
GLOBAL ANTITRUST LAW AND ECONOMICS

by

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PREFACE

No one would think of writing a casebook on Massachusetts Antitrust Law. It has long been too obvious that such a book would be parochial in at least two senses. First, markets (not to mention legal practices) generally span regions far larger than any state. Second, antitrust analysis has a common methodology applicable across the states, and thus does not benefit from a state-centric focus.

Yet antitrust casebooks continue to be parochial in the sense that they focus on the antitrust and competition law of only one nation. That perspective is rapidly becoming as outmoded as a state-centric approach would be. Markets are increasingly becoming global or at least multinational. A typical merger between large U.S. corporations must get approval not just in the United States but also by the European Community (the "EC"), for their activities often affect both markets. Likewise for large European corporations. Cartels in one nation affect supply in others. And countries are increasingly entering into treaties with each other about the content or enforcement of competition laws. Thus, businessmen, lawyers, and lawmakers can no longer content themselves with understanding only the antitrust and competition law of their nation. They must also understand the other regimes that form part of the overall legal framework that regulates competitive behavior.

Modern antitrust law is thus global antitrust law. (We shall use "antitrust" law to refer to what other nations generally call "competition" or "anti-monopoly" law.) Modern antitrust law also differs from traditional antitrust law in that it now reflects the dominance of the economic model of analyzing antitrust and competition policy. This is a shift that has occurred both in the U.S. and EC, where legal models that once included political, formalistic, corporatist, or autonomy-based notions of "competition" have embraced an exclusively economic methodology based on maximizing consumer welfare, and have done so in a way that is common to the diverging political viewpoints in each. There remain important differences between the U.S. and EC, and differing political viewpoints, but they no longer have as much to do with different values as with different presumptions about how to resolve theoretical or empirical ambiguities raised by a common framework of antitrust economics. The same is true for most other developed nations, as well as for the developing nations that increasingly borrow from the antitrust frameworks of the U.S. or EC.

These two key aspects of modern antitrust law are highly related, for the common economic methodology used in the U.S. and EC means both are

amenable to analysis by a common body of scholarship that speaks an increasingly common language of antitrust economics. It differs from pure economics in that it must crucially concern itself with the administrability and implementation of economic concepts in a world where information is limited, decision-makers are imperfect, adjudication is lengthy and costly, and parties are strategic both in litigation and in responding to different substantive rules. But those realities are common across nations, and thus this modern methodology means that antitrust and competition scholars are, whether they recognize it or not, now part of a global community and that ideas generated on one continent cannot safely be cabined and ignored on the others.

We thus organize this casebook as a study of global antitrust law and economics. Major U.S. and EC laws and cases will be presented and analyzed on each major antitrust topic. Although we also briefly summarize in each section the competition laws of other jurisdictions, our focus is on the U.S. and EC for several reasons. First, as a practical matter, the lion's share of global antitrust enforcement is done by the U.S. and EC. Second, as a conceptual matter, nations outside those jurisdictions by and large borrow the basic statutory frameworks of either the U.S. and EC and employ similar methods of antitrust analysis. Knowing how the U.S. and EC jurisdictions have grappled with the standard set of antitrust problems thus goes a long way to understanding how antitrust analysis is done in the rest of the world too. We discuss other nations in a bit more length where they seem to clearly raise a "third way" of addressing an important antitrust issue.

This is not a book on comparative law in the narrow sense of analyzing comparisons purely in order to shed light on laws that are really national in application. Rather we write with the conviction that this combination of laws from varying nations in actual practice presents a truer picture of the overall regime of competition law that now faces multinational market players. But it is surely a delightful side-benefit that this juxtaposition provides important comparative insights into differing possible approaches and their benefits and drawbacks, which will also aid analysis even in purely national markets. Nor is this a book on international antitrust law in the narrow sense of analyzing how nations resolve legal conflicts between their antitrust regimes. Such topics will certainly command attention in our final chapter, but our dominant perspective is that the antitrust laws of multiple nations are legally relevant to modern antitrust law and practice. Thus, this is not a book on comparative or international antitrust law any more than a casebook on contracts law that includes cases from multiple states is a book on comparative or interstate contracts law. It is rather a book designed to replace more parochial books on basic antitrust law by giving a more realistic sense of the range of issues and analyses relevant to modern antitrust law wherever practiced.

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