

Aggregate Concentration: Regulation by Competition law?



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Motivation

- 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 and does competition law play a role?**

The Economic Effects of Aggregate Concentration

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

- Substantial resources and varied experience
- Financial means
- Overcome missing institutions problem

Negative Effects

- increase oligopolistic coordination
- deterrence of entry or expansion
- stagnation and poor utilization of resources
- political economy
- “too big to fail”
- Roosevelt: “Private enterprise is ceasing to be free enterprise and is becoming a cluster of private collectivisms”



leads to the **entrenchment problem.**

Partial Conclusion



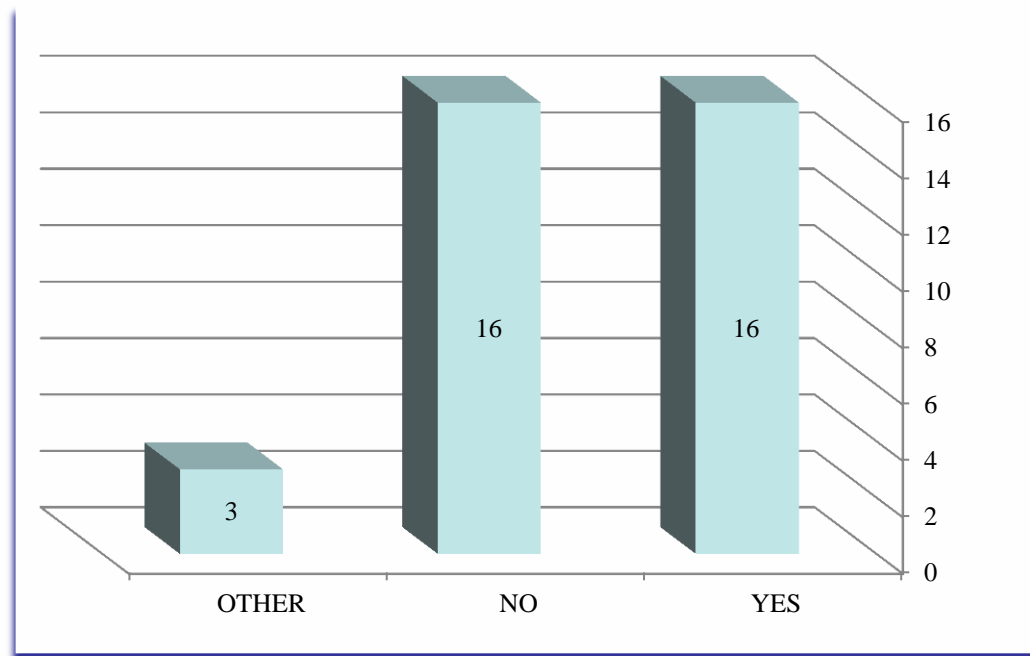
When Aggregate Concentration is high, the unit which is relevant for economic analysis is often no longer the freestanding firm, but rather the economic unit of which it is part through formal (e.g. ownership) and non-formal (e.g. family ties)

Potential effects

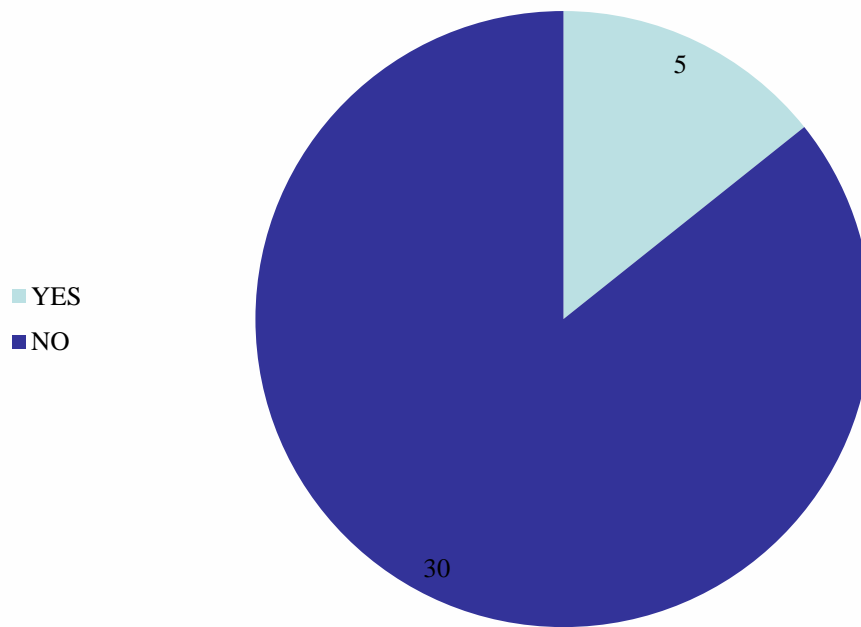
- Concentric circles:
 - Effects resulting from the market power of the conglomerate in the specific market
 - Effects resulting from market power in vertically connected markets (e.g. tying)
 - Effects resulting from market power in related markets (e.g. portfolio effects)
 - concerns at a macro-level (e.g., political economy influences, too-big-to fail concerns, liberty)

Qualitative Analysis

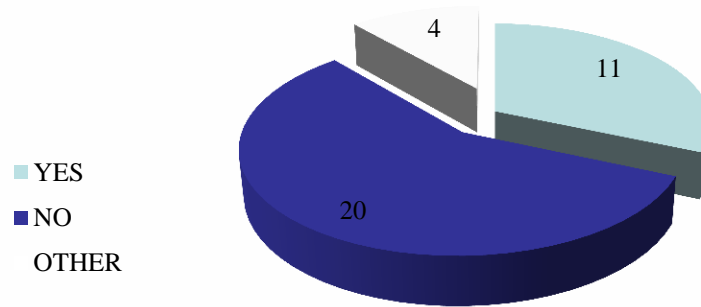
1. Does your jurisdiction suffer from high levels of aggregate concentration? In other words: does a small group of conglomerates dominate a significant part of your economy?



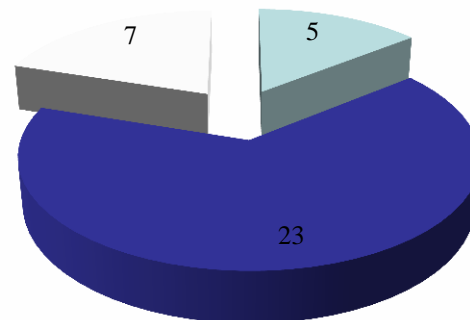
3.a. Does your competition legislation specifically address high levels of aggregate concentration?



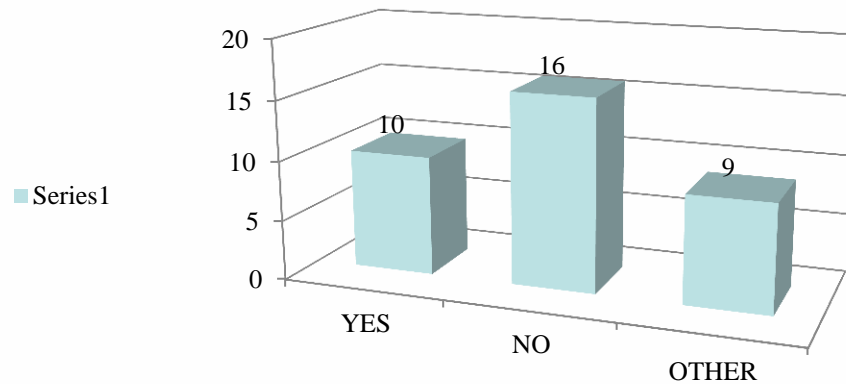
9. Does your merger law allow the decision-maker to take into account considerations regarding aggregate concentration levels?



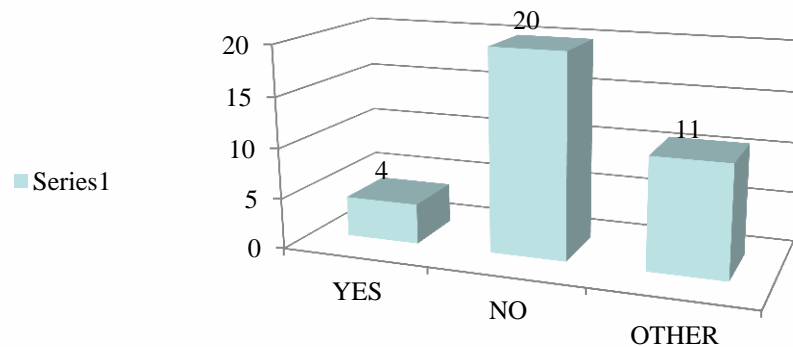
10. Have considerations of high levels of aggregate consideration ever been taken into account?



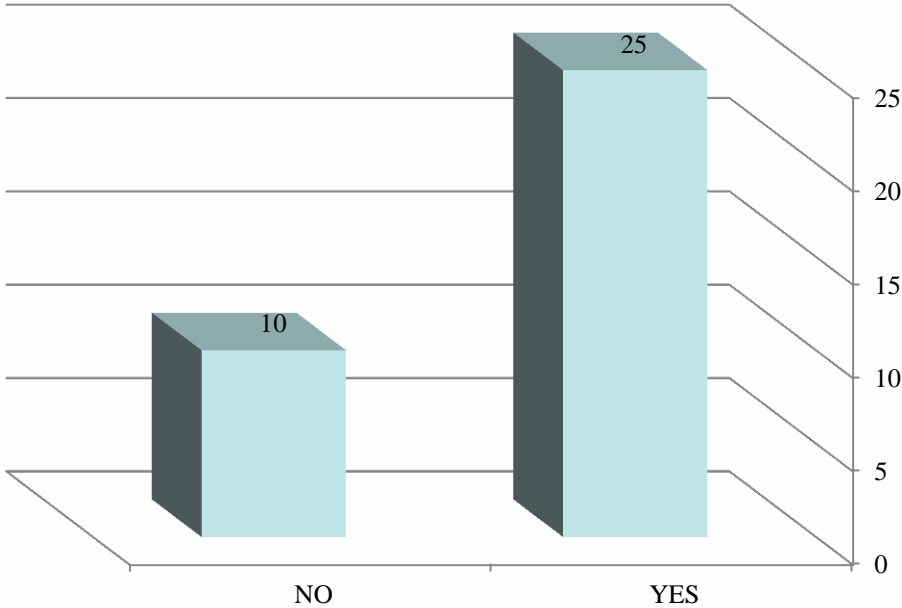
17. When weighing harm and benefits of the joint venture, are decision-makers also allowed to take into account considerations regarding high levels of aggregate concentration?



18. Was such a prohibition ever applied in practice?



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



Qualitative Analysis

Wide definition for dominance

Section 19(2) of the German Competition Law:

"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"

Merger Review

- foreclosure? Portfolio effects?
- **Lithuania:** size of group of associated undertakings, financial strength, and range
- Mergers with conglomerates: wider lens
 - **Israel:** “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.”
- **Japan:** excessive concentration of power

Joint Ventures

- Israel: wider lens **Middle East Energy:**
 - “ parallel competition might create mutual forbearance, according to which as the number of markets in which [conglomerates] operate in parallel increases, so does the competitiveness among them reduce in every market.... 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.”

Abuse of Superior Bargaining

- South Korea
 - Article 23(4)(1) of the MRFTA
 - Five kinds of abuse:
 - Forced purchase
 - Forced provision of benefit
 - Imposition of sales target
 - Imposition of disadvantages
 - Interference with business management

Superior Bargaining Position

- To be established in light of factors such as the “ease of securing a substitute party for trade, level of income dependency in the relationship, control or supervision involved, and characteristics of goods or services traded.”
- Typical scenarios in which such a position is found:
 - Large retailer and companies doing business with the retailer
 - Manufacturer and parts supplier
 - Broadcasting company and broadcasting program supplier
 - Situations where significant damage is likely to be caused due to [a] switch in business partners, due to the size of investment made to maintain business relationship with the specific undertaking

SBP and Conglomerates

- Market power not a prerequisite
- Lotte.com:
 - the defendant was one of the 77 companies affiliated with the Lotte Conglomerate
 - “[T]he 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.”
- Multi-market contact: Korea Land and Housing Corp.
- To consider the market share of the affiliates of the defendant which also have business dealings with the counterparty.

SBP and Conglomerates

- Difference in size between the defendant and the counterparty:
 - LG Electronics
 - Korea Land and Housing Corp.
- If we consider the defendant to be the conglomerate, difference in size would be even larger.

Abuse and Conglomerates

- Conduct more common for conglomerates:
 - Forced purchase: A conglomerate company may want to drum up business for an affiliate through forced purchases
 - Forced provision of benefit
 - KFTC Guidelines: such conduct “also includes an undertaking forcing provision of benefit using the superior position of its affiliate.”
 - This scenario of leveraging the superior bargaining position of an affiliate to extract financial benefit from a contractual counterparty is particularly likely with a conglomerate.

Abuse and Conglomerates

- Conduct more common for conglomerates:
 - Imposition of sales targets:
 - In South Korea, many of the producers of goods and services are members of big conglomerates, such as car, electronics, electrical appliances, etc.
 - Smaller retail businesses rely on these conglomerate companies for supply of goods and services, and are susceptible to pressure to meet sales targets.
 - Examples:
 - Sony Pictures Buena Vista case
 - LG Electronics case
 - GM Daewoo case

ASBP in Japan

- Elements of the offense:
 - Superior bargaining position
 - No market power necessary
 - Supplier's degree of dependence
 - Retailer's position in the market
 - Possibility to replace trading partner
 - “Unjustly in light of normal business practices”

ASBP in Japan

- Proscribed conduct:
 - Forced purchase or usage
 - Procuring money unjustly from suppliers
 - Procuring services unjustly from suppliers
 - Late payments, retrospective discounts, return of goods

Direct Regulation of Economic Concentration in Korea

- Cross shareholding:
 - Article 9 provides that a company belonging to a designated business group shall not own or acquire stocks of an affiliated company which owns that first company's stock.
 - Affiliated companies are defined as companies belonging to the same designated business group

Direct Regulation of Economic Concentration in Korea

- Debt guarantees:
 - In 1992, restriction was introduced to limit affiliate debt guarantees to 200% of the guaranteeing subsidiary's net assets.
 - In 1996, the cap was lowered to 100%.
 - In 1998, Article 10-2 was introduced which prohibited affiliate debt guarantees altogether.

Direct Regulation of Economic Concentration in 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.
 - The rationale is to prevent financial companies from using their customers' money to control other affiliate companies.

Direct Regulation of Economic Concentration in Korea

- Separation of financial and non-financial companies:
 - Article 8-2 mandates a strict separation between “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.

Direct Regulation of Economic Concentration in Korea

- Separation of financial and non-financial companies:
 - Article 8-2 prohibits a financial holding company from owning shares in a domestic company not engaged in the financial or insurance business. Conversely, a general holding company is prohibited from owning shares in a domestic financial or insurance company.

Direct Regulation of Economic Concentration in Korea

- Separation of financial and non-financial companies:
 - The rationale is that financial capital must be separated from industrial capital in order to prevent the chaebols from dominating the national economy.

Direct Regulation of Economic Concentration in Korea

- Other restrictions:
 - Holding companies were banned altogether between 1987 and 1999.
 - Article 8-2(2)(1): the debt-equity ratio of a holding company may not exceed 100%
 - Article 8-2(2)(2): A holding company must own at least 40% shares of a subsidiary (20% for listed subsidiaries)

Direct Regulation of Economic Concentration in Korea

- Other restrictions:
 - Article 8-2(2)(3): A holding company may not own more than 5% of the shares of a non-subsidiary domestic company
 - Article 11-2: A designated business group, before carrying out “large-scale intra-group transactions” with specially related persons, must obtain approval through board resolution and publish its intention to carry out such a transaction in a public notice

Governmental rights


- **US Public Utilities Holding Company Act 1935:** explicit ban on large pyramidal groups from controlling public utilities companies
- **Israeli Concentration Act 2013:** Take into account aggregate concentration concerns when allocating governmental rights

Comparative Advantage?

- A notable number already deal
- Most efficient? (e.g. tax or holdings)
- Political economy issues
- Measurement issues
- Problematic focus on specific market
- Democratic mandate



Conclusions

- Problem should be realized
- Different  :wider perspective
- Need deeper thinking



Thank You!

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