ISSN 1745-638X (Online)

THE COMPETITION LAW REVIEW

Volume 5 Issue 2 pp 147-151 **July 2009**

Editorial - Globalisation, International Enforcement and Extraterritoriality

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International competition law is not so much a discrete subject but a site where a number of different laws come together, sometimes abruptly. Competition law jurisdictions not infrequently reach different conclusions on the legality of a transaction or some other conduct that has economic effects in more than one jurisdiction; the *GE/Honeywell* merger being perhaps the most often cited example.[1] Understanding the many differences between jurisdictions, and the conflicts to which they occasionally give rise, requires appreciating that competition laws are not merely sets of substantive rules, but have procedural, institutional and jurisdictional dimensions. The enforcement of competition law in one country might also directly conflict with a variety of laws, industry specific regulations and policies of other jurisdictions. The study of international competition law therefore needs to not just take a holistic view of the scope of competition law, but also embrace the various exceptions and exemptions from general competition law rules, enforcement policies and practices, and other government measures and laws, including international agreements, that impact on the same variables as competition law.

The experience of the last half-century has generated a fair degree of understanding of the types of national (or regional) interests that are pursued in international competition law cases and of the circumstances when national and regional interests might come into conflict. While the problems may have been identified, the solutions to the problems have proved more elusive.

The conflicts arising from the extraterritorial application of the type that characterised international competition law in the second half of the twentieth century have now decreased in intensity, but have not totally disappeared. The need to protect, and the difficulties of protecting, local consumers from anticompetitive conduct abroad, whether through cartels, mergers or abuses of dominant positions, has become broadly accepted as a legitimate policy goal in most countries. Concerns about loss of national sovereignty and policy autonomy and the protection of the interests of local firms are still present, but do not dominate. This reflects both a greater acceptance of the value of competition laws, as well as a growing recognition of the need to meet the challenges that globalisation poses for economic regulation.

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[1] See COMP/M.2220, *General Electric/Honeywell*, OJ 2004, L48/1; US Department of Justice Press Release, 'Statement by Assistant Attorney General Charles A. James on the EU's Decision regarding the GE/Honeywell acquisition', 3 July 2001.

The somewhat different concern that anticompetitive conduct may create barriers to the access of foreign markets, as the exclusionary practices in the distribution of photographic film and paper were alleged to have done in the well-known *Kodak/Fuji* dispute, remains legally problematic.[2] Like the cases where the effects of anticompetitive conduct are felt abroad, where anticompetitive conduct restricts market access, the issue has become not so much whether competition law should be applied, but which competition law should be applied and whether there needs to be an international agreement setting out minimum standards or principles for competition laws. The emerging consensus appears to be that a country may apply its laws extraterritorially to protect consumers within its territory, but generally not to assist its competitors penetrate a foreign market. In the latter case, the local jurisdiction is in the best position to apply its own laws.

Many practical obstacles lie in the way of a jurisdiction successfully applying its competition law extraterritorially or ensuring that foreign competition laws are applied in cases where foreign anticompetitive conduct closes markets. However, all of the jurisdictions concerned have legitimate interests to protect. In the case of the extraterritorial application of competition law, the interests of foreign firms will be directly affected as might their competitiveness and efficiency. Similarly, in market access cases, a country applying its competition laws might have little interest in protecting local consumers and access by foreign suppliers, but will have an interest in not harming the competitiveness of local firms and the efficiency of its economy.

In all areas of international competition law, firms and most governments have been concerned about the costs of multiple overlapping competition laws. There is also a fear that one jurisdiction could derail a major international transaction or business practice that would enhance global welfare. These concerns are perhaps the greatest in the case of mergers, which are frequently reviewed in multiple jurisdictions.

Competition law is by nature a set of general rules that must be applied in a wide range of cases, both domestic and international. When the situations briefly described above are examined closely, it becomes apparent that the task of drafting a set of *rules* that will maximise the interest of any one, let alone all, jurisdictions, in every case would be difficult if not impossible. One consequence is that each jurisdiction must balance competing national or regional interests when designing national laws or negotiating international rules in this field. This internal balancing is probably as important and difficult as the task of reconciling competing interests among jurisdictions.

Chapters on competition laws are now commonplace in bilateral and regional trade agreements. While the World Trade Organization does not impose any requirement to adopt a general competition law, it contains a few sector-specific competition rules and some general trade rules, like national treatment, that might have a bearing on the application of the competition laws of its Members. There has also been a proliferation of enforcement cooperation agreements between competition authorities, as well as

[2] *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998.

increasing efforts to apply broad agreements on international judicial assistance enforcement cooperation agreements to competition law, including mutual legal assistance treaties, extradition treaties, and agreements and conventions on judgments and jurisdiction. The International Competition Network, the Organisation for Economic Cooperation and Development and other international organisations have provided forums for the discussion of best practices and the proselytisation of competition law. These initiatives all have some value and contribute to the solution of some international competition law problems. They have also become established features of the competition law landscape. Understanding the solutions and their relationship with competition laws and other international initiatives has therefore become part of understanding the problem.

International competition law is likely to remain an amalgam of laws and international rules in the foreseeable future. A binding global competition law code with a supranational enforcement agency is very unlikely. There is also a growing recognition that, while competition law enforcement will remain the responsibility of national and regional authorities, the agreements mentioned in the previous paragraph all have a role to play as part of a practical approach to reducing international competition law problems. However, as yet, success in envisaging how all of the dimensions of the international competition law problems and all of the elements of the solution fit together has been more limited.[3]

The importance of international competition law has grown with the increasing integration of national economies and the proliferation of national and regional competition laws. The number of major players is set to rise. All of the contributions to this issue of the *Competition Law Review* discuss developing countries in more or less detail, in particular the consequences of the adoption and modernisation of competition law in China and India. Marco Botta's article focuses on an element of developing country competition law that has not been addressed in the literature in any detail, namely the actual operation of competition law cooperation agreements between developing countries.

After providing an overview of the competition law agencies and enforcement systems in Argentina and Brazil, Marco Botta examines the agreement to establish a regional competition law in Mercusor as well as the arrangements for bilateral cooperation between the competition authorities in Argentina and Brazil. Competition law cooperation has not been successful. A number of lessons for developing countries are drawn from this case study. Cooperation is unlikely to be effective where there is a lack of trust between the agencies in question and one or more agency suffers from the institutional problems that many new competition agencies face, such as the lack of financial and human resources and limited independence from the executive branch. Many of these issues are likely to be resolved as the competition agencies mature.

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[3] This idea is pursued at length in Chris Noonan, *The Emerging Principles of International Competition Law* (Oxford: Oxford University Press, 2008).

The increasing prominence of developing country competition law regimes may have a broader significance for international competition law. First, that international competition law cooperation should not be seen as a North-Atlantic phenomenon and is likely to become increasing complex in the future. The struggle to conclude the Doha Round of Trade Negotiations in the World Trade Organization illustrates the difficulty of reaching agreement as the diversity and number of the major powers increases. Scholars and policy-makers might need to re-imagine international competition law as a more global phenomenon and explore how to cope with diversity. Secondly, international competition law cooperation should perhaps not be seen as a state of affairs, but as an iterative process whereby countries progress into deeper forms of cooperation over time as trust is built up, institutional arrangements are put in place and, mostly importantly, as the need arises.

The second article by Dr Jonathan Galloway discusses the international efforts to facilitate the convergence of procedures governing the review of mergers. While concluding that the promotion of best practices can lead to the clarification of rules and the reduction of unnecessary costs for the merging parties, the article demonstrates that there are limits to the extent to which cooperation and coordination are likely to take place and alleviate the burden of multiple reviews.

The article provides an important reminder of the difference between convergence of substantive and procedural rules, on the one hand, and coordination of laws and enforcement efforts, on the other hand. While differences between competition laws may occasionally give rise to conflict, the elimination of differences would neither eliminate conflict nor minimise the transaction costs involved with multi-jurisdictional merger review. The examination of multi-jurisdictional merger review also suggests that there are clear limits on what states could be reasonably expected to agree given the international system of states. Without states being able to agree to subordinate local interests to the pursuit of global welfare, ignoring the effect on the welfare of individual jurisdictions, divergent treatment of the same business activity and multiple reviews are inevitable. The improbability of states agreeing to a system of merger review that would minimise transaction costs through a one-stop, or even two-stop, shop is the price that must be paid for national and regional autonomy and experimentation. The optimal arrangement, whether from a national or a global point of view, is a complex problem, which involves several competing objectives.

In the third article in this issue, Professor Sock-Yong Phang discusses the exemption of international liner shipping and international airline sectors from competition law. The gradual liberalisation of the antitrust exemptions in these sectors in the EU and the US are documented.

International transportation industries have generated a significant amount of competition law litigation over the last century,[4] and have been the site of a number of

[4] See, for example, *United States v Pacific & Arctic Railway & Navigation Company*, 228 US 87 (1913); *Thomsen v Cayser*, 243 US 66 (1917); *United States v Hamburg-Amerikanisihie Packetfahrt-Actien Gesellschaft*, 200 Fed Rep 806 (1911), 239 US 466 (1916).

international disputes over the last half-century.[5] Trans-border operation inevitably meant that these industries would be in the forefront of international competition law. Nonetheless, many of the conflicts have arisen because one jurisdiction sought to apply its competition law to conduct in an international transportation sector that another jurisdiction believed should be exempt from competition law. As Professor Sock-Yong Phang's article shows the justifications for exemption of these sectors, or at least some conduct within these sectors, has been long contested.

Throughout the world a number of other industries or actions are exempt from general competition law rules. Sometimes the industry or conduct is subject to another regulatory regime. However, genuine disagreements about whether the conduct should be exempt from competition law rules continue to arise. The management of the international competition law system may therefore require not simply the coming to terms with the differences in competition law rules, but also exceptions from competition law rules. If agreement on the scope of exemptions cannot be reached, an international agreement that required countries or regions to adopt competition laws might need to contain general principles governing when exemptions are legitimate.

The three papers in this issue of the *Competition Law Review* address three different aspects of international competition law. They also suggest that the subject will retain a certain degree of messiness in the foreseeable future. It is perhaps desirable for the international competition law system to have some play at the joints. While it remains flexible, it remains open to new ideas.

Addendum

The Editors are delighted to include the first book review article in this issue of the Competition Law Review, by Matteo P Negrinotti of E.S. Rockefeller, *The Antitrust Religion*, and we would encourage the submission of similar review articles for future issues of the Review.

[5] See, for example, *Laker Airways v Sabena, Belgian World Airlines*, 568 F Supp 811 (DDC 1983), 731 F 2d 909 (DC Cir 1984); *British Airways Board v Laker Airways Ltd* [1984] QB 142 (CA), reversed, [1985] 1 AC 58 (HL).