concluded:

> In short, it would appear that Safeway was quite willing and able to employ competitive tactics resulting in substantial losses in one of its major divisions over an extended period of time, presumably because these losses would have no serious adverse effect on overall profit performance.[22]

Another example offered by the F.T.C. is that of Anheuser-Busch. As the Commission sees the case, Anheuser-Busch retaliated against local brewers for refusing to follow an Anheuser-Busch price rise after a union contract. The facts show that there was normally a certain price differential between premium and local beers. Thus, when in response to a labor settlement Anheuser-Busch raised its price along with all the national beers, it became vulnerable to the competition of local beers, since the local breweries refused to raise prices. Anheuser-Busch then retaliated by cutting prices, even to the extent of cutting out the premium differential. The F.T.C. found that the effect of this action was to insure that the local breweries would follow the next rise in prices, and they did do so.[23]

The third staff example was the only one of a product extension conglomerate merger. National Dairy Products acquired Bedford

[22] FTC REPORT, *supra* note 3, at 420.

[23] *Id.* at 421-32. *See also In re* Anheuser-Busch, Inc., 54 F.T.C. 277, 287-88 (1957), *rev'd on other grounds*, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960), *order again set aside*, 289 F.2d 835 (7th Cir. 1961).

Products, a producer of jams and jellies for private label. In 1956, National shifted Bedford production to a national distribution of jams and jellies under the Kraft label. After extensive advertising on television, in magazines, newspapers, etc., National doubled the production of Bedford and became the largest producers of full-line jams and jellies. In 1961, National, dissatisfied with its share of the market, in effect cut its price in half in the Washington market. It gave away one case of jellies and jams for each one purchased during a twenty-six day period. At this new price, it sold 400,803 cases as compared to 27,994 cases sold during the same period the year before. The Commission again concludes that only because National sold in other places could it engage in such activity. Of course such activity was a violation of section 2(a) of the Robinson-Patman Act.[24]

These three cases do not prove what the Commission claims they prove. First, neither Safeway nor Anheuser-Busch are conglomerates. National Dairy may be a conglomerate, but its action could be as easily explained if it produced only jams and jellies on a national scale. What it does show is that in a somewhat concentrated market, companies with larger cash resources than their competitors have market strategies available to them that are not available to their competitors. Not simply because a company is a conglomerate or because it has other markets in which it sells can it use a price-cutting strategy; such a company can cut prices simply because it has cash reserves. In addition to cash reserves, the company must believe that if it uses these cash reserves to lower prices in a local market it can permanently obtain a larger share of that market or insure that the competitors will not compete against it in the future. The use of economic muscle can and has been used to enforce various market arrangements but it must be justified by the expected return in the particular market, not on the fact that another market exists. On the other hand, the price discrimination provisions of the Robinson-Patman Act,[25] making it illegal for a national seller to cut prices in a particular market (except defensively), do protect local or regional sellers from the strategy outlined above. For in all these cases it would have been too expensive for the national concerns needlessly to cut prices in all of their markets in order to gain particular advantages in a local market. The problem of the affluent competitor cannot be solved either by allowing or prohibiting conglomerate mergers. It is true that in certain circumstances a subsidiary of a conglomer-

---

[24] FTC REPORT, *supra* note 3, at 432-43.

[25] Robinson-Patman Act § 2 (a), 15 U.S.C. § 13 (a) (1964).

ate would be better able to cut prices than a division of Safeway or Kraft because the price discrimination provisions of the Robinson-Patman Act would not apply to the subsidiary cutting prices. Nonetheless, the only time this would be a problem is when the conglomerate mergers enter into an industry where the companies have small financial resources in relation to the conglomerates and nationwide or marketwide price cutting was feasible.

The Reynolds Aluminum[26] and Procter and Gamble[27] mergers show the greatest danger of such activity. In these cases, the company buying Arrow, Reynolds Aluminum, and Procter and Gamble, the company buying Clorox, were well financed compared to the companies in the business. Reynolds and Procter and Gamble could demand a stabilized proportion of the business under a realistic threat to impose losses on other members of the particular industry. The other members knew that losses could be imposed upon them and that they could not impose substantial losses on Procter and Gamble or Reynolds without a suicidal loss to themselves.

We must recognize that no company, no matter how rich, would lose money to drive out or discipline competitors if that company were not reasonably sure that after the competitors were disciplined or driven out of business it would not be necessary to do it again.[28] These companies can be reasonably assured that their actions will be successful if the market structure has entry barriers because of strong product differentiation. In markets where conglomerates merge with small companies and there is therefore a large differential in financial resources, it would seem that the only defense against such new merged companies would be a counter-merger of the same sort. Such a change in market structure again would tend to limit entry, and would, therefore, properly be held illegal under section seven of the Clayton Act.[29]

On the other hand, most of the important conglomerate merger cases do not involve the merger of a large conglomerate into a small concentrated industry and hence we would not expect cross-subsidization. The use of financial muscle may be profitable only if one knows that he can soon drive the other parties to their knees, since substantial losses taken for any reasonable period of time generally cannot be made up. We would expect, therefore, that cross-

---

26 Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962).

27 FTC v. Procter & Gamble Co., 386 U.S. 586 (1967).

28 For a full discussion, *see* Rudolph, *The Rationale Behind the Foreclosure Doctrine*, 46 NEB. L. REV. 605, 609 (1966).

29 *Id.* at 607-08.

subsidization would not result whenever the competitors of the acquired company have substantial financial resources. Thus, in merger cases this argument is limited to the special situation outlined in *Clorox* or *Reynolds*, and cannot be used to deny proposed mergers such as the I.T.T.-Hartford Insurance Merger.

CONCLUSION

The staff report seems to indicate that the motive for most conglomerate mergers lies not in some sort of market control but in the stock market's premium for growth companies and in the failure of tax laws to tax exchanges of stock. An examination of the twenty-five most active acquiring companies shows that they have acquired fifty-nine percent of the assets held by the top 200 corporations.[30] Among those twenty-five are the best-known conglomerates. Except for the petroleum companies, which are geographic product extension cases, it may be difficult to show that any of the ill effects just discussed could or would arise from these conglomerate mergers. For example, it is impossible to see how L.T.V.'s acquisition of Wilson and Company, a meat packer and sporting goods firm, Jones and Laughlin, a steel firm, and Braniff, an airline, could result in reciprocal buying or elimination of a potential competitor or, for that matter, cross-subsidization. It is hard to imagine that Jones and Laughlin would attempt to discipline U.S. Steel or Bethlehem for not following a price set by Jones and Laughlin.

If such is the case, one wonders how the Attorney General hopes to stop the merger of any of the top 200 with each other or with a leading firm in any field. Thus the antitrust suit brought by the government involving the acquisition by International Telephone and Telegraph of Hartford Fire Insurance Company and Grinnell Corporation[31] has run into difficulty, as well as has its suit against the attempt by Northwest Industries to acquire B. F. Goodrich.[32] In both these cases, as well as its case against L.T.V., the Government has made the claim that reciprocal buying and the elimination of potential competition will result. The Government also claims that such a merger will increase the current trend of acquisitions of dominant firms in concentrated markets by large companies, thereby increasing the concentration of control of manufacturing assets, increasing the barriers to entry in concentrated markets, and diminishing the vigor of competition by increasing actual and

---

[30] FTC REPORT, *supra* note 3, at 258 *et seq.*

[31] United States v. International Tel. & Tel., 1969 Trade Cas. 87,633.

[32] United States v. Northwest Indus., 301 F. Supp. 1066 (N.D. Ill. 1969).

potential customer-supplier relationships among leading firms in concentrated markets.[33]

As previously indicated, no economic theory exists that can tell us what happens when firms in separate markets merge. In fact, all that economic theory seems to indicate is that to exert market control, a company must be able to control the production in a particular market. If the claim of the Justice Department is based on the political and social aspects of the Attorney General's speech on *Alcoa* and *Brown Shoe*, that claim does not seem to meet the legal standards for the application of such a rule. In addition, it is clear that most of the merger activity among the top 200 firms has not involved the top fifty firms. Obviously larger concentrations of assets are immune from such an attack. To make new political standards meaningful, we must adopt into law some standard other than competition. For example, we might adopt standards like those in the Bank Holding Company Act[34] or the I.C.C. Act.[35] At present, the only meaning that is given to the political and social language found in the cases is that, when necessary, efficiency may be sacrificed to insure competitive market control. Under such circumstances the Government must show how a conglomerate merger has injured the market structure.

Moreover, we have seen that in most instances reciprocal buying, elimination of potential competitors, or cross-subsidization does not occur in the true conglomerate merger. In fact the I.T.T. handled the government quite nicely with their theory of conglomerate mergers which made each subsidiary a profit center. I.T.T. built into its conglomerate a competitive base so that it would not pay any division to purchase reciprocally. In that arrangement, the managers of each subsidiary are paid on the profit that the subsidiary makes and not out of the general profits of International Telephone and Telegraph. This being so, no subsidiary managers would engage in reciprocal purchasing. Even the F.T.C. Report[36] states that reciprocal purchasing must be pushed vigorously by the higher officers of the companies engaged. The purchasing agents would not buy reciprocally if it were not profitable for the managers of the subsidiaries involved.

Without any economic theory to support it, the Government is left simply with its general bias against bigness and especially against the new conglomerates. Apparently no articulated theory of

---

[33] United States v. Ling-Tempco-Vought, Inc., Civil No. 69-438 (D. Pa., filed April 14, 1969).
[34] 12 U.S.C. § 1841 (1964).
[35] 49 U.S.C. § 5 (1964).
[36] Note 3 *supra*.

antitrust is available to stop such mergers. Perhaps the Government may have to retreat from its present concern with conglomerates and consider instead the basic question of whether oligopolistically organized industries should be made competitive.[37] Such a result would be much more productive than a series of meaningless victories against the new conglomerates.

[37] *See* REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY (1968) (reprinted in 2 ANTITRUST LAW AND ECONOMIC REVIEW 11 (Winter 1968-69)).