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STATEMENT

by

COMMISSIONER EVERETTE MACINTYRE

on

CONGLOMERATE MERGERS AND ANTITRUST LAWS

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CONGLOMERATE MERGERS AND ANTITRUST LAWS

Introduction

Today, we are considering conglomerate mergers and the questions they present under the antitrust laws. Of course, such consideration brings into focus not only the question of whether antitrust laws apply to conglomerate mergers, but also public policy questions presented by increasing overall concentration of economic power. There are no easy answers and the proposed solutions are often in conflict. Simple legal formulas obviously do not apply in this area, for here we deal with questions on the frontier of antitrust "in that no man's land where economics, law and political science converge." 1/ The approach to the issue of the reach of Section 7 of the Clayton Act with respect to conglomerate mergers and joint ventures is necessarily conditioned by one's views as to whether aggregate or overall concentration, as opposed to concentration in particular markets, is properly an antitrust problem. Distinguished lawyers, economists and legislators have expressed many different views on this point and a consensus is difficult to find.

1/ A.A. Berle, "The Measurement of Industrial Concentration", The Review of Economics and Statistics, Vol. XXIV (1952),p.172.

A quick reference to the statements of Senators Hart and Hruska, who have both been active in the recent hearings on economic concentration conducted by the Senate Subcommittee on Antitrust and Monopoly, will serve as an introduction to this dispute.

Senator Hart has concluded that the present antitrust policy has not been effective and that "[f]or too long we have kept our heads in the sand and assumed that concentration has not been rapidly increasing. Like all major problems, refusing to admit its existence does not solve it." 2/ Indeed, Senator Hart is of the opinion that the agencies responsible for enforcing the antitrust laws have been unduly complacent at a time when "[t]he United States is riding the crest of the greatest merger tide in our history with no end in sight." Further, in Senator Hart's view, agencies in charge of antitrust enforcement simply have not come to grips with the problems stemming from concentration. He deplores the fact that"[m]ajor mergers are consummated without apparent challenge; predatory practices often receive little attention; [and that] identical pricing patterns in concentrated industries seem to be regarded with little concer

2/ Hart, "A Forecast of Antitrust Policy Regarding Economic Concentration", X Antitrust Bull. 51, 53 (1965).

3/ Hart, "Emerging Paradoxes in Antitrust", 30 A.B.A. Antitru Sec. 80 (1966).

Senator Hruska, from a somewhat different perspective, also views current developments with alarm, fearing that the mere holding of the Senate hearings on economic concentration may lead to an even larger degree of Government control of business than now exists. Senator Hruska is of the opinion that overall concentration is of no relevance to antitrust since it has nothing to do with competition within a particular industry or the market behavior for a particular product. Antitrust analysis, in his view, should be concerned with particular markets and particular products. As a result, he believes computations of overall concentration cannot but be misleading. 4/

Concurrently with the question as to the antitrust implications of overall concentration raised by the hearings of Senator Hart's subcommittee, there has been a mounting criticism of enforcement of the merger statutes by business and certain areas of the antitrust bar. This furor obviously stems from significant Supreme Court decisions in the last four years, upholding both the Department of Justice and the Federal Trade Commission in the prosecution of various mergers. As a result, calls have arisen for restraint on the part of the enforcement agencies in choosing merger cases for prosecu-

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4/ Hruska, "A Forecast on Antitrust Policy Regarding Economic Concentration", X Antitrust Bull. 61, 66 (1965).

tion. It is said that since most merger suits are likely to be upheld by the Supreme Court, the Department of Justice and the Federal Trade Commission have a particular obligation to evaluate the economic implications of the merger cases, which, if brought, they are in any event likely to win. 5/

Those disturbed by current developments under the merger law apparently fear that the merger policy, as it is developing may freeze business into an obsolete pattern. The argument is made that the attempt to preserve a market structure of many competitors for the purpose of maintaining competition is groundless. The main thrust of the argument is evidently that a permissive policy as to mergers will foster the flexibility and encourage the innovation essential to a dynamic economy. For example, as I understand the proposition, a more permissive merger policy, allowing firms to acquire by way of merger managerial skills or additional product lines for purposes of diversification, would result in competitors

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5/ E.g., "In short, the broadly tolerant view which the Supreme Court is likely to take of agency decisions to prosecute acquisitions makes it imperative, in my view, that the agencies candidly and thoughtfully face the full implications of their roles -- antitrust is not just law enforcement. It is not a branch of whodunit law enforcement. Antitrust is economic regulation cast in the form of individual adversary proceedings. Those in charge of it . . . must justify their actions and their policy not only in terms of whether they win the case in the court (they usually will), but in terms of economic effect." Fortas, "Portents for New Antitrust Policy," X Antitrust Bull. 41, 47 (1965).

better able to withstand the vicissitudes of competition under modern conditions. 6/

Antitrust Agencies and Concentration

The problem then boils down to the question: What is the structure of the economy like at the present time and should the antitrust agencies concern themselves at all with the size and shape of economic markets? The antitrust laws are based on the premise that competition in the marketplace most efficiently allocates economic resources since it fosters efficient production, stimulates innovations and thus satisfies consumer needs better and more effectively than economic systems relying, for example, on Government regulation. 7/ In this connection, I am generally in agreement with the proposition that workable competition requires many firms, none of which has sufficient control of a product to greatly affect the price or terms of exchange that result from the

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6/ "Antitrust in an Era of Radical Change", Fortune, March 1966.

7/ See "The Annual Report of the Council of Economic Advisors" to the President, 131 (1965); see also Orrick, "Antitrust In The Great Society", 27 A.B.A Antitrust Sec. 26 (1965).

bargaining process in the market. 8/ Concentration has been singled out as a possible indicator of where significantly noncompetitive markets may be found. 9/ This proposition is one to be considered seriously in the establishment of public policy.

The difficulty for application of antitrust standards to conglomerate mergers and, for that matter, to joint ventures, is that generally the true conglomerate or the joint venture does not increase concentration within a specific market -- at least not immediately, although there may be a measureable effect stemming from conglomerat acquisitions and joint ventures on overall concentration in the economy. Further, since the phenomenon of

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8/ Testimony of Dr. David R. Martin, Graduate School of Business, Indiana University, Hearings on Economic Concentration (hereinafter referred to as Concentration Hearings) Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 89th Cong., 2d Sess. 695 (1965). See also United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963):

> "That '[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share,' is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the anti-merger statute."

9/ Testimony of Dr. Carl Kaysen, Professor of Political Economy, Harvard University, Concentration Hearings, 89th Cong., 1st Sess. 544 (1965).

conglomeration has no immediate effect on the centralization or dispersion of economic power within particular industries or markets calculable in terms of market shares, many of us in antitrust are not comfortable with either the concept of overall concentration or conglomerate power. It is difficult to weigh the competitive impact of these developments by traditional legal or economic standards. Although antitrust has begun to concern itself with these phenomena, we are still groping for solutions in this area.

There is some debate as to whether the degree of overall concentration in the economy is accelerating. There is testimony by economists to support either view, although, in my opinion, the evidence that there has been such an increase is, on the whole, somewhat more convincing. 10/ But in any

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10/ For example, Dr. Gardiner C. Means stated that manufacturing concentration, whether measured by total assets or by net capital assets, has increased greatly since 1929. He stated that the percentage of total assets for all manufacturing corporations held by the 100 largest manufacturing corporations increased from 40 to 49 percent in the period 1929 to 1962, while with respect to net capital assets, the percentage of the 100 largest manufacturing corporations in the same period increased from 44 to 58 percent. Testimony of Dr. Gardiner C. Means, Concentration Hearings, 88th Cong., 2d Sess. 18, 19 (1964).

Dr. Willard Mueller, Chief Economist of the Federal Trade Commission, determined that since World War II concentration measured on the basis of total assets held has increased in the period 1947 to 1962. According to his figures, the percentage of total assets held by the 113 largest manufacturing corporations increased from 40.0 percent in 1947 to 46.6 percent in 1962. Testimony of Willard Mueller, Concentration Hearings, *supra*, at 120-122.

(Continued on bottom of Page 8)

case, taking a number of yardsticks, the extent of concentration now at hand is impressive. For example, a computation of the 500 largest industrial corporations' percentage of the sales, assets and net profits for all manufacturing corporations in 1965 yields the following figures:

TABLE 11/

The 500 Largest Industrial Corporations Ranked by Net Sales	Percentage of All Manufacturing Corporations		
	Sales	Assets	Net Profits
1-50	30.20%	35.63%	40.89%
51-100	9.01%	11.43%	10.18%
101-150	5.62%	6.02%	5.69%
151-200	3.98%	4.08%	3.96%
1-200	48.81%	57.16%	60.72%
1-500	60.56%	70.09%	73.71%

Footnote 10/ Continued:

On the other hand, Dr. M.A. Adelman, who made a study for the period 1931 to 1960, found that overall concentration of the largest manufacturing firms had remained quite stable over a period of 30 years and, in fact, found a decline in the share of the 117 largest firms of total assets from 46.5 percent in 1931 to 45.4 percent in 1960. Testimony of Dr. Adelman, Concentration Hearings, *supra*, at 235, 339.

11/ Sources: "The Fortune Directory of the 500 Largest U.S. Industrial Corporations", *Fortune*, July 15, 1966, pp.232-238; Federal Trade Commission Quarterly Financial Report for Manufacturing Corporations, Fourth Quarter, 1965, pp. 34, 61.

Overall concentration, to a large degree, it appears, has been a function of business' drive for diversification 12/ and some commentators directly ascribe the increase in aggregate concentration to the conglomerate merger. 13/ Joint ventures also evidently bear some responsibility for this phenomenon. 14/ The implications of the conglomerate merger movement for antitrust policy is demonstrated by the increase in mergers of this category to a percentage of 71 percent of all large mergers in the period 1960 to 1965

12/ Cf., testimony of Dr. Joel Dirlam, Concentration Hearings, *supra* note 9, at 748.

13/ Senator Hart states: ". . . there is a substantial consensus that much of the increase in overall concentration which has already taken place -- to say nothing of the further increases which may occur in the future -- stem from the rapid growth of the large conglomerate corporations." Hart, "A Forecast Re Economic Concentration", *supra* note 2, at 55. See also Houghton, "Mergers, Superconcentration and the Public Interest", *Administered Prices -- A Compendium on Public Policy*, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 88th Cong., 1st Sess. 152, 154 (1963).

14/ According to Dr. Willard Mueller, an examination of the largest manufacturing corporations indicates that at a minimum 15 joint ventures with combined assets of almost nine hundred million dollars were included among the 1000 largest corporations in 1962. Testimony of Dr. Willard Mueller, Concentration Hearings, *supra* note 10 at 113.

at a time when the percentage of horizontal mergers declined to 12 percent of the total. 15/

The significance to antitrust of increasing aggregate concentration resulting from the conglomerate merger movement is that as a result of diversification certain firms have become more significant than the industries in which they operate. 16/ The conglomerate merger movement, it has been noted, threatens to break down traditional industry barriers. Accordingly, conventional economic analysis concentrating upon market power in a single market and assuming a single product may have little, if any, relevance to the behavior of the large, diversified firm. 18/

The competitive implications of the large conglomerate firms stem from the fact that such a firm operating across many different product markets or geographic markets may not be subject to the competitive discipline of any one market. 1

15/ Remarks of Commissioner Reilly, "Conglomerate Mergers -- An Argument for Action" before Annual Meeting, Chicago Chapte of the Federal Bar Association, Chicago, Illinois, June 13, 1966, p. 15.

16/ Testimony of Joel Dirlam, Concentration Hearings, *supra* note 9, at 770.

17/ Houghton, "Mergers Superconcentration and the Public Interest", *supra* note 13, at 165.

18/ See testimony of Joel Dirlam, Concentration Hearings, *su* note 9, at 770.

19/ Statement of Dr. Willard F. Mueller, "The Conglomerate F Retailer", before the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, Sept. 12, 1966, p. 1

The large, diversified company's ability to withstand the discipline of a particular market may stem simply from its financial resources and the fact that two or more conglomerate enterprises meeting in many markets may tend to soften their competitive tactics with respect to each other, while, on the other hand, smaller enterprises, depending entirely on their success in a single market, may tend to compete less aggressively with a large, diversified, multimarket company. Furthermore, if a multimarket firm possesses market power in some markets, this power may become a vehicle for achievement of market power elsewhere. For example, the large, diversified firm may use its financial power derived from a number of product or geographic markets to subsidize its expansion in additional areas. 20/ There is, of course, the view "that a truly conglomerate merger cannot be attacked in order to maintain competition, because it has no effect on any market structure." 21/ This proposition requires careful analysis.

If antitrust is to effectively deal with conglomerate mergers, both economists and lawyers in this field will have

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20/ Id. at 2; testimony of Dr. Corwin D. Edwards, Concentration Hearings, supra note 10, at 43; Edwards, "Conglomerate Bigness as a Source of Power", Business Concentration and Price Policy--A Conference, Princeton Univ. Press (1955).

21/ Adelman, "The Antimerger Act, 1950-60", 51 Amer. Econ.Rev. 236, 243 (Papers and Proceedings, 1961).

to devise realistic tests applicable to particular product or geographic markets which take into consideration whatever competitive advantages a large, diversified company derives outside the relevant market. 22/ A beginning along these lines has been made, as witness Commission merger cases dealing with market extensions in the milk and retail grocery industries, 23/ and an acquisition in the laundry products

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22/ An interesting early expression in a Section 7 case recognizing the importance of conglomerate power on local or single-industry markets is contained in Foremost Dairies, Inc. 60 F.T.C. 944, 1059 (1962), where the Commission stated:

> ". . . the 'leverage' advantage possessed by large, diversified and geographically dispersed firms such as respondent [should not be ignored]. A small dairy operating in a single local market has its competitive behavior constrained by conditions existing in this market; a large diversified firm does not operate under similar market constraints. It may, if it chooses, outcompete the little man by subsidizing its operations in one market out of its operations elsewhere. Of course, this temporarily may lower slightly the average profits on its overall operations. But for the little man, losses in one market mean no profits at all -- no profits with which to expand, no profits with which to develop new production techniques, no profits with which to make product improvements; or, simply put, the little man is deprived of the profits which, in a free enterprise economy, makes it possible for him to survive in the long run."

23/ See e.g., Foremost Dairies, Inc., supra note 22; National Tea Company, Docket No. 7453 (1966).

field in which the conglomerate merger had overtones of a product extension. 24/ There is also the Consolidated Foods Corp. case involving the first significant conglomerate merger coming to the attention of the Supreme Court. 25/ In those cases the Commission evaluated the impact of the acquisition by applying broadly three possible standards: the elimination of a potential competitor, reciprocity, or the raising of barriers to new competition.

While the Commission has proceeded against conglomerate mergers which -- at least in the short run -- are likely to result in additional aggregate concentration, the focus of the competitive analysis has nevertheless been on a particular industry or market. This will have to be the emphasis in the future if the attack is not to be on bigness as such. In short, in the case of conglomerate mergers, analysis of market structure requires an evaluation beyond the mere computation of market shares and which goes into an examination of the other variables of market structure which determine the behavior of firms in an industry. Consider, for example, the factor of product differentiation, which involves those features of a product distinguishing it from competitive merchandise which appeal to consumer preferences. Significantly, these, of course, can be created by advertising.

24/ The Procter & Gamble Company, Docket No. 6901, rev'd, 358 F. 2d 74, cert. granted, ____ U.S. ______ (1966).

25/ Docket No. 7000 (1963), rev'd, 329 F. 2d 623 (7th Cir. 1964) rev'd, 380 U.S. 592 (1965).

Another important market structure variable pertinent to the evaluation of conglomerate mergers is the concept of barriers to the entry of new competition. These measure the obstacles to entry of potential competitors into particular industries or markets. Taking into consideration the barriers to entry, economists -- and, hopefully, lawyers as well -- should be able to determine the cost or selling price advantages held by established firms in an industry relative to new or potential competition. This may be described as the condition of entry. The importance of this concept is clear, for:

> ". . . If the advantage of established firms is great, then the constraining influence on pricing provided by the threat of additional competitors entering the industry is weak. On the other hand, if established firms hold only a slight advantage, the conditioning influence of the threat of new competition is great. If entry conditions favor easy entrance, established firms would be under pressure to keep prices near competitive norms much the same as if the market of established firms were atomistically structured." 26/

Barriers to entry come roughly under three headings: namely, economies of scale, absolute costs and product differentiation. Personally, I believe that reciprocity, or at least the market power permitting its exercise, also

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26/ "The Structure of Food Manufacturing", a report by the staff of the Federal Trade Commission published as Technical Study No. 8, National Commission on Food Marketing, June 1966, pp. 61-62.

might be usefully brought under this heading. 27/ Barriers of economies of scale arise from the fact that a firm may not secure the lowest possible production costs until it has achieved a certain share of the market which it is to enter. Since it may be anticipated that any firm entering a new market may well have to start with a less-than-optimum market share, this factor will obviously impede entry. On the other hand, the presence of absolute cost barriers indicates that the potential entrant will not be able to overcome the cost advantage of the established firm at any rate of output -- for example, the established firm may have patents which prospective entrants can secure only by paying a royalty or spending funds necessary to invent substitutes for them. 28/ The factor of product

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27/ In this connection, see Dixon, "Merger Policy and the Preservation of the Competitive System", 30 A.B.A. Antitrust Sec. 86, 90 (1966):

> ". . . reciprocity may become an extremely significant market strategy to the conglomerate enterprise which buys and sells a large number and volume of industrial goods and services in oligopolistic markets . . .
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> . . . .
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> "If carried to its ultimate, the practice could result in closed-circuit markets from which medium or small factors are excluded."

28/ Caves, American Industry: Structure, Conduct, Performance (1964), pp. 24-26.

differentiation, already noted, is a third source of barriers to entry. When this condition applies, the established firm has a reservoir of customer goodwill which its advertising and sales promotion need only to maintain. A new firm in the industry, however,

> ". . . must sell at prices below those of the more preferred brands of established sellers or invest heavily in advertising and other types of promotional activity in order to achieve a preferred status for their own brands and a sales volume capable of generating low unit processing and distributing costs." 29/

This may well be a decisive factor for the potential entrant. 30/ Significantly, the various entry-retarding factors may interact, thus giving particular entry barriers a greater competitive impact than if they were acting alone. 31/

The importance of product differentiation as a market structure variable and the possible implications of the stress

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29/ "The Structure of Food Manufacturing", supra note 26, at 62.

30/ See Caves, supra note 28, at 27.

31/ "The significance of product differentiation as a barrier is greatly increased if accompanied by important scale advantages in either production or distribution. Faced with both a heavy product differentiation disadvantage and the necessity for having to operate at a relatively large scale, the new entrant would find it particularly difficult to achieve an initial share of the market commensurate to profitable operation." "The Structure of Food Manufacturing", supra note 26, at 62.

on this factor for future antitrust policy is underlined by an item in The Kiplinger Washington Letter, dated October 14, 1966. There it is stated:

> "The administration is readying two blockbusters for business. The first is aimed at advertising...how MUCH a company spends . . . This is being kept quiet for now lest the furor start too soon, but we can assure you that top officials are giving it close attention."

I might add parenthetically at this point that I have no personal knowledge of this and that I am not one of the top officials giving this matter close attention. The article states that the Government has decided that sheer volume of ads will strangle competition and that as a result some of the bigger concerns may overwhelm smaller competitors who cannot afford to match such spending in advertisng. It continues that a rule-of-thumb test is being worked out whereunder the Government would relate advertising budgets to share of the market and if it could be proven that a big spender dominates the market, then a cutback in advertising spending would be ordered to the extent necessary to reduce sales to a "fair share". This news item is thought-provoking. A regulatory approach of this kind deserves cautious treatment. It will call for the utmost good judgment in the exercise of administrative action. Otherwise it could result in a

situation which would be the very antithesis of antitrust. As such it undoubtedly would be severely criticized. Indeed, as noted in Business Week of November 5, 1966, the mere announcements about the investigation have provoked questions concerning possible end point results.

The virtue of analyzing the impact of conglomerate mergers in terms of barriers to new entry of competition is, of course, that this analysis facilitates the evaluation of the competitive impact of conglomerate mergers on a single, well defined industry and therefore within the framework of antitrust. Considerable empirical research, however, seems desirable so that general application of this theory will, in fact, result in the economic analysis of the competitive impact of a diversification merger on a specific industry or market rather than merely an attack on bigness as such. It is even conceivable that in the proper case the application of this theory to conglomerate acquisitions will afford the responsible administrative agencies and courts a sense of assurance approaching the comforting certitude derived from market share computation

in the case of horizontal mergers. 32/ Accordingly, it is an interesting question whether Mr. Bains' theory on "Barriers to New Competition" will be translated into antitrust law as the courts consider conglomerate merger cases brought by the Department of Justice and the Federal Trade Commission. It is significant that by accepting the concept that "'Potential competition . . . may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets'", the Supreme Court accepted one of the premises basic to that theory. See United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

Many of these considerations, in my opinion, also apply to an evaluation of the competitive impact of joint ventures. There, too, the appropriate yardsticks are the elimination of potential competition and whether the joint

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32/ According to Bain, the condition of entry may be evaluated by the degree to which established firms can raise their prices above a competitive level without inducing new firms to bring added capacity into use in the industry. Bain, Barriers to New Competition, Harv. Univ. Press (Cambridge) 1965 ed., p. 6. Assuming that the competitive price and the entry-forestalling price for particular industries can be established, this suggests that some sort of a mathematical value might be set on the magnitude of the barriers to entry facing potential competitors. Keeping in mind the dictum that the condition of entry is not translatable into "the ready crutch of percentages" (Procter & Gamble, supra, at 52), it is nevertheless an interesting question whether such a quantitative measure is possible in the first place and, secondly, whether it might not be at least a relevant consideration in the case of the diversification merger.

venture raises barriers to new entry or increases the hazards to existing competition. 33/

If this approach is to become really useful and significant in antitrust enforcement, considerable empirical research should be done in a variety of industries to determine the effect of conglomerate power on particular markets. The data necessary to effectively probe the quest[ion] of whether profits in one market have been or are likely to be used to subsidize entry to or expansion in another market in many instances simply has not been presented. Requiring conglomerate concerns to report their earnings by divisions should facilitate the analysis of the practical consequences of the conglomerate aspect of a large, diversified company to competition in specific

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33/ Another factor which might be considered, according to some commentators, is the question of whether or not the joint venture is, in fact, a competitive plus by adding a new entity to the established firms in the market. See Backman, "Joint Ventures and the Antitrust Laws", 40 N.Y.U. L. Rev. 651 (1965).

markets. 34/ In addition, there should be more studies to determine the relationship between price-cost margins in an industry and the degree of concentration in that industry. Data of this nature is extremely useful. Some interesting and useful work in this connection has already been done in the food industry. 35/

34/ See statement of Yura Arkas-Duntov, Investment Officer in Dreyfus Fund, New York City, Concentration Hearings, *supra* note 9, at 1705, 1708, who stated that more and more companies are becoming conglomerate through acquisition, thus steadily narrowing the field of investment in single product industries and therefore posing problems for the investor in evaluating their efficiency. The antitrust enforcement agencies, of course, are also faced with similar problems of evaluation. See statement of Willard F. Mueller, "The Conglomerate Food Retailer", *supra* note 19, at 32:

> "One of the basic problems in identifying and measuring the significance of a particular conglomerate firm's conduct is that we generally know so little about the financial characteristics of its constituent parts. The public financial statements of conglomerate enterprises are almost universally presented on a consolidated basis. This makes it virtually impossible to translate the impact on profits of particular business practices."

35/ See testimony of Dr. Norman R. Collins, Department of Agricultural Economics and School of Business Administration, Univ. of Calif., Concentration Hearings, *supra* note 9, at 719. The Economics Staff of the Federal Trade Commission has also made some studies along the same lines as Dr. Collins on the relationship between profits and concentration in food manufacturing, concluding on this point:

> "Analysis of the market structure of markets occupied by large food manufacturers showed a close positive statistical association between the
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While I believe that conglomerate acquisitions should be dealt with where the probability of anti-competitive effect can be demonstrated in specific markets and industries, it is my view the Sherman and Clayton Acts were not designed to cope with the problem of overall concentration as such. 36/ There is merit to the suggestion that if Government is to concern itself with the problem of superconcentration, then it should be done under a statute designed expressly to cope with that problem. 37/

Footnote 35, continued:

> level of market concentration and profit rates. That is to say, firms selling in highly concentrated markets earn substantially higher profit rates than those selling in less concentrated markets." "The Structure of Food Manufacturing", _supra_ note 26, at 212.

36/ Professor Corwin Edwards, despite his suggestion that Section 7 should be applied in the case of conglomerate mergers wherever possible, concedes that it is difficult to bring the antitrust laws to bear on these amalgamations. Testimony of Professor Edwards, Concentration Hearings, _supra_ note 10, at 44, 45.

37/ It is interesting to note that Donald Turner, Assistant Attorney General in charge of the Antitrust Division, has suggested the possibility of dealing with overall concentration by legislation specifically designed to curb growth by way of acquisitions in the case of certain of the largest corporations. Mr. Turner, on this occasion, specifically disclaimed having reached the conviction that there is a trend toward superconcentration, and stated that he did not want to be understood as proposing a law against this phenomenon but merely suggesting it "as a separate avenue if action is appropriate". "U.S. Aide Hints at Trust Law To Bar 'Super-Concentration'", _The Evening Star_, Washington, D.C., April 15, 1966.

To tackle the problem of overall concentration head-on would be an attack on mere bigness, for which there is no warrant in present legislation. The antitrust laws simply do not give the Federal Trade Commission or the Department of Justice a mandate for planning the structure of the economy as a whole. The disadvantages of such an approach are obvious:

> "The antitrust laws cannot be turned into a statute for the structuring of all markets in the direction of purer competition. Apart from the economic objections to such a program, it would be politically impossible. It is questionable if it is worth devoting the bureaucratic resources necessary to achieve the reordered structure, and it is questionable too whether the resultant discord and confusion might not impair economic performance more than the final restructuring would improve it. . . " 38/

The fact is that the past two years' hearings on various aspects of economic concentration, held by the Senate Subcommittee on Antitrust and Monopoly, are providing the Congress with a wealth of information on the subject of the competitive, political and social implications of concentration in the economy as a whole. A number of bills were introduced in the Congress in 1962 to deal specifically with the problem of concentration. 39/ Significantly,

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38/ Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy, Cornell Univ. Press (1954), p. 284.

39/ Senator Gore introduced S. 3167 and Mr. Celler, Chairman of the House Judiciary Committee, introduced H.R. 11870, H.R. 11871, and H.R. 11872.

all of these bills are concerned with the effect of concentration in "any line of commerce". Therefore, whatever restructuring of the economy is contemplated in these bills would probably be confined to particular markets or industries. In any event, a radical break from past antitrust policy to deal with the issue of aggregate concentration by the enforcement agencies is not appropriate where Congress is obviously cognizant of the problem and to date has failed to act.

Conclusion

In conclusion, I will restate my conviction that the Commission and the Department of Justice should proceed against conglomerate mergers and joint ventures under Section 7 of the Clayton Act, utilizing those methods of economic analysis which will help to properly evaluate the effect of such activity in particular markets or industries. The approach to this problem under the "Barriers to New Competition" theory already adverted to, deserves an honest trial. However, it is also my view that to a considerable extent conglomerate power is here to stay. An attempt to restructure industry with the thought of radically diminishing that factor on the economic scene simply is not practical. It is further my view that certain kinds of anticompetitive activity within a market can have an important effect on market structure and on the competi-

tive performance of the economy. Obviously, this was the view of Congress when it enacted legislation specifically focusing on anticompetitive practices such as price discrimination. It would be unwise to de-emphasize enforcement of those antitrust statutes designed to prohibit unfair methods of competition by virtue of an almost exclusive reliance on the structural approach to antitrust. In the real world, competition simply cannot be maintained by antitrust action directed to the structure of markets alone. As a result, if antitrust is to remain a viable concept, the enforcement agencies must rely on the structural and behaviorial approaches singly or in combination, whichever is appropriate. A reliance on either to the exclusion of the other would quickly make antitrust obsolete at a time when the economy is undergoing rapid and dynamic change. Such inflexibility, of course, is completely unnecessary when the basic antitrust law -- and to a certain extent this is true of the entire array of antitrust legislation -- has "a generality and adaptability comparable to that found to be desirable in consitutional provisions." 40/

40/ Opinion of Mr. Justice Holmes, Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).