

Aggregate Concentration: An Empirical Study of Competition Law SolutionsMichal S. Gal and Thomas Cheng¹

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Abstract

Competition law is generally focused on competition in *a market*. Yet, as recent economic studies have clearly indicated, one of the main sources of competition concerns of jurisdictions around the world is the impact of high levels of aggregate concentration in their markets, when a small group of economic entities controls a large part of the economic activity through holdings in many markets. High levels of aggregate concentration can significantly impact competition and welfare. On the one hand, conglomerates' substantial resources and varied experiences, as well as their economies of scale and scope, often enable them to enter markets more readily than other firms, especially when entry barriers are high. On the other hand, high levels of aggregate concentration raise significant competitive concerns. Most importantly, oligopolistic coordination in and across markets as well as entry barriers into markets might be increased. These effects, in turn, might lead to stagnation and poor utilization of resources, which adversely affect growth and welfare. Another major concern is a political economy one: given their size and economic heft, large conglomerates may attempt to translate their economic power into political power in order to create, protect and entrench their privileged positions. Given these effects, the paper attempts to explore the weight given- if at all- to aggregate concentration in the application of competition laws around the world. The analysis is based, *inter alia*, on the experiences of 35 different jurisdictions in dealing with aggregate concentration through competition law, based on a survey performed with the assistance of the UN Conference on Trade and Development.

¹ Professor and Director of the Forum for Law and Markets, University of Haifa, and Associate Professor, University of Hong Kong respectively. The authors wish to thank Neil Ben-Ishai, Nir Ofer, Yossi Sabag, Ran Hammer and Lior Frank for their excellent research assistance, the Israeli Science Foundation (ISF) for financial support of the research, the UN Conference on Trade and Development (UNCTAD), and especially Dr. Graham Mott, for support in conducting the empirical study, and participants at the UN Conference on Trade and Development Research Partnership Platform meetings as well as at the Oxford Antitrust Enforcement Symposium for their excellent comments. We also thank the competition authorities which have taken the time and effort to respond to the questionnaire.

I. Introduction

Competition law generally focuses on competition in a specific market. Yet, as economic studies have clearly indicated, one of the main sources of competition concerns of many jurisdictions around the world is the impact of high levels of aggregate concentration in their economy. High aggregate concentration levels imply that a small group of economic entities controls a large part of the economic assets (or equity) in the economy through holdings in many markets (hereinafter: "conglomerates").² High aggregate concentration levels are common in small economies. Yet the phenomenon can also be found in large and medium-sized jurisdictions. Some known examples include the Chaebols (meaning "wealthy families") in Korea, the Keiretsu in Japan, and the Business Houses in India.³ While a correlation often exists between a low level of development and high levels of aggregate concentration, even some European countries suffer from high levels of aggregate concentration.

Large conglomerates can significantly impact competition and welfare. On the one hand, they can strengthen competitive pressures. As elaborated below, their substantial resources and varied experiences, as well as their economies of scale and scope, often enable them to enter markets more readily than other firms, especially when entry barriers are high. On the other hand, they raise significant competitive concerns. Where several large conglomerates operate, this may increase the instance of oligopolistic coordination in and across markets. Given their current and potential multi-market contact, conglomerates are often likely to create a reciprocal status-quo, thereby forbearing from entering each other's markets or not engaging in aggressive competition in markets in which they potentially compete. Conglomerates might also deter the entry or expansion of competitors which are not related to another conglomerate. These effects, in turn, might lead to stagnation and poor utilization of resources, which impede growth and welfare. Another major concern is a political economy one: given their size and economic impact, large conglomerates may attempt to translate their economic power into political power in order to create, protect and entrench their privileged positions, thereby enjoying benefits such as government

² Aggregate concentration should be differentiated from two other types of concentration which also affect competition and welfare: market concentration which relates to concentration in a specific market, and concentration of ownership in firms, which might create agency problems in corporate pyramids. This study focuses on aggregate concentration only, but takes into account other sorts of concentration where they affect the former. Note that the definition does not extend or take into account concentration levels in international markets, which might also in some instances affect competition and welfare. We acknowledge that the word "conglomerate" is used for different definitions, including to relate to not necessarily large yet highly diversified holdings entities. In this paper we use the term to relate mainly to conglomerates' large size, relative to the economy, and put less emphasis on the extent of its diversification.

³ See, e.g., Stijn Claessens and others, 'The Benefits and Costs of Internal Markets: Evidence from East Asia' (2006) 7 EMERGING MARKETS REV. 1; Mara Faccio and Larry Lang, 'The Ultimate Ownership of Western European Corporations' (2002) 65(3) J. OF FIN. ECON. 365; For a survey of studies see Randall Morck and, 'Corporate Governance, Economic Entrenchment, and Growth' (2005) 43(3) J. OF ECON. LITERATURE 655.

protection from the perils of competition. Thus, even if the usual tests applied in competition law would not indicate that a firm possesses significant market power in a *particular* market, it might still be able to exercise significant power in that market if it controls a significant part of the economic activity in a jurisdiction.

Aggregate concentration raises non-trivial and under-explored challenges to competition law. One set of questions centers on the compatibility and efficacy of competition law's analytical and regulatory tools to deal with such issues. The question arises, *inter alia*, because the competitive issues created by aggregate concentration usually flow from the structure of the market (which could result from internal growth or from acquisitions that were allowed in the past) or from conduct which is generally regarded as lawful under competition law (most importantly, oligopolistic coordination and political influences). Thus, traditional competition law tools- retroactively prohibiting infringements of predetermined anticompetitive types of conduct rather than direct regulation which proactively intervenes in market conditions⁴- may not suffice to deal with many of the issues raised by high aggregate concentration levels. Furthermore, most competition law tools focus on narrowly defined markets that do not take economy-wide political or economic effects into account, despite the fact that such effects sometimes affect competition and welfare more than market-specific ones. Moreover, regulation might require the balancing of interests which go beyond pure competition-centered concerns.

Regulation of aggregate concentration by competition law also raises issues regarding the authorities' mandate, given that such regulation can have significant effects on the economy and would affect wider parameters of welfare. Also, such intervention is likely to raise political economy issues, both from powerful market players as well as from other regulators on whose turf the Authority might step, which might in turn affect the Authority's ability to perform its regular tasks.⁵ These considerations should be evaluated when determining whether competition authorities are well placed to deal with competitive concerns arising from high levels of aggregate concentration.

Against this backdrop, we set out to examine which tools, if any, jurisdictions around the world can and actually do apply in order to deal with high levels of aggregate concentration. A study was undertaken: questionnaires were drafted and sent to jurisdictions around the world, their answers gathered and analyzed, and several in-depth case studies were performed. This article reports on the results of this macro-study.⁶

⁴ See, e.g., Josef Drexler and Fabiana Di Porto (eds), *Competition Law as Regulation* (Edgar Elgar, Cheltenham 2015).

⁵ See, e.g., Tamar Indig and Michal S. Gal, 'New Powers – New vulnerabilities? A Critical Analysis of Market Inquiries', in *Competition Law as Regulation*, *Ibid*, chapter 4.

⁶ For an analysis of the Abuse of Superior Bargaining Power tool see Thomas Cheng and Michal S. Gal, 'Abuse of Superior Bargaining power: Dealing with Aggregate Concentration Concerns' in Iwakazu Takahashi and Paul Nihoul (eds), *Abuse of Dominance* (Edgar Elgar, Cheltenham 2016).

As this article demonstrates, a wide spectrum of competition law responses to aggregate concentration concerns exists. Despite the potential adverse competitive effects of high levels of aggregate concentration, most jurisdictions give little, if any, weight to competitive concerns resulting purely from high aggregate concentration levels. At the same time, other jurisdictions deal with such concerns, *inter alia*, through prohibitions against abuse of superior bargaining position, joint venture and merger regulation, or control of excessive pricing. A handful of jurisdictions go further, employing more regulation-oriented tools through their competition laws or competition authorities.

This study is timely: in the past few years the issue of how aggregate concentration affects social welfare and how its negative effects can be curbed have taken center stage in public and regulatory debates in various jurisdictions around the world, as a result of the public outcry against economic conditions and the inequality regarding entrepreneurial opportunities. Aggregate concentration and its resultant market conditions, it is argued, serve in some economies as significant explanatory variables of the high cost of living, reduced regulatory and legislative stamina in regulating conglomerates, and corporate governance agency problems in which a small number of owners control significant parts of the economy through partial holdings in multi-layered pyramidal structures. Accordingly, this study attempts to go beyond the rhetoric regarding what *should* be done, to explore what actually *has* been done, through competition law, to limit the adverse effects of high levels of aggregate concentration.

The roadmap of this article is as follows. The first chapter focuses on the competitive and welfare effects of high levels of aggregate concentration. The second chapter reports and analyzes the results of the study performed, in order to contribute to our understanding of what role competition laws actually play in regulating high levels of aggregate concentration in different jurisdictions. The third chapter offers some conclusions that arise from the research.

Chapter I: Aggregate Concentration: Effects on Competition and Welfare⁷

A. Definition of Aggregate Concentration

Aggregate concentration differs from market concentration in that the latter focuses on the level of concentration in a *specific market*, whereas the former focuses on a wider point of view, *across the economy*. Indeed, it might be possible that conglomerates that enjoy high levels of aggregate concentration might not enjoy a dominant position in many of the markets in which they operate, and therefore the tests of market power commonly used in competition law, which use market shares in a specific market as a *prima facie* indicator of market power, will indicate an absence of market power.⁸ Yet

⁷ Based, in part, on Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard University Press, Boston 2003) and Michal S. Gal, 'Merger Policy for Small and for Micro Jurisdictions' in *More Pros and Cons of Merger Law* (Swedish Competition Authority, Stockholm 2013) 61.

⁸ Yet some of the competition law offenses are based on leverage of market power from one market to another, in which the market player does not possess a dominant position as defined by competition

often large conglomerates might still be able to affect competition- directly or indirectly- even in such markets, given their holdings elsewhere that allow them to enjoy unilateral or collective market power in related markets.

High levels of aggregate concentration can take many forms. Below we provide several observations that might assist the reader in differentiating it from other economic phenomena. First, aggregate concentration can occur when one large conglomerate controls a significant part of the economy. For example, in South Africa one family controlled before the end of the apartheid more than 40% of the economy.⁹ Yet more often multiple conglomerates have diversified holdings across markets. Second, while there is no preset maximum number of large conglomerates upon which aggregate concentration is measured, the number must be small.¹⁰ Third, despite the observation that many conglomerates are diversified across multiple markets, there is no need for diversification of industries in which the conglomerates operate. Rather, some conglomerates achieve significant control of large parts of the economy through control of a limited number of major and economically important industries. Fourth, aggregate concentration can be defined based on several criteria. Some criteria that are often used include the percentage of assets relative to GDP, such percentage relative to the value of firms in the local stock exchange or in the economy, value added, profits, and employment.¹¹ Fifth, beyond aggregate measures, market power concerns can also be affected by the control of specific markets that create significant externalities on other markets, such as the control by large conglomerates of important bottleneck industries (e.g., telecommunications, infrastructure), as well as financial institutions and media outlets. Yet given that the externalities created by the control of such industries are often hard to measure, they generally do not come into play in aggregate concentration measurements. Accordingly, for the purposes of this study, we used the simple definition noted above, which captures most of the instances of high aggregate concentration: "a small group of economic entities controls a large part of the economic assets (or equity) in the economy through holdings in many markets."¹² At the same time, we acknowledge that these aggregate measurements may understate the actual

law. Also, competition law also recognizes instances of collective market power, such as when market conditions support a stable oligopolistic coordination.

⁹ South Africa, Answer to Questionnaire, question 1.

¹⁰ For an example of criticism of measures of the "100 or 200 largest firms" see, e.g., George Stigler, 'The Statistics of Monopolies and Mergers' (1956) 64 J. OF POL. ECON. 33 ("The statistical universe of the hundred largest corporation is inappropriate to studies of monopoly and competition"). Some have argued that Stigler is mistaken, and it is not self-evident that concentration among the 100 or 200 largest industrial corporations has "no relation whatsoever to economic power in the marketplace" David Mermelstein, 'Large Industrial Corporations and Market Shares: Reply' (1971) 61 AM. ECON. REV. 168. In our definition, we refer to much smaller numbers of firms.

¹¹ For an analysis of the measurements and their shortcomings see, e.g., Lawrence J. White, 'Trends in Aggregate Concentration in the United States' (2002)16(4) J. OF ECON. PERSP. 137, 142.

¹² Note that the term "business group" can also be subject to different interpretations. We follow Leff: "A group of companies that does business in different markets under common administrative or financial control whose members are linked by relations of interpersonal trust on the basis of similar personal ethnic or commercial background." Nathaniel H. Less, 'Industrial Organization and Entrepreneurship in Developing Countries: The Economic Groups' (1978) 26 ECON. DEVELOPMENT AND CULTURAL CHANGE 661, 669.

effects of conglomerates on the economy. Therefore, when studying specific cases, wider considerations should be taken into account.

B. Effects of Aggregate Concentration on Competition and Welfare

High levels of aggregate concentration characterize many jurisdictions around the world. Not surprisingly, they are common in many small economies. For example, in Israel the largest 16 conglomerates controlled almost half of the market value of all Israeli firms in 2009.¹³ In Hong Kong and Singapore, the largest 16 conglomerates controlled firms which generate 84% and almost 50% of the local GDP respectively.¹⁴ Yet the phenomenon is not unique to small economies, and can be found in large and medium-sized jurisdictions as well. While a correlation generally exists between a low level of development and high levels of aggregate concentration, some developed countries also suffer from high levels of aggregate concentration. In Sweden, for example, one family controlled until recently roughly half of the market capitalization of the Stockholm Stock Exchange, and South Korea, India and Japan are known for their large business groups. While the phenomenon does not characterize today economies like the U.S., the EU and the UK, it raises significant issues for many other jurisdictions around the world.

As economic studies have clearly indicated, high levels of aggregate concentration can have significant impact on competition and welfare. On the one hand, large conglomerates can strengthen competitive pressures. The substantial resources and varied experiences of conglomerates, as well as their economies of scale and scope (for example in production, distribution, marketing and billing) often enable them to enter markets more readily than other firms, especially when entry barriers are high, and to save some resources by creating internal enforcement mechanisms.¹⁵ Moreover, their vast financial means and diversified portfolios enable their business units to tap into a larger pool of retained earnings, thereby enabling them to take more risks in product development or in entry into new markets and increase their ability to overcome short-term financial obstacles. Most importantly, they may overcome what is known as the missing institutions problem, arising from inefficient enforcement of contracts and from inefficient external financial markets.¹⁶ Where governments and market

¹³ Tamir Agmon and Ami Tzadik, *Business Groups in Israel* (The Research and Information Center of the Israeli Parliament, 2010).

¹⁴ Stijn Claessens, Simeon Djankov & Larry Lang, 'The Separation of Ownership and Control in East Asian Corporations' (2000) 58(1) J. OF FIN. ECON. 81. In Singapore the problem is further exacerbated by the presence of many large and resource-rich Government-Linked Companies. See, e.g., Burton Ong, 'The Origins, Objectives and Structure of Competition Law in Singapore' (2006) 29(2) WORLD COMPETITION 269, 272-4.

¹⁵ Interestingly, a strong debate ensued between U.S. economists, starting in the early 1970's, with regard to the effects of diversification on welfare. For a literature review see, e.g., Jeffrey R. Williams, Betty Lynn Paez and Leonard Sanders, 'Conglomerates Revisited' (1988) 9(5) STRATEGIC MANAGEMENT JOURNAL 403, 404-6.

¹⁶ See, e.g. Takeo Hoshi, Anil Kashyap & David Scharfstein, 'Corporate Structure, Liquidity, and Investment: Evidence from Japanese Industrial Groups' (1991) 106 Q. J. OF ECON. 33; Tarun Khanna and Krishan Palepu, 'The Right Way to Restructure Conglomerates in Emerging Markets' (1999) 77

institutions do not function well, conglomerates may allow firms to overcome such obstacles by supplying the missing resources internally. Moreover, group reputation substitutes for underdeveloped legal and regulatory mechanisms that leave outside investors vulnerable to exploitation risks and information asymmetries.¹⁷ Conglomerates might also create scale economies in recruitment and in the development of human resources. Accordingly, conglomerates may have positive effects on the competitiveness of firms and markets.¹⁸

At the same time, high levels of aggregate concentration raise significant competitive concerns.¹⁹ Aggregate concentration might increase the instance of oligopolistic coordination in and across markets. Given their current and potential multi-market contact, conglomerates are often likely to create a reciprocal status-quo, thereby not entering each other's market or not engaging in aggressive competition in markets in which they potentially compete.²⁰ Conglomerates might also increase barriers to the entry or expansion of competitors into markets in which they operate.²¹ For example, conglomerates may find it more profitable to engage in predatory behaviour, because such conduct has wide externalities: it signals to competitors in the many markets in which they operate that the price of competition will be high. These effects, in turn, might lead to stagnation and poor utilization of resources, which undermine growth and welfare.²² A study of the Israeli market, for example, has shown that firms controlled by conglomerates usually had lower growth rates and were less profitable but were more likely to survive than firms not belonging to such conglomerates.²³

HARVARD BUS. REV.125; Yishai Yafeh and Tarun Khanna, 'Business Groups in Emerging Markets: Paragons or Parasites?' (2006) 45 J. OF ECON. LITERATURE 331.

¹⁷ Tarun Khanna and Krishan Palepu, 'Is Group Affiliation Profitable in Emerging Markets? An Analysis of Diversified Indian Business Groups' (2000) 55(2) J. OF FIN. 867.

¹⁸ See also Ronald W. Masulis, Peter K. Pham & Jason Zein, 'Family Business Groups around the World: Financing Advantages, Control Motivations and Organizational Choices' (2011) 24(11) REV. OF FIN. STUD. 3556.

¹⁹ We shall not analyze other concerns, such as agency problems resulting from pyramidal holdings, which are less relevant to competition concerns, although they enter the welfare analysis. See, e.g., Lucian Arye Bebchuk, Renier Kraakman & George Triantis, 'Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights' in Randall K. Morck (ed), *Concentrated Corporate Ownership* (University of Chicago Press, Chicago 2000) 445; Heitor Almeida and Daniel Wolfenzon, 'Should Business Groups be Dismantled? The Equilibrium Costs of Efficient Internal Capital Markets' (2006) 79(1) J. OF FIN. ECON. 99, 133.

²⁰ See, e.g., B. Douglas Bernheim and Michael D. Whinston, 'Multimarket Contact and Collusive Behavior' (1990) 21 RAND J. OF ECON. 1; Kirsty Hughes and Christine Oughton, 'Diversification, Multi-market Contact and Profitability' (1993) 60 ECONOMICA 203; *Concentrated Corporate Ownership*, Ibid.

²¹ For such an argument see, e.g., Corwin D. Edwards, 'Conglomerate Bigness as a Source of Power' in *Business Concentration and Price Policy* (Report of National Bureau of Economic Research No.5, Princeton University Press 1955) 331, 335 and 348 (The big company is able to outbid, outspend, or outlose the small one. It also generates psychological pressure which may force smaller ones to follow its pricing policies, and that its very presence in the market may discourage entrants or make lending institutions unwilling to finance them.)

²² Ibid; Morck, Wolfenzon & Yeung (fn 3).

²³ *Agmon and Tzadik* (fn 12).

The second major concern is a political economy one: given their size and economic impact, large conglomerates may well attempt- and sometimes manage- to translate their economic power into political power in order to create, strengthen and entrench their privileged positions, thereby enjoying benefits such as government protection from the perils of competition in the form of government-erected barriers to the entry and expansion of their rivals.²⁴ The greater the protection, the larger the profits that can be used for future lobbying.²⁵ Moreover, a concentrated economic landscape also implies that lucrative employment opportunities are often quite concentrated in conglomerates, thereby possibly limiting efficient regulation by some regulators seeking future employment opportunities in the private market.²⁶ Of course, regulatory capture can be limited to certain markets, especially if sector-specific regulators operate only in some of the markets in which the conglomerates have holdings. Still, the conglomerate might be close to the ears of legislators (which can be viewed as "super-regulators") and regulation in one market might have spill-over externalities in related markets. Importantly for our analysis, regulatory capture may have cumulative effects, if barriers to entry are raised in many markets in parallel. Some also argue that conglomerates also harm democracy, since they limit the autonomy that comes from maintaining competition among many players.²⁷

Furthermore, often the public is highly affected by such conglomerates, through employment or savings or as suppliers and consumers, a fact which implies that such conglomerates might be considered "too big to fail" and be protected by the government from competitive forces that might erode their power and harm the public in the short-term. This creates a problem not only at times of bailouts, but also creates economic power while the business is thriving.²⁸ The fact that the specific firms in the conglomerate are often tied in mutual guarantee agreements implies that a significant harm to each part of the conglomerate can affect the viability of other parts, thereby creating a domino effect, a fact which might increase governmental protection for any

²⁴ See e.g., Leonard Weiss, 'The Extent and Effects of Aggregate Concentration' (1983) 26 J.L. & ECON. 429; Louigi A. Zingales, *Capitalism for the People: Recapturing the Lost Genius of American Prosperity* (Basic Books, New York 2012). For some of the seminal articles on regulatory capture see, e.g., George J. Stigler, 'The Theory of Economic Regulation' (1971) 2(1) BELL J. OF ECONOMICS AND MANAGEMENT SCIENCE 3; Richard A. Posner, 'Taxation by Regulation' (1971) 2(1) BELL J. OF ECONOMICS AND MANAGEMENT SCIENCE 22; Sam Peltzman, 'Toward a More General Theory of Regulation' (1976) 19(2) JOURNAL OF L. AND ECON. 211; Gary Becker, 'A Theory of Competition among Pressure Groups for Political Influence' (1983) 98(3) THE QUARTERLY JOURNAL OF ECONOMICS 371.

²⁵ See, e.g., Morck, Wolfenzon & Yeung (fn 3).

²⁶ See, e.g., Che Y.K., 'Revolving Doors and the Optimal Tolerance for Agency Collusion' (1995) 26(3) THE RAND JOURNAL OF ECONOMICS 378; Jonathan D. Salant, 'Behind the Revolving Door: A New View of Public Utility Regulation' (1995) 26(3) THE RAND JOURNAL OF ECONOMICS 362.

²⁷ This has been part of the Ordoliberalist idea of a constitutional right of economic freedom that affected the development of EU competition law. For an excellent overview see David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press, Oxford 2001). For a more recent revival of this idea see Adi Ayal, 'The Market for Bigness: Economic Power and the Competition Authorities' Duty to Curtail it' (2013) 1(2) JOURNAL OF ANTITRUST ENFORCEMENT 221.

²⁸ Ayal, *Ibid*.

part of the conglomerate. This concern has been particularly evident in South Korea, where specific attention was paid in the competition law to intra-group debt guarantees, especially in light of what happened to a number of chaebols during the Asian Financial Crisis in the late 1990s.²⁹

A related concern focuses on the ability of public opinion to limit the welfare-reducing effects of conglomerates. Because of the size of their advertising budgets as well as their political power, their coverage in at least some of the media outlets might be more favourable and not expose all the harm they create to social welfare, thereby reducing the knowledge of the public of such harm, which is an essential ingredient in the ability of public opinion to bring about a change in market conditions.

Competitive forces are further stifled when conglomerates also control major financial institutions. In such situations, it is often harder for new or maverick competitors to get the credit needed to enter or expand in markets which the conglomerate controls or in which it enjoys a profitable status-quo. Indeed, economic growth requires that savings be directed to value-creating investments. Perfect capital markets allocate capital to each investment opportunity until its marginal return equals the market clearing equilibrium interest rate. Imperfect capital markets reduce investment opportunities and worsen borrowers' incentives.³⁰ The control of financial institutions by conglomerates and the resultant distortion of the allocation of capital has motivated some jurisdictions to regulate ties between financial institutions and general corporations in their competition law.³¹

All the factors explored above lead to what economists call "the entrenchment problem", whereby market structure is difficult to change through market forces alone.³² It is important to note that many of the negative effects delineated may exist regardless of competitive concerns in specific markets.³³

The above analysis leads to the conclusion that aggregate concentration may have mixed effects on an economy, depending on the economy's special characteristics, most importantly its level of development and the size of its markets. Any regulation should thus attempt to limit the negative effects of high levels of aggregate concentration on social welfare while preserving its positive effects, where they exist and outweigh or can be separated from the negative effects.

Aggregate concentration sometimes does not present new competition concerns, but rather traditional issues in new guises and combinations. Yet the aggregative nature of

²⁹ South Korean Monopoly Regulation and Fair Trade Act, art. 10-2.

³⁰ For a survey of the literature see, e.g. Philippe Aghion, Eve Caroli & Cecilia Garcia-Penalosa, 'Inequality and Economic Growth: the Perspective of the New Growth Theories' (1999) 37(4) J. OF ECON. LITERATURE 1615.

³¹ South Korean Monopoly Regulation and Fair Trade Act, art. 8-2.

³² *Morck, Wolfenson and Yeung* (fn 3).

³³ See, e.g. *White* (fn 10).

such concerns and their extent may increase their importance to the point that they require separate recognition. In addition, some of the competition concerns raised by them are new and focus on the macro-economic level of the economy. Indeed, as many studies have shown, when aggregate concentration is high, the unit which is relevant for economic analysis is often no longer the freestanding firm, or the specific market in which it operates, but rather the economic unit of which it is part through formal (e.g. ownership) and non-formal (e.g. family ties) connections and its effects across markets. In the past two decades the larger economic unit (referred to in this article as a conglomerate) has become center stage in finance, corporate governance, innovativeness, competitiveness and other economic analyses. This raises the question of whether these insights should not affect competition law as well.

Chapter II: Dealing with Aggregate Concentration through Competition Law in Practice

A. Introduction

An important conclusion from the above is that aggregate concentration can raise adverse competitive concerns which go beyond market-specific concerns, even if they eventually manifest themselves in specific markets. The question thus becomes whether such competition-related concerns come under the scope of competition laws.

Aggregate concentration concerns- at least some aspects of them- have long been acknowledged by legislators and competition authorities. Interestingly, the roots of the two largest and most developed competition law systems can be partly traced to such concerns. U.S. antitrust can be traced to concerns regarding the effects on the economy and on democracy of large business groups (trusts) which controlled a significant and diversified part of the economy. Although the trusts consisted of an aggregation of firms rather than one central holding company controlling a number of subsidiaries, they raised issues relating to aggregate concentration of power.³⁴ The political theory of balanced power, together with classical economic ideas about the evils of monopoly and the significance of competitive opportunity, provided the ideological context which led to the enactment of the Sherman Act.³⁵ Indeed, aggregations of economic power, it was said, threatened liberty in two ways: they excluded people from the market and they created opportunities to corrupt the legislative process in favor of the big firms. This, in turn, created not only a threat of selfish plutocracy, but also to excessive disparities of wealth which might harm democracy. Liberty therefore depended on the decentralization of economic power. In a famous quote from U.S. President Franklin Roosevelt-

"Private enterprise is ceasing to be free enterprise and is becoming a cluster of private collectivism...Industrial efficiency does not have to mean

³⁴ Ibid.

³⁵ David Millon, 'The Sherman Act and the Balance of Power' (1988) 61 S. CAL. L. REV. 1219.

industrial empire building...Interlocking financial controls have taken from American business much of its traditional virility, independence, adaptability, and daring—without compensating advantages. They have not given the stability they promised....Business enterprise needs new vitality and the flexibility that comes from the diversified efforts, independent judgments and vibrant energies of thousands upon thousands of independent businessmen."³⁶

Indeed, until several decades ago, U.S. courts -including the Supreme Court- specifically acknowledged the goal of "put[ting] an end to great aggregations of capital."³⁷

The focus in the U.S. has shifted from concern with economic power towards concern with efficiency, and nowadays little weight, if any, is given to pure concerns of aggregate concentration. Rather, economic power that results from economic opportunity is often treated as a natural and acceptable result of personal liberties to compete in the market. Yet some aspects of aggregate concentration still arise, especially in times of economic crisis.

Likewise, German Ordoliberalism, which was one of the main sources of influence on EU competition law, was also concerned with issues regarding political influence of large aggregations of economic power, which go beyond market-specific concerns.³⁸ Ordoliberal theories, which were developed by the Freiburg School of German academics before and immediately after the Second World War, attempted to create a tolerant and humane society that would protect human dignity and personal freedom while creating a framework for the well-functioning of the market. The Ordoliberal ideology stressed the need for an economic constitution that would limit the

³⁶ Franklin D. Roosevelt, 'Appendix A: Message from the President of the United States Transmitting Recommendations Relative to the Strengthening and Enforcement of Anti-trust Laws' (1942) 32(2) *America Econ. Rev.* 119 . See also *Millon*, *Ibid*.

³⁷ *United States v. Aluminum Company of America and others* [1945] F.2d 148 (Cir) 416, 428; *U.S. v. American Telephone and Telegraph Company and others* [1982]F 552 (U.S. Supp.) 131 ("The legislators who enacted the Sherman Act voiced concerns beyond the effects of anticompetitive activities on the economy: they also greatly feared the impact of the large trusts, which then dominated the business world, on the nation's political system, and they regarded the power of these trusts as an evil to be eradicated"). *FTC v. Procter & Gamble Co.*[1967] (87 S.Ct. 1224, 18 L.Ed.2d 303) 386 (U.S. Supp) 568, 578 (The substitution of the powerful acquiring firm for the smaller, but already dominant, acquired firm may substantially impair the competitive structure of the industry by raising entry barriers and by dissuading smaller firms from aggressively competing. The Court reasoned that the presence of the large firm might deter new entrants who would be more reluctant to face the giant than the smaller rival. Justice Harlan, writing a separate opinion, stated that "A conglomerate case... is not only too new to our experience to allow the formulation of simple rules but also involves "concepts of economic power and competitive effect that are still largely unformulated... the statute does not leave us free to strike down mergers on the basis of sheer speculation or a general fear of bigness" (p. 590). Thus, he attempted to create some guidelines which include" the position of Procter in other markets...and proof of demonstrated ability to mobilize and utilize large financial resources" (p. 600-1)). However, no U.S. court has prohibited a merger on a similar theory since this case, and the U.S. antitrust agencies have since repudiated this theory.

³⁸ See. e.g., Alan Peacock and Hani Willgerodt (eds), *Germany's Social Market Economy: Origins and Evolution* (Macmillan, London 1989); Alan Peacock and Hani Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (Macmillan, London 1989); *Gerber* (fn 26).

convergence of private economic power in the interest of a free and fair political and social order.

Such ideological roots can be found in other jurisdictions as well. The South African Competition Act, for example, specifically recognizes the South African history of excessive concentrations of ownership and control and seeks to promote greater ownership by a greater number of South Africans.³⁹ Likewise, Article 1 of the South Korean Monopoly Regulation and Fair Trade Act specifically mentions the prohibition of excessive concentration of economic power as one of the purposes of the Act.⁴⁰

Yet, as the empirical study elaborated below indicates, despite this historical background and rhetoric regarding the goals of competition law, most competition laws focus on market power in a specific market rather than on economic power, thereby providing relatively limited tools to deal with the potential adverse competitive effects of high levels of aggregate concentration.

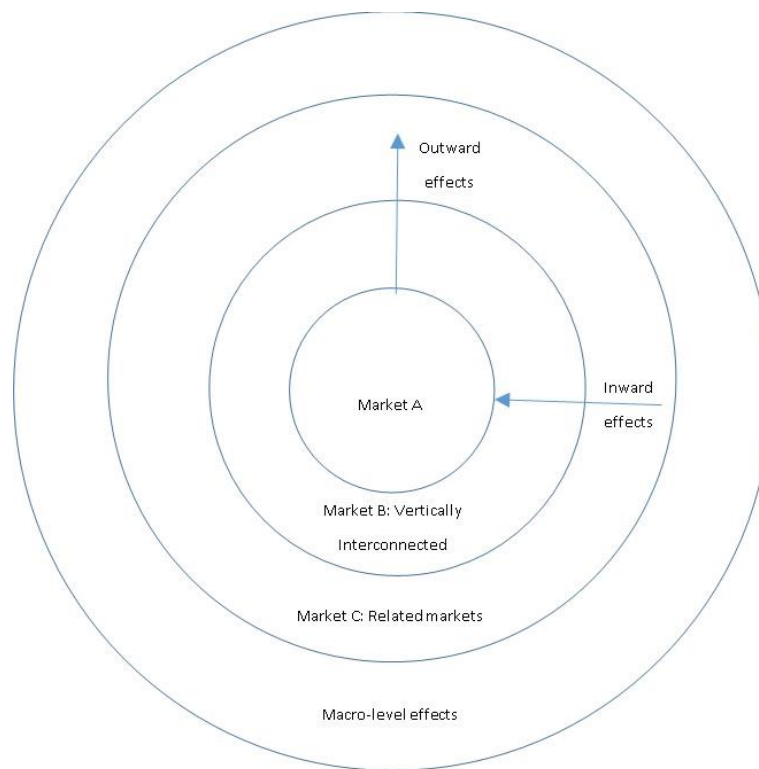
Before delving into the details of the study, let us offer the following observation. Aggregate concentration creates effects on competition and welfare that can be described as a series of concentric circles, all relating to possible effects on a core market A. All circles share the following three common traits: (1) The closer the circle to market A, the more direct the effect of a conduct on market A, but not necessarily the strongest; (2) effects of a conduct can be cumulative- that is, they might include all circles, or they might include only some; and (3) effects might start from the outer layer and radiate inwards (whether directly or indirectly, through externalities), or alternatively radiate outwards.

The inner circle depicts market-specific effects that result from the market power of the conglomerate in market A, on market A. This might be the case, for example, when the conglomerate controls a large market share in market A, which is protected by high entry and expansion barriers, or if two conglomerates control large shares each in market A and create oligopolistic coordination between them. The next circle involves effects on market A that result from the market power of a conglomerate in a vertically integrated market. For example, control of a product or a service in market B, which is an essential input in market A (e.g., a patent on which the standard in market A is based). The third circle of influence involves effects on competition in market A through market power in markets which are not vertically connected, but are related. For example, the effects of a cross-market status-quo between conglomerates, which might then lead some of them not to enter market A or to limit the intensity of competition among them in it. The widest circle involves macro-level effects, including political economy influences and too-big-to fail considerations that might affect governmental regulation of market A or of other markets with whom firms in market A

³⁹ Preamble, South African Competition Act 1998.

⁴⁰ South Korean Monopoly Regulation and Fair Trade Act 2011, art. 1.

interact. Democratic concerns, such as limitations on the ability of small entrepreneurs to enter the market, also fall within this category.



Drawing 1: Concentric effects on market A

This depiction of the effects of aggregate concentration leads to the following observation: all economic effects may eventually boil down to certain market(s). The question thus becomes whether these effects are significant enough to be considered under competition law.

As our study below indicates, the wider the circle, the less the probability that competition law will be used to deal with its effects. While the two internal circles raise issues that are the classic focus of competition laws, focusing on market power in a specific market and the ability to extend it to vertically integrated markets, and the third can relate to the portfolio effect theory of harm applied in some jurisdictions as well as to theories of oligopolistic coordination, the outer one does not raise typical competition law concerns and is not deal with traditional competition law tools, although some competition agencies have been empowered to take such issues into account.

B. The questionnaire

1. General

To determine whether, and to what extent, competition law tools actually deal with competitive concerns arising from high levels of aggregate concentration, we created a

questionnaire.⁴¹ With the assistance of UNCTAD, it was sent out to competition authorities around the world either in English, French and Spanish, depending on the language spoken in the jurisdiction. We received 35 answers from diverse jurisdictions.⁴²

The questionnaire included 30 questions (some with several parts), separated into four sets. The first set focused on the levels of aggregate concentration in one's jurisdiction. Questions first centered on a general perception of whether the jurisdiction suffers from high aggregate concentration levels, and then competition authorities were requested to provide specific data on the number, size and industries in which large conglomerates operate, including a check list of such potential industries (e.g., banking, insurance, construction, media and telecommunication). It is noteworthy that most competition authorities did not possess much knowledge regarding the more specific questions, a fact which is not surprising given the limited extent to which they actually deal with such issues, and that, as elaborated below, those issues that do arise are usually analyzed in a narrow context. The exception was those jurisdictions which have or are contemplating the adoption of specific tools to deal with aggregate concentration.

The second set of questions focused on competition law tools in general. It first centered on the theoretical possibility of using competition law: "Does your competition legislation specifically address high levels of aggregate concentration? If yes, then how?" (question 3a), as well as questions that related to such application in practice, such as "in practice is the competition law enforced to deal with aggregate concentration?" (question 3b). It also focused on the legislative process: "In the discussions leading to the enactment of your competition law, was aggregate concentration discussed in some way?" (question 4).

The third set of questions focused on specific provisions that might be relevant to aggregate concentration. These included structural tools, such as merger law, joint ventures and break-up of monopolies, as well as behavioral tools, including price and conduct regulation and abuse of superior bargaining position. Questions included both simple yes/no queries as well as a request for specific details. For example, with regard to break-up, it was asked "does your competition law allow for the break-up of firms/conglomerates?" If so- "What are the conditions for such break-up?". A list of potential options was also provided, including the option "[t]he firm's aggregate concentration exceeds a certain level" (question 5). With regard to all types of regulation, it was asked whether it was actually applied in practice to deal with aggregate concentration concerns. For example, with regard to merger law,

⁴¹ A copy of the questionnaire will be sent upon request.

⁴² These include Australia, Barbados, Brazil, Central African Republic, Chile, Cyprus, Czech Republic, El Salvador, Germany, Guernsey, Honduras, Hungary, Indonesia, Israel, Italy, Japan, Kenya, Latvia, Lithuania, Malaysia, Mauritius, Mali, Mexico, New Zealand, Pakistan, Portugal, Philippines, Romania, Serbia, South Africa, Spain, Sweden, USA, Zambia and Zimbabwe.

jurisdictions were asked “Were you ever asked to approve a merger between (or with) conglomerates? If so, please elaborate” (questions 13 and 14).

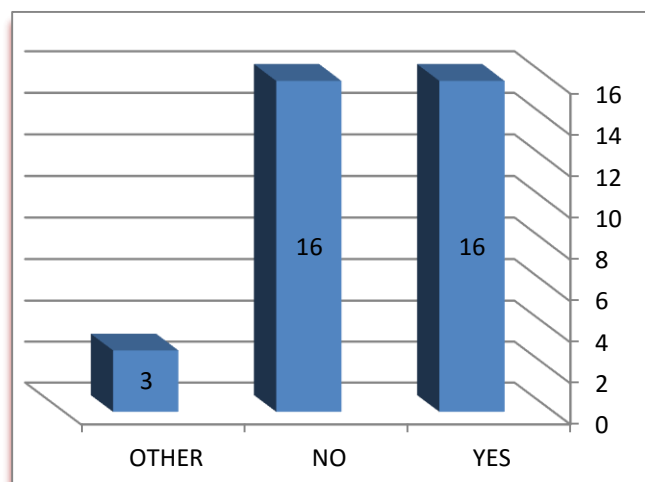
The final part of the questionnaire focused on other policy tools. For example, it was asked “Are you aware of other policy tools (apart from the competition law) that impose some restrictions on high levels of aggregate concentration? If so, please elaborate” (question 28). It also asked competition authorities to elaborate generally on their experience: “Do you have a success story in which your competition authority has applied the competition law to regulate the effects of high levels of aggregate concentration? If so, please share it with us” (question 29), and a similar open-ended question was asked with regard to frustrations: “Do you have frustrations in not being able to catch certain effects of high levels of aggregate concentration, whereas, with a change in the competition law, you could do so? If so, please identify the type of restraint and the change that could correct the situation” (question 30).

Below we report on the most relevant results of the research. First we report on some of the questions which provide us with a quantitative analysis, and afterwards the questions that serve as the basis for the qualitative analysis. It is noteworthy that with regard to the qualitative part, we double-checked and cross-referenced each instance in which the answers indicated that special consideration was given to aggregate concentration concerns, to ensure that the answer actually referred to special treatment. We also conducted several in-depth studies, focusing especially on those jurisdictions which took such considerations into account.

2. Quantitative analysis

The first question focused on the perception of high levels of aggregate concentration - whether the competition authority thought that its jurisdiction suffered from such a problem.

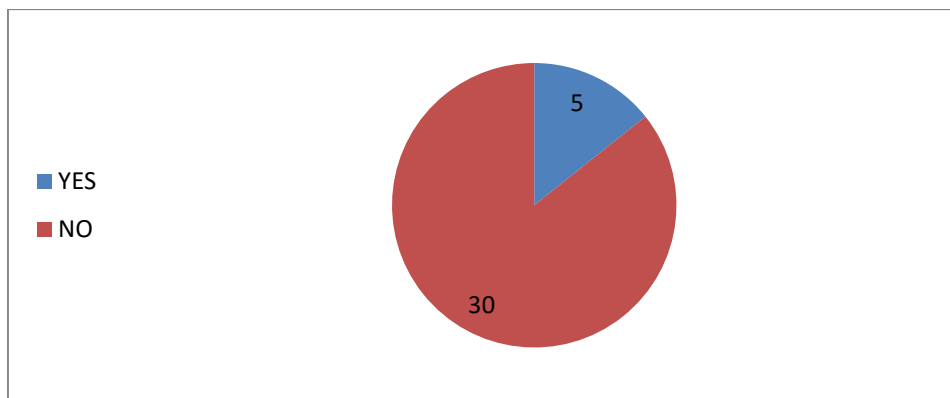
Question 1: Does your jurisdiction suffer from high levels of aggregate concentration (that is, a small group of economic entities controls a large part of the economic activity through holdings in many markets (hereinafter: "conglomerates")? In other words: does a small group of conglomerates dominate a significant part of your economy?



As can be seen, almost half of the jurisdictions recognized such a problem in their jurisdiction. Yet not in all cases was there a strong correlation between the perception of the competition authority and the objective statistics regarding actual levels of aggregate concentration, which were either provided as an additional part of the answer to this question, or that were observed in comparative studies. On the other hand, and not surprisingly, a correlation was found between a positive answer to question 1 and the existence of special tools to deal with aggregate concentration. It is also noteworthy that most competition authorities- even some of those that suffer from high levels of aggregate concentration- did not provide in the latter parts of question 1 statistics about the levels of aggregate concentration in their jurisdictions. This fact might be indicative of the general finding of this paper, that most competition laws are not applied to deal directly with aggregate concentration concerns, and thus competition authorities generally have no specific knowledge of the these facts.

The next set of questions focused on competition law tools that can be utilized to address the issue. Below are some of the representative answers:

Question 3.a. Does your competition legislation specifically address high levels of aggregate concentration?

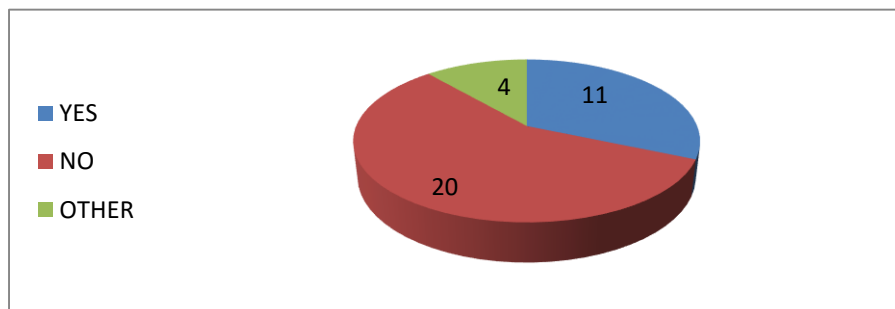


On the question of whether the competition legislation specifically addressed high levels of aggregate concentration, one out of seven jurisdictions answered positively. These include: Cyprus, Guernsey, Indonesia, Japan, and Mali. We explore some of these tools in more detail below.

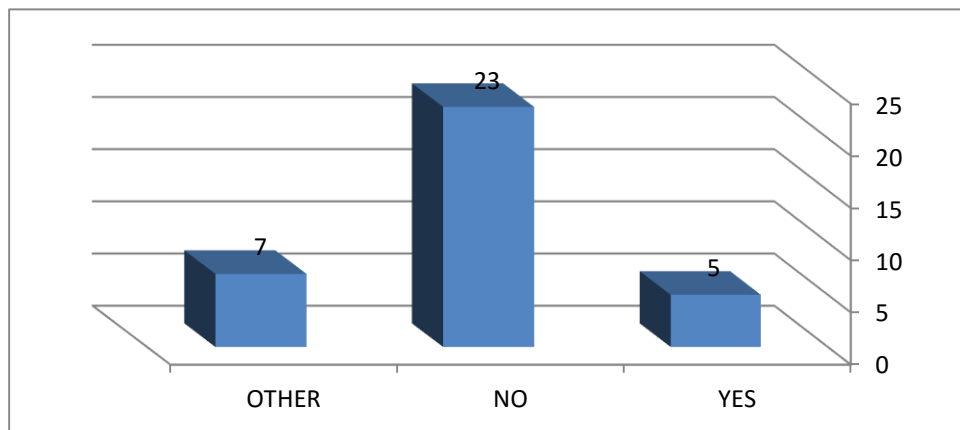
We then turned to the ability to apply specific competition law tools to address issues of aggregate concentration, and whether such considerations were ever taken into account. As we predicted, although most competition laws do not specifically address issues of aggregate concentration in their competition laws, a notable number noted that their laws may be used to address at least some of these issues. We first focused on structural remedies, through the regulation of mergers and joint ventures.

While 31% of jurisdictions answered that aggregate concentration concerns can be taken into account in their merger review, only 14% answered positively that such considerations were indeed taken into account in merger review.⁴³ To reduce the risk that jurisdictions confuse the ability to take into account pure portfolio effects⁴⁴ with wider aggregate concentration concerns, we specifically asked about the former. Indeed, a much higher percentage of jurisdictions (80% compared to 31%) answered that they can take into account portfolio effects.

Question 9: Does your merger law allow the decision-maker to take into account considerations regarding aggregate concentration levels?



Question 10. Have considerations of high levels of aggregate consideration ever been taken into account in merger review?



Such low levels of enforcement in practice might be at least partly explained by the fact that competition laws in many of the jurisdictions surveyed which suffer from high levels of aggregate concentration are relatively new. Also, they might be affected by a selection-bias. Such a bias might affect the merging parties, who may choose not to merge if they are concerned that the merger will be blocked, as in a case reported by Guernsey.⁴⁵ A bias may also characterize the competition authority, since, as elaborated

⁴³ Of course, this answer is also affected by the length of time that the competition law was in effect.

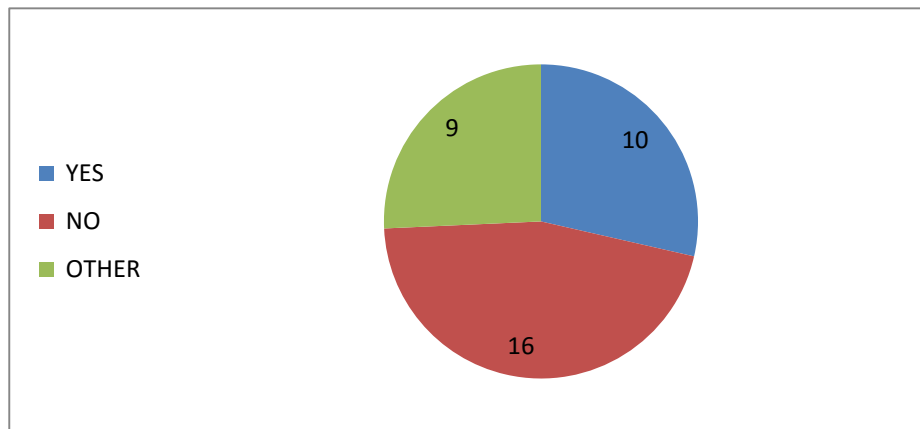
⁴⁴ Portfolio effects arise when the merged firm can offer a wide range of non-competing but often complementary products to a customer.

⁴⁵ Guernsey, Answer to Questionnaire, question 11.

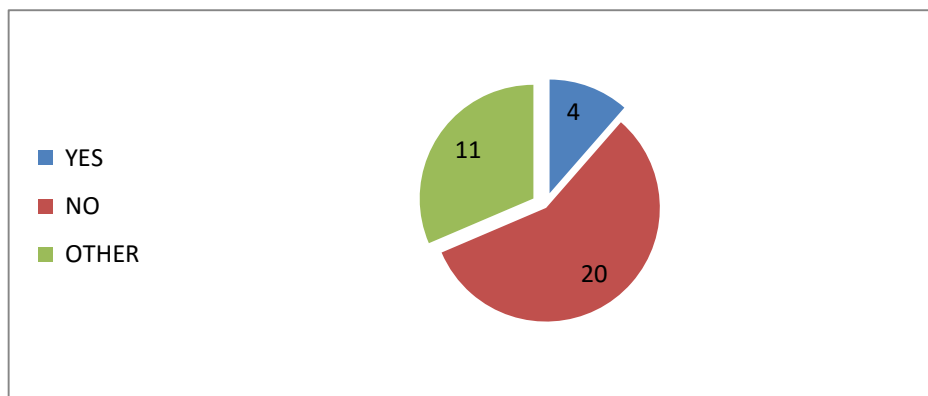
below, aggregate concentration cases are harder to deal with than regular merger cases, and thus the authority might rationally choose not to deal with such cases, due to institutional or political economy reasons. These reasons may be relevant to other regulatory tools surveyed as well.

The next set of questions focused on joint ventures. The outcome was almost similar to that of merger review. A relatively similar percentage of jurisdictions (29%) answered that they may take considerations of aggregate concentration into account when assessing joint ventures, and 11% answered that in practice such considerations were taken into account.

Question 17. When weighing harm and benefits of the joint venture, are decision-makers also allowed to take into account considerations regarding high levels of aggregate concentration?

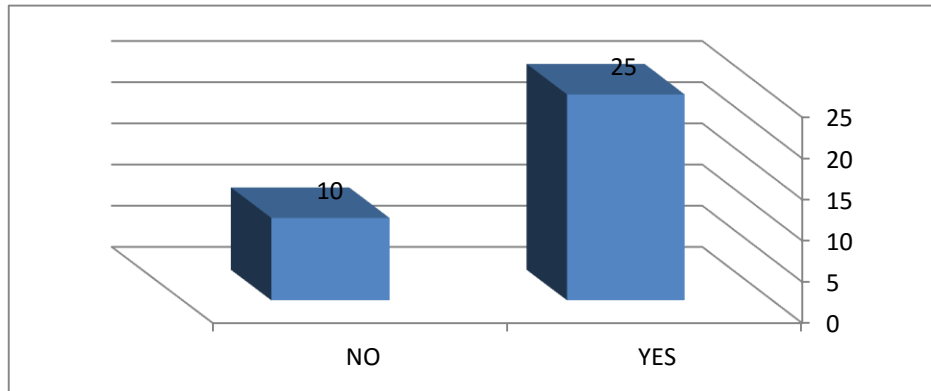


Question 18. Have such considerations ever been taken into account?



The next set of questions turned to conduct remedies, including price control.

Question 24. Does your competition law prohibit or limit the fruits of a superior bargaining position (i.e., imposition of exploitative contractual terms)?



As can be seen, most jurisdictions have the (theoretical) power to limit the results of a strong bargaining power by the conglomerate by regulating exploitative terms of trade.

The qualitative answers also provide us with some interesting correlations, beyond the ones reported above. For each pair of questions, the strength of the connection and the direction of the association was analyzed (using a Phi Coefficient), as well as its statistical significance (the p value, which was measured by Fisher’s Exact test).⁴⁶ The most relevant results, which were not already reported above, are as follows. No strong correlation was found between a positive answer to question 1 (“Does your jurisdiction suffer from high levels of aggregate concentration”) and the existence of any specific tool to deal with aggregate concentration (questions 9-24 which focused on structure and conduct remedies).

A strong and significant correlation was also found between Question 9 (“Does your merger law allow the decision-maker to take into account considerations regarding aggregate concentration levels”) and Question 17 (“When weighing harm and benefits of the joint venture, are decision-makers also allowed to take into account considerations regarding high levels of aggregate concentration”). This result is not surprising, since once aggregate concentration considerations are allowed to be raised in one type of structural regulation, there exist stronger reasons to apply it in another as well, partly in order to ensure that market participants do not choose one form of structural change over the other because of the difference in regulation. A weak correlation was found to exist between those applying structural tools and those applying behavioral tools (parts III and IV of the questionnaire). Finally, a weak negative correlation was found between those which indicated that their merger laws

⁴⁶ It is noteworthy that due to the sample size, the power of the tests is quite low. This yields some moderate associations (relatively high Phi) which are not significant. On the other hand, the multiplicity of testing increases the familywise type I error. This might cause misleading significant results.

focused specifically on “competition in a market” and those which applied their merger laws to deal with aggregate concentration (questions 7 and its extended answers and 9).

We also analyzed the correlation between the answers and two values: whether the jurisdiction is small, and its level of development.⁴⁷ The most significant results are as follows: A strong and statistically significant correlation was found between a positive answer to Question 1 (“Does your jurisdiction suffer from high levels of aggregate concentration”) and whether the jurisdiction was a developing one. Interestingly, a very weak correlation was found to exist between a low level of development and the adoptions of structural tools (Questions 9, 10, 17, 18), and a weak one was found to exist with the regulation of the abuse of superior bargaining power (Question 24).

Interestingly, a weak correlation was found between Question 1 and whether the economy is small. This might be partially explained by the fact that our measure of smallness focused on population size alone, and did not separate between those jurisdictions which are economically part of a larger market (as in the case of most EU members), and those that are not. Nonetheless, small economies were found to have a stronger tendency than others to adopt some measures to deal indirectly with aggregate concentration, mostly through joint venture regulation and/or abuse of superior bargaining position.

3. Qualitative Analysis

As is evident from the quantitative results, despite the fact that most competition laws do not specifically address the issue of aggregate concentration, some indirect tools can address at least some of its effects on markets, and a non-negligible percentage of jurisdictions report that they have actually used competition law tools to deal with some of the effects of aggregate concentration. Yet the quantitative analysis only provides a crude picture of the role of competition law. The essence is in the details: how exactly is each tool applied in order to address aggregate concentration concerns. Herewith we report on some of the more interesting results from the qualitative parts of the questionnaire that sought to explore in more detail the specific experience of those jurisdictions that applied competition laws to deal with aggregate concentration concerns. As we shall see, there exists a wide scope of powers and tools that are used to deal with different aspects of aggregate concentration, but most stop close to the second or third-tiered inner circles depicted in diagram 1 above. Some of the tools are

⁴⁷ A small jurisdiction was defined as an independent, sovereign jurisdiction with a population below 10 million. It differs from a “small economy” which is defined as “an independent, sovereign jurisdiction that can support only a limited number of firms in most of its industries” and in which population dispersion and openness to trade also affect the definition. See MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 13-45 (2003). The definition also includes countries that, although autonomous, have constitutional ties to other jurisdictions (such as Guernsey). As defined by the World Bank, developing economies include low and middle-income jurisdictions with gross national income per capita of less than US\$12,736. See World Bank, Country Classification, <http://data.worldbank.org/news/new-country-classifications-2015>. Many developing countries are also small, and vice versa.

unique to a certain jurisdiction (e.g. wide definition of dominance), while others (e.g. merger review) are more common.

At one end of the spectrum of dealing with aggregate concentration through competition laws lies New Zealand, in which the competition law is based on the concept of individual firm as the relevant unit in market analysis.⁴⁸ The New Zealand Competition Act promotes competition "in markets."⁴⁹ The Mergers and Acquisitions Guidelines state that "pure conglomerate acquisitions, which involve the aggregation of businesses operating in markets that are unrelated either horizontally or vertically, are unlikely in themselves to lead to the acquisition of a substantial degree of market power *in a market*, except in unusual circumstances."⁵⁰ Such circumstances include cases where the merging parties share some common features even though they operate in different markets, and thus are potential entrants into each others' markets. It is interesting to note that whereas competition constraints are assessed only with regard to a relevant market, the analysis of benefits from the merger is not limited to any specific market.⁵¹

At the other end of the spectrum lies South Korea, which included in its competition law a multitude of tools to deal specifically with the economic power of its large conglomerates. This can be explained by its economic history. In the 1960s and 70s the South Korean government made use of chaebol, which are conglomerates owned and controlled by a founding family, in its move towards industrialization and economic development. However, chaebol dominance remained even after the country successfully industrialized. The South Korean government has spent the last three decades trying to rein in the influence of chaebols. Indeed, limiting their power has been a main driving force in the enactment and enforcement of the competition law, the Monopoly Regulation and Fair Trade Act ("MRFTA"). As Shin notes, concerns about chaebol "have had a profound impact on important aspects of Korea's competition law and policy,"⁵² and that chaebol "are presumed to possess and exercise more power, and power of a different kind, than conventional monopoly power, posing a unique threat

⁴⁸ Section 21 of the Israeli Competition Law 1988 focuses on effects on the "same market".

⁴⁹ New Zealand Commerce Act 1986, section 1A.

⁵⁰ New Zealand Mergers and Acquisitions Guidelines, Section 10.2.

⁵¹ A note regarding the New Zealand (and Australian) regulatory systems is in place: The Commerce Act prohibits any person from acquiring a firm's assets or shares if that acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market. However, it also allows a person proposing a merger to (voluntarily) seek clearance or authorization from the Commission. The Commission will clear a merger if it is satisfied that the merger will not have, or would not be likely to have, the effect of substantially lessening competition in a New Zealand market; and it will authorize a merger where it is satisfied that the merger will result, or will be likely to result, in such a benefit to the public that it should be permitted even though it is likely to substantially lessen competition. Public benefits are not relevant in a clearance decision; they are relevant in an authorization decision. Such benefits are also not relevant where a merger proceeds without clearance or authorization.

⁵² Kwangshik Shin, 'The Treatment of Market Power in Korea' (2002) 21(2) REV. OF INDUSTRIAL ORGANIZATION 113, 116.

to the free enterprise market system and democratic values in Korea.”⁵³ Choi and Patterson characterized the MRFTA as part of the “[e]fforts to reduce, or at least slow, the growing influence of Korea’s chaebol.”⁵⁴ Indeed, prevention of abuse of market dominance and excessive concentration of economic power are given equal weight in the articulation of the purpose of the Act, and the law contains a full chapter, the bulk of which is dedicated to addressing the chaebol problem.⁵⁵

Most countries lie in-between these two extremes. Below we report on the main tools used by different jurisdictions in order to deal with aggregate concentration concerns, as apparent from their questionnaires as well as from several in-depth studies we conducted. Due to space limitations we provide a general overview, while some of the tools are further elaborated elsewhere.⁵⁶ Most jurisdictions share, however, an important trait: whatever the tool they apply, they usually focus on competition in a specific market (analyzing all potentially affected markets in parallel), rather than on the cumulative effects of aggregate concentration across the economy. Another trait which characterizes most of the tools below is that the prohibitions do not deal with the root of the problem- the high levels of aggregate concentration. Rather, they deal with some of the effects of high levels of aggregate concentration on specific markets, each separate episode requiring a separate investigation and analysis. We elaborate the significance of these traits in the discussion below.

It is noteworthy that the application of competition law to deal with aggregate concentration in some jurisdictions has changed over time. Such changes were influenced, inter alia, by the strength of the concerns that aggregate concentration raise at a specific time (both economic as well as political, in the governmental sphere as well as in the public sphere), the availability of alternative tools to deal with high levels of aggregate concentration and their relative efficiency, the economic theories regarding the effects of aggregate concentration, and the effect of measurement issues and error costs on designing applicable rules. As elaborated below, Japan is a case in point: provisions that specifically targeted aggregate concentration have been rolled back over time given the belief that conglomerates have become a less serious problem in the Japanese economy.

Relatedly, we attempt to distinguish those examples that can be easily carried over to other jurisdictions from those that are country-specific. To do so, we analyze the relative costs and benefits of the different tools. We also explore, where possible, the

⁵³ Ibid. Yo Sop Choi, 'The Enforcement and Development of Korean Competition Law' (2010) 33(2) WORLD COMPETITION 301, 303. See also Jeong-Pyo Choi and Dennis Patterson, 'Conglomerate Regulation and Aggregate Concentration in Korea- An Empirical Analysis' (2007) 12(2) JOURNAL OF ASIA PACIFIC ECONOMY 250, 257 (the competition law is part of the “[e]fforts to reduce, or at least slow, the growing influence of Korea’s *chaebol*”).

⁵⁴ Ibid.

⁵⁵ South Korean Monopoly Regulation and Fair Trade Act 1980 ("MRFTA"), art. 1.

⁵⁶ See, e.g., *Cheng and Gal* (fn 6); Michal S. Gal and Thomas Cheng, 'Aggregate Concentration Concerns and Merger policy' (work in progress, on file with authors).

ideological, social, economic, institutional and political traits that have enabled the adoption of such tools.

1. Wide Definition of Dominant Position

Section 19(2) of the German Competition Law defines a dominant firm, *inter alia*, as a firm which:⁵⁷

"has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the scope of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings."

This wide definition is used both to determine dominance for the purposes of prohibiting the abuse of dominance, as well as for merger law.⁵⁸ Accordingly, while dominance is always determined with regard to a specific market, the definition of dominance extends beyond the conditions of the specific market and takes a wider, macro-economy point of view.

The use of a wide definition has implications for dealing with high levels of aggregate concentration concerns, as it captures under its wings a wider set of firms. In so doing, it may make it easier to limit exclusionary conduct that comes under the first, second and sometimes even third circles defined above. The wide definition also allows the decision makers to take a wider set of considerations into account in merger review.⁵⁹ Yet it might also reduce the clarity of the analysis, a point we shall relate to below. Also, it is a first step in the analysis, the efficiency of which is affected by the substantive prohibitions that follow. From the questionnaires it appears that Germany is unique in adopting this tool.

2. Abuse of Dominance

Traditional prohibitions against abuse of dominance may also limit some types of conduct resulting from high levels of aggregate concentration. Both exploitative and well as exclusionary conduct prohibitions might be relevant. For example, if the conglomerate possesses significant market power in a specific market, it may be prevented from extending that power into related markets through tying, or from charging excessive prices. Indeed, some of the questionnaires mention abuse

⁵⁷ German Act Against Restraints of Competition 2005.

⁵⁸ Sections 19 and 36 of the German law, *Ibid.* respectively.

⁵⁹ See, e.g., Bundeskartellamt, 'Guidance on Substantive Merger Control' [2012] http://www.bundeskartellamt.de/wEnglisch/download/pdf/merkblaetter/2012-03-29_Guidance_final_neu.pdf, accessed 22 November 2015, especially the chapter on conglomerate mergers; Ingo Klauss and Nina Laskey, 'Germany: Merger Control - Substantive Assessment' (2012) 33(7) ECLR 114. See also the analysis of the Springer/ Prosieben merger below.

prohibitions as dealing- albeit indirectly- with some of the effects of aggregate concentration.

Yet the fact that the abuse prohibitions usually require market power in specific markets, might limit their application. For example, it might be profitable for a conglomerate to engage in aggressive exclusionary tactics such as predatory pricing in markets in which it does not (yet) enjoy a dominant position, in order to signal to its competitors in other markets what they can expect when competing vigorously with it. The conglomerate's conduct will not be caught under the abuse prohibition, despite its potential significant externalities on competition in other markets in which the conglomerate operates.

3. Abuse of Superior Bargaining Power

In most jurisdictions the use of superior bargaining power, by itself, is not recognized as a competition law offense. Instead, its outcomes are prohibited only if they fall within the recognized categories of anti-competitive abusive conduct. Yet some jurisdictions, such as Japan, Germany, Italy, Barbados, Honduras and South Korea, prohibit not only the outcome but also the abuse of superior bargaining power itself, thereby casting a wider competition law net (some countries, including Latvia, Czech Republic, and Hungary limit such abuse to certain retail sectors). One of the least recognized justifications for this prohibition, yet one that is rooted in the economic histories of some of these jurisdictions, is limiting the effects of high levels of aggregate concentration.

The South Korean competition law, for example, prohibits “trading by unjustly using a superior bargaining position”.⁶⁰ The law enumerates five instances of abuse of superior bargaining position, namely forced purchase, forced provision of benefit, imposition of sales target, imposition of disadvantage, and interference with business management and operations. Imposition of disadvantage is defined as an “[a]ct of causing a disadvantage in the process of carrying out the trade, setting or changing the trading condition to the disadvantage of the counterpart using methods other than ... forced purchase, forced provision of benefit, and imposed sales target.”⁶¹

In the *Korea Land and Housing Corporation* case, the Korean Fair Trade Commission ("KFTC") formulated the test for determining whether a superior bargaining position exists as follows: whether "the subject is in a relatively superior position or the subject can exert significant influence on the counterparty's business activities."⁶² It listed several relevant factors, including the markets in which the parties operate, the gap between the parties' business capacities and their scope of business activities, and the

⁶⁰ South Korean MRFTA, art. 23(1)4. Article 23(3) proceeds to explain that “[t]he types and criteria of unfair trade practices shall be provided by the Presidential Decree.”

⁶¹ Enforcement Decree of The Monopoly Regulation and Fair Trade Act 2012, Table 1-2 <http://eng.ftc.go.kr/bbs.do>.

⁶² *Abuse of Superior Bargaining Position by Korea Land and Housing Corp.*, Korea Fair Trade Commission Case 2010-#0242, at para. 31.

characteristics of the product or service. These factors suggest that a conglomerate would be more likely to be found to have a superior bargaining position. The case law suggests that the KFTC seems to give weight to economic power concerns. One example involves the *Lotte.com* case, in which the KFTC emphasized that the defendant was one of the 77 companies affiliated with the Lotte conglomerate.⁶³ The KFTC observed that “the suppliers’ business activities, such as the expansion of their businesses and promotion of their products, would be inevitably subject to the influence of their trades with the defendant, who has connections with the powerful conglomerate.”⁶⁴

Likewise, Articles 2(9)5 and 19 of the Japanese Anti-Monopoly Act (hereinafter: “AMA”) prohibits the abuse of a superior bargaining position against a trading partner. The Japanese Fair Trading Commission (“JFTC”) Guidelines state that a superior bargaining position is found “(i) where the supplier needs to continue transactions with the retailer, as discontinuing the transaction substantially impedes the supplier’s business and (ii) thus, the supplier finds it difficult to reject the retailer’s request, although it causes substantial disadvantage to the supplier”.⁶⁵ The JFTC examines factors such as the supplier’s degree of dependence on the commercial relationship with the retailer at issue, the retailer’s position in the market, the possibility for the supplier to replace the trading partner, and other facts indicating the supplier’s need to continue transactions with the retailer.⁶⁶ Similar to South Korea, the consideration of the degree of dependence and the difficulty of substitution can relate to conglomerates. Assuming that the contractual counterparty transacts with multiple companies in the same conglomerate, what would need to be substituted is not only the trading volume with an individual company, but often with the entire conglomerate. Likewise, assessment of dependence refers to the trading volume with the conglomerate rather than the individual company. Infringement is found when the practice falls within pre-specified categories, which resemble the South Korean list. Compulsion is one of the considerations in determining abuse of superior bargaining position. It might be easier to establish compulsion if the contractual counterparty deals with multiple companies within a conglomerate. Yet the fines that can be imposed for this offense are much lower than those imposed for an abuse of dominance.⁶⁷

The tool of abuse of superior bargaining position is an indirect tool for dealing with aggregate concentration. For one, just like the two previous tools it does not deal with the root of the problem- the high levels of aggregate concentration. Rather, it deals, partially, with the effects of such high levels of concentration. Therefore, where aggregate concentration is not justified by welfare considerations, a prohibition of superior bargaining position is, at most, a second-best tool. Also, it only reaches up to

⁶³ *Lotte.com* (fn 79) **Error! Bookmark not defined.**, § 2.C.2.A.

⁶⁴ *Ibid.*

⁶⁵ The JFTC Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act 2010, § II-1.

⁶⁶ *Ibid.*, § II-2.

⁶⁷ Japan Anti-Monopoly Act, art. 7-2(4) and 20-2.

the third-tier circle of influence. Furthermore, it is too wide and too vague to focus on the intricate effects of aggregate concentration on welfare and competition. Yet its application in practice plays an important role. If courts and competition authorities can separate those instances in which the superior bargaining power results from legitimate competition on the merits which, in the long run, benefits welfare, from those instances in which the superior bargaining position results from or creates illegitimate harm from aggregate concentration, and create clarity while doing so, then it can indeed be used as a tool to limit such negative effects. Otherwise, it is a crude tool and its costs might well exceed its benefits.

4. Merger Control

Mergers can potentially strengthen aggregate concentration. Of course, a merger of two or more conglomerates can significantly increase aggregate concentration levels, and can reduce the threat of potential entry of each one into the other's markets.⁶⁸ But even a merger among firms controlled by such conglomerates may raise anti-competitive concerns which extends beyond the specific market by placing the parent firms in dangerous proximity to discuss and act jointly on wide aspects of their business and by creating an aura of cooperative team spirit that is set to dampen competitive intensity between the firms involved. The danger is especially high when the merged entity constitutes a significant part of the business of one or more of the conglomerates, as it should not be expected that parties that share much of their economic interests in one market will compete vigorously as before in another. Finally, mergers between firms outside the conglomerate can potentially create potential competition that might reduce the conglomerate's economic power.

Accordingly, as the questionnaires indicate, merger control is the most common tool used by jurisdictions around the world to deal with at least some of the effects of aggregate concentration. Commonly applied doctrines capture at least some effects of aggregate concentration. For example, portfolio effects⁶⁹ and oligopolistic coordination considerations capture second and third-tier effects. The answer from the German authority is indicative: "The Bundeskartellamt would examine coordinated effects, portfolio effects, the elimination of imperfect substitutes or the increases in financial strength as reasons for the prohibition of conglomerate mergers."⁷⁰ One problem with relying on such doctrines, however, is that the economic models underlying them often signify tendencies but do not provide clear answers about how the market will operate in the post-merger period. This has led some jurisdictions to prefer an ex post rather than an ex ante regulatory approach: controlling anti-competitive behaviour if and when it occurs rather than limiting changes in market structure.⁷¹ Thus, much depends on the weight given to the above considerations and their balancing with efficiencies resulting

⁶⁸ See, e.g., *Weiss* (fn 23) 437.

⁶⁹ OECD, Policy Roundtables – Portfolio Effects in Conglomerate Mergers (2001).

⁷⁰ German answer to questionnaire, question 11.

⁷¹ OECD.

from the merger. Another limitation arises from the fact that competition law is interpreted as specific-market-centered, and thus effects must focus on competition in a certain market. This is apparent, for example, from the German answer to the questionnaire which stated that “Apart from all cases where aggregate concentration would create or strengthen a dominant position in a specific market, aggregate concentration is not taken into account.”⁷² Therefore, the focus is not on aggregate concentration itself, but on how aggregate concentration augments market power in a particular market. Elimination of imperfect substitutes can be treated as potential competition concerns. This, together with coordinated effects and portfolio effects, are still closely tied to an individual market. Increase in financial strength is arguably the only factor that relates to aggregate concentration in general, and is independent of specific markets.

Below we provide examples from all over the world, which arise from the questionnaires as well as more in-depth case studies, of the application of merger control to deal with aggregate concentration concerns. We first focus on Israel, which has historically suffered from high aggregate concentration levels.

Israeli competition law does not have special provisions that deal with aggregate concentration. Rather, as many other jurisdictions, its merger regulations are based on the traditional concept of the individual firm as the relevant unit in market analysis, and thus the focus is on the effects on competition in "a market".⁷³ A similar provision in the merger laws of other jurisdictions has led to a narrow interpretation of the scope of considerations that can be taken into account.⁷⁴ Indeed, the Israeli Supreme Court noted, in obiter dictum, that the criteria for prohibiting a merger is not harm to competition in the economy, but rather harm to competition in a specific market.⁷⁵ However, at least two mergers between conglomerates have been blocked by the Competition Authority due to economy-wide considerations that could not be pinpointed to specific markets.

The most interesting decision is the case of *Columbus Capital/Cur Industries*.⁷⁶ Cur was a large Israeli conglomerate that controlled many firms that held monopoly positions in their respective markets (it produced 7% of the Israeli industrial output). Columbus Capital was part of an international holdings company with many holdings in the Israeli market, some of which were minority shares in firms controlled by other conglomerates, mostly with the largest conglomerate, IDB. Columbus sought to acquire Cur in order to become a major player in the Israeli economy. The Authority analyzed

⁷² German answer to questionnaire, question 9.

⁷³ Section 21 of the Israeli Competition Law 1988.

⁷⁴ See, e.g., American Bar Association Section of Antitrust Law, *Antitrust Law Developments* (6th ed., ABA Books, Chicago 2007) 357: "Despite congressional concerns regarding the amounts of assets and sales controlled by large corporations generally, challenges to conglomerate mergers have been limited to cases where an anticompetitive effect was alleged in one of the markets affected by the merger"

⁷⁵ *Director of the Competition Authority v. Tnuva, Inc.* [1998] Court decisions 52(5) 213 (Civil Appeal 2247/95).

⁷⁶ Director of Israeli Competition Authority, *Conditioned Approval of Merger between Columbus Capital Corporation and Cur Industries Ltd.* (unpublished, Jan. 5, 1998).

the effects of the proposed merger both on horizontal competition in markets in which both firms operated, as well as on the potential and existing competition between the merging parties among themselves and with other firms in the market.

Yet the crux of the matter was the effect of the proposed merger on competition among the large conglomerates. The questions posed were whether a conglomerate can be too big, despite its positive - and sometimes essential - role in an economy?; Should the Authority object to a merger that significantly increases aggregate concentration and thereby harms competition?; And when do the benefits that are created by large size transform into costs?⁷⁷ In answering these questions, the Director argued that one of the main roles of merger regulation was to ensure that potential competition exists between large market players.⁷⁸ In the pre-merger situation three main conglomerates operated in the Israeli market. Given that each of them controlled a large set of monopolies in markets characterized by high entry barriers that could not be easily overcome by small rivals, the fear of potential competition by other conglomerates was crucial for constraining the strategic decisions of incumbent firms. Each of the two merging parties had significant business ties with two other large conglomerates, mostly through joint holdings. The Director stated that any business ties between firms controlled by the conglomerates could potentially reduce their inclination to enter into new markets in which another conglomerate held a dominant position, or would at least reduce the vigor of competition. The harm to competition from such business ties is larger, he stated, the more central such ties to the operation of the parties and the more central the parties to such ties are to existing or potential competition in the market. Especially in an economy with high degrees of aggregate concentration, which is characterized by high entry barriers, strengthening the business ties among the conglomerates raises anti-competitive concerns centering on the level of competition in markets in which the conglomerates will strengthen their joint holdings as well as on the investment decisions of the newly-formed post-merger large conglomerate in potential new markets. This is especially so where the large conglomerates are the main potential competitors in many major markets given their resources, reputation, economies of scale, experience and financing opportunities. Take away their incentives to compete, and you harm competition significantly. Therefore, it was stated, it is not sufficient to simply add up the market shares of the parties to the merger in the specific markets in which they operate. Rather, it is necessary to analyze the business environment in which the merging parties operate and the effect of the merger on competition through a wider prism of incentives to compete.⁷⁹

The theory of harm on which the decision was based can be understood as grounded in three interconnected conditions: (a) the number, extent and importance of the markets controlled by conglomerates; (b) the limited number of additional market players that can challenge the dominant position of a conglomerate in markets it controls; and (c)

⁷⁷ Ibid, section 6.2.

⁷⁸ Id., section 5.

⁷⁹ Id., section 5.2(v).

anti-competitive spillover effects into other markets controlled by the conglomerates resulting from the business ties of the merging parties. Accordingly, where the merger involves large conglomerates with a dominant presence in many central markets, harm to potential competition among them will create significant harm to competition and to the public, given that they are often the most important potential competitors of each other. Cooperative projects among the conglomerates might thus significantly harm competition and the public good. This theory of harm is essentially an extension of potential competition concerns, which is often part of traditional merger analysis. Yet it had an added twist: the role of conglomerates as potential competitors in many markets, even if the conglomerates did not, as of yet, signal their wish to enter specific markets.

Accordingly, it was decided that protecting the public from harm to competition requires the prevention of mergers that significantly reduce actual or potential competition among large conglomerates. In the case at hand it was feared that the new entrant's financial strength and competitive advantages would be harnessed to further strengthen the cooperative joint ventures that already existed among the conglomerates, thereby further increasing the entry barriers that protect them from competition. The Director therefore conditioned his approval to the merger on the severing of the contractual ties of the merged entity with the other large conglomerates and on the merging firms' agreement to obtain his approval for any future business ties with another conglomerate. While the merging firms were also required to sell some of their holdings in a market in which their combined market share rose significantly as a result of the merger, the main focus of the decision was not on micro market-specific effects but rather on macro potential spillover effects into other yet unknown specific markets. The decision was thus based on third-tiered effects.

The **Mexican** case of *Grupo Televisa SAB/Iusacell* is based on somewhat similar, although narrower, considerations. The case involved a merger between firms which were part of two major conglomerates. Each of the conglomerates controlled a major player in the market for open-broadcast-TV.⁸⁰ The direct market affected by the merger was the mobile sector, but the Competition Commission based its analysis of anti-competitive effects on broader markets. It found that the merger might create stagnation in markets in which both conglomerates operate, as a result of their wish not to upset the status-quo. It also found that the merger will strengthen communication channels between the conglomerates. It thus applied conditions that related to the broadcasting market.⁸¹

Germany does not go as far as Israel but applies its merger prohibitions in a much wider manner than most jurisdictions. The German Guidelines for Mergers⁸² include a special chapter on conglomerate mergers (defined as mergers between firms which do not have horizontal or vertical ties). It is recognized that such mergers can strengthen

⁸⁰ Final decision 7 June 2014.

⁸¹ Its decision came under criticism and is under appeal.

⁸² Bundeskartellamt, Guidance on Substantive Merger Control (fn 55).

both unilateral and collective dominance. While the analysis boils down to effects in a *specific market*, the considerations to be taken into account are quite wide, and potentially capture third-tier effects.

With regard to unilateral dominance, the German Guidelines identify four different mechanisms through which a conglomerate merger may create or strengthen dominant position: weakening of fringe competition or potential competition, tying and bundling practices (through bundling complementary products), portfolio effects (when consumers find a wider range of products advantageous) and strengthening the financial or industry-specific resources of the merged entity.⁸³ With regard to collective dominance, the Guidelines state that a conglomerate merger can have this effect if the likelihood of tacit collusion increases in the relevant markets. That can occur if the leading market players are more inclined to coordinate their conduct or if coordination becomes easier, effective or more stable in the post-merger conditions.⁸⁴ If the merger leads to multi-market contacts, it can enhance the ability of the relevant companies to reach terms of coordination, increase market transparency and thus make it easier to detect deviations from the terms of coordination, and facilitate more effective punishment for deviations.⁸⁵

The Guidelines emphasize that the stronger the pre-existing market position of one or both of the merging companies, the greater the risk that the merger will lead to anti competitive effects.⁸⁶ They also point out that competitive concerns will arise, in particular, if the merging companies are active on economically related markets, and specifically if the production and distribution of products require the same inputs, the products are targeted at the same customer groups, or if the products of the merging companies may be complements or imperfect substitutes for each other.⁸⁷ In the *ProSiebenSat.1/Axel Springer AG* case,⁸⁸ the Federal Court of Justice stated that its decision practice, according to which there is no appreciability test for a strengthening of a collective dominant position,⁸⁹ also applies to conglomerate mergers. An abstract ascertainment that the oligopoly will face a more beneficial competitive situation following the merger for legal or factual reasons, justifies a prohibition. Accordingly, in cases of concentrated markets, a slight impairment of the remaining or potential competition is sufficient for a prohibition. This clearly deviates from European merger control which requires a significant impediment of competition.⁹⁰

⁸³ Ibid. For some examples of cases see, e.g., BundesKartellamt, 'Conglomerate Mergers in Merger Control: Review and Prospects' (discussion paper, 21 September 2006).

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Decision of the Federal Court of Justice of June 8, 2010.

⁸⁹ The test has since changed to significant impediment to effective competition.

⁹⁰ Council Regulation (EC) No. 139/2004 (29 January 2004) On the Control of Concentrations Between Undertakings (the EC Merger Regulation), Recitals 5, 25-24 and Articles 2(2)-2(3).

Other jurisdictions have also indicated that they take into account in their merger analysis quite a wide set of considerations. **Hungary**, for example, stated that it takes into account considerations which focus on whether the market position of the undertaking improves considerably concerning its economic, financial or income conditions which are decisive factors of economic power affording possibility to use restrictive strategies.⁹¹ **Lithuania** also indicated that the size of the group of associated undertakings, the financial possibilities, and range of products a group of firms can provide to a customer are important factors.⁹² Yet much depends, of course, on the weight given to such factors.

Merger policy is a strong tool in the competition law arsenal, yet it is a limited tool to deal with aggregate concentration given that it does not capture internal growth. Also, the benchmarks for merger notifications often do not center on the overall business operations of the conglomerate, but rather only on the firm wishing to merge, so that the larger picture will not always be captured and the merger might stay under the radar. This is especially problematic where formal holdings do not provide the full picture, for example where financial control or strategic minority holdings tie firms together, thereby masquerading parts of a large conglomerate as independent units. Moreover, using merger policy to deal with the mutual forbearance issues presented by conglomerates might face severe limitations. While it is true that the existing merger laws of most jurisdictions do take into account coordinated effects, the effects are usually confined to the market in which the merger takes place. The coordinated effects doctrine as it is generally formulated do not take into account the effects of the merger on coordination in other markets, though other parts of the conglomerate. Finally, not many jurisdictions widen their merger laws to capture concerns that might affect not-yet-specifically-identified markets. Note that in none are pure aggregate concentration concerns sufficient to block a merger.

5. Joint Ventures

Several jurisdictions also reported that they regulate some aspects of aggregate concentration through joint ventures which involve conglomerates. An interesting example involves the Israeli decision in *Middle East Energy Consortium*.⁹³ There, the two largest Israeli conglomerates requested to cooperate in order to create a joint venture in the gas market. The proposed agreement was analyzed for its horizontal, vertical and conglomerate effects. Despite the fact that the first two effects were sufficient to object to the joint venture, the Director also chose to analyze the latter effects. He emphasized that the cooperation between the two largest conglomerates, which control significant parts of the Israeli market, from its very nature limits competition among the conglomerates. Obviously, it can limit competition in the market of the joint venture given that two major potential competitors instead join

⁹¹ Answers to Questionnaire, Hungary, questions 3a and 12 (on file with authors).

⁹² Answers to Questionnaire, Lithuania (on file with authors)

⁹³ The Decision of Israeli Competition Authority's Director, Not to approve a clearance to Middle East Energy (unpublished, 13 May 1997), translated from Hebrew by the authors.

forces (horizontal effects). But it might also strengthen the mutual forbearance of competition between the conglomerates in other markets.⁹⁴

"When a conglomerate operates in many markets in parallel, the probability that he will potentially compete with other diversified companies in several markets in parallel increases. Such parallel competition might, in turn, create mutual forbearance, according to which as the number of markets in which they operate in parallel increases, so does the competitiveness among them reduce in every market. The explanation for this phenomenon lies in the ability of a competitor to reply by harming his competitors in their weakest spot, which might well be in another market in which the other firm might enjoy a comparative advantage. Concern for such reaction creates self-restraint in competition, and grows with the number of markets in which the firms can potentially compete and as the number of markets in which either conglomerate enjoys a monopolistic position grows."

Furthermore, a joint venture between such conglomerates increases such mutual forbearance as it creates a joint interest, and can also be used as a facilitating device for transfer of information and of signals between the parties. It can also be used for sanctioning purpose. If members of the joint venture belong to a cartel and one of them cheats, the other can inflict harm on the cheater by undermining the joint venture. It cannot be expected that parties which share significant economic interests in the joint venture that can significantly affect their profitability will vigorously compete in other markets to the same extent as they would have competed absent the joint venture. This is not to say that joint ventures among conglomerates will always be prohibited, but they will be eyed with suspicion and their actual or potential effects on all markets will be carefully analyzed. While the economic literature has recognized the possibility of a joint venture facilitating cartel conduct in another market, competition law has been slow to embrace this theory of harm. This is another limitation of using competition law to deal with aggregate concentrations concerns in the context of joint ventures, although this limitation can be remedied.

Other jurisdictions have also noted when weighing harm and benefits of the joint venture, decision-makers are allowed to take into account considerations regarding high levels of aggregate concentration, yet none have gone so far as Israel. Latvia, for example, takes into account the financial strength of the conglomerate and the position the other companies that belong to it and are active in closely related markets. Yet the analysis is limited to those circumstances that may have an effect on competition in specific markets.⁹⁵ Barbados stated that aggregate concentration considerations "are always a consideration in investigations", but such considerations were never actually taken into account.⁹⁶

⁹⁴ Ibid.

⁹⁵ Latvia, Answers to Questionnaire, question ?.

⁹⁶ Barbados, Answer to Questionnaire, questions 17-18.

6. Regulation of Collective Dominance

As noted, the existence of several large conglomerates may lead to a status quo based on oligopolistic coordination among them, in and across several markets. Under such a status quo, each conglomerate may not enter or may not compete aggressively in markets dominated by other conglomerates. Competition law is not designed to deal with voluntary unilateral decisions not to enter a market, which are not based on the inability to compete as a result of artificial barriers to entry. It also does not deal directly with oligopolistic coordination, which is not considered to be an "agreement" in order to constitute an agreement in restraint of trade.

Collective dominance or shared monopoly doctrines, applied in some jurisdictions under abuse of dominance provisions as well as merger regulation,⁹⁷ can capture some instances of oligopolistic coordination. Yet the conditions for the recognition of collective dominance are often very limited and difficult to prove. To overcome this obstacle, the Israeli legislature recently added a chapter to the Competition Law, defining a "collective group" based solely on structural elements.⁹⁸ To declare the existence of such a group, the Director of the Competition Authority must prove the existence of high entry barriers into the market, as well as three additional elements out of a pre-specified list, including high switching costs between firms, homogeneity of products or services, transaction transparency and a small number of market players.⁹⁹ Where such a collective group is declared to exist, the Director can impose conditions, such as a requirement for lowering switching costs (e.g., by reducing the costs charged by firms for transferring one's accounts to another firm), or request the Competition Tribunal to apply structural remedies such as divestiture, if such remedies are necessary in order to prevent a significant harm to competition or increase competition among the members of the group or in the industry in which they operate.¹⁰⁰ Once again, all these tools focus on competition in a specific market, and only once firms have chosen to enter it. This provision is nonetheless unique in that intervention is not premised on anti-competitive conduct, but on market structure.

7. Limitations on Allocating Governmental Rights

A rare formative moment, in which public awareness towards the negative effects of aggregate concentration created willingness of the legislative body to deal with this

⁹⁷ For U.S. mergers see U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (2010)

<http://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>. For the EU see, e.g., John Temple Lang, 'Oligopolies and Joint Dominance in Community Antitrust Law' in Barry Hawk (ed.), *International Antitrust Law and Policy* (Juris Pub., New York 2002) 269.

⁹⁸ Chapter D1 of the Israeli Competition Law 1988. The EU *Gencor* case also creates a presumption of collective dominance based on structural elements alone. *Gencor Ltd v. Commission* [1999] Case T-102/96 (ECR) p. II-00753, para. 206. For caution against a technocratic approach see Simon Bishop and Andrea Lofaro, 'A Legal and Economic Consensus? The Theory and Practice of Coordinated Effects in EC Merger Control' (2004) 49 ANTITRUST BULL. 195, 242.

⁹⁹ Section 31b(b) of the Israeli Competition Law 1988.

¹⁰⁰ *Ibid*, Section 31c.

politically explosive issue, has led to the enactment of the Israeli *Act for Competition Advancement and Concentration Reduction* in 2013 ("Concentration Act"). The Act addresses aggregate concentrations issues through three main tools: limitations on the allocation of public resources, prohibition of corporate pyramid structures beyond a certain size among public companies in order to limit corporate governance issues resulting from layered ownership, and ownership separations of significant financial and real enterprises in order to ensure a more level playing field in the allocation of credit to Israeli companies. We shall focus on the first, since it grants the competition authority an important role in its implementation.

Given Israel's already concentrated nature, the Act compels the relevant regulator to take into account aggregate concentration considerations when allocating a public right. Such rights include, inter alia, granting licenses in essential-infrastructure sectors and the transfer of 20% or more of the control over government-owned companies.¹⁰¹ When considering the allocation of such a right to a conglomerate, the regulator must consider aggregate concentration issues and consult with the "Concentration Reduction Committee." The Committee, which is headed by the Director of the Antitrust Authority and includes representatives from the Treasury and the National Economic Council,¹⁰² is also authorized to create a list of conglomerates which come under the Act.¹⁰³ Conglomerates are defined to include, inter alia, a significant financial or real enterprise, an enterprise with considerable influence in the printed news or broadcasting sector, or an enterprise which is active in at least four essential-infrastructure sectors, through at least ten licenses or contracts.¹⁰⁴

This mechanism is important yet limited in scope, since it is effective only in industries in which the government plays a significant role in the economic arena. In markets in which most of the economic resources are already privatized, this mechanism will not be effective for decentralizing economic power. Also, the law does not specify the weight to be given to aggregate concentration concerns and their balancing with potential efficiency consideration. Thus, the efficiency of this Act is still in question.

8. Direct Regulation of Conglomerate Size

The **Japanese** Anti-Monopoly Act ("AMA") contains some provisions that specifically address economic concentration which were designed to prevent the reemergence of the large conglomerates after Japan's defeat in the Second World War (known before the war as zaibatsu and after it as keiretsu).¹⁰⁵ In fact, the control of zaibatsu was one of the main impetuses behind the imposition of a competition law on Japan by the Allied

¹⁰¹ Section 2 of the Israeli Concentration Act 2013.

¹⁰² Ibid, Section 4.

¹⁰³ Id.

¹⁰⁴ It is noteworthy that the U.S. Public Utilities Holding Company Act 1935 created an explicit ban on large pyramidal groups from controlling public utilities companies.

¹⁰⁵ Toshiaki Takigawa, 'Competition law and policy of Japan' (2009) 54(3) ANTITRUST BULLETIN 435, 496.

occupational force.¹⁰⁶ As has been noted, “[c]ompetition law was originally introduced in Japan... to avoid excessive concentration of economic power.”¹⁰⁷ However, the issue of economic concentration has gradually lost its urgency during the post-War years, and the scope of regulation of economic concentration was loosened. For example, the prohibition against pure holding companies, which had formed the bedrock of regulation of economic concentration, was lifted in 1997.¹⁰⁸

Two main restrictions on economic concentration remain in the AMA. We shall focus on Article 9(1), which prohibits the excessive concentration of economic power, and states that “[a]ny company that may cause excessive concentration of economic power through holding of the shares ... of other companies in Japan, shall not be established.”¹⁰⁹ Article 9(3) proceeds to define an excessive concentration of economic power as “a situation in which the extreme largeness of comprehensive business scale over a considerable number of fields of business of a company and its subsidiary companies and other companies in Japan whose business activities are controlled by the said company through holding of their shares, the remarkably strong power of the said companies to influence other entrepreneurs due to transactions pertaining to the funds of, or the occupancy of influential positions over a considerable number of interrelated fields of business by the said companies, has a large effect on the national economy and impedes the promotion of fair and free competition.”¹¹⁰

The JFTC issued *Guidelines Concerning Companies which Constitute an Excessive Concentration of Economic Power* to provide a more precise definition of excessive concentration of economic power. According to the Guidelines, excessive concentration of economic power refers to three scenarios: (1) a corporate group which has “business activities whose overall scale is exceptionally large and covers a substantial number of principle [sic] fields of business”¹¹¹; (2) a corporate which wields “a high degree of influence over other companies derived from trades involving funds”¹¹²; and (3) a corporate group which “occupies a substantial position in each of a substantial number of principle [sic] fields that are interrelated”¹¹³. These three scenarios would only constitute excessive concentration of economic power if the corporate group wields “big influence over the national economy”¹¹⁴ and “obstructs enhancement of fair and free competition.”¹¹⁵ The Guidelines set exact benchmarks for

¹⁰⁶ Simon Vande Walle and Tadashi Shiraishi, 'Competition Law in Japan' [2015] <http://ssrn.com/abstract=2219881>, accessed 22 November 2015.

¹⁰⁷ Hiroshi Iyori, 'Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development' (2002) 1 WASH. U. GLOBAL STUD. L. REV. 35, 39-40.

¹⁰⁸ Takigawa (fn 77) 496.

¹⁰⁹ Japan Anti-Monopoly Act 1947 (AMA), art. 9(1).

¹¹⁰ Ibid, art. 9(3).

¹¹¹ Guidelines Concerning Companies which Constitute an Excessive Concentration of Economic Power 2002, art. 2(1).

¹¹² Ibid.

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id.

these three scenarios and seem to adopt a prescriptive, mechanical approach to the prohibition. Under these Guidelines, the JFTC has little discretion whether to allow significant concentration of economic power.¹¹⁶ This emphasis on structural elements creates a per se prohibition of large conglomerates, thereby potentially capturing all four tiers of the circles of influence.

9. Limitations of Cross-Ownership and Debt Guarantees

The most extreme measures for dealing with aggregate concentration through a competition law have been adopted in South Korea. **South Korea** imposes in its competition law ("the MRFTA") specific restrictions on stock ownership and the provision of debt guarantees by chaebol companies.¹¹⁷ The purpose of these provisions is to reduce cross share ownership and the complex financial links among companies in the same chaebol as it was perceived that "[t]he chaebols' extensive ownership links, complex financial relationships and in-group transactions...facilitate highly leveraged expansion, insulate subsidiaries from market forces, cause the risk of chain bankruptcies, and prevent inefficient firms from exiting the market."¹¹⁸

The MRFTA provides that a company belonging to a designated business group (a business group whose combined assets exceed 6 trillion won) shall not acquire or own stocks of an affiliated company which owns that first company's stock.¹¹⁹ Affiliated companies are defined as companies belonging to the same designated business group.¹²⁰

Aside from restrictions on cross share ownership, the MRFTA also imposes restrictions on the ability of chaebol group companies to provide debt guarantees to each other. This was believed to be a serious issue as it allowed chaebol companies to be excessively leveraged. The first version of the restriction restricted affiliate debt guarantees to 200% of the guaranteeing subsidiary's net assets.¹²¹ In 1996 the cap was lowered to 100% of the guaranteeing subsidiary's net assets.¹²² Finally, in the 1998 amendment, which remains effective to this day, all kinds of intra-group debt guarantees by affiliated companies for each other were prohibited altogether.¹²³ It was said that prior to the introduction of this restriction, "*chaebols* had easy access to banks because the *chaebol* subsidiaries would have other affiliates guarantee the *chaebols*' debts under the collateral-based loan system (it is very difficult in Korea to obtain credit without collateral), thus disproportionately favoring the *chaebols* and fueling their rapid expansion."¹²⁴ The hope was that this restriction would level the playing field between

¹¹⁶ Takigawa (fn 77) 497.

¹¹⁷ Some additional jurisdictions impose similar restraints, yet not through their competition laws.

¹¹⁸ Shin (fn 48) 118.

¹¹⁹ MRFTA, art. 9.

¹²⁰ MRFTA, art. 2.

¹²¹ Kyu Uck Lee, 'Economic Development and Competition Policy in Korea' (2002) 1 WASHINGTON UNIV. GLOBAL STUD. L. REV. 67, 70.

¹²² Ibid.

¹²³ MRFTA, art. 10-2.

¹²⁴ Lee (fn 116) 70.

chaebols and other companies in their access to credit. However, access to capital remains an issue for small businesses in South Korea.

The South Korean competition law also includes additional provisions the purpose of which is to maintain some separation between finance and insurance companies on the one hand and non-finance companies on the other hand. For example, a finance or an insurance company belonging to a designated business group is prohibited from exercising its voting rights in stocks of domestic affiliated companies.¹²⁵ The rationale for this prohibition is “to prevent them [finance and insurance companies belonging to a designated business group] from using their customers’ money to control other member firms.”¹²⁶ The MRFTA also creates strict separation between “financial holding companies” and “general holding companies”.¹²⁷ A financial holding company cannot own shares in a non-financial company and vice versa. A financial holding company is defined as “a holding company which owns stocks of its subsidiary conducting the financial business or insurance business.”¹²⁸ The rationale for this strict separation is that “financial capital must be separated from industrial capital in order to prevent *chaebols* from dominating the national economy.”¹²⁹

This policy tool deals directly with internal growth and with cross-holdings by setting clear limits on internal structures and internal ties within each conglomerate. It thus solves some of the limitations noted above of merger policy. Yet its effectiveness can only be measured by balancing the benefits created by the less concentrated structure of the economy and the potential loss of efficiencies that might have been created by the conglomerates.

Interestingly, some jurisdictions reported that limitations on internal growth or cross ownership in certain sectors are applied by other laws. Australia, for example, reported the application of such limitations on the banking and the media industries, while Hungary reported such restrictions to media and to pharmacies, and Mauritius to banking and telecommunications.¹³⁰

IV. Discussion and Conclusions

As the study clearly demonstrates, a notable percentage of jurisdictions deal with at least some aspects of aggregate concentration through their competition laws. Most apply traditional tools in a traditional manner, which allow them to indirectly contend with some of the marginal effects of aggregate concentration, generally within the first two concentric circles of effects. Hungary’s response is representative: “the level of aggregate concentration itself is not a decisive factor.”¹³¹ As seen in our analysis, since

¹²⁵ MRFTA, art. 11.

¹²⁶ *Choi and Patterson* (fn 49) 258.

¹²⁷ MRFTA, art. 8-2(2)(4) and (5).

¹²⁸ MRFTA, art. 8-2(2)(4).

¹²⁹ *Lee* (fn 116) 69.

¹³⁰ Australia, Hungary and Mauritius, Answer to Questionnaire, question 28.

¹³¹ Hungary Answers to Questionnaire, question 3a.

competition laws were not designed to deal with aggregate concentration issues, they generally do not provide efficient solutions.

Other jurisdictions- mostly those that regard themselves as significantly suffering from high levels of aggregate concentration- adopted wider tools that assist them in better dealing with high aggregate concentration issues. Some of the jurisdictions expanded existing tools (e.g., merger review), while others added to their competition laws new ones that go to the core of the issue- the control of significant parts of the economy by large conglomerates (e.g., limitations on cross ownership or internal financial subsidies in the conglomerate). What is common to all these tools is the widening of the lens of competition law to take into account concerns regarding aggregate concentration and the fact that they resemble sector-specific regulation more than competition law. As noted above, such a widening fits with and follows a change of thinking in other areas, which have also begun to look beyond the single firm or single market in their analysis.

Against this backdrop, the question arises whether the use of competition law tools to deal with aggregate concentration concerns is effective and efficient, or whether their costs are higher than their benefits. Let us offer some observations that result from our study, which attempt to provide some answers- although sometimes partial- to the questions posed at the beginning of this article.

First, competition law is most likely not a first-best solution to tackle issues of aggregate concentration when comparing all options from a purely economic point of view. This is because competition law often does not touch the core structural issues, centering instead on competition in a specific market and has limited tools to deal with multi-market oligopolistic coordination. Therefore, to deal effectively with high levels of aggregate concentration, other regulatory tools are required. A separate issue focuses on who is the best regulator to apply such tools: whether the competition authority (as in the case of South Korea), or other regulators. We address some aspects of this issue below.

A second, and related observation is that the political economy forces that protect the creation and continuation of high levels of aggregate concentration, might also prevent a jurisdiction from applying such first-best solutions. This is especially true because there are probably no independent ways of dealing with political economy issues of aggregate concentration short of directly regulating conglomerates. It would be very difficult to limit their political influence without also restricting their size. At the same time, at least in the short or medium run, using competition law tools that are general, might fall under the radar of those that are harmed by its application, so that their political economy influences would be reduced. Furthermore, competition authorities are often regarded as less susceptible to political influences, a fact that makes it easier for them to deal with such issues. Indeed, it might be that in some jurisdictions the widening of competition law tools to deal with aggregate concentration concerns resulted because other tools could not be employed. In other words, the width and vagueness of some competition law tools may serve to open the door for their use to

tackle issues of aggregate concentration that could otherwise not be reached through other tools, due to political considerations. Yet this is a narrow door, since the more jurisdictions use competition law tools in such a way, the more those that enjoy regulatory capture in other jurisdictions would be aware of this potential.

A related observation is that the most interventionary tools that were found to be applied by competition authorities (e.g., limitations on growth beyond a certain size, on cross-ownership or debt guarantee) were based on specific legislation (either within the competition law or external to it but empowering the competition authority to be part of the enforcing institutions). This may be explained and justified on several grounds. First, because exact economic estimates of the effects of an increase in aggregate concentration on welfare are lacking, legislation can define red lines (such as maximum cross-holding levels), thereby reducing the level of uncertainty of the rule. Second, legislative thresholds also reduce the level of judicial scrutiny to which the Authority's decisions will be subject and therefore enable it to be more confident in applying the prohibition. Third, it might also reduce harm to the authority's reputation.¹³² Indeed, those harmed by a decision to reduce aggregate concentration or its effects are likely to have significant economic power. This power might translate not only into capture of legislators or regulators, but also into effects on the media, especially if the conglomerate also controls some media outlets. Those harmed might wish to use this power in order to harm the reputation of the authority, especially if most jurisdictions do not have similar tools. Yet it might be more difficult to tarnish the authority's reputation where its decision is based on clear legislative guidelines. Fourth, legislation solves some of the political economy issues at the stage of enforcement. While political economy issues might affect the legislative process, a formative moment may enable legislators to overcome such pressures. Finally, basing the regulatory powers on specific legislative guidelines solves the democratic mandate problem which might otherwise arise: whether the competition authority is the proper body to make decisions that affect the economy in many inter-connected ways. Once a specific regulatory power is endowed on it by delegation of powers, the question then becomes one of efficiency rather than of authority.

A fourth observation is that almost none of the jurisdictions surveyed dealt with the measurement problems involved in aggregate concentration. Aggregate concentration raises significant and not easily surmountable measurement issues, such as when the economic and political costs of a conglomerate outweigh its benefits so that economic power negatively affects social welfare; and what weight should be given in the analysis to its control over financial, infrastructure or media markets. Such issues have led many jurisdictions to give aggregate concentration concerns almost no weight in their analysis. This is not surprising, given that without a coherent and applicable economic theory of harm, governmental intervention may be unjustified. It is thus suggested that

¹³² See Indig and Gal (fn 5).

if governments wish to deal more effectively with aggregate concentration, in-depth studies should be performed on such issues, to create a coherent basis for regulation.

This connects to our fifth observation: Institutional capabilities can explain, at least to some degree, the tools adopted. The more experienced the antitrust authority, and the better its economic analytical capabilities, the more it is generally inclined to expand the traditional boundaries on competition law through its decisional practice. Still, in many cases we observe that the authority relies on traditional competition law analysis, in conjunction with wider and less precise arguments about how high levels of aggregate concentration affect welfare, as a basis for its decisions. This might be explained, *inter alia*, as an attempt to limit judicial interference given the vagueness of the economic knowledge which currently exists with regard to specific changes in aggregate concentration.

A sixth observation is that even if jurisdictions wished to give more weight to aggregate concentration concerns in competition law cases, one of the major obstacles is the wording of many competition laws, which concentrate on competition in a specific market. This requirement mandates that the analysis be market-specific. Coupled with the requirement that the analysis be relatively precise, this requirement often closes the door on fourth-tiered considerations, and sometimes even on third-tiered ones that are not sufficiently precise. It is interesting to observe some of the tools adopted by some of the surveyed jurisdictions in order to broaden this point of view. Barbados does not limit the analysis to competition in a specific market;¹³³ South Africa added a public good consideration which may trump market-specific considerations, and which might focus on enabling small businesses to grow;¹³⁴ and Mexican law allows taking into consideration the shares of the merging parties in other markets, as well as the concentration of third parties in other markets, so long as those third parties are involved in the specific market(s) affected by the merger or in interconnected markets.¹³⁵

Seventh, and relatedly, a market-centric analysis looks at each market separately, setting a minimal benchmark of effects that would justify intervention in each market on its own. What such an analysis misses is the cumulative effects over many markets. This can be exemplified as follows: assume that the benchmark for recognizing non-negligible anti-competitive effects in each market is 10 units of harm. Further assume that the anti-competitive effect of aggregate concentration on each market is 5 units, and 100 markets are affected in parallel. There will be no intervention ($5 < 10$), although the cumulative anti-competitive effects are significant ($5 * 100 = 500$) and much larger than the market-specific benchmark ($10 \ll 500$). This simplified example indicates that sometimes there is significance in the number of markets affected, and that taking a step back from the focus on specific markets can assist one in realizing economy-wide effects.

¹³³ Barbados, Answer to Questionnaire, question 7.

¹³⁴ South Africa, Answer to Questionnaire, questions 7-8.

¹³⁵ Mexico, Answer to Questionnaire, question 9.

Eighth, another limitation of competition law arises from a combination of two factors. First, competition law rarely, if ever, limits internal expansion, the exception being the power to break-up monopolies if they harm welfare and conduct remedies are inefficient that some jurisdictions include in their laws. Moreover, external expansion via mergers, that was not prohibited in the past, is not revisited by the authority. Second, competition law possesses limited tools to address oligopolistic coordination. These facts, taken together, enable conglomerates to create and enjoy a multi-market status-quo which limits entry across markets (do not enter mine, I will not enter yours). Alternatively, it might allow conglomerates to operate in similar markets but impose limited competitive pressure on each other. This situation might be more harmful than the previous one, as no firm might hold a monopolistic position, therefore no firm will be subject to limitations imposed on monopolies, yet oligopolistic coordination might keep prices and market conditions at supra-competitive levels.

Ninth, we have not found any cases in which economy-wide political or economic effects (fourth-tier effects) were taken into account when applying competition laws, even if the wording of the law allowed it. This is not surprising, given that competition authorities are ill-equipped and often not authorized to perform the balancing of interests which goes beyond pure competition-centered concerns. Accordingly, other regulatory tools must be created to fill this gap, if one wishes to deal with such effects. Nonetheless, when such interests clash with a competition-centered analysis, the same tools that enable overriding of competition analysis in favor of the public good can be employed. Jurisdictions differ in the extent and the institution which can make such a decision, which include courts, minister(s) and even sometimes the competition authority itself.¹³⁶

The above observations lead to the following conclusion, which answers one of the main questions posed at the beginning of this article: competition law's analytical and regulatory tools cannot deal wholly and effectively with aggregate concentration concerns that flow from the structure of the market (which might have resulted from internal growth or from acquisitions that were allowed in the past) or from conduct which is generally regarded as lawful under competition law (most importantly, oligopolistic coordination and political influences). It is ill-equipped to deal with fourth-tiered issues, and lower level issues are often dealt with indirectly and incompletely. Thus traditional competition law tools may not suffice to deal with many of the issues raised by high aggregate concentration levels. At the same time, when a regulatory vacuum exists with regard to aggregate concentration, competition law tools can offer a partial solution, especially to those types of conduct which focus on narrowly defined markets that do not require taking economy-wide political or economic effects into account. This limited focus also solves issues regarding the authorities' mandate. Yet this implies, in turn, that the balancing of interests which go

¹³⁶ Cite literature on public good.

beyond pure competition-centered concerns must be performed elsewhere. Disregarding the need for such balancing might not always serve the public good.

Furthermore, it may well be argued that the conditions are not ripe for expanding competition law doctrines beyond their traditional boundaries: As long as there do not exist sufficiently accurate economic models of the effects of high levels of aggregate concentration on competition, competition authorities must focus only on what we know with a relatively high level of certainty. Otherwise, we might reduce market failures but at the same time increase governmental regulatory failures. Finding a balance between these two types of failures is especially important in an age where flexibility and adaptability are essential for continued successful operation in global markets.

At the same time, competition authorities might need to hold the torch and serve as vehicles for providing the empirical and theoretical basis to justify and move along modifications in a long-standing status quo, or at least incentivize government to do so. Such a study might also overcome one of the problems of modern governance, which Freeman and Rossi describe as a fragmented and overlapping delegation of powers to several agencies, each responsible 'for part of a larger whole'.¹³⁷ Our suggestion is based on several grounds. First, political economy effects, noted above, might make it easier for the authority- which is often an independent, professional and oversees a wide range of markets and therefore less susceptible to political pressures- to initiate such studies.¹³⁸ Second, the competition authority has expertise in performing market studies. Although the authority's regular analysis focuses on anti-competitive conduct in a specific market, such expertise might be carried over, at least to some extent, to study the effects of aggregate concentration on competition. Yet this might require the authority to move from eliminating anti-competitive conduct into the field of increasing competition.¹³⁹ Once these tools are available, the competition authority might have a more significant role in regulating aggregate concentration.

Our suggestion is, of course, not without limitations. It is essential to ensure that the authority has the capacity to perform such studies, so that they do not interfere with its regular work. With regard to effects on the competition authority's reputation, such studies might create mixed effects. On the one hand, they serve as valuable opportunities to demonstrate the authority's contribution, professionalism and relevance to economic policy. In particular, studies that lead to visible and positive changes in market conditions can strengthen its reputation. Such reputational effects, in turn, may contribute to the enhancement of competition in the long run, through increased resources or readiness to take into account the authority's suggestions.

¹³⁷ J. Freeman and J. Rossi, 'Agency Coordination in Shared Regulatory Space' (2012) 125 *Harv. L. Rev.* 1133, 1134.

¹³⁸ D.E.M. Sappington and D.L. Weisman, 'Regulating Regulators in Transitionally Competitive Markets' (2012) 41 *J. Reg. Econ.* 19, 31 and 36.

¹³⁹ For similar problems see Indig and Gal (fn ?), chapter 3.

However, such a study can also create negative reputational effects. It might harm the authority's reputation if it is required to make decisions on issues that involve a non-obvious trade-off among different values. As noted by the OECD, 'distributional issues are inherently more political than might be considered optimal for a body that needs to be regarded as an impartial overseer devoted to advancing the general public welfare'.¹⁴⁰ One way to overcome such effects is to narrow the mandate of the authority to perform only studies that focus mainly on obstacles to competition. With regard to the democratic mandate, this does not raise a problem so long as any deviation from its traditional powers should be specifically embedded in clear legislation or in a clear delegation of powers from the government.¹⁴¹ Furthermore, intra-regulatory effects should also be taken into account. This is because empowering the authority to engage in a broad study that analyse and make remedial suggestions for overcoming market and regulatory failures, changes the status quo within the executive branch.¹⁴² Finally, since such a study requires a high level of economic complexity, it is suggested that only those authorities with a high level of expertise and sophistication of economic analysis engage in such studies. Such studies may then create positive learning externalities for other jurisdictions in similar positions.

Of course, to fully explore whether competition law tools are a first-best solution (even if not a perfect one) to problems of aggregate concentration, future study should provide on a holistic (or rather a whole-istic) analysis of the relative efficiency of alternative tools (such as tax tools,¹⁴³ corporate tools,¹⁴⁴ limitations on growth beyond a certain size, and direct regulation¹⁴⁵) in dealing with the potential adverse competitive effects of aggregate concentration. Such an analysis should not be purely legalistic (e.g., determining the content of regulatory tools or constitutional limitations on their potential scope) or economic, but also take into account political economy issues, such as the practical ability to adopt and apply each tool in a certain jurisdiction, given the political influence that those enjoying aggregate concentration often hold, as we noted above. Of course, the answer need not be dichotomous; rather, some competition concerns raised by aggregate concentration can effectively be dealt with competition

¹⁴⁰ OECD Directorate for Financial and Enterprise Affairs Competition Committee, Policy Roundtables: Market Studies (Competition Law and Policy OECD 2008), 8, 218 and 234 with regard to market studies, available at: <http://www.oecd.org/regreform/sectors/41721965.pdf>.

¹⁴¹ Indig and Gal (fn ?), chapter 4.

¹⁴² Id.

¹⁴³ For tax tools see, e.g., Randall Morck, 'How to Eliminate Pyramidal Business Groups: The Double Taxation of Intercorporate Dividends and other Incisive Uses of Tax Policy' in James M. Poterba (ed.), *Tax Policy and the Economy* (MIT Press, Vol. 19, Cambridge 2005) 135; 26 U.S. Code § 243 - Dividends received by corporations (Internal Revenue Code).

¹⁴⁴ For limitations on the ability to exploit shareholders at the lower levels of a conglomerate structured as a pyramid see, e.g. The U.S. Public Utilities Holding Company Act 1935 (which subjected utilities to Federal regulation and banned pyramids more than two layers high from holding public utilities such as power or water companies); The Israeli Act for Promoting Competition and Limiting Concentration Act 2013, Section 21 (limiting large holding companies to three levels of the pyramid under certain circumstances).

¹⁴⁵ India attempted to deal with aggregate concentration through a detailed system of licensing, which has led, according to some economists, to stymied growth for a generation. Paradoxically, the large business groups were probably better able to deal with the licenses than others.

law tools, while others should be left outside its realm. Indeed, after exploring the competition law tools above, it seems to us that at least some of the competition law tools (mostly merger review) can and should serve as part of a toolbox to deal with aggregate concentration concerns, where it is not efficient to otherwise limit incentives to grow to such large extent. Whilst intriguing, these issues are beyond the scope of this article. Nonetheless it is hoped that this article will assist in raising awareness of the issues created by aggregate concentration in the competition law realm. By outlining and analyzing the competition law tools which are already applied around the world to deal with the adverse effects of aggregate concentration, we have hopefully provided a new and formative building block towards such an analysis.