

# Aggregate Concentration: Regulation by Competition law?



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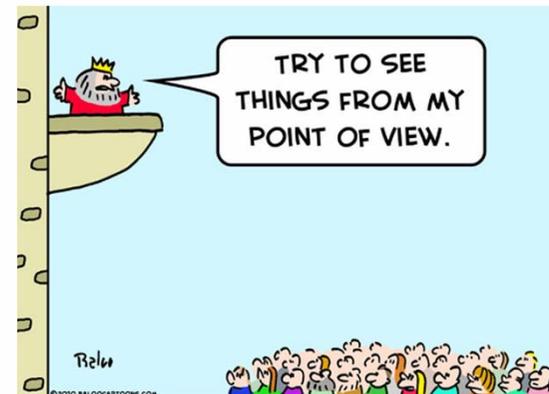
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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD

# Motivation

- General focus: competition in *a market*
- Aggregate concentration: a small group of economic entities controls a large part of the economic activity through holdings in markets.
- Significant effects on competition and welfare
- Should we change our point of view?



# The Economic Effects of Aggregate Concentration

Positive: (e.g., Masulis, Pham & Zein)

- substantial resources and varied experience
- financial means: take more risk
- overcome the missing institutions problem (e.g., Hoshi, Kashyap & Scharfstein; Yafe and Khanna)

# Negative Effects

- increase oligopolistic coordination in multi-market setting (e.g., Bernheim & Whinston)
- strong deterrence for the entry or expansion
- stagnation and poor utilization of resources (e.g., Morck, Wolfenzon & Yeung)
- political economy concerns
- possibly limiting efficient regulation
- "too big to fail"



leads to the **entrenchment problem**.

# Partial Conclusion

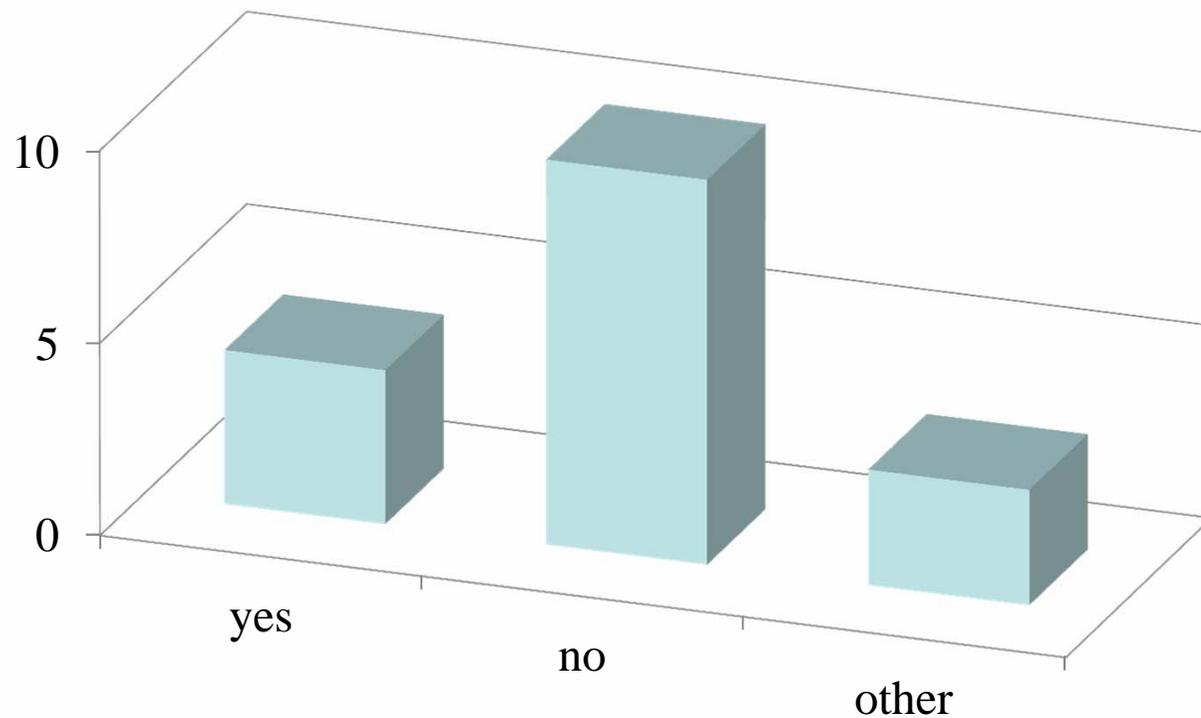


When Aggregate Concentration is high, the unit which is relevant for economic analysis is often no longer the freestanding firm, but rather the economic unit of which it is part through formal (e.g. ownership) and non-formal (e.g. family ties)

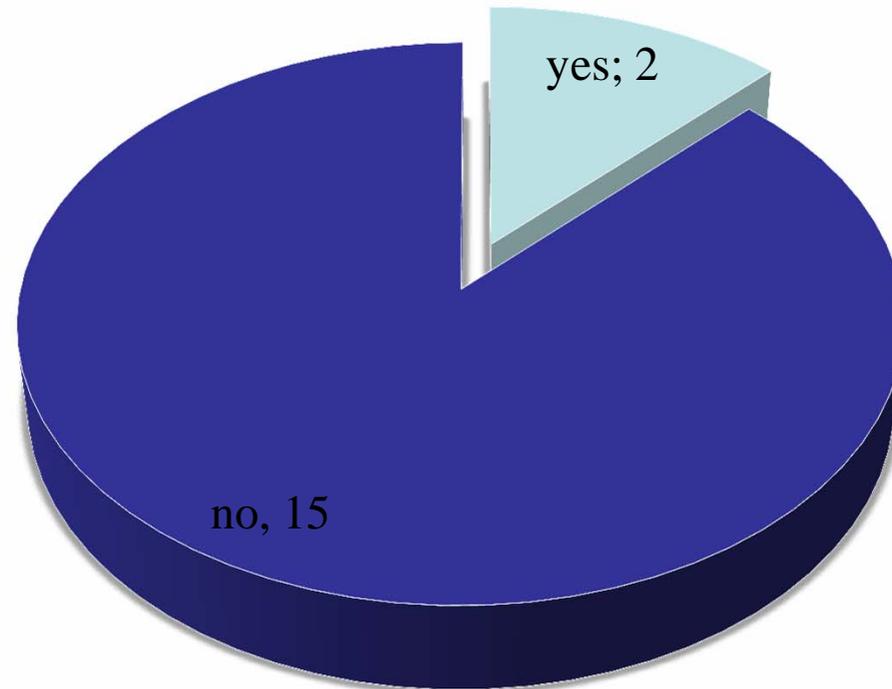
# Potential effects on CL

- Mergers with conglomerates: wider lens
  - **Cur:** “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 the prism of incentives to compete.”
- Conditions for oligopolistic coordination
- JVs with conglomerates
- Super dominance
- Abuse: predatory conduct?

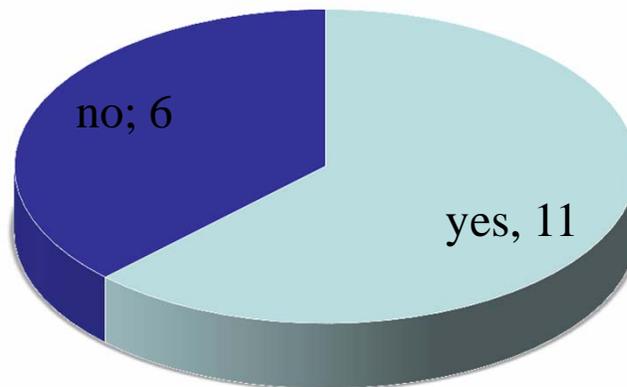
1. Does your jurisdiction suffer from high levels of aggregate concentration? In other words: does a small group of conglomerates dominate a significant part of your economy?



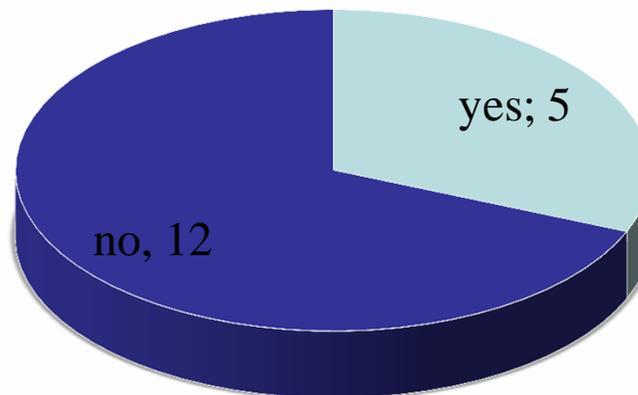
3.a. Does your competition legislation specifically address high levels of aggregate concentration?



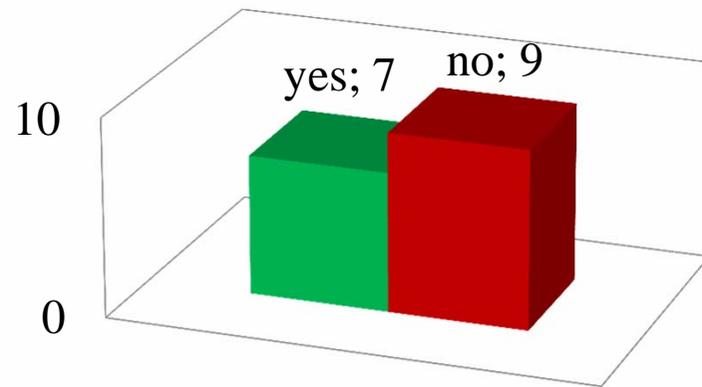
9. Does your merger law allow the decision-maker to take into account considerations regarding aggregate concentration levels?



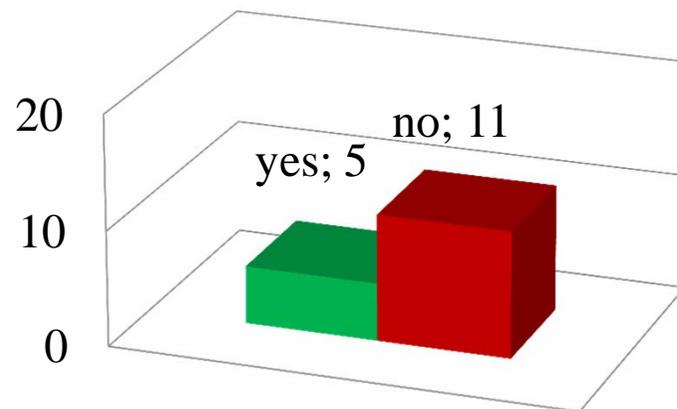
10. Have considerations of high levels of aggregate consideration ever been taken into account?



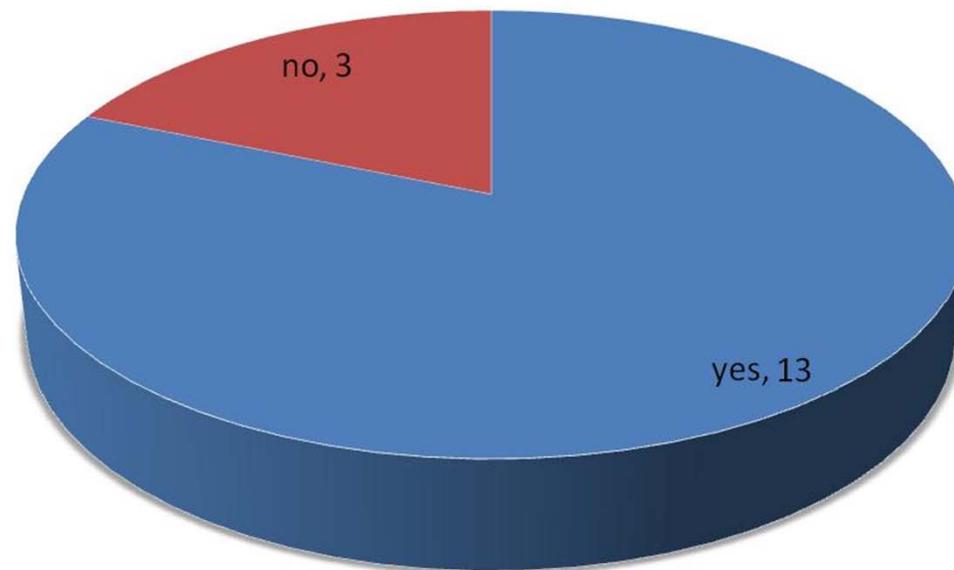
17. When weighing harm and benefits of the joint venture, are decision-makers also allowed to take into account considerations regarding high levels of aggregate concentration?



19. Was such a prohibition ever applied in practice?



22. Does your competition law prohibit high/unfair prices as abuse of a dominant position?



# Case Study: Japan

- Historical problem with conglomerates: zaibatsu and keiretsu
- The control of zaibatsu was one of the main impetuses behind the imposition of competition law on Japan by the Allied occupational force.
- Anti-Monopoly Act
- It has been noted that economic efficiency or consumer welfare was never the sole concern of Japanese competition law: “[c]ompetition law was originally introduced in Japan to achieve the political goal of economic democratization, i.e. to ensure equal opportunity for all individuals to engage in economic activity and to avoid excessive concentration of economic power.”
- Four zaibatsu groups have remained to this day: Mitsui, Mitsubishi, Sumitomo, and Fuyo groups. Together with two non-zaibatsu principal bank groups, Sanwa and Daiichi-Kangyo, they are known as “the six major business groups”

# Case Study: Japan

- Two main restrictions on economic concentration remain in the AMA.
- Article 11 of the AMA prohibits banks from holding greater than 5% of the shares of a non-banking corporation and insurance companies from holding greater than 10% of the shares of a non-banking corporation.
- Article 9(1) of the AMA states that “[a]ny company that may be to cause excessive concentration of economic power through holding of the shares ... of other companies in Japan, shall not be established.”
- The JFTC has issued the *Guidelines Concerning Companies which Constitute an Excessive Concentration of Economic Power* to provide a more precise definition of excessive concentration of economic power.

# Case Study: Japan

- According to these 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”; (2) a corporate which wields “a high degree of influence over other companies derived from trades involving funds”; and (3) a corporate group which “occupies a substantial position in each of a substantial number of principle [sic] fields that are interrelated”. These three scenarios would only constitute excessive concentration of economic power if the corporate group wields “big influence over the national economy” and “obstructs enhancement of fair and free competition” *Guidelines Concerning Companies which Constitute an Excessive Concentration of Economic Power*, art. 2(1).

# Case Study: Japan

- The Guidelines further interpret these three scenarios as respectively referring to “[a] company group ... (a) of large scale and has (b) large-scale enterprises in each of a (c) substantial number of (d) principal fields of business”; “[a] company which owns both (a) a large-scale financial company and (b) a large-scale company except (c) a company engaged either in financial business or in a line of business closely related thereto”; and “[a] company which owns (a) substantial number of (b) companies each of which possesses a substantial position (c) over a principal field of business, (d) the said fields of business being interrelated but different for each company”.

# Case Study: Japan

- A company group is of large scale if it has total assets of over 15 trillion yen.
- A large-scale financial company is one with total assets over 15 trillion yen.
- A large-scale enterprise or company is one with total assets of over 300 billion yen.
- A company possesses a substantial position if it accounts for no less than 10% of the total sales in the field of business.
- A substantial number refers to five or more.
- A principal field of business is “a type of industry which is included in the 3-digit classifications of Japan Standard Industrial Classification and in which shipment volume exceeds 600 billion JPY.”
- Fields of business are interrelated if they share trade relationships or complement or substitute relationships.

# Case Study: Japan

- Abuse of superior bargaining position:
- Article 2(9)(v) provides three examples of abuse of a superior bargaining position:
  - (a) Causing the said party in regular transactions ... to purchase goods or services other than the one pertaining to the said transactions;
  - (b) Causing the said party in regular transactions to provide for oneself money, services or other economic benefits;
  - (c) Refusing to receive goods pertaining to transactions from the said party, causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party, delaying the payment of the transactions to the said party or reducing the amount of the said payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the said party” .

# Case Study: Japan

- Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act
- Designation of Unfair Trade Practices applicable to all business types (generally known as the General Designations)
- A number of designations of unfair trade practices applicable to specific business types (generally known as the Special Designations) for industries such as newspaper, logistics, and large-scale retailers
- There is an abuse of a superior bargaining position when “a party who has superior bargaining position against the other transacting party makes use of such position to impose a disadvantage on the transacting party”, and when the act is unjust in light of normal business practices and “poses the risk of impeding fair competition”
- No need for dominance. The concept of superior bargaining position is relative.

# Case Study: Japan

- In determining whether such a relatively superior bargaining position exists, the General Guidelines stipulate a number of factors to be consulted: (1) the degree of dependence of the inferior party on the transactions with the superior party, (2) the position of the superior party in the market, (3) the possibility for the inferior party to change its business counterpart, and (4) other concrete facts indicating the need of the inferior party for transactions with the superior party.
- Impediment of fair competition does not require a showing of anticompetitive effects. Only some adverse effect on the market is required.

# Case Study: Japan

- Examples of abuse of superior bargaining position:
  - Forced purchase of goods from the superior party or party designated by the superior party
  - Forced provision of economic benefits such as financial contributions or staff
  - Unjustified refusal to accept delivered goods
  - Unjustified return of delivered goods
  - Unjustified delayed or reduced payments
  - Unjustified price reductions
- Recent cases:
  - Sanyo Marunaka
  - Toys 'R Us Japan
  - Edion (surcharge: USD48.7 million)

# Case Study: South Korea

- Reliance on chaebols for industrialization
- Monopoly Regulation and Fair Trade Act (“MRFTA”)
- Article 1 of the MRFTA states the purpose of the Act as follows: “The purpose of this Act is to promote fair and free competition, to thereby encourage creative enterprising activities, to protect consumers, and to strive for balanced development of the national economy by preventing the abuse of Market-Dominant Positions by enterprisers and the excessive concentration of economic power, and by regulating improper concerted acts and unfair business practices.”
- Kwangshik Shin noted that chaebols “are presumed to possess and exercise more power, and power of a different kind, than conventional monopoly power, posing a unique threat to the free enterprise market system and democratic values in Korea.”
- Jeong-Pyo Choi and Dennis Patterson characterized the MRFTA as part of the “[e]fforts to reduce, or at least slow, the growing influence of Korea’s *chaebol*”.

# Case Study: South Korea

- “The 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.” Kwangshik Shin, “The Treatment of Market Power in Korea” (2002) 21 Review of Industrial Organization 113, 118.
- Chapter 3 of the MRFTA
- Prohibition of cross-shareholding:
  - Article 9 of the MRFTA provides that a company belonging to a designated business group (the criteria for which as defined in a presidential decree) shall not acquire or own stocks of an affiliated company which owns that first company’s stock.
- Prohibition of debt guarantees:
  - The first version of the restriction came about in the 1992 amendment, which restricted affiliate debt guarantees to 200% of the guaranteeing subsidiary’s net assets.
  - In the 1996 amendment, the cap was lowered to 100% of the guaranteeing subsidiary’s net assets.
  - Finally, in the 1998 amendment, which remains effective to this day in the form of Article 10-2, all kinds of intra-group debt guarantees by affiliated companies for each other are prohibited altogether.

# Case Study: South Korea

- Separation of financial and non-financial companies:
  - Article 11 prohibits a finance or an insurance company belonging to a designated business group from exercising its voting rights in stocks of domestic affiliated companies.
  - Article 8-2 mandates a strict separation between what the statute calls “financial holding companies” and “general holding companies”.
  - A financial holding company is defined as “a holding company which owns stocks of its subsidiary conducting the financial business or insurance business”. A general holding company is any holding company that is not a financial holding company.
  - Article 8-2 prohibits a financial holding company from owning shares in a domestic company not engaging in the financial or insurance business. Conversely, the article prohibits a general holding company from owning shares in a domestic financial or insurance company.
- Further restrictions:
  - Article 11-2 requires a designated business group, before carrying out what are called “large-scale intra-group transactions” with specially related persons, to obtain approval through a resolution of the board of directors and publish its intention to carry out such a transaction in a public notice.
  - The provision of special assistance in the form of advanced payment, loans, manpower, immovable assets, stocks and bonds, or intellectual property to an affiliated company or specially related persons has been classified as an unfair business practice under Article 23 since the 1996 amendment.

# Case Study: South Korea

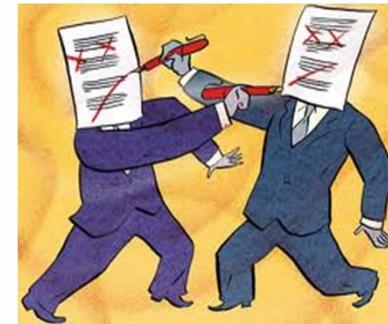
- Abuse of superior bargaining position
- In the KFTC Guidelines for the Review of Unfair Trade Practices, the KFTC enumerates five types of abuse of superior bargaining position:
  - Forced purchase by contractual counterparty
  - Forced provision of benefit
  - Imposition of sales targets
  - Causing a disadvantage to the contractual counterparty
  - Interfering with the management of the contractual counterparty
- Effects on competition need not be demonstrated to prove an abuse of a superior bargaining position. The KFTC only needs “to prove unfairness of individual transactions rather than of the entire market competition in order to apply Article 23.”

# Case Study: South Korea

- “Whether or not a superior trading position occurs is judged based on the ease of securing a substitute business to trade with, turnover dependency of the business, position superintendency of the business, and characteristics of the goods or services.”
- Whether a particular alleged abuse is unfair depends on “the purpose of the act, prediction possibility of the opposite party ..., normal trading practice in the industry, whether damage has been sustained by the opposite party as a result of [the alleged abuse]”.
- Recent cases:
  - *Hyundai Department Store Ltd* case
  - *Daewoo Department Store Ltd.* case
  - *Hyundai Mobis Ltd* case

# Comparative Advantage?

- needed expertise?
- democratic mandate?
- most efficient? (e.g. tax or holdings)
- Required tools?



## Effects on the Authority

- intra-regulatory political economy effects
- inter-regulatory political economy effects

# Conclusions

- Problem should be realized
- Different  :wider perspective
- To some extent already applied
- Need deeper thinking



Thank You!

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