ANTITRUST POLICY FOR A GLOBAL ECONOMY

JOHN J.P. HOWLEY*

Antitrust and competition laws have experienced a resurgence in recent years. In Eastern Europe, the former communist states of Bulgaria, Hungary, Poland, the Czech and Slovak Republics, and Russia have each adopted antitrust and competition laws as a means of dismantling government-controlled monopolies and encouraging competition among private enterprises.[1] Similarly, developing nations that once embraced socialism, such as India, Mexico, Kenya, Pakistan, Peru, Sri Lanka, Venezuela and Zimbabwe, have also adopted antitrust laws as an integral part of their movement from state-dominated economies to free markets.[2] Both groups of nations recognize that emerging free markets require antitrust and competition laws to protect small competitors, to promote a competitive marketplace, and to ensure that the privatization of inefficient state-controlled monopolies does not merely result in the creation of inefficient privately-controlled monopolies.[3]

Antitrust laws have also become an important part of international economic treaties and agreements. In addition to the antitrust and competition laws enacted by individual Western European nations to regulate business conduct within their borders, the member states of the European Community have included in the Treaty of Rome a comprehensive competition law and enforcement authority governing

---

* John J.P. Howley is an attorney in the Litigation-Antitrust Department of the international law firm of Kaye, Scholer, Fierman, Hays & Handler in New York. He is also Editor of *Antitrust Law Developments (Fourth)*, a leading treatise on U.S. antitrust law. He served as Chairman of the *Plenary Session on International Economic Structures/Law* at the 1993 World Law Conference in Manila, and as Chairman of the 1994 *Conference on NAFTA and GATT* in Washington, D.C.

[1] *See* E. Fox & J. Ordover, *Free Enterprise and Competition Policy for Central and Eastern Europe and the Soviet Union*, PRIVATIZATION IN CENTRAL AND EASTERN EUROPE 85 (1992); E. Fox, *Antitrust, Trade and the Twenty First Century – Rounding the Circle*, The Annual Handler Lecture at the Association of the Bar of the City of New York (May 26, 1993) at 2, 21-24.

[2] *See* W. Kovacic, *Competition Policy, Economic Development, and the Transition to Free Markets in the Third World: The Case of Zimbabwe*, 61 ANTITRUST L. J. 253 (Summer 1992).

[3] *See, e.g., FTC Chairman Finds Progress in Global Antitrust Enforcement*, 65 Antitrust & Trade Reg. Rptr. 568 (1993).

business entities and transactions that affect more than one member state within the European Community.[4] Similarly, the North American Free Trade Agreement among Canada, Mexico, and the United States provides that each member state shall adopt or maintain antitrust and competition laws, and shall cooperate and consult with the other member states on the enforcement of those laws.[5] These multi-lateral agreements are in addition, of course, to the existing bi-lateral agreements governing consultations with foreign governments and cooperation in enforcement of national antitrust laws.[6]

Buoyed by the developing national, bi-lateral, and multi-lateral antitrust laws and agreements, prominent political leaders and scholars have urged the adoption of an international antitrust code. For example, at the XVI World Law Conference in Manila last year, the delegates passed a resolution calling on the United Nations to adopt an international antitrust code regulating private business conduct along the lines of the Havana Charter.[7] In a separate development, the European Community Commissioner for External Economic Affairs and Commercial Policy has called for the development of an international antitrust code under the auspices of the General Agreement on Tariffs and Trade ("GATT").[8]

These resolutions and calls for international antitrust codes have not gone unnoticed. In fact, a working group of antitrust scholars and practitioners has developed a draft international antitrust code and has proposed that it be adopted as part of the General Agreement on Tariffs and Trade.[9] If adopted, this international antitrust code would provide not only for uniform substantive antitrust laws, but also an international enforcement authority.[10]

---

[4] Treaty of Rome, Article 85.

[5] North American Free Trade Agreement, Chapter 15.

[6] *See, e.g.*, U.S./EC Agreement on Antitrust Cooperation and Coordination, *reprinted in* 61 Antitrust & Trade Reg. Rptr. 382 (Sept. 26, 1991).

[7] *See* 30 BULLETIN OF THE WORLD JURIST ASSOCIATION at 25 (Nov./Dec. 1993).

[8] *See EC Commissioner Recommends Larger Role for GATT in Developing Competition Policy*, Daily Report for Executives (BNA) (Feb. 5, 1992).

[9] *See* DRAFT INTERNATIONAL ANTITRUST CODE AS A GATT-MTO-PLURILATERAL TRADE AGREEMENT (Munich, Germany, July 10, 1993), *reprinted in* 64 Antitrust & Trade Reg. Rptr. S-1 (Aug. 19, 1993).

[10] *Id.* While most government officials and commentators agree on the need to harmonize existing national antitrust and competition laws to avoid conflicts, *see, e.g.*, Charles S. Stark, Chief, Foreign Commerce Section, Antitrust Division, U.S. Department of Justice, *Remarks Before the Antitrust and International Sections of the American Bar Association* (Aug. 9, 1993),

At the same time that antitrust and competition laws are experiencing a resurgence elsewhere in the world, however, many political leaders and legal commentators in the United States – the birthplace of antitrust law – are questioning whether antitrust laws are relevant in an era of international competition and global markets. Faced with a growing trade deficit,[11] critics of antitrust law in the United States complain that it gives foreign companies an unfair advantage by subjecting domestic companies to restrictions that do not apply to their foreign competitors.[12]

The critics of U.S. antitrust laws raise valid concerns. Antitrust laws that were designed to address monopolies and restraints of trade within the United States at a time when it was the undisputed economic leader of the world, do not necessarily apply when domestic businesses are faced with international competition. Contrary to the views of some politicians and commentators, however, antitrust laws are by no means the sole or even the most significant impediment to international trade. A nation's ability to compete in international markets depends on a large number of factors, including corporate structure, financial and operating business practices, the nation's rate of savings and investment, interest rates, and other factors affecting the cost of capital. For example, a business that is able to take a long-term view of its profit potential may be better able to compete in international markets, where the struggle to gain market share in a foreign country may result in substantial losses over the short term. In contrast, companies that are overly concerned about their quarterly profits may be unable to compete in such markets.

---

reprinted in 7 Trade Reg. Rptr. (CCH) ¶ 50,114, at 48,941 [hereinafter "C. Stark, *Remarks*"], the ambitious proposals for an international antitrust code and enforcement authority have been met with mixed reviews. *Compare* C. Stark, *Remarks* (endorsing development of uniform or core substantive laws to be adopted on a multinational basis) *with OECD Committee Lacks Enthusiasm for Draft International Antitrust Code*, 65 Antitrust & Trade Reg. Rptr. (BNA) 771 (Dec. 16, 1993) (OECD official reports that the "draft international antitrust code within the framework of the General Agreement on Tariffs and Trade 'was greeted by a great deal of skepticism'") and Interview: Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, 8 Antitrust 8, 9 (Fall 1993) ("I'll be dead before a world antitrust enforcement authority is established.") [hereinafter *"Interview, Anne K. Bingaman"]* and ABA SECTION OF ANTITRUST LAW, REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL ANTITRUST 294 (Oct. 1991) (rejecting concept of an international antitrust code).

[11] In 1992, the U.S. trade deficit over the preceding decade was estimated at $1 trillion. *See* 138 CONG. REC. S4646 (April 1, 1992).

[12] *See, e.g., Report of the Senate Judiciary Committee on The International Fair Competition Act of 1992*, REP. NO. 102-403, S. 2610, 102d Congress, 2d Sess 12-14 (Sept. 16, 1992) ("Too often, U.S. companies face foreign competitors that operate in markets at home in which cartels and other restraints of trade are tolerated.").

Even the critics of U.S. antitrust law recognize the complexity of international trade and the need for laws that prohibit unreasonable restraints of trade. These critics do not call for the abolition of antitrust law. Rather, they seek a balance between encouraging competition by limiting restraints of trade and protecting domestic industries from unfair foreign competition.

The key to obtaining this balance lies in the manner in which antitrust laws define the "relevant markets." It is an indisputable fact that markets for goods and services – and the business entities that trade in those goods and services – can no longer be defined strictly along national boundaries. Because the competitors to be regulated by antitrust and competition laws are no longer limited to business entities within a single nation, antitrust and competition laws – as well as the domestic agencies that enforce those laws – are naturally challenged by global markets.

Antitrust may serve as an impediment to international trade in certain circumstances. First, antitrust laws are inherently complex and they require a legion of lawyers and economists to enforce. The complexity inherent in antitrust laws also may lead to uncertainty. This uncertainty may, in turn, deter legitimate, pro-competitive business activities. For example, two competitors who have an opportunity to develop a new technology in a joint venture might be deterred from developing this technology for fear that the antitrust laws would consider their joint venture an agreement in restraint of trade. The absence of clear rules in antitrust laws, and the reliance on a bureaucracy to interpret and enforce those laws, also invites corruption.

Antitrust laws can also be an impediment to international trade when more restrictive rules apply to domestic companies than to their foreign competitors. Perhaps the best example of this is the experience of the U.S. color television industry. In the 1950's, U.S. companies developed the technology to produce affordable color television sets and by 1964, 27 U.S. companies were producing over 1 million sets each year.[13] In contrast, Japanese companies produced less than 10,000 sets and did not export.[14] By 1977, however, Japanese manufacturers accounted for 42 per cent of all color television sets produced in the world.[15]

---

[13] I. Magaziner & R. Reich, MINDING AMERICA'S BUSINESS at 169 (Harcourt Brace Jovanovich 1982).

[14] *Id.*

[15] *Id.*

The rapid growth of the Japanese color television industry was the result of an aggressive export program designed to increase market share without regard to short-term profits.[16] In fact, according to the U.S. manufacturers of color television sets, the Japanese manufacturers deliberately priced their color television sets in the United States below cost as part of a conspiracy designed to drive them out of the U.S. and world markets for color television sets.

In a landmark case, U.S. television manufacturers sued their Japanese competitors under the civil enforcement provisions of the U.S. antitrust laws and alleged that the Japanese manufacturers had engaged in a "'scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [the defendants] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to and sold in the United States.'"[17] The alleged purpose of this scheme was to drive the American manufacturers out of the United States market, at which time the Japanese companies would be able to charge whatever price they wished. Such a tactic is known as predatory pricing.

The U.S. Supreme Court began its antitrust analysis by ignoring all allegations and proof concerning conduct that occurred outside the United States. The Court held that such evidence was irrelevant because the U.S. antitrust laws do not regulate the competitive condition of another nation's economy. The Court also observed that the American plaintiffs could not recover damages for any conspiracy by the Japanese companies to charge *higher* than competitive prices in the American market. While such a conspiracy would violate the Sherman Act, it would not injure competitors, who would be free to charge lower prices. The Court concluded, therefore, that any evidence of a conspiracy in Japanese markets or a conspiracy to raise prices in the United States was immaterial.

These findings disposed of the only "direct evidence" of a conspiracy. More importantly, these findings disposed of the only evidence suggesting that the Japanese manufacturers would ultimately succeed in their conspiracy to charge below cost prices in the United States. Under the plaintiffs' theory of the case, the Japanese manufacturers were able to charge predatory prices in the United States because they had conspired to charge higher prices in Japan. The

---

[16] *Id.* at 179.

[17] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578 (1986) (emphasis added).

higher prices outside the United States thus subsidized their predatory price-fixing conspiracy.

Once it dismissed all evidence demonstrating this subsidy from foreign markets, the Supreme Court easily dismissed plaintiffs' claims of a conspiracy to charge predatory prices as implausible because no rational business would intentionally "lose" money by charging prices that were below cost. Relying on recently adopted economic theories, including "the strong inference that rational business would not enter into conspiracies such as this one," the Court found that the American manufacturer's claims of predatory pricing were "implausible": "A predatory pricing conspiracy is by nature speculative... For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered."[18] Since the court had eliminated the evidence of a conspiracy to charge high prices in Japan, it found that there was no evidence that the Japanese manufacturers would succeed in their predatory pricing conspiracy because it was implausible that the Japanese manufacturers would be able to continue to charge low prices until they had driven their American competitors out of the market.[19]

As a matter of antitrust law, the Supreme Court effectively held that Japanese manufacturers of color televisions would be held to a less stringent standard of antitrust scrutiny than their U.S. counterparts. Although it would plainly violate the U.S. antitrust laws if the American manufacturers agreed to raise prices in one market in order to subsidize predatory prices in another market, since the Japanese

---

[18] *Id.* at 575.

[19] At the time of the *Matsushita* decision, this author was one of very few critics to point out the fallacy of the Court's economic theories. *See* J. Howley, *Summary Judgment in Federal Court: New Maxims for a Familiar Rule*, 34 N.Y.L. Sch. L. Rev. 201 (1989). In more recent years, leading government officials and antitrust scholars have recognized the validity of this criticism. *See, e.g., Interview: Anne K. Bingaman, supra* note 10, at 9 ("I have concerns about the *Matsushita* decision and I would want the Division to look very closely at legislation that proposes to overturn it."); *Antitrust Enforcement Officials Discuss Problems of Acting Against Foreign Firms*, 62 Antitrust & Trade Reg. Rptr. (BNA) 611, 612 (1992) (Professor Eleanor Fox of New York University complains that the *Matsushita* decision "failed to recognize and take account of complex competitive strategies."); *Report of the Senate Judiciary Committee on The International Fair Competition Act of 1992*, REP. No. 102-403, S. 2610, 102d Congress, 2d Sess. 14 (Sept. 16, 1992) (As a result of the *Matsushita* decision "antitrust laws were not adequate to protect our consumer electronics industry from being cannibalized by a Japanese cartel bent on destroying it."). Indeed, even the U.S. Supreme Court has retreated from its prior decision in *Matsushita* and altered the summary judgment standard in antitrust cases to require evidence, rather than speculative economic theories. *See Eastman Kodak v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1993).

agreement took place outside the United States, the Supreme Court held them immune from the U.S. antitrust laws.

The Supreme Court's refusal to look beyond domestic markets in the *Matsushita* case is one of the principle reasons some commentators argue that U.S.-style antitrust laws impose unfair restrictions on domestic companies that hamper their ability to compete in global markets. But much has changed since 1984. The Supreme Court has since announced in the *Kodak* case[20] that courts should not place undue reliance on economic theories but should instead look to the actual workings of markets. This will allow plaintiffs to argue, for example, that conduct which seems implausible when viewed in the confines of a domestic market may be entirely plausible when viewed in the reality of a global market.

This new emphasis on actual market conditions is not limited to predatory pricing cases, but is also found in the context of mergers and acquisitions. In the U.S. Justice Department's guidelines for mergers and for international transactions, the definition of a relevant geographic market is not constrained to theoretical economic models. Instead, the geographic market is defined in terms of actual choices made by buyers and sellers of the relevant product. The evidence that will be considered includes:

(1) evidence that buyers have shifted or have considered shifting purchases between different geographic locations in response to relative changes in price or other competitive variables;

(2) evidence that sellers base business decisions on the prospect of buyer substitution between geographic locations in response to relative changes in price or other competitive variables;

(3) the influence of downstream competition faced by buyers in their output market.[21]

Under these Guidelines, the U.S. Justice Department will include in its analysis not only domestic firms, but also their foreign competitors.

---

[20] *Eastman Kodak v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1993).

[21] U.S. Department of Justice, *Merger Guidelines* § 1.2 (1992).

The Merger Guidelines also define the participants in the market both in terms of firms that currently produce or sell the relevant product in the geographic market, and in terms of "other firms not currently producing or selling the relevant product in the relevant area . . . if their inclusion would more accurately reflect probable supply responses."[22] These firms, known as "uncommitted entrants," may be included as market participants if they would likely enter the geographic market within one year and without the expenditure of significant sunk costs of entry and exit, in response to a small but significant (usually 5%) and nontransitory price increase.[23]

The upshot of these guidelines and changes in case law is that a domestic firm's conduct will be considered in the context of a market that includes its foreign competitors — including foreign competitors who are not yet in the domestic market, but who might enter the domestic market in light of changing prices and other competitive conditions. This analytical construct more accurately reflects the realities of global markets — and it also addresses the concerns of critics who complain that antitrust laws hinder the ability of domestic firms to compete with foreign competitors by looking only at the conduct of domestic firms.

CONCLUSION

Guidelines like those developed by the U.S. Justice Department address two of the most important concerns with antitrust in a global economy. First, by setting forth the manner in which prosecutors will analyze markets and the competitors in those markets, the Guidelines provide businesses with a level of certainty. When businesses know the boundaries of legal and illegal conduct, they can make informed decisions based on legitimate business decisions without the risk of prosecution if they guess wrong as to how a prosecutor and judge might interpret the law.

Second, by defining markets in terms of actual competitors without regard to national boundaries, the Guidelines bring antitrust laws in touch with economic realities. In those industries where research and development costs require that domestic firms pool their resources in

---

[22] *Id.* § 1.32

[23] *Id.*

order to compete with foreign firms, the Guidelines recognize this reality and permit the coordinated conduct – even though under a purely domestic view of antitrust laws such combinations might be considered monopolistic.

Domestic guidelines alone are only part of the solution. As more nations develop their antitrust laws – and as more firms compete in foreign markets and subject themselves to foreign laws – nations must cooperate to ensure that conflicting domestic laws and domestic policies do not lead to the uncertainty in international markets that domestic guidelines were designed to ameliorate. Accordingly, in addition to adopting guidelines domestically, nations must continue the effort to harmonize their antitrust laws and develop mechanisms – such as the Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement[24] – to resolve conflicts of laws efficiently.

[24] *See* DRAFT INTERNATIONAL ANTITRUST CODE AS A GATT-MTO-PLURILATERAL TRADE AGREEMENT (Munich, Germany, July 10, 1993), *reprinted in* 64 Antitrust & Trade Reg. Rptr. S-1 (Aug. 19, 1993).