St. John's Law Review

Volume 44, Spring 1970, Special Edition Article 52

The International Firm and Its Implications

Eberhard Gunther

THE INTERNATIONAL FIRM AND ITS IMPLICATIONS

EBERHARD GUNTHER*

I

In modern industrialized economies we observe a considerable growth of firms which is mostly due to mergers, the establishment of joint ventures or other kinds of affiliations or cooperation. The firms involved are mostly large themselves and, consequently, a merger or some kind of cooperation produces giants which frequently dominate the respective home markets and play an important part on the world market.

Two countries in particular have become known for the number of mergers accomplished in recent years which are frequently fostered by the respective governments, *i.e.*, Japan and France. In Japan concentration is largely due to the resurgence of the Zaibatsu, the powerful family enterprises. They had been dissolved after the war but in the fifties and especially the sixties the parts of the Zaibatsu came together again.[1] Today the old family control does not exist any more, but the traditions, reputation, cohesion and other implications of names and trademarks continue to exist and to hold the firms together. Examples are the Mitsubishi, Mitsui and Sumitomo concerns. The most recent merger between the two steel giants, Yawata and Fuji, which has created the world's second biggest steel producer, is but another example of this development. Both enterprises were parts of the steel monopoly Nihon Seitetsu and were dissolved after the war.

The French government has repeatedly declared its intention to establish a powerful group of enterprises in every branch of the industry which could effectively compete on the world market. Examples are the mergers between the steel manufacturer Ugine and the nitrogen producer Société des Produits Azotés, and, within the steel industry, the mergers between Usinor and Lorraine-Escaut, and between de Wendel, Sidelor, and the Société Mosellane de Sidérurgie. Groups were further formed by Saint Gobain and Pont à Mousson and by Rhône-Poulenc and Pechiney, Ugine-Kuhlmann, and Naphtachimie. Finally, the mergers between the car manufacturers Renault and Peugeot and in the electrical industry between the Compagnie Générale d'Electricité and Thomson-Brandt may be mentioned.

Increases in business concentration occurred to a lesser extent in other

---

* President, Federal Cartel Office, Berlin, Germany.

[1] For a detailed description of this development, see generally *Zaibatsu Revival?* (pt. 1), 26 THE ORIENTAL ECON. 633 (1958); *Zaibatsu Revival?* (pts. 2-9), 27 THE ORIENTAL ECON. 10, 65, 122, 178, 241, 348, 412, 461 (1959); *Zaibatsu Leadership Race* (pts. 1-5), 29 THE ORIENTAL ECON. 73, 141, 199, 259, 350 (1961).

countries. In Germany the Badische Anilin und Sodafabriken (BASF) and Wintershall have formed a combine in the chemical industry. In the steel industry the two combines, Thyssen and Mannesmann, agreed to divide their field of production with Mannesmann specializing in pipes and Thyssen in rolled steel. Joint ventures were set up by Siemens and AEG for the production of transformers and turbines and by Siemens and Bosch for electrical household appliances.

With the growth of an enterprise its scope becomes wider and its interests stretch farther. Finally, we find the international firm which is active in a number of countries and which often has a world-wide network of plants, offices, branches, divisions *etc.*

Wertheimer[2] distinguished between five stages of this development: in the national stage a company has production and sales only within the home country. This is followed by the next stage during which the enterprise begins to sell abroad directly to the customers or through intermediaries. This would be followed by the establishment of foreign sales offices which in turn may result in the creation of plants and lastly in the establishment of a full line subsidiary or operating company.

In this way an international firm has come into existence which has to face new problems both inside and outside. The inside problems concern mainly questions of organization and location of the decision-making power. A centralized organization in one city — often in the country in which the firm originated — has the advantage that all decisions can be made in one place which receives the information from all places of activity and which is, therefore, in the best position to make decisions. On the other hand, the disadvantages are clearly visible. A central directing organ may be too far away from the place where a decision needs to be made and, despite all the information available, may not be able to take into account all the pertinent and often intangible implications involved. Also, it may be that the employees in the foreign branches dislike the idea that they have to take orders from a foreign head office.

It seems appropriate therefore that an international firm should give its foreign branches greater responsibility with the degree of their growth. An example might be the Ford Motor Company which had established a European central office in London in 1967. This office was to serve as an intermediary between the head office in Detroit and the branches in the single European countries and was thus set up as a further means of decentralization. In the majority of cases as much decentralization as possible seems to be indicated, because it allows a greater degree of flexibility of the single national branches and stimulates the initiative of the responsible employees.

---

2 *The International Firm and International Aspects of Policies on Mergers*, Lecture by E. Wertheimer, International Conference on Monopolies, Mergers and Restrictive Practices, Cambridge, England, Sept. 1969.

How far decentralization can go differs in each firm and depends on a number of factors: for example, a greater degree of central planning is necessary in cases where the single branches are interdependent with regard to the manufacture and supply of certain components of the final products. There may further be a greater dependence on a central office in industries in which research which may best be conducted in a central laboratory, if only for the reason to avoid double work, is important. Of course, we must not overlook an important factor which is based on the attitude of the top management. It is in their discretion how much or how little independence the foreign branches are to have and this again depends on the mentality of the top managers and the degree of confidence in the local management.

The outside problems are based on the fact that the international firm has to cope with different languages, different legal provisions, and different attitudes of the governments in the host countries. Of these, the attitude of the respective government would seem the most important factor to be considered. It is influenced by a variety of factors such as the actual condition of its own economy or its balance of payments situation. It may differ in cases where a domestic enterprise enters a foreign market, be it through the establishment of new sales outlets or through the acquisition of a firm which already exists in the foreign country by way of direct investment or merger, and it may differ in cases where a foreign firm enters the domestic market.

In general, a country will adopt a positive attitude towards a domestic company which enters a foreign market if its balance of payments situation is healthy, *i.e.*, if the flow of money into another country has no serious effects on it. It will also be regarded as a positive factor that this is a step which adds to the wealth of the company and thus, indirectly, to the wealth of the country. On the other hand, the attitude will be negative in countries with balance of payments problems, or may become negative when, in the course of time, the trend of the domestic enterprises to go into foreign markets becomes too pronounced and thus, finally, affects even a country with an originally sound balance of payments.[3]

Similarly, there are the two sides of the coin with respect to a foreign firm entering the domestic market. Countries will be in favor of such new investments if they thereby gain access to new technologies and know-how, and if their employment situation is improved.[4] This may be true first of all for the developing countries, but even the highly developed countries of the western world are aware of these advantages. The *Canadian Watkins Report*[5] states in this connection that this "package of product, technology,

[3] For instance the United States adopted in 1965 a Voluntary Balance of Payments Program under which American enterprises voluntarily limited the amount of funds for foreign direct investments. In 1968 the Foreign Direct Investment Program followed which brought mandatory controls over private investments abroad.

[4] *See* G. MEIER, INTERNATIONAL TRADE AND DEVELOPMENT 94 (1963).

[5] REPORT OF THE TASK FORCE ON THE STRUCTURE OF CANADIAN INDUSTRY, FOREIGN

management, capital and market access brings with it large potential benefits for the host country."[6] On the other side we find a xenophobia in countries with a strongly nationalistic attitude[7] which may even develop in countries which are basically open to foreign enterprises wanting to enter the domestic market.[8] Further, a government may fear that the foreign firm is too strong a competitor for the domestic firms on the home market, or that the foreign firm might ignore or even counteract the economic policy of the domestic government.[9]

Despite all these difficulties, more and more firms become international. This involves special problems for antitrust enforcement. Some national antitrust laws provide for an international application of their regulations. Thus, sections 1 and 2 of the Sherman Act[10] refer to conspiracies and monopolization in restraint of trade or commerce among the several states, or with foreign nations. This position was interpreted by Judge Learned Hand in the famous *Alcoa* case[11] to mean that it is possible to impose liabilities even upon persons not within the allegiance of the United States for conduct outside its borders that has consequences within its borders. Section 98(2) of the German Act Against Restraints of Competition declares the Act applicable "to all restraints of competition which have effect in the area in which this Act applies, even if they result from acts done outside such area."

These tools may be sufficient in dealing with international trade of national firms, but they are not effective enough for the control of international firms. This task asks for more than the international application of domestic laws; it requires the cooperation of the national governments in the field of international antitrust enforcement. Unfortunately, this is a field where very little has been achieved so far.

Several attempts to establish a coordination of policies have failed. The Havana Charter had the aim "to prevent business practices among commercial enterprises which restrain competition, restrict access to markets, or foster monopolistic control in international trade."[12] It was accepted in

---

OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY (prepared for the Privy Council Office 1968).

6 *Id.* at 36.

7 Here the example of France may be cited which has so far strongly objected to the market entrance of foreign firms.

8 Germany is principally open to foreign firms entering the domestic market. Sometimes, however, warning voices can be heard against excessive foreign investment. Thus, in 1966 the German government held that Texaco's merger with the German firm DEA would be undesirable. The merger was, however, later accomplished. The same is true for Canada. The essence of the *Watkins Report* was the concern that Canadian industry was dominated by foreign firms.

9 This has caused a number of countries to introduce legislation which obliges international firms to appoint nationals to the board of domestic subsidiaries. Examples are Finland, Sweden, Denmark, and Switzerland.

10 15 U.S.C. §§ 1, 2 (1964).

11 United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

12 HAVANA CHARTER art. 46. *See also* C. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES 230 (1967).

1948 by representatives of 53 countries, but did not materialize in the end because opposition had become so strong that ratification was impossible.

A similar project, initiated by the United Nations Economic and Social Council in 1951, was likewise without result. After some first positive reactions in the United Nations the plan failed, since the differences in national policies and practices were held to be of such magnitude that the agreement would neither be satisfactory nor effective in accomplishing its purpose.[13]

The most recent step undertaken in this field is the recommendation adopted by the Council of the Organization for Economic Cooperation and Development (OECD) member countries on October 5, 1967.[14] It provides for a notification procedure under which a country undertaking an investigation or a proceeding gives notice to another member country if its interests are involved, and for an exchange of information on restrictive business practices in international trade as far as is permitted by the national laws and legitimate interests. Lastly, the OECD member countries are asked to coordinate their efforts in dealing with international restrictive business practices on a fully voluntary basis.

It is still too early to assess the efficacy of this recommendation, but there are two points which make the recommendation a good and useful beginning for the aims for which it is intended. Firstly, it does not superimpose a new international legislation in the manner of the Havana Charter which could not possibly fit all the different national antitrust ideologies, but leaves each country with its own legislation and its own approach to antitrust. Secondly, the cooperation is voluntary. This may require a certain degree of conviction on the part of the countries involved in a given case where the recommendation is to be applied. The important factor, however, is that no member country feels obliged or bound to act; it is left at its free will.

Hopefully this recommendation is a first step towards a closer international cooperation which may one day even lead to an international charter. With the further increase in the number and importance of international firms this will one day be a necessity.

II

Specific problems are being put forward by the growth of conglomerate firms, both national and international. For the purpose of this paper a conglomerate firm will be defined as that kind of an enterprise which is involved in the production, distribution and/or sale of goods or services that have no direct economic relation to one another.[15] A conglomerate firm may come into existence after a period of internal growth through the in-

---

[13] C. EDWARDS, *supra* note 12, at 233-35.

[14] *See* COUNCIL OF THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COOPERATION BETWEEN MEMBER COUNTRIES ON RESTRICTIVE BUSINESS PRACTICES AFFECTING INTERNATIONAL TRADE (1967).

[15] Stelzer, *Antitrust Policy and the Conglomerates*, 44 ST. JOHN'S L. REV. 196 (1969).

vestment of available funds in lines of manufacturing or trade other than the previous ones or after successful mergers.

As to antitrust legislation and policy, internal growth of firms has for a long period of time not been regarded to present a problem. Indeed, reinvestment of profits in order to expand production or to enter new markets was looked upon as being the prime source of successful stimulation of competitive processes and of the achievement of remarkable rates of economic growth. There was, of course, the inherent danger of monopolizing, but the history of antitrust shows that there were only few, though spectacular, cases that had actually led to antitrust litigation.

This is quite different with mergers. A merger will *ex definitione* lead to the economic disappearance of a formerly independent company. In cases where the acquired firm is entirely integrated into the acquiring firm, the acquired company will also disappear as a legal unit.

The antitrust implications differ according to the direction in which the merger has occurred. The general attitude of antitrust authorities towards mergers has never been positive, even if disapproval was not expressed publicly. Negative statements were most likely in instances of horizontal mergers. In such cases changes of market structures conducive to competition were taking place and changes of the conduct of individual firms had to be anticipated. Even though an unambiguous and determinate relationship between market structure and market conduct of firms cannot be established generally, it is fairly consistent with economic experience to assume that concentration of markets tends to discourage price competition. Additionally, patterns of conduct will be encouraged that will lead to economically unsound results, as for example, excessive promotional expenditures or the preservation of outdated methods of production.

Because of these reasons borderlines beyond which horizontal mergers would very probably lead to detrimental competitional effects could be defined rather easily. Sections 4-10 of the American *Merger Guidelines*[16] deal with this sort of concentration. In sections 5 and 6 the antitrust division announced fairly precise figures to define critical market shares beyond which a merger will ordinarily be challenged.

In Germany the second amendment to the Law Against Restraint of Competition will probably be submitted to the Bundestag (Federal Parliament) in 1970. One of the major propositions of this amendment is the provisions for merger control. The main criterion to initiate deconcentration litigation against a particular merger will be the competitive situation in the affected market. Mergers which will create a dominating position (or "monopoly," in American legal terms) may face divestiture proceedings. Since legal provisions of this sort will be new in Germany, it seems likely that horizontal mergers will first be challenged. According to a survey, con-

16 DEPARTMENT OF JUSTICE, MERGER GUIDELINES NOS. 4-10, in 1 CCH TRADE REG. REP. ¶ 4430, at 6683-85 (1968) [hereinafter cited as MERGER GUIDELINES].

ducted by the National Economic Research Associates, Inc. (NERA) within the United States, some 40 percent of the respondents thought that the enforcement of anti-merger legislation as demonstrated in the *Merger Guidelines* of the Department of Justice will limit future plans for horizontal mergers severely; only 15 percent of the respondents did not feel affected at all.[17] Due to the lack of similar legislation, no such figures are available for Germany.

It is more difficult to conclusively assess the impact of vertical mergers, *i.e.*, acquisitions of firms at the supplying or at the purchasing side of the acquiring company. Market-share considerations alone would not help to determine whether the particular vertical merger might be harmful. Anti-competitive consequences could be expected to occur, however, whenever a vertical acquisition either tends significantly to raise barriers to entry in either market or to disadvantage existing non-integrated firms in either market in ways unrelated to economic efficiency.[18]

It is apparent that market shares by themselves cannot provide a satisfactory and objective standard of measurement so that both the administration and the courts will have a wider scope to exert their discretion. Even if market shares are taken into consideration as objective standards, non-market share standards, such as the conditions of entry, can hardly be measured unambiguously, so that the overall assessment will lack absolute determinateness.

Allowing for the wider scope of different interpretations, the business community feels less limited in its merging opportunities. Only some 17 percent of the respondents of the NERA survey felt severely restricted, as opposed to 40 percent claiming such restriction under American *Guidelines* for horizontal mergers.

Another set of problems is brought about by mergers of companies that did not compete with each other or did not stand in a buyer-seller relationship because of different products and/or because of different geographical markets (market extension merger). "A major issue is whether diversified firms, which take the merger route to grow, enjoy unique advantages over smaller single product competitors."[19]

At first sight conglomerate mergers do not seem to have any antitrust relevance. The classical analysis of monopoly and oligopoly behavior cannot be used to analyze the behaviour of multi-product firms. Furthermore, the profit maximizing principle has been replaced by a system of subsidization.[20] Through the establishment of such a system conglomerate

---

17 NATIONAL ECONOMIC RESEARCH ASSOCIATES INC., CORPORATE REACTION TO THE MERGER GUIDELINES (1969). It was assumed that the sample was statistically significant.

18 *See* MERGER GUIDELINES No. 11, at 6685.

19 E. SINGER, ANTITRUST ECONOMICS 259 (1968).

20 *See id.* at 260-66. According to Singer, subsidization occurs as the equalization of profit rates, as a compensation for a loss, and in relation to the "price squeezing" of non-integrated independents.

mergers might gain relevance for the particular single markets. Having the backing of the diversified firm, every dependent company belonging to that firm will be enabled to make use of the advantages of "conglomerate power."[21]

It is true that unambiguous firm standards cannot be set up according to which future conglomerate mergers may be evaluated. This is one of the reasons why the American *Merger Guidelines* are cautiously saying only that there are two categories of conglomerate mergers which are sufficiently identifiable in terms of their anticompetitive effects: mergers involving potential entrants and mergers creating a danger of reciprocal buying.[22] Also, by conglomerate acquisition the market power of the acquired firm or the acquiring firm could be considerably enlarged.

The Antitrust Division uses the market share basis to come to some sort of an objective standard. Since the other standards are essentially qualitative statements (mergers to prevent "disturbances" or "disruptions") the business community is least impressed by the guidelines concerning conglomerates. According to the NERA survey a mere 4 percent felt severely limited, while 43 percent believed that they were not affected at all.

The main danger of extensive movements of conglomerate mergers seems to be the growing number and intensity of links between a few hundred huge corporations which have now already obtained the power to influence competitive processes in particular markets.[23] This poses a basic threat to our economic system. Once the political decision in favour of a market economy as the system of coordination and control of productive factors and commodities and services has been made, freedom of competition should be maintained at any rate.

This statement also has social and political consequences. Large corporate power is essentially without democratic control. This is especially true when diversified and linked-up corporations are powerful enough to steer market processes according to their will. The idea does not only worry radical students that there might be a few hundred vast firms in the end that effectively control the economies of North America, Western Europe and Japan without being subject to workable control.

There is, however, quite a number of economists that could not go along with the basic idea that has been expressed above. Irwin Stelzer said as a conclusion to his remarks on antitrust policy and the conglomerates: "It is not at all clear whether the open economic society which is generally accepted as a legitimate goal can best be achieved by opposing or permitting this form of asset turnover."[24] Similar were the misgiving of Commissioner Jones of the Federal Trade Commission (FTC):

---

21 C. EDWARDS, *supra* note 12.

22 *See* MERGER GUIDELINES Nos. 17-20, at 6687-89.

23 BUREAU OF ECONOMICS, FTC, ECONOMIC REPORT ON CORPORATE MERGERS 5-9 (1969).

24 *Id.* at 11.

> There should be no illusion that Phase Two of the Study [*i.e.*, the 1969 *Economic Report on Corporate Mergers* by the FTC] will present the last word on the economic performance of conglomerates, or even that the light it sheds on such questions as efficiency, innovation, and use and abuse of market power will furnish definitive answers to the competitive impact of conglomerate mergers.[25]

It seems to me that both parties are talking about different categories. Stelzer and Jones wondered whether the anti-competitive impact of a particular single conglomerate merger is really such that legal action should be taken, because the merger might have positive aspects. The FTC, on the other hand, thought of what is going to happen when after a large scale conglomerate merging (quantitative aspect) a new market situation (qualitative change) has emerged, when workable competition will have been replaced by the planning and market control of giant, diversified corporations. Looking back from this point of final development, all the possible aspects of approval of individual mergers must appear to be highly irrelevant.

III

It is obvious that conglomerate mergers also play an important role with international firms. This is especially true as most international mergers are of the conglomerate type even if a horizontal international merger appears to have taken place.

These conglomerates pose the same actual or potential danger to freedom of international markets as do the national conglomerates to the national markets.[26] An international anti-merger legislation, similar to that in the United States, is desirable.

Considering the difficulties of past international antitrust activities and legislation it does not appear possible to make all nations concerned agree on a common system of merger control. This will certainly apply to European States where there is a common belief that European corporations are considerably smaller in absolute terms than their American competitors.

It might, however, be feasible to agree on something like a "negative" approach. If it is not possible to restrict active mergers by national firms, it might be possible to prevent domestic firms from being acquired by large international combines. To avoid the arousal of nationalistic feelings among European nations[27] it might be advisable to agree on common anti-merger

---

[25] *Id.* at XVII.

[26] I would just like to mention the problems to determine market shares of international firms in their various single markets.

[27] For example, the latent hostility of Europeans to see their growth industries being taken over, or the troubles with the FIAT-Citroen merger, or with the proposed GBAG-CFP (oil industry) merger. These hostile emotions are particularly remarkable, because all the countries concerned (France, Germany, Italy) are members of the ECSC and the Common Market. This shows that even close economic cooperation of national states does not prevent national governments from discretionarily using their influence and power against mergers between corporations of member countries. Companies of member

guidelines, indicating explicitly when national governments should contradict.

---

countries might even be discriminated against: The German Federal Ministry of Economics did not finally object to the Texaco-DEA merger; a short time later the French CFP was not allowed to acquire a considerable share of the GBAG stock; and now the Ministry approved of the Gulf-Frisia merger.