Editor's Note: Antitrust and the Limits of Globalization

BY JAMES J. O'CONNELL

ONLY 100 YEARS AGO, WHEN THE Federal Trade Commission was opening its doors and the Sherman Act had started making its mark, the world was a much smaller place than it is today. Despite all that the railroad, steamship, telegraph, and other 19th century advances had done to speed communications and collapse distances, the world in which businesses operated still looked a lot more like what had been than what was to come. Indeed, the very concept of the large, multistate corporation, let alone a multinational one, was a relatively new phenomenon in a world in which there was still a King in Rome, a Kaiser in Berlin, an Emperor in Vienna, a Czar in Moscow, a Sultan in Istanbul, and China's last emperor had only recently abdicated in Beijing.

Today there are competition law enforcement authorities in each of those and many other capitals around the world—all of which, along with antitrust lawyers and their clients, operate within an increasingly integrated and globalized society. From tickertapes and telegraph lines, we've advanced to a world in which smartphones and the Internet connect us instantly to unfathomable amounts of information. Today, the biggest communications challenge most of us face is picking a time for an international conference call that doesn't force too many participants to set their alarms for the middle of their night.

The publication of this issue of ANTITRUST, which has an international theme, coincides with the Annual Spring Meeting of the ABA's Section of Antitrust Law. Edward R. Johnston, the Section's first Chair, convened the first meeting 63 years ago, and I suspect that he and the other founders of the Section would be astonished by how international the event has become. This year alone, hundreds of attorneys from outside the United States, along with representatives of enforcement agencies from every continent save Antarctica, are expected to join their U.S. colleagues in Washington for an event that now even has its own "International Track." The 14 panels that make up that track this year include sessions on foreign investment and competition reviews, managing global distribution, proving damages across jurisdictions, and antitrust and intellectual property in China. Speakers hail from jurisdictions as diverse and far-flung as the European Union, Canada, Hong Kong, Brazil, Japan, the UK, Germany, China, Italy, Singapore, Australia, Finland, and the Netherlands.

And it's not just the Section that's become a global enterprise—enforcement has as well. Eleven days after the final session of the Spring Meeting, enforcers and non-governmental advisors from all over the world will meet in Sydney, Australia, for the 14th annual conference of the International Competition Network (ICN), an organization which in those 14 years has grown from 16 agencies to include enforcers from over 100 different jurisdictions. During its short existence, the ICN—through its conferences, workshops, workbooks, and "recommended practices"—has made great strides towards fostering convergence in both the substance and process of antitrust enforcement, and has served as a valuable forum for the development and discussion of what its members call "agency effectiveness."

Thanks in part to the work of the ICN and the Antitrust Section, the world of antitrust has grown less fragmented and discordant. For a long time, the United States stood virtually alone on the world's antitrust enforcement stage. The only attention that many nations paid to competition was when they sought to prevent it, for example though the nationalization of industry through state-owned enterprises, efforts to protect their own private sectors from foreign competition, or the filing of briefs in U.S. courts to protest the extraterritorial enforcement of the Sherman Act. Today, the enforcement stage is crowded. Although one still sees examples of state efforts to pursue policy goals that may be inconsistent with free competition, there is also general agreement around certain core antitrust enforcement principles: that antitrust laws should protect competition rather than competitors; that, outside the context of cartels and other hardcore conduct, enforcement and liability decisions must be based on sound economic analysis of the competitive effects of challenged conduct; that competition law enforcement should not be muddied by consideration of other policy goals, no matter how important, and that such non-competition concerns should be addressed separately; that hardcore cartel conduct is destructive, rather than just "how business is done," and therefore should be prosecuted and punished vigorously, etc. And while not every jurisdiction gives companies with monopoly power as much freedom to choose those with whom they will deal, and on what terms, as the United States does, the view that "big is bad," which was prevalent even in the U.S. not that long ago, is considered by many to be out of step with mainstream enforcement principles.

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But the globalization of antitrust has its limits. We don't focus on those limits very often, in part because many of them are very difficult to overcome, at least from within the antitrust community itself. Some are caused by longstanding differences in legal traditions, others by larger cultural differences, and many are part of a status quo that has vocal defenders. In a world in which enforcers and private bars and corporations alike must choose their battles, many of these differences, which have real consequences for companies seeking to operate efficiently across the world, persist. But they don't have to.

Some of these challenges are discussed in the pages of this issue of ANTITRUST. Lisa Wood writes about a very basic but critical one: translation protocols. English is often the common language of doing business, but what happens when large quantities of important documents and witness testimony introduced in a court in the United States are in a language other than English? How can litigants and courts ensure that those materials are translated efficiently without losing important nuances of meaning? This is not an issue that is unique to antitrust, of course, but if U.S. courts are to hear cases involving allegedly anticompetitive activity that took place outside this country, the translation challenge is of great significance. As Lisa writes in her piece, however, there are ways that litigants and courts might address that challenge in individual cases.

Less tractable are the challenges created by jurisdictions' different laws and legal traditions, enforcement structures and policies, and processes. In Europe, for example, communications between employees and in-house legal counsel are not protected by the attorney-client privilege, as they are in the United States, and some Member States don't apply the privilege to communications between a client and its foreign counsel. In fact, as Nina Macpherson and Ted Stevenson explain in their contribution to this issue, countries with legal systems and traditions as diverse as China, France, and Saudi Arabia are virtually in agreement on what may seem, to American eyes, a very narrow view of what sorts of communications should be protected by legal privilege.

Looking at the more specific issue of competition law enforcement, there are other aspects of the European approach that stand out. For example:

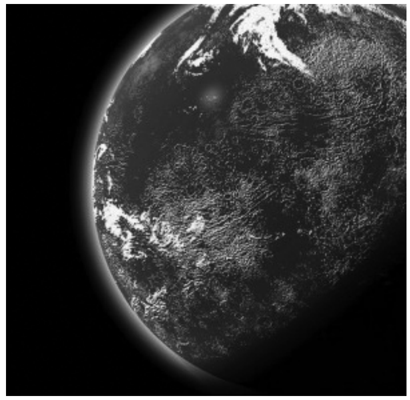
- European law regarding single-firm conduct is not limited to exclusionary conduct, but also in certain cases prohibits "exploitative" abuses of dominance, such as charging too high a price. Although these provisions are sparingly enforced in Europe, where enforcers and courts share to some extent the reluctance of their U.S. counterparts to engage in price regulation, they arguably reflect the general view in Europe that dominant firms have a "special responsibility" to be mindful of the effects of their conduct on competition—or, as EC economist (and now member of the cabinet of Commissioner for Competition Margrethe Vestager) Claes Bengtsson put it during a 2004 speech in Washington, to compete "like gentlemen."
- Brussels will require parties that are forming a "full-function" joint venture to file a notification in Brussels even if the JV will be located outside of, and have nothing to do with the markets of, Europe, if the forming parties satisfy the European turnover thresholds. The HSR process in the United States, in contrast, includes exemptions for acquisitions of interests in non-U.S. entities, including newly formed joint ventures that don't have a sufficient nexus to U.S. commerce.
- The rights of injured persons to seek damages from those whose anticompetitive conduct has injured them are not consistent across Europe, and in many jurisdictions are significantly restricted or nonexistent—although this has started to change in recent years, as Mark Sansom, Anna Morfey, and Patrick Teague discuss in their contribution to this issue.

Shifting from Europe to Asia, the competition laws of Japan include the concept of "abuse of a superior bargaining position," which is typically used to protect smaller businesses from the depredations of larger ones. A company need not have market power in order to run afoul of the law—it is sufficient that the "superior" party have "relative dominance" over the "inferior" party. Thus, companies like Toys "R" Us have been fined for practices such as returning unsold goods to suppliers without any "reasonable justification" when they have been shown to be in a superior bargaining position than that of the suppliers.

The Anti-monopoly Law of China, as written and as enforced, considers the effect of conduct or a transaction on the economic development of the country, rather than just on competition. This key difference between the Chinese approach and that of most other jurisdictions allows—arguably, requires—AML enforcement agencies to look to China's larger industrial policy and other priorities when deciding, for example, whether a dominant firm is charging a price that is "unfairly high" or whether the acquisition of a Chinese company or a merger between two large foreign companies is "good for China," even if it might be "good for competition and Chinese consumers." This process, which often involves consultations with other Chinese agencies and ministries and is not transparent, makes it very challenging to advise clients, who must also contend with an enforcement culture in which respect for essential principles of procedural due process and fairness is often not evident.

Moving on to Africa, the Common Market of Eastern and Southern Africa (COMESA), a bloc of 19 member states, including Egypt, Congo, Kenya, Namibia, and Uganda, has a relatively new merger control regime that requires parties to submit a "file and close" notification within 30 days of their "decision to merge" if either party has operations in two or more member states, regardless of turnover or other quantifiable measures of activity. It's not clear whether a COMESA filing, like its DG-COMP equivalent in Europe, is meant to supersede any required member state filings, nor whether transactions that have minimal local effects must still be notified to the bloc. But, on the surface at least, there is much about the COMESA merger control process that would seem to be outside the international enforcement mainstream.

For many years, a similar "file and close" approach taken by Brazil often made that country the odd man out when parties assessed their merger control obligations. Of greater concern to practitioners was the need to get any necessary filing in to the Brazilian authorities within days of signing a deal—a filing which could require the parties to take positions about the relevant markets and likely effects of the transaction before they had decided how best to present their deal to antitrust enforcers in other jurisdictions. Brazil did away with that approach when it enacted an overhaul of its antitrust enforcement regime a few years ago and now follows the "file and wait" suspensory approach of most jurisdictions. Although Brazil's 330-day maximum statutory waiting period is very long, in practice CADE reviews and clears most mergers at a pace that tracks with those of its fellow enforcers in North America and Europe. That the COMESA bloc has decided to follow an approach Brazil decided to abandon after years of experience with it is discouraging.



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One needn't take a position for or against any of these different policies and practices to recognize that they can present significant challenges to companies that operate within a global market. No company wants to break the law or get caught up in a government investigation or litigation over their practices in any jurisdiction in which they do business. So the approach taken by just one jurisdiction, if its market is important enough to a company, can force that company to organize its operations around that lowest common denominator—or, put differently, that "most strict"—approach, regardless of whether it is within the global enforcement mainstream or stands some distance outside of it.

Finally, how things are done in the United States presents challenges to global firms, too. After all, it is here that one finds:

- Two federal agencies which share civil enforcement authority—a system which works far more often than not but which can still result in dissonance, whether over clearance for an investigation of a particular merger or the larger question of whether the laws that they each enforce to protect "competition" reach the same conduct.
- Fifty-plus states and other jurisdictions, each with independent enforcement authority under their own statutes, which is why a defendant who is sued in federal court in San Francisco for resale price maintenance under the Sherman Act can offer justifications for his conduct but not if he is sued across town in state court for the same conduct under California's Cartwright Act.
- A time-honored role for "private attorneys general"—private plaintiffs who, whether acting directly on their own or via class actions organized and brought by members of the plaintiff's bar, can initiate litigation that tends to be so costly that the Supreme Court has issued a series of recent decisions that have arguably been designed to make such cases more difficult to bring.
- A federal enforcer—the Antitrust Division of the Department of Justice—which, with the help of the courts, has for decades not hesitated to risk the wrath of friend and foe alike to enforce the Sherman Act extraterritorially against foreign conduct that it determines has caused harm to American commerce and consumers. The DOJ's approach may be somewhat less controversial today than it once seemed, now that many of the countries that used to complain have their own vigorous antitrust enforcement regimes. But a more diverse and globalized enforcement system raises other challenges, including whether enforcement in any one jurisdiction may make it more difficult for agencies and plaintiffs in others to use their own competition laws to protect their consumers effectively. These challenges add to the concerns that have traditionally been expressed over the years about the extraterritorial enforcement of the Sherman Act, an issue that is not going away any time soon, as the contributions of Lee Greenfield and Ellen Meriwether to this issue—regarding international "component" cartels generally and the Seventh Circuit's decision in *Motorola Mobility LLC v. AU Optronics Corp.* more specifically—demonstrate. One would like to be able to offer companies that operate outside the U.S. clear guidance on whether and when they may come within reach of Sherman Act jurisdiction, over a century after the statute was enacted. But we're not there yet.
- A legal culture that can require massive doses of documents and other data in order to function. Whether in the context of discovery in private litigation or that of a federal merger investigations, this results in parties having to review and produce more documents and information than the requester could possibly ever examine. From the perspective of many companies, especially those whose domestic legal systems do not have the same document-heavy discovery traditions as one finds in the United States, this inefficient and often wasteful process sometimes seems to have less to do with gaining access to needed information than with encouraging settlement, buying time, or otherwise gaining some advantage.
- A merger control process shared by two enforcement agencies, each of which faces a different legal standard if it wants to block a transaction—which means that parties to transactions also face different standards depending on which agency reviews their transaction. The DOJ must

generally convince a federal judge that a merger violates the antitrust laws in order to enjoin it. The FTC, in contrast—as the D.C. Circuit put it in its 2001 *H.J. Heinz Co.* decision—need only persuade a judge that the deal raises questions "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation," after which it can continue to consider the deal through its own in-house administrative processes.

This last quirk of the U.S. system, in particular, makes no sense, regardless of whether it is the result of the deliberate choices made by those who wrote the relevant statutes or just a historical accident, and regardless of whether it bites often or in only a few cases. At best, having two different approaches to the same regulatory task and deciding which will apply to a given transaction based on the industry in which the parties operate or the outcome of an interagency clearance fight creates the perception of unequal treatment. Parties to transactions may understandably develop the view that the outcome, or the process they will have to take to reach that outcome (which can be as important in the time-sensitive world of merger clearance), depends on whether their deal comes before the FTC or the DOJ, even though both are enforcing the same statute. And the perception is that it really does matter which agency gets your deal. Try explaining that to a client. Then try suggesting with a straight face that foreign enforcement processes should follow the enlightened, experienced example provided by the United States.

As it happens, there is legislation working its way through the U.S. Congress which, if enacted, would resolve this last issue by amending the Clayton Act and the FTC Act, so that the FTC would have to satisfy the same standard as the DOJ when seeking a preliminary injunction to delay the closing of a transaction until its legality under the Clayton Act can be adjudicated. This legislation—the "Standard Merger and Acquisition Reviews Through Equal Rules Act or, in that wonderful Washington tradition of value-laden acronyms, the "SMARTER Act"—would also remove the FTC's authority to use its administrative proceedings authority to challenge a transaction under the Clayton Act, leaving the FTC to do what the DOJ does: challenge mergers in federal district court.

The SMARTER Act would leave intact the FTC's authority to initiate administrative proceedings in other types of cases, but the legislation illustrates that the world's antitrust enforcement authorities do not operate in a vacuum. There is sometimes little that agencies and the antitrust bar and its clients can do to address the inconsistencies between and within different jurisdictions' approaches to competition law and its enforcement, like those mentioned here, aside from encouraging change and reform. But that's not always the case, and even when it is, such encouragement can make a difference between a problem that persists and one that may get the attention it deserves.

Like most who take on this issue, I don't have an easy answer to the fair question, "So what do we do about it?" But even when solutions are hard to find, ignoring the problems won't make them go away, and in fact may invite others to step in with their own solutions. When the enforcement community does not acknowledge and seek to address the differences and inefficiencies that persist—and, to be clear, it often does, as the work of the ICN demonstrates—it risks ceding control over the direction that reform might take. There are those, for example, who see international antitrust as less an exercise in law enforcement or economic regulation and as more of a trade issue and who would like to see more aspects of antitrust enforcement fall within the purview of trade treaties and the WTO. I suspect the vast majority of those in the international antitrust community would blanch at that idea, but the fact is that the globalization of antitrust has its limits, as, perhaps, does the ability of the antitrust community to self-regulate. If differences among legal systems generally, or antitrust enforcement policies and procedures more specifically, cause friction and inefficiencies within the global market, market participants may be forced to seek and obtain solutions from their legislatures and courts and from multilateral bodies, if they cannot find them within the antitrust community itself. ■