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Issues & Overview

Harmonizing The Globalization Of Antitrust Laws

To suggest that antitrust and competition concepts are becoming more global is akin to suggesting that ipods might be more than a fad. Antitrust globalization is old news. Consider, for example, the International Competition Network (ICN), which formed in 2001 with the hope that it would become a meeting place for ideas, education and coordination among the world's competition enforcement agencies. The press release heralding its formation identified thirteen countries and The European Union as founding members. Today, the ICN's roster totals 90 nations and the EU, and includes a considerable number of countries where the concept of competition policy and enforcement would have seemed incongruous 10-15 years ago.

With globalization well under way, the more pressing concern is harmonization. Although the general concepts underlying competition laws are similar across jurisdictions, application presents a stickier issue. One need look only at the disparate treatment afforded GE/Honeywell and Microsoft by EU and U.S. regulators to see the potential dilemma, which is magnified all the more as the number of active enforcement agencies multiplies. How does a business handle one jurisdiction's condemnation of a particular practice or merger, while another has already given its blessing? Of course, this is not an issue that is unique to competition law. For example, businesses face an array of labeling and packaging requirements across national boundaries. But the stakes are raised when the practice being challenged by the competition laws is at the core of the product or of the company's marketing strategy. The great danger is that the lowest common denominator will apply, and in antitrust that means the most aggressive enforcement. As the American experience has shown over the last 100-plus years, that is not necessarily a good thing.

Despite the ubiquity of competition laws, practitioners and their clients are increasingly faced with uncertainty over how those laws will be applied across different jurisdictions. The upcoming implementation of China's Anti-Monopoly Law (AML) makes the point. The concept of a fair competition law in China has been roundly applauded and still evokes some surprise. But after thirteen years of drafting and tweaking, skepticism still exists about whether the law will be applied transparently and without favoritism to domestic Chinese businesses. The so-called "foreign security review," which allows the competition authorities to challenge a transaction if it poses a risk to industries important to China's national security, is fraught with such potential. Likewise, concern remains high over protection of intellectual property rights and whether the AML will actually be used to invade those rights. Of course, these concerns are not unique to China. The Dubai Ports fiasco in the United States, as well as the protectionism seen in France and other countries present similar issues.

Another noteworthy trend has been what some term the "Americanization" of European private enforcement actions. EU Competition Commissioners have been calling for increased private enforcement for some time, and the 2006 green paper addressing the issues makes clear that there is an appetite for greater action. In a clear indication that it's coming, the market also endorses the concept. U.S.-based plaintiffs law firms have opened offices in London, and corporate law firms have answered the call to arms. This development is interesting because advocates mouth the need to avoid the "excesses" of U.S.-style litigation, while at the same time Europe seems to be moving toward embracing these concepts. For example, a U.K. appellate court recently upheld third party funding of competition claims, and the Civil Justice Counsel just released a report recommending the use of such funding and advocating serious consideration of contingent fees in multi-party cases where individual parties would not consider the benefits of litigation to be worth the costs of independently funding it. Sounds an awful lot like the class actions and contingency fees that are so often derided in the U.S.

So in antitrust and competition law, like in some many other areas, businesses and their lawyers are being significantly affected by the process of globalization. In the not-too-distant past, competition lawyers could concern themselves with a handful of key jurisdictions when seeking approval of a merger, and private remedy litigation was largely a province of the United States, Canada and a few other countries. A global antitrust capacity was nice but hardly essential, and few law firms had any antitrust presence outside their home markets. But now, counselors *and* litigators must have the capacity to deal simultaneously with multiple jurisdictions, and their still quite different procedures and standards. This has produced a small number of truly global antitrust practices (and a larger number of aspirants), and it has driven global companies to demand law firms that can efficiently manage and coordinate competition issues around the world. The firms must have strategies that account for differences between jurisdictions so that what may be helpful in one does not cause problems in another.

This is just part of the broader engagement of lawyers and law firms as global change agents. Globalization can only succeed if the rule of law is enshrined in all relevant jurisdictions; while the trends are positive, we have a long way to go to reach the global application of the rule of law to international business – just ask oil companies in Venezuela if they feel protected by clear and fair legal rules. Lawyers, because of their special role as intermediaries between business and citizens and their government, play a critical role in this essential aspect of global development. Antitrust lawyers and law firms have essentially established a global physical presence, and their critical role in creating the institutions that will nourish and support the expansion of global business opportunities is already clear. But there is still far to go.

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