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Antitrust & Competition

Enforcement

Traps for the Unwary: Competition Law in a Global Economy

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One of the greatest challenges for antitrust practitioners and their international clients lies in anticipating the next enforcement initiative. For many years, while it might have been difficult to accurately anticipate the nature of the initiative, it was safe to assume that either the U.S. or the EU authorities would be the likely prime actors.

As antitrust enforcement becomes more global in its reach, the ability to anticipate both the nature of the next enforcement initiative and the identity of the primary enforcement authority has become progressively more difficult. Often with encouragement from U.S. and EU authorities, nations around the world have adopted competition laws at an astonishing pace. As of 2003, more than ninety jurisdictions had competition law of some form, in place. The number of nations or authorities with competition laws now exceeds one hundred.[1] While there have been efforts at convergence, competition laws are neither uniform in content nor application.

Businesses competing on a global scale must be mindful of the various and sometimes differing restrictions imposed by the jurisdictions in which they operate. No longer can they presume that compliance with either or both U.S. and EU competition law principles will provide them with a reasonable assurance that they are acting in conformity with applicable competition law. In recent years, there has been a marked increase in the enforcement of competition laws by some of Europe's major trading partners, including Japan, Korea and Brazil. These developments, coupled with the emergence of competition laws in many other nations, most notably China, highlight the need for international businesses to take stock of the competition laws of those foreign jurisdictions in which they – and their competitors – conduct (or are planning to conduct) business.

This article does not undertake the Herculean task of providing a survey of the divergence among competition laws and their enforcement in one hundred nations,[2] nor does it undertake to identify either the likely primary conduct areas or the likely enforcers of the next major initiative. Rather, this article undertakes to highlight by means of selected examples why it is necessary to broaden one's perspective on competition law issues and acknowledge that conformity with U.S. and EU competition law principles may no longer be prudent.

Abuse of Dominance and Unfair Business Practices

While U.S. and EU competition laws diverge both in their terms and in their enforcement, as competition laws develop in a number of jurisdictions, their focus and import may differ widely from either the U.S. or the EU approach. This issue is becoming more prominent particularly in the area of conduct restrictions. Depending on the nation at issue, conduct restrictions may range from abuse of dominance by a monopolist or a market participant with significant market power to unfair business practices by parties without regard to whether they possess a dominant market position.

While there is hardly convergence between U.S. antitrust enforcement and EU competition policy with respect to unilateral conduct by dominant market players, whether other nations will follow either the U.S. or EU approaches or will chart their own course is an unknown factor to be addressed over time. In the interim, for antitrust practitioners and their international clients, it is imperative to appreciate both the U.S. and European perspectives, while undertaking to anticipate the direction which other competition authorities will take on such matters.

The divergence between the U.S. and European approach to such matters was brought into sharp relief in the different approaches of U.S. and European Commission regulators to perceived abuses by Microsoft, with the U.S. Department of Justice Antitrust Division (DOJ) entering into a consent decree with Microsoft, while the Commission pursued much more aggressive enforcement efforts. After the Court of First Instance of the European Communities issued its decision in September 2007 affirming the substance of the Commission's March 2004 decision against Microsoft, imposing fines in excess of $600 million,[3] ordering Microsoft to make its operating system available without certain functionalities embedded, and requiring that the company make specifications for technology available to competitors, notably, the DOJ issued a statement cautioning that "the standard applied to unilateral conduct by the CFI, rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition."[4]

South Korea, in the review of Microsoft's business practices, generally aligned with the European approach, and took action against Microsoft for alleged abuses of dominant position.[5] The Korean Fair Trade Commission (KFTC) fined Microsoft $32 million and issued a code removal order similar to that imposed by the Commission.[6] Highlighting the divergence on this issue, the DOJ criticised the KFTC decision, cautioning that it "continues to believe that imposing 'code removal' remedies that strip out functionality can ultimately harm innovation and the consumers that benefit from it."[7]

In assessing its options, Microsoft reportedly considered the idea of withdrawing from the South Korean market altogether while the KFTC conducted its review, but ultimately decided not to take such dramatic action in response.[8] While, as a practical matter, Microsoft apparently determined that it was better served by maintaining its presence in the South Korean market, as the number of competition enforcers around the world continues to grow, international companies that have dominant or potentially dominant market positions elsewhere will need to make informed decisions about what markets they choose to enter, whether they continue to remain in certain markets, or whether they undertake to change their business practices to accommodate the actual or anticipated enforcement approach of different competition authorities.

This assessment is not reserved, however, solely for international companies that have dominant market positions on a global scale and thus a perceived potential to abuse that dominant position in a particular market. As competition laws proliferate, they are not (and will not be) uniform in nature and do (and will) not necessarily follow the format or the approach of either U.S. or EU enforcement authorities. For example, a number of nations have adopted provisions that impose restraints within their competition law regimes upon the "abuse of superior bargaining positions."[9] The implementation of such restraints by competition authorities garnered greater attention as the subject of one of the sessions at the recent International Competition Network meetings. While these restraints are generally focused on controlling retailer buyer power, an issue that has received attention in European nations,[10] the framework of these restraints are not and may not be limited in their import solely to retailers.

While abuse of a superior bargaining position is just one example of the manner in which competition laws are developing in ways that diverge from the traditional U.S. and European approaches, it serves to highlight the need for all international companies to consider the entire scope of the competition laws – including guidelines and behavioural restrictions – that may be of broad application to companies regardless of their market position.

Pre-Merger Review and Merger Control

As the number of nations with competition laws has continued to grow, the process of determining the proper ambit of pre-merger review and merger control processes has, likewise, continued to grow. The International Competition Network Web site lists sixty-seven nations or authorities that have some form of merger review or control laws.[11] A simple review of that web site and the underlying laws reviews a series of complex and often differing regimes for merger review. In many instances, whether merger review is required is determined not only by the value of the assets or company to be sold, but also by domestic market shares. As such, in some nations where the value of the assets or company to be sold can be relatively limited, merger review is necessitated by the simple fact that the target company at issue, or the combined companies, may possess a meaningful share in what can be a relatively obscure relevant product market.

While care must be taken to determine the need for merger review in an increasing number of nations, with the emergence of competition laws in China, the perspective that traditional U.S. and European merger review laws, with some local modifications, would be the standard approach clearly warrants reconsideration.

The American Bar Association Section of Antitrust Law's commentary on China's Anti-Monopoly Law (AML) merger provisions, which are due to go into effect on 1 August 2008,[12] highlight some of the areas of marked divergence. Among the criticisms levelled against the AML pre-merger notification provisions are that its scope was too broad as merger review can be triggered simply by becoming the largest shareholder of a company. This could be problematic given that "[i]n many companies, particularly publicly listed companies, the largest shareholder may hold less than five percent of the voting securities."[13] Further, it was asserted that there is a lack of safeguards to ensure the protection of sensitive commercial information submitted to enforcers for review.[14] While these and other issues of divergence may well be addressed over time by the Chinese authorities, the key consideration is that China will be an important player in international mergers. The uncertainty of the process and divergent approaches, both in China and in other nations around the world, therefore, should be taken into account both by antitrust practitioners as they advise their international clients and by international companies as they plan and implement their growth and expansion strategies.

Conclusion

While this article focused on unilateral conduct/abuse of dominance and merger review differences emerging between the traditional U.S. and European approaches to competition laws and those of other nations that are adopting competition laws or taking a more proactive approach to enforcement, there are numerous other areas where divergent approaches to competition law are emerging. The international company with a presence in multiple jurisdictions needs to increase both its efforts to understand these areas of divergence, and its efforts to achieve compliance with the competition laws of all of these jurisdictions. Likewise, international companies planning to expand their operations should pay increased attention in the planning stages to competition law issues, including clearance of any

mergers or joint ventures. Each nation that adopts and enforces competition laws will differ in their approach, enforcement philosophy and the ultimate societal objectives. Antitrust practitioners must keep abreast of those developments beyond the U.S. and the EU in order to serve their international clients. Global and international companies, in turn, must recognise the need for antitrust counsel who can help them position themselves to compete aggressively without becoming ensnared by competition laws.

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[1] William E. Kovacic, Sauce for the Gander: Foreign Extraterritorial Regulation of U.S. Parties, 97 Am. Soc'y Int'l. L. Proc. 309, 309 (2003). A useful reference on the various nations and authorities with competition laws can be found at http://www.globalcompetitonforum.org.

[2] In certain limited areas, most notably cartel enforcement, there is growing convergence in terms of deterrence, although divergence remains as to deterrent enforcement techniques. See, *e.g.*, Int'l Competition Network, Co-Operation between Competition Agencies in Cartel Investigations (May 2007), available at: http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/19ReportonCo-operationbetweencompetition-agenciesincartelinvestigations.pdf.

[3] For a substantive discussion of the CFI Microsoft decision and subsequent developments, *see* Renato Nazzini, The Microsoft Case and the Future of Article 82, Antitrust at 59 (Spring 2008).

[4] U.S. Dep't of Justice, Antitrust Division, Assistant Attorney General for Antitrust, Thomas O. Barnett, Issues Statement on European Microsoft Decision, available at: http://www. usdoj.gov/atr/public/press_releases/2007/226070.htm.

[5] At the time of this writing, the Japanese Fair Trade Commission, the KFTC and other authorities have announced that they have investigations in process of international companies for alleged unilateral conduct that abused a dominant position.

[6] *See* Young-Sam Cho, Microsoft Loses Antitrust Ruling in South Korea (Update7) Bloomberg News (7 Dec 2005).

[7] U.S. Dep't of Justice, Antitrust Division, Statement Of Deputy Assistant Attorney General J. Bruce McDonald Regarding Korean Fair Trade Commission's Decision In Its Microsoft Case, available at: http://www.usdoj.gov/atr/public/press_releases/2005/213562.htm.

[8] *See supra* at 6.

[9] *See* Int'l Competition Network, Report on Abuse of Superior Bargaining Position (April 2008), available at: http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/ASBP_1.pdf.

[10] By way of example, *see* The supply of groceries in the UK market investigation, UK Competition Commission Final Report of 30 Apr 2008, and the Commission's decision in *Case No. IV/M. 784, Kesko/Tuko*, OJ. L 110, 26.4.1997, p. 53–76.

[11] *See*, Int'l Competition Network, Merger Review Laws, Related Materials, and Templates, available at: http://www.internationalcompetitionnetwork.org/index.php/en/publication/293.

[12] *See, e.g.*, Zhenguo Wu, Perspectives on the Chinese Anti-Monopoly Law, 75 Antitrust L.J. 73, 73 (2008) (describing key elements of new law).

[13] American Bar Assoc., Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on Draft for Comments of the State Council Regulations on Notifications of Concentrations of Undertakings at 6 (11 April 2008), available at: http://www.abanet.org/antitrust/at-comments/2008/04-08/UndertakingDraft.shtml.

[14] *Id.* at 11–12.