

# Deconcentration as a Remedy for the “Oligopoly Problem”: A Comparative Law Perspective

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# Outline of Presentation

- The nature of the “oligopoly problem” in small national markets
- Competition Law tools available to deal with the oligopoly problem
  - Merger control
  - Enhanced control of cartels
  - Joint dominance
  - Structural intervention
- The challenges of structural intervention
  - What is the experience in other jurisdictions?
  - Can a competition authority devise an optimal market structure?
  - Is implementation of deconcentration practical?
  - Will deconcentration in downstream national markets simply transfer the monopoly surplus to international suppliers?

# The “Oligopoly Problem” in Small National Markets

- Concentration through “natural causes” can give rise to consumer harm through “coordinated effects”
  - Higher prices
  - Reduced consumer choice
- This problem may be particular concern in small national/regional markets
  - barriers to entry (linguistic, transport costs, first mover advantages) may be prevalent
  - Economies of scale may not be exhausted within a small market
  - Distribution, retail sales., locally traded consumer goods, may all be particularly susceptible to concentration (as well as industries based on local networks – e.g., telecoms or transport)

# Competition Policy Tools for Controlling Oligopoly

- Merger control
- Enhanced control of cartels
- Joint dominance
- Structural intervention

# Merger Control and Oligopoly in Small Markets

- In competition policy as in medicine: “prevention is better than cure”
- Biggest development in competition policy worldwide over last thirty years has been introduction of pre-merger competition law review
- This is clearly most important tool for controlling oligopoly
- Problems:
  - Not always possible to predict subsequent evolution of market
  - Doesn't deal with pre-existing concentration

# Cartel Enforcement

- Strict enforcement of rules limiting cooperation between competitors is alternative for controlling oligopoly
- This is not limited to price-fixing or market sharing cartels but could also involve forms of cooperation that might be acceptable in other market contexts
  - Standardisation
  - Information exchange including
    - discussions with suppliers/customers / government agencies
    - Industry associations
- Problem is that where market is concentrated and pricing/output is transparent, collusion is not necessary (and may not matter)

# Cartel Enforcement II

- Temptation may be to reduce standard of proof needed to find infringement – but this means goal is the *remedy* – not control of the conduct under examination

# Is “Joint Dominance” the Answer?

- Joint dominance as currently understood under Article 82 EC Treaty is not an apt tool for dealing with oligopolies in national markets
- The case law (e.g. *TACA*, *CEWAL*) has treated joint dominance as a sub-set of dominance – once dominance is established general rules on abuse are applicable
- Applying established rules on exclusionary abuse will not deal with oligopoly problem
  - Cost-based pricing rules may *reduce* price competition
  - Banning rebate schemes may *increase* transparency
  - Anti-discrimination rules will provide a tool for *enforcement* of cartel



# Is “Joint Dominance” the Answer?

- Competition authorities may use joint dominance as basis for imposing direct control on “unfair” pricing or contract terms by oligopolists (with all the associated problems)
- New rules for “joint abuse” might provide grounds for intervention to impose specific forms of conduct, e.g.:
  - Requirements for open tenders, controlled bidding (as in case of public authorities)
  - Limited contract duration (in absence of open bids)

# Deconcentration as a Cure for Oligopoly

- Given the limits of other tools for dealing with oligopoly, obvious question is “why not deal with problem directly?”  
-- If oligopolistic structure is the problem, why not just deal directly with that structure?
- There may be significant legal/constitutional problems involved in creating direct divestiture powers (e.g., are owners entitled to compensation since they have “done nothing wrong”?) but
- Remainder of presentation focuses on competition law issues
  - Experience in other jurisdictions
  - Defining the basis for deconcentration
  - Administering the remedy

# Deconcentration – the Experience of Other Jurisdictions

- US antitrust law (FTC Act) allows direct intervention to achieve deconcentration
- US law allows deconcentration as a *remedy* where a substantive violation is identified (Regulation 1/2003 may allow similar remedy in EC law, but no precedents yet)
- Substantial experience worldwide with *divestiture* as a remedy for issues raised in merger assessment

# The US Deconcentration Experience

- In the 1970's the FTC conducted a series of investigations intended to provide the basis for “breaking up” industries with excessive concentration, e.g.,
  - Breakfast foods
  - Cars
- These investigations ground to a halt by 1981
  - Partly a changed climate for antitrust enforcement
  - A realisation that the empirical evidence was not there to support inference of competitive effects from market structure
  - Cars is good example – increasing role of imports from Japan made breaking up of Detroit “big three” appear irrelevant

# Deconcentration as a Remedy

- There is more positive experience from the US where deconcentration has been invoked as a remedy
- Some of most significant cases historically have involved deconcentration
  - Tobacco Trust
  - Petroleum Trust
  - International patent pools
  - AT&T
- In some cases the substantive infringement can be viewed almost as pretext – in AT&T defendant settled in consent decree although liability was not clearcut)
- These cases suggest that deconcentration *can work* as a device for opening markets
- These were all cases, however, where real issue was unilateral effects –not coordinated effects

# Divestiture in Merger Cases

- It is now commonplace for parties seeking approval of a concentration to offer divestiture of assets or business units as a basis for eliminating overlaps that might threaten approval of their merger
- Current practice often involves policing divestiture process to ensure that divested unit remains viable
  - Can divested entity operate on a stand-alone basis?
  - Does proposed buyer have experience in industry?
  - Can parties choose buyer (subject to approval) or should reviewing authority have initial role?
- This experience can illuminate potential difficulties of deconcentration remedies

# Building the Case for Deconcentration

- The US experience in the 1970's is a salutary reminder of the biggest problem with deconcentration powers – can a competition authority be confident of its ability to create a structure for a market that will enhance consumer welfare on a long-lasting basis?
  - The existing structure may not be as “anticompetitive” as it appears
    - external competition and partial substitutes may erode market power
    - lack of transparency and strong buyers/sellers may make collusion difficult)

# Building the Case for Deconcentration II

- An alternative structure may involve losses in economies of scale/scope that lead to higher costs and ultimately higher prices
  - Deconcentration in local markets may make buyers less effective as purchasers of internationally traded goods – benefits of “increased competition” may be consumers in other countries
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- These problems counsel caution in invoking concentration (and existing coordinated effects) as a basis for competition law intervention



# Administering Deconcentration

- The US remedy cases and the more recent experience worldwide with merger control remedies illustrate practical concerns in administering deconcentration
- Remedies work where
  - Upstream/downstream operations are separated
  - Existing business units with autonomous management are “demerged” (usually on geographic or product lines)
  - Assets (patents, individual stores) are sold to parties either already active in the market or active in similar product markets in different geographic markets

# Administering Deconcentration II

- Where these factors are absent, effective deconcentration will be difficult to achieve
- Deconcentration in retail (e.g., supermarkets) or distribution may require sale of locally owned assets to foreign trade buyers
- Could the imposition of this remedy threaten political legitimacy of competition law policy?

# Conclusion

- The significance of the oligopoly problem in small national markets is understood -- in many cases it is hard to justify intervention in cases of single firm dominance or vertical restraints when the overall market structure is hardly conducive to competition
- Deconcentration cannot be rejected *a priori* as a tool for competition policy in this context
- The comparative law analysis suggests, however, that extreme caution is required in asserting and applying this theory