

# CONGLOMERATE-POWER MERGERS

## I. TYPES OF MERGERS

Government's attacks on corporations which upset the ideal of economic competition by controlling price rather than being guided by the "impersonal" laws of supply and demand<sup>1</sup> are directed to a great extent in the laws forbidding certain mergers. A merger entered into with intent to monopolize or one which is in restraint of trade is subject to attack under the Sherman Act;<sup>2</sup> one which may substantially lessen competition or tend to create a monopoly is subject to attack under section 7 of the Clayton Act.<sup>3</sup>

Until the last decade the applicability of section 7 was limited to horizontal mergers:<sup>4</sup> those in which the merging firms perform similar functions

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1. The ideal is premised on a conviction that competition exists primarily when no firm or group of firms can control prices in a given market. GALBRAITH, *AMERICAN CAPITALISM* 7-14 (rev. ed. 1956). In *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963), the Court notes with approval the statement in Comment, 68 *YALE L.J.* 1627, 1638-39 (1959) that "competition is likely to be greatest when there are many sellers, none of which has any significant market share." The Court added that this is "common ground" among economists, and "was undoubtedly a premise of congressional reasoning about the anti-merger statute." 374 U.S. at 636; *accord*, *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *Scott Paper Co.*, 3 *TRADE REG. REP.* ¶ 16706 (FTC 1964); *Procter & Gamble Co.*, 3 *TRADE REG. REP.* ¶ 16673 (FTC 1963). See also Bok, *Section 7 of the Clayton Act and the Merging of Laws and Economics*, 74 *HARV. L. REV.* 226, 247 (1960); Walden, *Antitrust in the Positive State*, 41 *TEX. L. REV.* 741, 763-64 (1963). In *United States v. Philadelphia Nat'l Bank*, *supra*, the Court did not mention that the comment in the *Yale Law Journal*, in a footnote, indicated the contrary views of those who advocate workable competition, by which the market of a few sellers, although an oligopoly, may be the preferable form of competition in certain industries. Comment, 68 *YALE L.J.* 1627, 1639 n.56 (1959).

2. Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1958). Section 1 provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal." Section 2 provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor."

3. Clayton Act § 7, 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). The pertinent section, as amended in 1950, forbids acquisition of stock or assets of another corporation where the effect of such acquisition "in any line of commerce in any section of the country . . . may be substantially to lessen competition, or to tend to create a monopoly."

4. Federal enforcement agencies originally thought that the statute covered only horizontal mergers. See, *e.g.*, FTC, *REPORT ON CORPORATE MERGERS AND ACQUISITIONS* 168 (1955). For a discussion of this erroneous position, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 313 (1962); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 590 (1957).

in the production or sale of comparable goods or services.<sup>5</sup> Originally, application of section 7 required (1) that the merging firms operate within the same line of commerce<sup>6</sup> and (2) that they compete in the same geographical market.<sup>7</sup> The threat to competition in such a merger is clear. Where firms in the same line of commerce in the same geographical market merge, there is an *immediate* increase in the market share of the acquiring firm.<sup>8</sup> In determining the validity of such a merger, the test applied is whether the acquisition of new market shares will substantially lessen competition.<sup>9</sup>

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5. *Brown Shoe Co. v. United States*, *supra* note 4, at 334.

6. "Line of commerce" is synonymous with "product market." *United States v. Bethlehem Steel Corp.*, 168 F. Supp 576, 588 (S.D.N.Y. 1958). In *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26 (1962), the Court said that the outer boundaries of a product market are "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."

Within this broad market, there may also exist "sub-markets" which constitute product markets for anti-trust purposes. The determination of sub-markets is made by examining "such practical indicia as industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." The Court added that "the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." See *United States v. Continental Can Co.*, 378 U.S. 441, 452-58 (1964).

7. See *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357-62 (1963). "Section of the country" in section 7 of the Clayton Act is described as referring to "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *Id.* at 357; see *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

The requirement of the same geographic market means that the horizontal aspects of market-extension mergers (performing similar functions), defined in text accompanying notes 17-18 *infra*, are not covered by section 7, since the merged firms are not in the same geographical market.

8. *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38, 335, 342-43 (1962); *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 823-24 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 588, 604 (S.D.N.Y. 1958); *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673, at 21565 (FTC 1963).

9. *Brown Shoe Co. v. United States*, *supra* note 8, at 334-35 n.62. Among factors to be considered are the amount of the market share, the nature of the companies and the industry and the tendency toward concentration of market shares in a few firms. *Id.* at 343-46. Emphasis is on the "trend toward concentration, the tendency to monopolize, before the consumer's alternatives disappeared through merger." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963).

A merger which produces "an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market" will be set aside in the "absence of evidence clearly showing that the merger is not likely to have such anti-competitive effects." *Id.* at 363-64; see *A. G. Spalding & Bros., Inc. v. FTC*, 301 F.2d 585, 625-27 (3d Cir. 1962); *American Sugar Crystal Co. v. United*

The limitation of section 7 to horizontal mergers has been removed. In 1950, the section was amended to bring all mergers within its scope.<sup>10</sup> In 1957 the Supreme Court held that the section, even before its amendment, in fact had been intended to apply to other types of mergers.<sup>11</sup> The merger attacked in the 1957 decision was vertical—one between a customer and a supplier.<sup>12</sup> Such a merger does not immediately affect the market share of either firm's line of commerce, because they are not in competition with one another. But it may provide the supplier with an unfair advantage, since the customer firm will tend to purchase from the supplier firm rather than from the latter's competitors.<sup>13</sup> A vertical merger thus will "foreclose the competition of either party from a segment of the market otherwise open to them."<sup>14</sup>

Both horizontal and vertical mergers pose clearly discernable threats to competition. However, more subtle threats to competition have been recognized since the expansion of section 7. These arise from mergers that produce advantages peculiar to a diversified firm operating in several lines of commerce or to a chain firm operating in several geographical markets. This note will discuss the definition of these advantages as a threat to competition under section 7 of the Clayton Act.

States, 259 F.2d 524, 527-28 (2d Cir. 1958); *United States v. Bethlehem Steel Corp.*, *supra* note 8, at 603-11; *Inland Container Corp.*, 3 TRADE REG. REP. ¶ 17012, at 22120 (FTC 1964) (initial decision of the hearing examiner).

10. *Brown Shoe Co. v. United States*, *supra* note 8, at 317; *United States v. Maryland & Va. Milk Producers Ass'n*, 167 F. Supp. 799, 802 (D. C. Cir. 1958), *aff'd in part*, 362 U.S. 458 (1960); *United States v. Bethlehem Steel Corp.*, *supra* note 8, at 583. A review of legislative history is given in Bok, *supra* note 1, at 233-38, and in Handler and Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629, 652-74 (1961).

11. In *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), the Court held that paragraph one of the original section 7 attacked three types of mergers: those which would (1) "substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition," (2) "restrain such commerce in any section or community," and (3) "tend to create a monopoly of any line of commerce." Types (2) and (3) would not be restricted to horizontal mergers. *Id.* at 591-92.

12. *Du Pont*, a major manufacturer of finishes, had acquired 23 per cent of the stock of *General Motors*, a major buyer of finishes. *United States v. E. I. du Pont de Nemours & Co.*, *supra* note 11, at 602. The Court held that the merger allowed *du Pont* to use its stock to "pry open the *General Motors* market to entrench itself as the primary supplier of *General Motors*' requirements for automotive finishes and fabrics." *Id.* at 606.

13. *Id.* at 607; *accord*, *A. G. Spalding & Bros., Inc. v. FTC*, 301 F.2d 585, 623-24 (3d Cir. 1962). In *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 229-30 (D.C. Cir. 1962), it is pointed out that a vertical merger may also provide the acquired firm access to the "deep-pocket" of the acquiring firm.

14. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962); *accord*, *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 613 (S.D.N.Y. 1958).

### A. Conglomerate-Power

“Conglomerate-power” is the term used in this note to describe the possession of these advantages. It may result from a conglomerate merger—one in which the merging firms do not compete in the same product line and are not in a customer-supplier relationship.<sup>15</sup> A favorite example is the acquisition by a New York butcher shop of a newspaper stand in San Francisco.

Actually, threats to competition from conglomerate mergers are relatively rare.<sup>16</sup> Conglomerate-power may also arise, however, as the result of two types of mergers which are variants of the conventional horizontal merger. One type is a merger between two companies which produce the same product but sell in different geographic markets.<sup>17</sup> These are called market-extension mergers; they are horizontal but their horizontal qualities do not result in a conventional section 7 violation.<sup>18</sup> The other variant which may create conglomerate-power is the merger of firms that utilize similar processes in manufacturing, advertising and distributing their respective products, but produce products in different lines of commerce.<sup>19</sup> These are called product-extension mergers; they are partly horizontal because of the similarity of their manufacturing, advertising or distribution processes. These similarities do not produce a conventional section 7 violation because the merger does not directly increase the market share

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15. It has also been described as an acquisition in which there is “no discernible relationship in the nature of business between the acquiring and acquired firms.” 1 TRADE REG. REP. ¶ 4350 (1963).

16. See Bicks, *Conglomerates and Diversification Under Section 7 of the Clayton Act*, 2 ANTITRUST BULL. 175, 177-78 (1956).

17. See *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1064 (1962).

18. See *Transamerica v. Board of Governors of Fed. Reserve Sys.*, 206 F.2d 163 (3d Cir.), *cert. denied*, 346 U.S. 901 (1953); *Foremost Dairies, Inc.*, *supra* note 17, at 1086; *Beatrice Foods Co.*, 3 TRADE REG. REP. ¶ 16831 at 21812 (FTC 1964) (initial decision of the hearing examiner).

19. *United States v. Continental Can Co.*, 217 F. Supp. 761 (S.D.N.Y. 1963), *rev'd on other grounds*, 378 U.S. 441 (1964); *United States v. Lever Bros. Co.*, 216 F. Supp. 887 (S.D.N.Y. 1963); *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673 (FTC 1963). In *Continental Can*, the majority in the Supreme Court held that the products of the two merged firms were in the same line of commerce because of inter-industry competition and hence the merger was horizontal. 378 U.S. at 457, 465. However, the dissenting opinion (Mr. Justice Harlan joined by Mr. Justice Stewart) felt that the products were in different, although competing, lines of commerce; hence “an inquiry into competitive effects in the actual lines of commerce involved” must be made to determine “the impact of the merger in the two lines of commerce here involved.” *Id.* at 475. The lower court had made the same analysis as the Supreme Court dissent on the line of commerce question and had described the merger as “conglomerate.” 217 F. Supp. at 785. The Supreme Court, however, has yet to use the term “conglomerate” to describe a merger in a case before it.

of firms in the same line of commerce.<sup>20</sup> Conglomerate-power arises, however, from the accessibility to each firm of the other's resources; this indirectly affects the market shares in each line of commerce.<sup>21</sup>

Thus three types of mergers may result in the creation of conglomerate-power: the conglomerate merger, the market-extension merger and the product-extension merger. The term "conglomerate-power merger" will be used to describe all three.<sup>22</sup>

### B. *Indirect Effects of Conglomerate-Power*

Conglomerate-power mergers differ from horizontal or vertical ones primarily because their effect on competition is not immediate. This points up the additional difficulty of establishing the conglomerate-power merger's effect on competition in a line of commerce.<sup>23</sup> Although this showing is also necessary in cases involving horizontal and vertical mergers, it is seldom an issue because the harm to competition is patent. For example, merger of firms in the same line of commerce causes an immediate increase of the market share to accrue to the merged firm. The means by which competition may be harmed from vertical mergers are similarly obvious. The Su-

20. Ekco Prods. Co., 3 TRADE REG. REP. ¶ 16879, at 21900 (FTC 1964). The term "product-extension" is restricted to a merger in which the acquired product is similar to already existing ones of the acquiring firm. Procter & Gamble, *supra* note 19, at 21565-66. When the product is not related, it is a conglomerate merger. Union Carbide Corp., 59 F.T.C. 614, 658-59 (FTC 1961).

21. Market-extension and product-extension mergers are sometimes called conglomerate mergers. More often, however, they are called "quasi-horizontal mergers," since there is some integration of facilities. This note discusses the market-extension merger's conglomerate power which poses a threat to competition as distinguished from the increase in market shares which poses the threat in a horizontal merger.

22. Other recent articles dealing with cases in this area generally use the term "conglomerate merger," but with reservations warning of the semantic jungle. Clark, *Conglomerate Mergers and Section 7 of the Clayton Act*, 36 NOTRE DAME LAW. 255 (1961); Day, *Conglomerate Merger and the "Curse of Bigness,"* 42 N.C.L. REV. 511 (1964); Note, *Conglomerate Mergers: The Attack on Diversification*, 25 U. PITT L. REV. 683 (1964); Note, *The Consolidated Foods Case: A New Section 7 Test for the Conglomerate Merger*, 49 VA. L. REV. 852 (1963).

"Conglomerate-power" is used in this note to describe the threats to competition which arise from non-horizontal and non-vertical aspects of relations between merging firms. It has been a factor in cases arising under the Sherman Act. *United States v. Griffith*, 334 U.S. 100, 107-08 (1947) (movie theatre chain will not put films in one-theatre town unless given competitive advantage in multi-theatre towns); *United States v. Swift & Co.*, 286 U.S. 106, 116-17 (1931) (chain store balances off profits and losses to drive out local competitors); *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd*, 367 U.S. 909 (1961) (use of meat distribution channels for non-meat sales).

23. See *Scott Paper Co. v. United States*, 301 F.2d 579 (3rd Cir. 1962); *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1084 (1962); *New Economic Issues in Merger Enforcement*, 24 A.B.A. ANTI-TRUST SEC. 113, 136 (1964).

preme Court has stated that "every extended vertical arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer party to the vertical arrangement."<sup>24</sup> Disputes involving horizontal or vertical mergers generally focus on the factors of line of commerce and geographic area, and on the question whether the merger will substantially lessen competition.<sup>25</sup> However, these touchstones for violation of section 7 have no meaning when considering the indirect effect on competition of a conglomerate-power merger until a determination is made of the means by which it will harm competition. This requires both an investigation of the industries in which the merging firms operate and a detailed examination of the relation between them to establish whether factors exist which may create an unfair competitive advantage in a division of the merged firm, and therefore threaten a lessening of competition in a line of commerce.<sup>26</sup>

Four problems, therefore, must be resolved in conglomerate-power merger cases. First, the way in which a conglomerate-power merger might affect competition in some product market must be shown. Second, the line of commerce must be established. Third, the geographic limits of the market must be defined. Fourth, the merger must be shown to cause a "substantial lessening of competition." Steps two, three and four are factors common to all merger cases, while step one is unique (as a matter of dispute) to conglomerate-power merger cases.

Before the recent awakening to the anti-competitive potential of conglomerate-power mergers,<sup>27</sup> concern over mergers was restricted to the effect

24. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). Of course, the effect on competition must be "substantial." *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 566 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

25. These are the three elements of section 7. See note 3 *supra*.

26. *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962); *Scott Paper Co. v. FTC*, 301 F.2d 579 (3d Cir. 1962); *United States v. FMC Corp.*, 218 F. Supp. 817 (N.D. Cal) (preliminary injunction denied), *appeal dismissed*, 321 F.2d 534 (3d Cir.), *aff'd*, 84 Sup. Ct. 4 (1963) (Goldberg, J., opinion in chamber); *United States v. Continental Can Co.*, 217 F. Supp. 761, 786 (S.D.N.Y. 1963), *rev'd on other grounds*, 378 U.S. 441 (1964); *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673 (FTC 1963); *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1084 (1962); *Hooker Chemical Corp.*, No. 8034, FTC, Aug. 22, 1961 (consent order to cease and desist); *National Tea Co.*, 3 TRADE REG. REP. ¶ 16376 (FTC 1963) (initial decision of hearing examiner).

The *Hooker* consent order noted that there is no violation of Section 7 "when the acquiring firm had contributed nothing of competitive consequence to the acquired firm which would vary the competitive relationship between industry member, and the acquiring firm's entrance into the industry had not affected market structure, market control or performance." For an early discussion of this necessity of proof, see Neal, *The Clayton Act and the Transamerica Case*, 5 STAN. L. REV. 179, 188-91 (1952).

27. For the history of this awakening, see Blair, *The Conglomerate Merger in Eco-*

of an immediate change in the market.<sup>28</sup> This narrow view overlooked conglomerate-power mergers, which initially result in nothing more than the substitution of one firm for another in a given market structure.<sup>29</sup> They cause no immediate increase in market shares. Indeed, such mergers may, under some circumstances, increase competition. For example, a corporation with excess funds tends to invest in industries where profit rates are high due to imperfect competition, thereby stimulating competition in that industry.<sup>30</sup> Or a large firm in one industry may acquire a smaller one in an oligopolistic industry, cracking the lethargy of the dominating firms.<sup>31</sup> Furthermore, where intra-divisional buying and selling exists within a diversified firm, "transfer costs" are eliminated, permitting a reduction in prices which in turn tends to stimulate competition.<sup>32</sup>

A sophisticated analysis<sup>33</sup> of actual business operations, however, reveals that in many cases the long-range effect of a conglomerate-power merger is a substantial lessening of competition. A 1962 report to the House of Representatives recognized the unique effects of conglomerate-power mergers in its statement that the economic impact was "often found in its side effects, rather than in immediate repercussions."<sup>34</sup> The report continued:

The conglomerate corporation . . . often has the advantages of horizontal and vertical firms, and more. It can weather a storm of competition or emerging technical obsolescence in one of its areas of interest, while seeking opportunities in other newly developing fields. It has

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*nomics and Law*, 46 GEO. L. J. 672, 675-79 (1958). An important landmark was the FTC REPORT ON THE MERGER MOVEMENT 59-63 (1948).

28. Procter & Gamble Co., 3 TRADE REG. REP. ¶ 16673 (FTC 1963); Bicks, *supra* note 16, at 177-78 (1956); Neal, *supra* note 26, at 188-91 (1952).

29. United States v. Continental Can Co., 217 F. Supp. 761, 786 (S.D.N.Y. 1963), *rev'd on other grounds*, 378 U.S. 441 (1964); Ekco Prods. Co., 3 TRADE REG. REP. ¶ 16879, at 21900 (FTC 1964); Union Carbide Corp., 59 F.T.C. 614, 659 (1961); Hooker Chemical Corp., No. 8034, FTC, Aug. 22 1961 (consent order to cease and desist).

30. Blake, *Mergers and United States Antitrust Law*, INT'L & COMP. L.Q. SUPP. PUBL. No. 6, at 91 (1963).

31. United States v. Lever Bros. Co., 216 F. Supp. 887 (S.D.N.Y. 1963); see Consolidated Foods Corp., No. 7000, FTC, Nov. 15, 1962, *rev'd on other grounds*, 329 F.2d 623 (7th Cir.), *cert. granted*, 379 U.S. 412 (1964) (No. 422); Blair, *supra* note 27, at 691-92; Bicks, *supra* note 16, at 185.

32. MASON, ECONOMIC CONCENTRATION & THE MONOPOLY PROBLEM 22 (1957).

33. For a discussion of the significance of examining actual business operations rather than merely market shares, see *New Economic Issues in Merger Enforcement*, 24 A.B.A. ANTI-TRUST SEC. 113 (1964).

34. STAFF OF SELECT COMMITTEE ON SMALL BUSINESS, H.R., 87TH CONG., 2D SESS., MERGERS AND SUPERCONCENTRATION, ACQUISITION OF 500 LARGEST INDUSTRIAL AND 50 LARGEST MERCHANDISING FIRMS 44 (Comm. Print 1962) [hereinafter cited as MERGERS AND SUPERCONCENTRATION].

staying power, ready access to the capital markets, accessibility to new Government research and development grants, and supply contract awards.<sup>35</sup>

The report emphasized the increasing impact that the conglomerate or diversified firm will have on the economy, and depicted the "pervasive rise of the conglomerate corporation" as the "new challenge to small business."<sup>36</sup>

## II. ASPECTS OF CONGLOMERATE-POWER

### A. *Reciprocal Buying Practices*

One aspect of conglomerate-power is the leverage obtained in indirect reciprocal buying. Direct reciprocal buying is utilized in a vertically integrated firm when one division sells to another at reduced prices; this is one reason why the vertical merger can constitute a major threat to competition.<sup>37</sup> Indirect reciprocal buying, however, is also a threat where an indirect customer-supplier relationship exists within the diversified firm. This may be the result of a conglomerate merger.

The basic situation arises when firm *A* acquires *B* and *C* is a supplier of *B* and a customer of *A*. Firms *A* and *B* are in neither a vertical nor a horizontal relationship. Nevertheless, *A* may put pressure on *C* to buy more than he normally would from *A* through threats of depriving *C* of *B* as a customer.<sup>38</sup> This result is also possible without express pressure, because *C* may increase its purchases from *A* simply to maintain the latter's good will. The FTC has stated that the existence of these influences strikes at the basic premise of the competitive ideal:

It distorts the focus of the trader by interposing between him and the traditional factors of price, quality and service an irrelevant and alien factor which is destructive of fair and free competition on the basis of merit. The efficient producer may thereby suffer loss because of a circumstance extrinsic to the worth of its product. In this situation,

35. *Ibid.*

36. *Ibid.*; see Address by Willard E. Mueller, Chief Economist of the FTC, Faculty Seminar of the College of Business Administration, University of Florida, 5 TRADE REG. REP. ¶ 50191 (1963).

37. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957); *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 229 (D.C. Cir. 1962); *Scott Paper Co. v. FTC*, 301 F.2d 579 (3d Cir. 1962).

38. Such overt threats have been held to be unfair methods of competition under section 5 of the Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (now 15 U.S.C. § 45 (a) (1958)). See *California Packing Corp.*, 25 F.T.C. 379 (1937); *Mechanical Mfg. Co.*, 16 F.T.C. 67 (1932); *Waugh Equip. Co.*, 15 F.T.C. 232 (1931); *Krash, The Legality of Reciprocity Under Section 7 of the Clayton Act*, 9 ANTITRUST BULL. 93, 98-99 (1964).



it is the relative size and conglomerate power of business rivals, rather than economic efficiency, that may determine firm growth and success and ultimately, the allocation of resources.<sup>39</sup>

Two cases, *United States v. Ingersoll-Rand*<sup>40</sup> and *Consolidated Foods Corp. v. FTC*,<sup>41</sup> both involving conglomerate mergers, have considered reciprocal buying leverage. In each, the three-way pressure illustrated above existed, and both the threat to competition and the applicability of section 7 was recognized.<sup>42</sup>

In the first case the acquiring firm, Ingersoll-Rand, was a manufacturer of general industrial machinery. It merged with several firms manufacturing coal mining machinery, whose customers included steel mills owning their own coal mines (captive mines). These steel companies were, of course, interested in selling steel to Ingersoll-Rand for its use in the manufacture of general industrial machinery. Thus the steel mills became a customer of one division of the diversified firm and a supplier of another. The court noted that the steel mills would be aware of their dual relationship with the diversified firm and that they would tend to purchase coal-mining machinery from Ingersoll-Rand's newly-acquired divisions in order to increase their steel sales to the manufacturing divisions.<sup>43</sup> If the steel mills should overlook their opportunity, the court continued, Ingersoll-Rand could remind them of it by "judicious use of its [Ingersoll-Rand's] steel-purchasing power."<sup>44</sup>

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39. *Consolidated Foods Corp.*, No. 7000, FTC, Nov. 15, 1962, *rev'd on other grounds*, 329 F.2d 623 (7th Cir.), *cert. granted*, 379 U.S. 412 (1964) (No. 422). This is cited with approval in *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa.), *interlocutory injunction aff'd*, 320 F.2d 509 (3d Cir. 1963).

40. 320 F.2d 509 (3d Cir. 1963) (hearing on interlocutory injunction). The district court opinion, *supra* note 39, contains a more extended discussion of reciprocal buying.

41. 329 F.2d 623 (7th Cir.), *cert. granted*, 379 U.S. 412 (1964) (No. 422), *reversing* No. 7000, FTC, Nov. 15, 1962. The Seventh Circuit reversed because post-acquisition evidence showed that the predicted results did not, in fact, occur.

A third case is given in a complaint filed against the Electron-Motive Division of the General Motors Corporation by the Justice Department. General Motors acquisition of 80 per cent of the new and used locomotive market, the complaint charged, was helped by other divisions of General Motors giving preference for the shipment of freight to railroads which purchased General Motors locomotives. Thus the railroads would tend to purchase a particular type of locomotive in order to keep the good will of General Motors. *General Motors Corp.*, 3 TRADE REG. REP. ¶ 45063 (1963) (digested complaint).

42. "Acquisitions may contravene the provisions of Section 7 if they result in the creation of relationships between the resulting company and its customers and suppliers which may bring about competitive advantages to the merging companies detrimental to competition." *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 552 (W.D. Pa.), *interlocutory injunction aff'd*, 320 F.2d 509 (3d Cir. 1963).

43. *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 524 (3d Cir. 1963).

44. *Ibid.*

In *Consolidated Foods Corp. v. FTC*,<sup>45</sup> a similar relationship existed. Consolidated Foods was the nation's largest food producer, and a customer of food processors to whom Gentry Foods, the acquired firm, sold dehydrated onion and garlic. This made the food processors customers of one division of the diversified firm and suppliers of another. The FTC noted that these processors would, "to say the least, consider Gentry's connection with Consolidated in selecting a course of supply of onion and garlic."<sup>46</sup>

The danger to competition was compounded by the oligopolistic nature of the dehydrated onion and garlic industry. Gentry and one other firm, Basic Vegetable Products, together dominated between eighty and ninety percent of both markets. Any balance between the two firms might be upset if Gentry were given the advantage of the merger with Consolidated.<sup>47</sup> Apart from this, the remaining small firms in the market would face a particularly precarious future as a result of the merger, since it is the custom of the buyers in the food processing industry to have two suppliers. Those who did retain Basic Vegetable Products as a prime source of supply and had one of the smaller firms as a secondary source would now tend to substitute Gentry as their secondary source.

The merger was struck down by the FTC. On appeal, the Seventh Circuit noted that the basic analysis of the FTC was consistent with section 7 principles: "business reciprocity has the effect of substantially lessening competition or can be so utilized."<sup>48</sup> However, by the time the case reached the Seventh Circuit the predicted results had not occurred. Gentry had lost in shares of the garlic market (down twelve percent) and had gained only slightly in shares in the onion market (up seven percent). This was fatal to the case; the FTC was overruled and the merger allowed. The Seventh Circuit's holding that "the experience reflected by . . . [the] post-acquisition period must weigh heavily in appraising future probabilities,"<sup>49</sup> indicates that other elements might offset the advantages predicted to result from reciprocal buying opportunities. For example, in the *Consolidated Foods* case the food processors' decision to buy onion and garlic was influenced more by factors such as "quality, better service, a need for an additional source of supply, and type of containers furnished,"<sup>50</sup> than by the threatened loss of their finished product sales to Consolidated Foods. This

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45. 329 F.2d 623 (7th Cir.), cert. granted, 379 U.S. 412 (1964) (No. 422).

46. *Consolidated Foods Corp.*, No. 7000, FTC, Nov. 15, 1962, rev'd on other grounds, 329 F.2d 623 (7th Cir.), cert. granted, 379 U.S. 412 (1964) (No. 422).

47. *Ibid.* This was recognition of the effectiveness of oligopolistic competition.

48. 329 F.2d 623, 626 (7th Cir.), cert. granted, 379 U.S. 412 (1964) (No. 422).

49. *Ibid.*

50. *Id.* at 626.

is particularly true in the case of nationally advertised brands, "which through consumer acceptance and loyalty would be relatively immune from . . . [Consolidated's] dictation of the source from which ingredients must be obtained."<sup>51</sup> In other words, Consolidated was more at the mercy of its large suppliers than in a position of dominance. Reciprocity is clearly more effective with small suppliers.

The court's analysis of the actual market effects poses the further question whether diversified corporations actually take advantage of reciprocal buying opportunities. It has been contended that they do not. The argument made is that in large diversified corporations division managers may have limited face-to-face contact and they may know little of another division's business practices and needs.<sup>52</sup> Nevertheless, intra-corporate communication systems can be established to ensure exploitation of reciprocal buying opportunities. For example, following the vertical merger between du Pont and General Motors, a company policy was established requiring purchasing agents of General Motors to check the availability of necessary supplies from du Pont before reaching a buying decision.<sup>53</sup>

### B. Advertising and Marketing Advantages

With the rise of a mass-market for consumer goods and the development of extensive communication facilities, a new element has been introduced into the businessman's kit of competitive tools: persuasive advertising. Combined with modern marketing and packaging techniques, it has drastically affected the consumer's selection of a particular item from the array offered by competing sellers. Rather than the differences between products—price, quality, service, durability or convenience—the buyer's choice is more often influenced by packaging and advertising techniques.<sup>54</sup> The increased

51. *Id.* at 627. Thus, wholesalers to whom Consolidated sells will demand certain brands made popular by advertising. The manufactures of these brand products could answer Consolidated's demand that more onion and garlic be bought from Gentry by threatening to utilize another marketing firm to distribute their products to wholesalers.

52. Blake, *supra* note 30, at 89. This is particularly true because of the "recent trend toward substantial autonomy of operating divisions."

53. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 603-05 (1957).

54. "The housewife purchases the brand that she sees displayed prominently on the shelf or that is familiar and attractive to her by reason of advertising or sales promotions." *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673, at 21563 (FTC 1963), *citing* *United States v. Lever Bros. Co.*, 216 F. Supp. 887, 893 (S.D.N.Y. 1963).

The nature of large-scale advertising generates a great deal of debate. Some contend it is a recognition that the consumer is "sovereign"; others charge that the consumer is constantly being "duped." A review of the attitudes is given in SUTTON, HARRIS, KAYSSEN & TOBIN, *THE AMERICAN BUSINESS CREED* 138-60 (Schocken ed. 1962) (originally published, 1956). Perhaps the consumer is both sovereign and duped.

significance of advertising largely results from the increased importance of "pre-selling" a product. In today's self-service supermarket, the personal advice of the friendly merchant has been replaced by advertising and packaging techniques geared to sell the product before the consumer enters the store.<sup>55</sup> In this sales atmosphere, the allegiance of the housewife tends to be ephemeral and subject to change by pin-pointed advertising campaigns. In many markets, the result is that competition between advertising and packaging experts replaces that between producers.<sup>56</sup> Furthermore, the close relation between advertising and sales success threatens the beneficial aspects of competition for the consumer.<sup>57</sup> When advertising becomes a dominant factor in a product market, the large firm has an inherent advantage because of the enormous cost of large scale advertising.<sup>58</sup> "Victory in some forms of non-price competition may go not to the firm with the lower costs or the best product, but to the company which can spend the most on advertising, sales promotion, model changes, etc."<sup>59</sup> The result will not necessarily be a better product for the consumer, but rather a constant shifting of brands by the consumer as advertising proficiency in various products waxes and wanes. With the cost of advertising falling eventually on the consumer, the end result is higher prices for all products.<sup>60</sup>

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55. See *United States v. Lever Bros. Co.*, *supra* note 54, at 893; *Procter & Gamble Co.*, *supra* note 54, at 21563. Thus, there is a decentralizing of the buying decision, with the consumer rather than the merchant making the effective buying choice. Hence the problem exists of what actually determines the consumer's choice: his careful buying habits or his susceptibility to mass advertising.

56. *Procter & Gamble Co.*, *supra* note 54, at 21586 (FTC 1963). Decline in price competition may bring other types to the fore, such as advertising, sales technique and product development. Barnes, *Primacy of Competition and the Brown Shoe Decision*, 51 *Geo. L.J.* 706, 716 (1963). The author applied the term "non-price competition" to such practices as advertising, artificial product differentiation, misrepresentation and packaging, stating that such competition is largely concerned with "switching sales from one supplier to another without giving the consumers any greater advantage in price, quality or service."

57. *Procter & Gamble Co.*, *supra* note 54, at 21586. "Advertising performs a socially and economically useful function insofar as it educates the consumer to the broad range of product alternatives . . . but this process is distorted in the case of a homogeneous product . . . produced under conditions of oligopoly. . . ."

58. *Procter & Gamble Co.*, *supra* note 54, at 21586; see *General Foods Corp.*, 3 *TRADE REG. REP.* ¶ 16612 (FTC 1963) (complaint). For a discussion of the benefits of a conglomerate-power merger for advertising in a "product discrimination" field, see Blair, *supra* note 27, at 687. The large fund available for advertising new product *B* will have come from the success of established product *A*. Thus competition in *B*'s market is distorted.

59. Address by Senator Phillip Hart (Chairman of the Anti-Trust and Monopoly Subcommittee), Fourth Annual West Side Conference, Feb. 1, 1964, 5 *TRADE REG. REP.* ¶ 50224 (1964).

60. *Procter & Gamble Co.*, 3 *TRADE REG. REP.* ¶ 16673, at 21569 (FTC 1963).

That a substantial lessening of competition may result from the use of these advantages is particularly evident in product-extension and market-extension mergers. A large company may acquire a small firm competing with other small firms in a market similar (but not the same as) that of the acquiring firm. Similarly, a chain store may acquire a retail outlet competing with other small retail outlets in one local market. In each case where the large firm's experienced and well financed advertising team is made available to the smaller acquired firm, the smaller firm is enabled to boost its market share at the expense of its competitors.

### 1. *Firms Producing Similar and Dissimilar Products*

Two situations are possible in the acquisition of a firm producing a different product. It may be a similar product (product-extension merger) or a dissimilar product (conglomerate merger). When a large acquiring firm produces a product similar to that of the small acquired firm, the advertising facilities of the larger may be utilized for the benefit of the smaller firm and thereby substantially threaten competition in the acquired firm's market. An example is the case of *Procter & Gamble Co.*<sup>61</sup> In this case, the acquired firm, Clorox, was the largest firm in the household bleach market with sales of forty million dollars. Procter and Gamble, the acquiring firm, had sales of over one billion dollars. Since a product such as bleach is complementary to other household cleansers produced by Procter and Gamble, extensive integration of advertising could readily have been achieved by their experienced advertising team.<sup>62</sup> The economies of large scale advertising in national news and broadcasting media were made more available to Clorox than to its smaller rivals.<sup>63</sup> In addition, the large diversified firm could obtain local advertising tie-ins for Clorox.<sup>64</sup> Finally, established consumer preference for Procter and Gamble's products would naturally extend to any new product which it marketed.<sup>65</sup> The benefits thus gained could drive the smaller firms from the market.

However, when the acquired firm produces a product dissimilar to that of the parent, a different situation is presented. There would not be a complete and harmonious integration of advertising facilities, although the par-

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61. *Ibid.*

62. *Id.* at 21582-86, 21572.

63. *Id.* at 21563; *United States v. Lever Bros. Co.*, 216 F. Supp. 887, 899 (S.D.N.Y. 1963). Another advantage is advertising discounts for large volume. *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673, at 21576-77.

64. *Id.* at 21563; see *General Foods Corp.*, 3 TRADE REG. REP. ¶ 16612 (FTC 1963) (complaint).

65. *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673, at 21579.

ent firm's extensive financial resources could be channeled into the acquired firm's advertising budget as part of a general financing program.<sup>66</sup> Because of the product dissimilarity, there is a natural inhibition to the application of conglomerate-power. A portion of the decision in *Union Carbide Corp.*<sup>67</sup> may have been based on these considerations. The acquired firm manufactured sausage-casings, a product which bore no relation to any products marketed by the acquiring firm. The merger was permitted in this case because it was not shown in what manner competition could be adversely affected.<sup>68</sup>

In some situations, advertising advantages transferred to an acquired firm may result in a stimulus, rather than a deterrent, to competition. A comparison of *Procter & Gamble* with *United States v. Lever Bros. Co.*,<sup>69</sup> illustrates this possibility. In *Procter & Gamble*, where the market in which the acquired firm participated was composed of firms much smaller than Procter and Gamble, merger produced an industry in which the new firm had immensely larger resources than its competitors. However, in *Lever Bros. Co.* the acquired firm, operating in the low-sudsing, heavy-detergent market, was, before the merger, competing at a disadvantage with large diversified firms experienced in advertising and marketing household cleansing agents.<sup>70</sup> The merger with Lever Brothers was permitted because the acquired firm otherwise would have remained at a hopeless competitive disadvantage with its two rivals. Thus a significant factor in these cases is a determination of whether the market structure of the acquired firm is principally one of large firms or small firms; new conglomerate-power might not tend to adversely affect competition in an existing oligopolistic market.<sup>71</sup>

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66. *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962); *Ekco Prods. Co.*, 3 TRADE REG. REP. ¶ 16956, at 22017 (FTC 1964).

67. 59 F.T.C. 614 (1961).

68. *Id.* at 658-59. Since the product was an industrial one, it may be that the possibilities open in consumer advertising did not exist in this case.

69. 216 F. Supp. 887 (S.D.N.Y. 1963).

70. *Id.* at 895-96. Before the acquisition, the acquired firm was a division of a large chemical corporation with no experience in marketing and advertising household cleansing agents. The acquired firm's two rivals manufactured a full line of such agents, as did Lever Brothers.

71. See note 31 *supra*. On the other hand, a conglomerate firm may have greater resources for the non-price competition often engaged in by oligopolistic firms. It would also cause additional harm to whatever small firms remained in the predominantly oligopolistic industry. See Blair, *supra* note 31, at 692-93.

For example, suppose that firms *A*, *B* and *C* dominate an industry, each possessing one hundred units of resources. Also in the industry are firms *D* and *E*, with five units of resources each. Firm *F*, possessing 1000 units of resources, acquires firm *C*. Now firm *C* may draw on *F*'s resources to compete with *A* and *B* in non-price competition and to

## 2. *Firms in a Different Geographic Market*

Conglomerate-power exercised through advertising may also be a factor in market-extension mergers. The merger might permit the newly acquired firm to employ more television or periodical advertising than its local competitors.<sup>72</sup> Furthermore, at the final portion of nationally televised commercials by the conglomerate, the name of the local outlet may be mentioned through agreements with the local television station. And where the chain store has previously been broadcasting in the acquired firm's locality, because of network commitment, it incurs little increase in costs,<sup>73</sup> just as the parent firm's advertising department can create additional copies of its standard promotional materials at little added expense. These advantages are not available to the firm's one-market competitors.

### C. *Marketing Advantages*

Market-extension and product-extension mergers may also produce marketing advantages. Just as these mergers permit integration of advertising facilities, so they also allow an integration of marketing facilities. For product-extension manufacturers there is a spreading of sales-force costs over several items: one salesman sells several products for the diversified firm, while salesmen for a one-line manufacturer are able to sell only one product at each stop.<sup>74</sup>

The fight for shelf space is also tipped in favor of the diversified and chain operation. With the multitude of presently existing products, a retailer must sometimes limit the number of competing brands which he places on his shelves. Multi-product manufacturers or wholesaling firms may force less popular items upon a retailer by threatening to withdraw established lines.<sup>75</sup> A one-line producer is not able to do this.

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compete with *D* and *E* in price competition. Whether *F* will be willing to allocate such a large amount of its resources to firm *C* is a separate question.

72. Procter & Gamble Co., 3 TRADE REG. REP. ¶ 16673, at 21562-64 (FTC 1963). A particularly damaging piece of evidence is given in *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1080-81 (1962). Respondent's 1953 corporate report stated that acquisitions of firms in other geographic markets would protect it from local market declines and enable more effective national advertising.

73. *Beatrice Foods Co.*, 3 TRADE REG. REP. ¶ 16831, at 21811 (FTC 1964) (initial decision of hearing examiner).

74. Procter & Gamble Co., 3 TRADE REG. REP. ¶ 16673, at 21585 (FTC 1963); see Hale, *Diversification: Impact of Monopoly Policy Upon Multi-Product Firms*, 98 U. PA. L. REV., 320, 331-32 (1949). This advantage was a factor in the Sherman Act proceeding in *United States v. Swift & Co.*, 189 F. Supp. 885, 912 (N.D. Ill. 1960). For a criticism of the alleged cost savings analysis, see Blair, *supra* note 31, at 680-81.

75. Procter & Gamble Co., *supra* note 74; see *General Foods Corp.*, 3 TRADE REG. REP. ¶ 16612 (FTC 1963) (complaint); Neal, *supra* note 26, at 189.

#### D. *Balancing of Profits and Losses*

The diversified firm enjoys further advantages in its computation of profits and losses since the ultimate figures of its profit-and-loss statement reflect the aggregate sum of its activity as a single entity. A losing division or branch may therefore be sustained for several years without harm to the entire firm's profit image.<sup>76</sup> The one-line competitor, however, must show consistent profits within a reasonable period of time or suffer extinction. A loss statement for even one year might cause serious consequences in relation to the one-line firm's credit rating, stock prices, personnel drawing potential and the image it seeks to project in the business community. Thus where one division of a diversified firm competes with a one-line firm, their long-range outlooks are inherently different. While the former is able to withstand short-term losses to acquire long-term advantages, the latter is not.<sup>77</sup>

These advantages, made available by the inherent structures of the competing firms, may also lead to further leverage in favor of the diversified firm. The diversified firm may finance research and expansion activities (with finances heretofore unavailable to the acquired firm) to obtain, for instance, new machinery. The smaller firm may operate on a profit margin too narrow to acquire the new machinery.<sup>78</sup> The diversified firm can also advantageously transfer personnel, and make available existing facilities and trade contacts, with the expense allocated to other divisions.<sup>79</sup> The net effect is that the diversified division will be able to lower costs and undercut the small firm, with the ultimate aim of acquiring a monopoly position in which prices may be raised.<sup>80</sup> These considerations are part of the "deep pocket" rule noted in some vertical merger cases.<sup>81</sup> But mere existence of the "deep pocket" is insufficient to constitute a section 7 violation for a

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76. Procter & Gamble, *supra* note 74, at 21578, 21583; see Barnes, *Comparative Mores and Legal Tests in Merger Tests: The DuPont General Motors Decision*, 46 GEO. L.J. 564, 585 (1958); Blair, *supra* note 31, at 681-82. Because of accounting difficulties, such as allocating overhead costs, this may be done unwittingly and to the harm of the diversified firm. See Hale, *supra* note 74, at 359-61.

77. *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1059, 1072, 1083-84 (1962).

78. It should be noted that much of contemporary business expansion is financed by retained earnings, rather than by borrowing in the capital market. See Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1, 8 (1965) (retained earnings used for approximately 60 per cent of expansion in 1964); EDWARDS, *MAINTAINING COMPETITION* 145 n.84 (1949) (retained profits used for 57 per cent of expansion in 1947).

79. See *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 543 (W.D. Pa.), *interlocutory injunction aff'd*, 320 F.2d 509 (3d Cir. 1963).

80. *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1059, 1072, 1083-84 (1962). For a Sherman Act violation, see *United States v. New York Great A. & P. Tea Co.*, 173 F.2d 79, 86-88 (7th Cir. 1949). Situations other than diversification may give rise to price-cutting, however. Hale, *supra* note 74, at 349.

81. *E.g.*, *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 229-30 (D.C. Cir. 1962).



conglomerate-power merger; a showing of ways in which the "deep pocket" could be utilized for the benefit of the small acquired firm is necessary.<sup>82</sup>

In product-extension and market-extension mergers, particular means exist by which the balance of profits and losses made possible by the "deep pocket" may be utilized. For example, a chain with stores in separate geographic markets may temporarily lower prices in one market, driving the weaker one-market firm to the wall, while financing the loss with profits derived from stores in other parts of the chain.<sup>83</sup> This is not possible when several chains compete in a local area, although this gives rise to a new problem: the tendency may be for each chain to avoid economically sound price-cutting in one market for fear of retaliation in other markets.<sup>84</sup>

While the discrimination in prices, if put into effect, may be a violation of the Robinson-Patman Act,<sup>85</sup> a successful attack under section 7 prevents formation of the market structure which would entice such discriminations.<sup>86</sup> The attack is two steps removed from the offense. The merger may cause price discrimination; the price discrimination may cause harm to competition.<sup>87</sup>

In any merger whereby a firm in a different product-line is acquired, the financial "deep pocket" is made available to the acquired product.<sup>88</sup> In a product-extension merger, other advantages are also made possible. For example, where advertising is an important competitive factor, the "deep pocket" may subsidize crash advertising programs to sway consumer tastes.<sup>89</sup> The parent firm's advertising team, when used for the new product, may be charged off on the balance sheet against existing products; in any event, the

82. *Id.* at 230; *Transamerica Corp. v. Board of Governors of Fed. Reserve Sys.*, 206 F.2d 163, 169 (3d Cir. 1953); *Ekco Prods. Co.*, 3 TRADE REG. REP. ¶ 16879, at 21900 (FTC 1964); *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673 (FTC 1963); *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962); *Union Carbide Corp.*, 59 F.T.C. 614, 658 (1961).

83. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 600 (S.D.N.Y. 1958); *Foremost Dairies, Inc.*, *supra* note 82, at 1059, 1081-82 (1962). For a Sherman Act proceeding, see *United States v. Swift & Co.*, 286 U.S. 106, 116-17 (1932).

84. See *Barnes*, *supra* note 76, at 586. Thus, the tendency of prices to seek their market level in each area is inhibited. An artificial upward push on prices in all areas will result.

85. 49 Stat. 1526, 1528 (1936), amending 38 Stat. 730 § 2 (1914) (now 15 U.S.C. §§ 13-13b, 21a (1958)).

86. The same holds true in a Sherman Act proceeding. See *United States v. New York Great A. & P. Tea Co.*, 173 F.2d 79, 88 (7th Cir. 1949).

87. For a criticism of this double possibility, see Day, *Conglomerate Mergers and the Curse of Bigness*, 42 N.C.L. Rev. 511, 550-51 (1964).

88. *Ekco Prods. Co.*, 3 TRADE REG. REP. ¶ 16879, at 21907 (FTC 1964); *Procter & Gamble Co.*, 3 TRADE REG. REP. 16673, at 21583 (FTC 1963); see *Blair*, *supra* note 31, at 687.

89. *Procter & Gamble Co.*, *supra* note 88, at 21564.

acquired firm is given access to expertise not available to its small competitors.<sup>90</sup>

With market-extension and product-extension mergers, then, the balancing of profits and losses which any diversified firm may employ is more effectively employed. Thus, showing the marketing and advertising advantages may be sufficient as a showing of the particular utilization of the "deep pocket" which could "substantially" harm competition.<sup>91</sup>

### III. COMPETITION AND CONCENTRATION

Three consequences result from a conglomerate-power merger: (1) competitive advantages are made available to the acquired firm which allow it to increase market shares in a manner incompatible with the competitive model; (2) this increase in market shares comes at the expense of the acquired firm's competitors; (3) in turn, market shares are concentrated in a few large firms, which, with a combination of conglomerate-power and conventional oligopolistic power, can drive small businesses from the market.

#### A. Competition

In the competitive model it is assumed that two results occur simultaneously: (1) the buyer receives the products he desires, and (2) sellers satisfying these desires will prosper.<sup>92</sup> Buyer demand elicits seller response, which in turn assures satisfaction of buyer demand. Absent unusual circumstances, the system is self-operating and benefits both the seller and buyer. Indeed, this simultaneous benefit to both sides of a business transaction is considered the ultimate justification of the competitive system. As the Court in *Northern Pac. Ry. v. United States* said:

[The Enforcement of the anti-trust laws] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions.<sup>93</sup>

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90. *Id.* at 21578.

91. See text accompanying note 26 *supra*.

92. See Adams & Durlam, *Brown Shoe: In Step With Anti-Trust*, 1963 WASH. U.L.Q. 158, 160-61; Barnes, *The Primacy of Competition and the Brown Shoe Decision*, 51 GEO. L.J. 706, 716-17 (1963); *The Role of the Economist in Merger Cases*, 3 ANTI-TRUST BULL. 501, 507 (1958). That is, the same competitive system which rewards efficient producers benefits the consumer. GALBRAITH, *AMERICAN CAPITALISM* 19 (rev. ed. 1956). For a discussion of the popular conception of this theory, see SUTTON, HARRIS, KAYSER & TOBIN, *op. cit. supra* note 54, at 161-83.

93. 356 U.S. 1, 4 (1958).

The Supreme Court also has stated that the competitive system demands, wherever possible, that an increase in market share result from internal expansion—by enticing away customers of competitors.<sup>94</sup> A firm does this by offering better wares for a lower price. The two favorable consequences of the self-operating competitive system occur when a firm increases its share of the market by internal expansion. First, customers continually receive better bargains because of the pressure of each firm to expand its sales. Second, since each firm seeks to produce more efficiently in order to provide better bargains, there is a continual improvement in the efficiency of the entire economy. External expansion—securing an increase in market shares by acquiring competitors and thus their customers—does not provide this dual benefit.

Following a conglomerate-power merger, the newly-acquired firm (now a division of the conglomerate firm) increases its market share in a manner that satisfies part of the goal of fostering internal expansion. It entices away customers of competitors rather than acquiring them through merger (as does an acquiring firm in a horizontal merger).<sup>95</sup> But it does this not by offering better wares or by producing more efficiently. Rather, it attracts customers and increases its share of the market by virtue of competitive advantages unrelated to efficiency of production; that is, by the use of reciprocal buying, excessive advertising, or the balancing of profits and losses among markets. The division of the conglomerate firm benefiting from the exercise of conglomerate-power thus attracts customers which it would not have if it were forced to rely on the attractiveness of the product itself. Further, in reciprocal buying and excessive advertising cases, the customer does not benefit by receiving a better product at a better price; other considerations lead him to purchase the conglomerate division's product. A customer attracted by a balance of profit and losses may temporarily benefit in price, but only until the smaller competitors are driven from the market. The customer may then be faced with higher prices as the conglomerate division exploits its monopolistic or oligopolistic

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94. *Brown Shoe Co. v. United States*, 370 U.S. 294, 345 n.72 (1962); *accord*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963); *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 616-17 (S.D.N.Y. 1958); *Scott Paper Co.*, 3 TRADE REG. REP. ¶ 16706, at 21636-37 (FTC 1964); *Adams & Durlam*, *supra* note 92, at 159-62; *New Economic Issues in Merger Enforcement*, 24 A.B.A. ANTI-TRUST SEC. 113, 120-24 (1964). Of course, internal expansion may lead to oligopoly as weaker firms drop out of the market. It has been contended that this is inevitable in most industries of a modern economy. From an initial position of a group of many sellers, there is a steady decline in the number of competitors "until a point of stability is reached with a handful of massive survivors and, usually, a fringe of smaller hangers-on." GALBRAITH, *op. cit. supra* note 92, at 33.

95. See text accompanying notes 8-9 *supra*.

power. Thus these competitive methods resulting in internal expansion are "socially disadvantageous"<sup>96</sup> since they allow expansion at the expense of competitors who seek to expand internally through improving product efficiency.<sup>97</sup>

### B. Concentration

The ultimate consequence of these socially disadvantageous methods is further concentration of the market shares by firms in the acquired firm's industry.<sup>98</sup> This is an important consideration in any merger case, the general fear being the development of an oligopoly which will allow the creation of artificially high prices.<sup>99</sup> Concentration is immediately furthered in a horizontal merger, because one firm disappears from the market. In a conglomerate-power merger, the process may be slower, but more deadly. When conglomerate-power begins to develop, it drives small firms from the market.<sup>100</sup> As this happens, the remaining firms move towards oligopoly. Thus, the division connected with a conglomerate-power firm may be using both conglomerate power and oligopolistic power.

Not only are existing small firms threatened, potential entrants into the market, counted on to offset the normal rate of business failure, are discouraged.<sup>101</sup> The threat of massive injection of conglomerate-power, po-

96. Procter & Gamble Co., 3 TRADE REG. REP. ¶ 16673, at 21585 (FTC 1963).

97. *Id.* at 21586. This characterization of "advantageous" or "disadvantageous," one writer warns, demands a "value judgement as to which forms of rivalry are most beneficial." Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 244 (1960). But one man's value judgement may be another's economic analysis.

98. Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962); United States v. FMC Corp., 218 F. Supp. 817 (N.D. Cal.) (preliminary injunction denied), *appeal dismissed*, 321 F.2d 534 (3d Cir.), *aff'd*, 84 Sup. Ct. 4 (1963) (Goldberg, J., opinion in chamber); United States v. Lever Bros. Co., 216 F. Supp. 887 (S.D.N.Y. 1963). Up to a certain point, of course, concentration in a given market will be beneficial, since economies of scale and opportunities of research are fostered. See Givens, *Affirmative Benefits of Industrial Mergers and Section 7 of the Clayton Act*, 26 IND. L.J. 51 (1960). The point will necessarily be different for each industry, since each has its own economies of scale and research possibilities.

99. United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964); *accord*, A. G. Spalding & Bros., Inc. v. FTC, 301 F.2d 585, 617 (3d Cir. 1962); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 604 (1958); see 61 COLUM. L. REV. 629, 667 (1961).

100. See Clark, *Conglomerate Mergers and Section 7 of the Clayton Act*, 36 NOTRE DAME LAW. 255, 273 (1961). A contrary view is given in Blair, *The Conglomerate Merger in Economics and Law*, 46 GEO. L.J. 672, 683-85 (1958). In Consolidated Foods Corp. v. FTC, 329 F.2d 623 (7th Cir.), *cert. granted*, 379 U.S. 412 (1964) (No. 422), it was noted that reciprocal buying could be more effectively used against small firms.

101. This is a consideration in any discussion of concentration. See, e.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 366-67 (1963); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 606 (S.D.N.Y. 1958); American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F. Supp. 387, 400 (S.D.N.Y. 1957).

tentially greater than any threat which could be posed by concentration of existing competition, makes conglomerate-power firms uniquely successful in foreclosing access to potential entrants.<sup>102</sup> Further, when a large firm merges into a similar product area or into a new geographic area, it terminates its status as a potential competitor who could have created a new division or entered the market on its own.<sup>103</sup> Thus, what could have been an infusion of new blood into the competitive structure of the market becomes a clog on it. Moreover, the firm's position as a potential competitor may have operated to check any tendency among the existing firms toward monopoly prices.<sup>104</sup> The increasing occurrence of conglomerate-power mergers, with these forces of market concentration, was a major reason for the "rising tide of economic concentration" described by the Supreme Court as the inducement for the 1950 amendment to section 7.<sup>105</sup>

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102. Procter & Gamble Co., 3 TRADE REG. REP. ¶ 16673, at 21570-71 (FTC 1963). This potential use of conglomerate-power is of particular importance as the product line approaches monopoly status, since a new entrant would face a firmly entrenched market leader, able to use his monopolistic power as well as able to draw on conglomerate power. Ekco Prods. Co., 3 TRADE REG. REP. ¶ 16879, at 21900-01 (FTC 1964); Procter & Gamble, *supra*, at 21583.

103. Ekco Prods. Co., *supra* note 102, at 21907; Procter & Gamble Co., *supra* note 102; Foremost Dairies, Inc., 60 F.T.C. 944, 1071-72, 1086-87, 1089 (FTC 1962); Beatrice Foods Co., 3 TRADE REG. REP. ¶ 16831, at 21811 (FTC 1964) (initial decision of hearing examiner).

104. Ekco Prods. Co., *supra* note 102, at 21900-01; Procter & Gamble Co., *supra* note 102, at 21584; Foremost Dairies, Inc., *supra* note 103, at 1087.

In *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), acquisition of a firm which was a potential competitor in the respondent's geographic area was set aside on the ground that this was elimination of a potential competitor. No exercise of conglomerate-power existed here. The merger was actually a market-extension merger, but the Court was not concerned with competition in the acquired firm's geographic market. It was instead concerned with competition in the acquiring firm's geographic market. See *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 599 (S.D.N.Y. 1958).

105. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18, 345-46 (1962); *accord*, *United States v. Bethlehem Steel Corp.*, *supra* note 104, at 582. Whether there was this "rising tide" is a matter of some dispute. From 1947 to 1954 the value added by the 200 largest manufacturers rose from 30 to 37 per cent. STOCKING, WORKABLE COMPETITION AND ANTI-TRUST POLICY 410 n.14 (1961); MERGERS AND SUPERCONCENTRATION, *supra* note 34, at 13. On the other hand, it has been contended that reports showing little increase in concentration were ignored by Senate groups seeking enactment of the 1950 amendment, and that the major rise was delayed until the 1950s. Bok, *supra* note 97, at 232. Some "natural" increase in concentration is inevitable as the economy shifts from a decentralized agricultural basis to a relatively centralized industrial basis. By the 1950s this trend was about complete. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM 24, 30-32 (1964). Probably because of growing markets and availability of excess funds, concentration grows during periods of prosperity. The first two large merger movements were in the 1900s and the 1920s; the country is now in its third. This corresponds to the periods of peacetime prosperity in the twentieth century. MERGERS AND SUPERCONCENTRATION, *supra* note 34, at 9-12.

Basically, there are two reasons for congressional opposition to market concentration. First is the economic reason that it leads to oligopoly or monopoly with a consequent artificially higher level of prices.<sup>106</sup> Second is the desire to perpetuate a system of small economic units in a decentralized society for reasons unconnected with economic theory.<sup>107</sup>

The second basis of opposition is premised on the personal virtues supposedly inculcated in the population as a result of a small-business system.<sup>108</sup> There are indications that this basis may prevail even if the first basis reveals that oligopoly may actually achieve the result ideally achieved by the competitive model.<sup>109</sup> The Supreme Court has stated that: "Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."<sup>110</sup> In the 1950 debates prior to the passage of the section 7 amendment, Congress thrust a political stick into the economic model; as one observer said of the debates: "competition appeared to possess a strong socio-political connotation which centered on the virtues of the small entrepreneur to an extent seldom duplicated in economic literature."<sup>111</sup>

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106. See note 1 *supra*.

107. *United States v. Aluminum Co. of America*, 377 U.S. 271, 281 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 316-18 (1962); *John Wright & Associates v. Ullrich*, 328 F.2d 474, 480 (8th Cir. 1964). In the *Aluminum Co.*, case it was stated that "Rome [Cable Corporation] seems to us the prototype of the small independent that Congress aimed to preserve by Section 7." 377 U.S. at 281. For criticism of this emphasis, see Barnes, *The Primacy of Competition and the Brown Shoe Decision*, 51 GEO. L.J. 706, 740 (1963); Handler & Robinson, *The Supreme Court v. Corporate Mergers*, *Fortune*, Jan. 1965, p. 164.

108. For example, see the dissenting opinion by Mr. Justice Douglas in *Standard Oil Co. v. United States*, 337 U.S. 293, 318-19 (1949):

But beyond all that [effects on prices] there is the effect on the community when independents are swallowed up by the trusts and the entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry.

109. *Crown Zellerbach Co. v. FTC*, 296 F.2d 800, 825 (9th Cir. 1961), *cert. denied*, 370 U.S. 937 (1962). This seems to result from ignoring the notion of workable competition which "takes cognizance of the sadly overlooked point that over-all consequences, which in theory are deplorable, are often in real life quite agreeable." GALBRAITH, *op. cit. supra* note 92, at 58.

110. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962); *accord*, *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D.Pa. 1963), *interlocutory injunction aff'd*, 320 F.2d 509 (3d Cir. 1963); *United States v. Bethlehem Steel Co.*, 168 F. Supp. 576, 617-18 (S.D.N.Y. 1958); see Barnes, *supra* note 92, at 711.

111. Bok, *supra* note 97, at 236-37. The preoccupation with small business units may be the result of current popular economic theory being based largely on conceptions developed in the nineteenth century when small business units were by far the major

In opposing concentration, Congress is not unmindful that much of the threat to small business comes about because of the diversified firm.<sup>112</sup> In light of modern business considerations, there are many compelling reasons for a successful firm to diversify. Such a firm may spread risks, have access to greater financial resources, enjoy increased stability, expand into new geographic or product areas without fear of unpredictable costs present in internal expansion, maintain a ready supply of raw materials to offset market uncertainties and enjoy ready access to short-term and long-term credit.<sup>113</sup> It is no wonder that the FTC stated in 1963 that "many, perhaps most, mergers involving substantial firms are conglomerate."<sup>114</sup> It is true, of course, that a diversified firm may have resources, such as research facilities, which may produce better products for the consumer in the acquired firm's market.

But most of these advantages simply mean that existing divisions of the conglomerate firm help carry burdens for the newly-acquired division.<sup>115</sup> A firm becoming a division of a diversified firm receives aid in its competitive struggle. Or, put another way, it receives the benefit of conglomerate-power. Thus, the recognition of conglomerate-power mergers as threats to competition places the anti-trust law as a roadblock, at least partially, to diversification. So far this has been limited to rather blatant methods of competi-

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part of the economy. Agriculture, the most obvious example of the competitive model, was then the dominant sector of the economy. The description of the nineteenth century, however, has become the goal of the twentieth century, or, stated another way, "the preoccupation ceased to be with interpreting reality and came to be with building a model economic society." GALBRAITH, *op. cit. supra* note 92, at 16. Thus a theory assuming the existence of small business units is being applied to an economy with large business units.

112. *Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962).

113. MERGERS AND SUPERCONCENTRATION, *supra* note 34, at 15; Dean, *Business Considerations—Why Merge?*, 3 ANTI-TRUST BULL. 513 (1958); Hale, *supra* note 74, at 335-38; *New Economic Issues in Merger Enforcement*, *supra* note 94, at 119. For a discussion of the importance of insuring supplies in the steel industry, see *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 587, 612-13 (S.D.N.Y. 1958).

114. *Procter & Gamble Co.*, 3 TRADE REG. REP. ¶ 16673, at 21567 (FTC 1963).

115. Facilities available for research to develop products for the newly-acquired firm are largely made possible by retaining earnings from profits from existing products (see note 78 *supra*). In a purely competitive model, profits retained from existing products would have been lower, however, because of competition from other firms, or because of lowered prices or quality improvements in the product generating the profits, or because of increased dividends to shareholders. A corporation which retains earnings and uses them to finance diversification in effect substitutes the judgement of corporate managers for the supposedly impersonal capital market in determining the allocation of resources in the economy. Of course, the "impersonal" capital market may in turn reduce itself to the sum total of personal decisions by investment officials and large investors. Paradoxically, the government encourages diversification by taxing capital gains at a lower rate than dividends. INT. REV. CODE OF 1954, §§ 301, 1201-02.

tive harm. Nevertheless, as suggested in the conclusion, there lurks in the competitive model a proposition which may provide a theoretical basis for outlawing a large part, if not almost all parts, of the diversification movement.

#### CONCLUSION

The essence of the concept of conglomerate-power is the transfer of corporate resources from one division of a firm to another, or from one market to another. In neither case does a product stand or fall in its market on its own. In a conglomerate-power merger there is a gathering under one financial roof of two or more disparate (either in product or market) economic organizations with each ready to help the other. To the extent that one does help the other, the other's ability to compete is heightened. But its advantages do not come because it can gain customers on its own, but rather from the aid it receives from another division of the conglomerate.<sup>116</sup>

Thus far the courts have recognized only blatantly overt methods of transferring conglomerate-power from one division of a firm to another—usually in cases in which the transferred advantage has been considered “socially disadvantageous.”<sup>117</sup> But the courts have recognized the business reality that conglomerate-power is generally feasible only where there is a significant disparity in size between the acquiring firm and the competitors in the acquired firm's market.<sup>118</sup> It is only when the diversion of resources

116. In a diversified firm, the price of a given product may be pegged at cost or less, the difference being subsidized by the other divisions. See EDWARDS, *BIG BUSINESS AND THE POLICY OF COMPETITION* 11, 45 (1956); MILLER, *THE MANAGERIAL PROBLEMS OF DIVERSIFICATION* 139-40 (1963). Unless there is careful cost-accounting, such subsidies may unconsciously be made. ZINKE, *THE AMERICAN ECONOMY* 491-92 (1959).

117. In product-extension mergers, advertising and marketing resources to aid newly-acquired products are shifted from established products; in market-extension mergers, profits from an established market are used to allow price cuts in a newly-acquired market and in reciprocal buying mergers, the cost of the regularly-bought product may be higher as the coerced firm raises its prices to offset losses suffered by buying the coerced product (thus the coerced product is subsidized by the regularly-bought product).

Thus the courts have been willing to make the above analysis, but not the analysis in note 115 *supra*. It is difficult to see, in view of the theory of the competitive model, how the two differ. A possible reconciliation is that corporate diversification decisions in note 115 situations may turn out to conform with consumer demands. When they do not, the devices mentioned above may be used in an effort to achieve by socially disadvantageous methods what could not be achieved by socially advantageous methods. This is what the courts fear: but query whether such predictions can be made before the fact. Hence the importance of post-acquisition evidence (see text at notes 48-49 *supra*). Will efforts to enforce the “impersonal” supply and demand economy lead to a requirement for judicial approval of every diversification decision?

118. *E.g.*, the following disparities in size have been noted between the conglomerate firm and the acquired firm's market:

Conglomerate sales of over \$1,000,000,000 and acquired firm's industry's maximum



from one of the conglomerate's divisions causes a small amount of harm to the yielding division but a great benefit to the benefiting division that conglomerate-power will be utilized.<sup>119</sup> Otherwise, the conglomerate would be merely robbing Peter to pay Paul. Thus conglomerate-power will be utilized generally only to the detriment of small firms; in this sense the economic analysis of conglomerate-power leads to a conclusion compatible with the political objectives of Congress in protecting small business.

Paradoxically, the discovery of the potential harm from conglomerate-power was delayed by virtue of an economic theory which apotheosizes the role of small business. Traditionally, a fundamental assumption of the competitive system has been that it is made up of relatively small sellers and that each firm competes in each of its product-lines as if it is a one product firm. No doubt this assumption stems from the traditional reality that most firms were one-product firms, or that where there were multi-product firms, there was no sophisticated use of conglomerate-power. At any rate, the economic theory was based on the assumption that prices in a given market were affected only by the activities of a firm in that product market. Even the concept of "workable competition," considered a realistic recasting of economic theory, emphasized the relationships of one-product firms.<sup>120</sup>

sales of \$40,000,000. Procter & Gamble Co., 3 TRADE REG. REP. ¶ 16673, at 21568-69 (FTC, 1963).

Conglomerate assets of \$60,000,000 and acquired firm having one-half of its market with assets of \$1,200,000. Consolidated Foods Corp., No. 7000, FTC, Nov. 15, 1962, *rev'd on other grounds*, 329 F.2d 623 (7th Cir.), *cert. granted*, 379 U.S. 412 (1964) (No. 422).

Conglomerate sales of \$388,000,000, acquired firm's market ranged generally from \$225,000 to \$4,000,000 in sales, with one having \$48,000,000. Foremost Dairies, Inc., 60 F.T.C. 944, 1049, 1064, 1066, 1069, 1085 (1962).

Conglomerate sales of \$181,000,000, total sales in the three lines of commerce acquired firms were engaged in were \$10,000,000; \$18,000,000; and \$37,000,000. United States v. Ingersoll-Rand Co., 320 F.2d 509, 518, 521-23 (3d Cir. 1961).

119. This is particularly possible when the yielding division itself is in an oligopolistic industry with imperfect competition, where profit rates may be high, or where prices can be raised slightly without losing a proportionate amount of sales. All rivals in an oligopolistic industry, of course, may be each charging prices slightly higher than would normally be charged in an industry which had many sellers. In this case, each would be in a position to use the excess over market price to continually subsidize newly-acquired small market firms.

120. This is the recognition that under certain conditions competition between a few large firms may be more effective than that between a large number of small firms. See DIRLAM AND KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 3-17 (1954). It has been contended that this theory was developed in response to recognition of de facto oligopoly in large segments of the economy. GALBRAITH, *op. cit. supra* note 92, at 40; GIVENS, *supra* note 98, at 53; WALDEN, *Anti-Trust in the Positive State*, 41 TEX. L. REV. 741, 764-65 (1963).

The success of an economic organization in each product-line (or market) is supposedly gauged by the success of that product-line (or market); the most efficient firms survive because they produce the most demanded product. But a division of a conglomerate-power firm may survive even when it produces an inferior product, because it receives benefits from other divisions of the conglomerate. Only when an analysis of actual business operations disclosed that conglomerate-power allowed a firm to do this was the anti-competitive threat from diversified firms recognized. Once recognized, it was a relatively simple step to point out that the use of conglomerate-power conflicted with the classical model. The gains from competition in some product-lines or markets are used to benefit the conglomerate and harm competition in another product-line or market. Although a diversified firm may find it advantageous to lessen profits in one of its product-lines in order to gain advantages in a second, the harm to competition in the second product-line, not the profits of the firm, is the principal factor establishing a violation.

To a farsighted business executive, this use of conglomerate power may be common sense, an opportunity to be seized. He is concerned not with profits to be gained by a particular product, but the profits to be gained by the firm. But when emphasis is shifted from profit from products to profit for the firm, a major presupposition of the classical competitive theory is removed; that the price of a product reflects its costs plus a profit. Concern with the firm's profits can allow a loss on one product, while another is gaining.

However, this means that there is no longer a correlation between firm competition and product competition: the twin consequences of seller advantage and buyer advantage no longer exist. Because it benefits the seller and not the buyer, conglomerate-power has been added to monopolistic and oligopolistic power as a threat to competition. For a business practice to conform to the competitive system which the courts are enforcing, it must benefit both buyer and seller.

With the developing recognition that conglomerate-power may adversely affect the competitive system and thus be a threat to competition, firms seeking diversification through mergers<sup>121</sup> may find it as difficult to justify their activities as many now do who seek expansion by acquiring competitors.

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121. The provision that Section 7 "shall not apply to corporations purchasing such stock solely for investment" (Clayton Act, § 7, 38 Stat. 731 (1941), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958)) does not validate a merger if it nonetheless results in a substantial lessening of competition. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957).