

COMPETITION POLICY IN THE GLOBAL ECONOMY

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INTRODUCTION

This on-line casebook examines the fields of international antitrust and international trade law. In general, it will examine how the United States and other jurisdictions regulate competition among firms which do business abroad. This will include how competition policy regulates individuals and firms located outside the United States in their competition with United States firms as well as the rules governing United States firms. These issues would not be of great legal importance if there were no imports or exports, no international boycotts or cartels, no licensing of technology, or no mergers or joint ventures between companies located in different countries. However, the complexity of today's international economy poses a variety of complex problems which can no longer be addressed solely from the perspective of one country's laws.

Some recent examples include the international criminal and civil litigation involving multi-billion international cartels; the antitrust litigation against Microsoft in the United States, the European Union, Korea, and other jurisdictions; the Boeing-McDonnell, GE/Honeywell and the Time Warner/AOL mergers; the bankruptcy of Laker Airlines and its effect on the United States market; mega-mergers between major U.S. corporations for the purpose of better competing with foreign firms; extensive joint ventures between U.S. and foreign manufacturers in the energy, automotive, and pharmaceutical industries; the

lengthy antitrust and trade proceedings between the United States and Japanese television industries; the formation of export trading companies and export cartels among rival American firms; and the challenges associated with cooperation between countries in competition matters and seeking to harmonize conflicting laws in the field.

The types of legal issues posed by these situations raise troubling questions beyond those dealt with in traditional United States antitrust laws. Unlike traditional antitrust litigation involving a government investigation or civil treble damage action between two domestic firms, a variety of complications are introduced when one or more of the parties, or the activity involved, takes place outside the United States. We will be looking primarily at how the United States has coped and adapted its antitrust laws to deal with the complexities of international business and how other jurisdictions have followed or rejected this path.

One hundred years ago, the answer would have been simple. Originally, the Supreme Court simply held that the antitrust laws did not apply to conduct of persons located outside the United States. For the last sixty years, however, the answer has been different. The antitrust and other regulatory laws of the United States have been held to apply to conduct anywhere in the world once some requisite effect on the United States market has been demonstrated.

This is a problem which has ramifications far beyond that of merely the laws of the United States. The European Union, other developed market economies, hosts of countries with newly adopted antitrust laws, the United Nations, the Organization of Economic Cooperation and Development and the new International Competition Network have all

recognized the potential problems posed by cartels and monopolies operating at the international level and affecting the economies of more than one nation. Throughout these materials, there will be references to how other legal systems have sought to protect their own markets from anticompetitive behavior.

An effective legal solution to these problems raises a variety of difficult questions for the United States and its partners in antitrust enforcement. How much contact with the United States is necessary before our courts can proceed? How much effect on the United States is necessary before subject matter or personal jurisdiction can be established? What is the appropriate scope of discovery of information located outside the United States? What are the appropriate sanctions for the refusal of a foreign defendant to appear or cooperate in the discovery process? How will a judgment against an international corporation be enforced?

The answers to these questions depend both on how foreign countries view the legitimacy of the United States antitrust policy and how those same countries view the legitimacy of the United States litigation process. Many of the premises of the United States legal system are based on assumptions relating to the relationship between businesses and the government which do not hold true in other countries. For example, it is generally assumed that business corporations in the United States are privately-owned enterprises independent from the government, and largely adversarial to the interests of government regulators. This is not necessarily true for the business corporations in other countries which may be either publicly-owned or operated in substantial cooperation with their governments. This in turn raises the question of how anticompetitive behavior should

be treated that is legal, encouraged, or even compelled by foreign government.

The second principal area covered in these materials analyzes United States antitrust laws in contrast to the full spectrum of the other laws regulating international trade. The purpose and effect of the United States antitrust law must be read in conjunction with United States foreign and international trade policy in order to understand the constraints placed on the United States and foreign firms. Rationalizing these competing and conflicting principles, you must take into account the different purposes behind each set of laws. At its simplest, antitrust law seeks to promote full and free competition. In contrast, our international trade policy since World War II has sought to promote the idea of “fair” competition and a system based on a “level playing field” without the interference of trade practices which distort the market place. Finally, our foreign policy has sought, however erratically, to maximize the military, political and economic power of the United States in a world system consisting of independent sovereign states.

The final frontier explored in the casebook is the burgeoning field of cooperation between countries in the enforcement of competition law and the beginning of what may be the first glimmering of true antitrust law. The casebook examines cooperation agreements between the United States, the European Union and their trading partners where the jurisdictions actively assist each other in criminal and civil investigations and litigation. It will look at less specific regional agreements to the same effect and finally at a series of attempts to create multilateral rules in the competition law area.

In examining the legal and economic problems and issues posed in this casebook,

there are three perspectives which must be kept in mind. First, there is the perspective of the private parties engaged in an international business transaction. The private parties must be able to predict the legal effect of the laws and regulations they must obey. They must be able to plan their transactions and their conduct to maximize their profits without violating the civil or criminal laws of each of the legal systems in which they operate. In the event that they miscalculate, the private parties must be able to choose a course of conduct that will minimize the penalties they face in each of those legal systems.

The second perspective is that of the national level. How is the United States or another country affected by the private conduct? What set of laws will best effectuate the national interest and a consistent national legal policy? Should the private conduct be regulated by governmental action or left to private litigation? Whose laws were meant to apply to the private transaction under review? Can the laws of other countries be relied upon to properly regulate anticompetitive or other undesirable conduct?

Finally, there is the truly international perspective. Does the private transaction and national policy promote the interests of the international community? How can one distinguish between a conflict between sovereign nations and not merely a conflict between citizens of different nations? How can a true international conflict be best resolved and avoided in the future? How can national antitrust agencies cooperate with each other in regulating transnational anticompetitive behavior? Does the world trading system need a set of international antitrust rules? What international institutions should take the lead in developing such rules and principles and in resolving disputes over international competition issues?

These materials are intended for use in a U.S. style law school class or seminar and designed to provide the base knowledge necessary to engage in sophisticated research in the field and to produce a research based paper of 20-25 pages in length. By necessity, these materials are in English and have primarily a United States focus. The value of an on-line casebook in this field goes beyond the merely the cost savings and convenience. It is also an opportunity for a collaborative exercise that will allow for the creation of a more in-depth and creative set of materials that can be done in traditional hard cover format.

I therefore invite any teacher or scholar to submit additional chapters on other competition law topics or jurisdictions not covered in these materials for inclusion in future iterations of these materials. Materials must be original or accompanied with proof of permission/license to use for this purpose and must be in English and in either Word or Word Perfect format. Submission of materials constitutes your permission to include the material in future editions of the on-line casebook for educational purposes with attribution on a royalty-free basis under a Creative Commons Attribution-Share Alike 3.0 United States License, available at <http://creativecommons.org/licenses/by-sa/3.0/us/>. Submission of materials also constitutes permission to edit the submitted material for style, content, and compatibility with the existing text, although every reasonable effort will be made to allow you to review edited material before posting on-line. I look forward to working with the global competition law and policy community to make this the most effective and interesting teaching tool possible.