The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?

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High-profile antitrust cases—like the still-evolving *United States v. Microsoft Corp.*— are nothing new in America. The tradition dates from 1890, when popular fear of the growing power of industrial "trusts" led to passage of the Sherman Act. Since then, each generation has witnessed a handful of antitrust cases brought against the largest U.S. business enterprises, each case a monument to America's belief in free markets and the use of law to control excessive business ambition.[1]

More recently, the U.S. pattern of landmark antitrust decisions has been extended abroad with a vengeance. In 1997, the European Commission, antitrust authority of the European Union (EU), nearly scuttled Boeing's acquisition of the venerable but competitively flagging airframe supplier McDonnell Douglas. Then, last year, tensions flared when the European Commission rejected General Electric's (GE) offer to acquire Honeywell International—the first time a merger was approved in the U.S. but blocked in Europe because of irreconcilable differences in the antitrust approaches of the two jurisdictions.[2] President Bush expressed concern, and U.S. cabinet officials and congressional leaders delivered

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sharp public rebukes to European officials, who dug in, returned the verbal fire, and held their ground.

The GE-Honeywell experience forcefully imprinted the message that landmark antitrust cases are no longer confined to America. Indeed, aggressive antitrust enforcement is now found not only in Europe, but also throughout the world. When the Soviet Union dissolved in 1991, barely a half-dozen nations had an actively enforced antitrust law. A decade later, more than 100 jurisdictions have them, representing a spectacular increase unmatched in speed and ubiquity by any other legal or regulatory regime in modern experience. This eruption of new antitrust laws has imposed order-of-magnitude increases in the cost, uncertainty, and complexity of legal compliance by business enterprises around the world. If allowed to continue unchecked, a tidal wave of antitrust constraints could swamp businesses in excessive and conflicting regulatory dilemmas, as in GE-Honeywell. The result could be a significant loss in competitive flexibility and the spirit of innovation essential to world economic growth.

The need to cut through the thicket of new antitrust initiatives is well-recognized among the antitrust bar and senior enforcement officials of the numerous jurisdictions that enforce antitrust law around the world. A variety of efforts have been under way—in some cases, since the very start of the antitrust explosion—to assess opportunities to rationalize and harmonize overlapping antitrust regimes and reduce compliance burdens. Yet these initiatives have made limited tangible progress as antitrust continues its swift expansion. How will the surge of antitrust be shaped and refined to prevent future GE-Honeywells and other similar confrontations and impasses? How can antitrust law fulfill its role as a protector of free markets without choking off the avenues of international commerce it was originally intended to protect? This article describes the course of recent developments and attempts some preliminary answers to these important policy questions.

THE RISE OF WORLD ANTITRUST AND ITS IMPACT ON THE CONDUCT OF INTERNATIONAL BUSINESS

Although the heritage of antitrust goes as far back as Periclean Athens where price-fixing grain dealers were put to death, strong antitrust enforcement is a recent phenomenon outside the U.S. In 1889, Canada became the first modern nation to enact an antitrust law, but enforcement was desultory until major statutory revisions in 1986. The European Economic Community, predecessor to the EU, was formed in 1957 and implemented broad antitrust rules in 1962. The period of activist EU enforcement, however, did not begin until 1990, when companies were required to prenotify major acquisitions to the European Commission for approval, thus setting the stage for cases like Boeing-McDonnell Douglas and GE-Honeywell. Until 1990, perhaps only a half-dozen other devel-

oped nations had functional antitrust regimes with at least episodic enforcement. Competition laws were found in the developing world as well, but enforcement was sporadic at best.

In 1990, however, a variety of forces coalesced to create a dramatic surge of antitrust. Ideological resistance to free markets vanished with Soviet Communism. Moreover, the U.S., the EU, and multilateral organizations like the International Monetary Fund and the World Bank, began to require or encourage the enactment, strengthening, and active enforcement of antitrust rules. The results were startling and unprecedented. Iceland, India, Indonesia, Ireland, Israel, and Italy—just to list the "I" countries—today all have antitrust laws and fully operational enforcement agencies. The majority of the 100-plus countries with antitrust law require some form of notification and approval for mergers and acquisitions. (Of the "I" countries, only India does not, but proposed statutory revisions would eliminate that gap.) All such countries impose requirements and present the threat of enforcement action for agreements, licenses, franchises, supply arrangements, and other common forms of business coordination, and all pose the same risks for even unilateral behavior by monopolies or "dominant" firms.

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As more businesses fan out operations across the globe, they encounter antitrust regimes virtually everywhere. Practically all antitrust regimes apply their rules based on potential local effects rather than limiting their reach to local businesses and local transactions. Thus, aside from the sheer magnitude of the compliance burden, businesses cannot simply finesse antitrust by complying with local laws in each jurisdiction where they operate. GE and Honeywell were careful to secure approval from antitrust authorities in the U.S., where both are domiciled, headquartered, and receive the bulk of their revenues. The EU banned the acquisition anyway. In international antitrust, the slowest boat sets the speed of the convoy.

A case brought by the EU against IBM in the 1970s presaged a similar kind of cross-border business predicament now becoming common in the multinational antitrust enforcement web. The EU wanted to use its antitrust rules to require IBM to disclose certain design specifications for its computer systems to competing suppliers of disk drives, printers, and other "peripheral" devices. The theory was that whenever IBM introduced a new computer system, competing suppliers of peripheral devices were at a competitive disadvantage because they had no products to offer customers on IBM's launch date. Competitors needed time to develop their own IBM-compatible products, and IBM could use its head

start to achieve an early leadership position. However, by compelling IBM to disclose information to its competitors prior to its launch date, thus permitting competitors to hit the market simultaneously with IBM, the EU would have shifted the balance of competition not just in Europe, but also worldwide. In other words, because the predisclosed information could not be confined geographically, forced disclosure anywhere meant forced disclosure everywhere. Again, the most restrictive standard, wherever applied in the world, would automatically become the world standard. Behind the scenes, Reagan Administration representatives objected forcefully to this novel antitrust intervention, and IBM eventually reached an accommodation with the EU.[3]

The proliferating business obstacles and mounting costs of compliance in the international antitrust crossfire exemplified by GE-Honeywell and IBM are eliciting growing concern among international enterprises. Although total prohibition of a major acquisition as in GE-Honeywell is an obvious example of how antitrust rules become business obstacles, the real impact of international antitrust enforcement is worked out in far more subtle ways: every day, thousands of individual legal advisers caution their business clients about the antitrust implications of price changes, distribution agreements, patent and other intellectual property license provisions, franchise agreements, joint ventures, and many other forms of standard business transactions and conduct, nearly all of which are subject to antitrust rules and potentially severe remedies.[4]

Predicting how courts and antitrust enforcement agencies in a single jurisdiction will react to any specific set of transactions or practices is a complicated and difficult business by itself. The legal rules involve careful evaluation of complex facts and subtle legal judgments. What is the "market power" of the firm or firms involved? What are the key competitive interactions among suppliers, customers, competitors, and potential competitors? How will a particular practice or transaction influence those interactions? If there is some likely negative impact, will the conduct promote innovation, cost savings, or other efficiencies that justify the potential risks? Even if antitrust rules were the same throughout the world, these would be difficult and subtle judgments, requiring extensive investigation of facts, patient reflection on alternative economic models, and thoughtful consideration of legal rules and policy objectives.

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Businesses face real challenges in shaping their behavior in ways that do not attract antitrust litigation or government enforcement interest. But it is clear that different jurisdictions do not follow the same rules. In the case of GE-Honeywell,

the parties hoped to combine GE's strength in aircraft engine manufacturing with Honeywell's competence in avionics and other aircraft components. They argued that the acquisition would enable the combined firm to offer a more comprehensive range of products and services at lower prices to customers. The U.S. accepted the view of the parties and therefore approved the merger, viewing lower prices and an improved product portfolio as beneficial (subject to some divestitures to prevent the parties from gaining control of a few narrow market segments, such as the supply of military helicopter engines). The EU also accepted the view of the parties, but prohibited the transaction, fearing that a strengthened GE-Honeywell would eventually undermine its competitors by use of its advantages. In other words, the EU condemned precisely what the U.S. applauded. Are the U.S. and EU stuck in a merger stalemate? The question now hangs over the discipline of antitrust counseling and acquisition planning of any company with U.S. and EU operations—of which there are many. While antitrust practitioners and enforcement officials hope the GE-Honeywell experience was *sui generis,* most experts are skeptical and concern runs high.

EFFORTS AT CONVERGENCE AND HARMONIZATION OF DIVERSE ANTITRUST LAWS AND PROCEDURES

Government antitrust enforcement officials are conscious of their differences in approach, and to that end they have launched a variety of coordination efforts.[5] The Organization for Economic Cooperation and Development (OECD)—the intergovernmental agency that evolved from the Marshall Plan to become the central developed-nation forum for the study and coordination of economic policy—has long included an active committee on competition law and policy. The OECD has also begun a special effort to reach out to the numerous jurisdictions—particularly in the developing world—that enforce antitrust laws but are not OECD members. In addition to the OECD, other multilateral organizations are looking at the international aspects of antitrust enforcement, including the World Trade Organization (WTO), which launched a study group on trade and competition during its Singapore meeting in December 1996, and, as evidenced by the Doha meeting in November 2001, seems committed to growing WTO involvement with competition matters.

In addition to numerous multilateral discussions of antitrust, many bilateral arrangements also structure and encourage cooperation among antitrust enforcement agencies around the world. The U.S. and the EU have entered into a detailed agreement and engage in continuous cooperation (although that did not prevent the GE-Honeywell spat, and probably could not have done so in light of the fundamental policy differences that emerged from the dispute). Other bilateral relationships, between the U.S. and Canada, for example, also involve

close and constant antitrust coordination. In addition to formal bilateral arrangements, enforcement agency officials are engaged in constant dialogue with each other with regard both to matters of policy and to issues arising in specific cases of common interest. Antitrust enforcement is well and truly a Global Village.

Despite clear interest in and efforts towards harmonizing antitrust rules and reducing the cost and complexity of dealing with more than a hundred overlapping and conflicting sources of antitrust jurisdiction, progress has been scant. The 1991 Report of the Special Committee on International Antitrust of the American Bar Association (ABA) Section of Antitrust Law and a 1994 report commissioned by the OECD both identified the issue of conflicts and multiplying enforcement burdens resulting from overlapping jurisdiction over mergers and acquisitions. France, Germany, and the United Kingdom offered to use a common merger notification form, but it is little used because each jurisdiction continues to insist on full compliance with its own notification rules. Even with these efforts, the burden on international commerce continues to accumulate. More and more jurisdictions are enacting new antitrust laws or strengthening existing rules and institutions. The EU is proposing a broad reform of its enforcement institutions, encouraging member states to step up their enforcement of antitrust rules and to create a more hospitable legal environment for assertion of private rights of action. Canada is debating the matter of "private access" to its Competition Tribunal—meaning that private parties would have a clearer shot at their commercial adversaries through Canadian antitrust rules. The United Kingdom recently strengthened its competition rules by bringing them into line with the EU approach, and already there is a government proposal for more enforcement powers, including criminal prosecution for serious antitrust violations and the use of surreptitious surveillance in investigating antitrust allegations. To put it simply, international antitrust continues in its "luxuriant growth" phase, awaiting the discerning gardener who will weed, prune, and create a more ordered environment.

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THE FUTURE OF INTERNATIONAL ANTITRUST HARMONIZATION

The explosive worldwide growth of antitrust cannot continue indefinitely without adverse consequences for the global economy. If every price change, supply agreement, distribution contract, and asset transfer becomes subject to antitrust investigation in scores of jurisdictions, each with its own procedures, its own rules, and its own remedies—conflicting in many cases—world economic

growth will visibly slow. A world in which every country could bring criminal enforcement remedies to bear on business conduct affecting its territory (and therefore reachable under the effects test alluded to above), in which any private citizen or consumer could bring a lawsuit to challenge routine business conduct, in which even states, provinces, or other subordinate jurisdictions could challenge conduct when national authorities do not, would be a world devoid of the entrepreneurship, risk-taking, flexibility, and spirit of innovation essential to growth.

But what should be the model for shaping the antitrust garden? Multilateral government groups are now well focused on the issue, but progress has been limited. In October 2001, antitrust authorities of 13 nations undertook an important new initiative, the International Competition Network (ICN), which will have the unique advantage of standing independent of the other agendas (trade, development, etc.) pursued by existing international organizations. The ICN is the only multilateral government organization that discusses "all competition, all the time." An International Task Force formed by the ABA Section of Antitrust Law—the world's largest and oldest group of antitrust practitioners—has just issued a report (joined by the ABA's Section of International Law and Practice) urging the ICN to demonstrate some tangible progress in reducing the multiplicity of merger review rules and practices to help ease the compliance burden in that specific area of real practical impact. As of this writing, a total of 56 authorities have joined ICN.

In the long-run, however, the more serious question is whether the existing model of antitrust law enforcement—separate laws in each jurisdiction and even in subordinate jurisdictions such as states of the U.S. and member states of the EU, each proceeding according to its own rules and agendas, subject to coordination with other jurisdictions only at the margins—is viable. In the U.S., a period of aggressive antitrust enforcement begun in the 1960s was abruptly terminated when an economy plagued by the "triple double" of double-digit unemployment, double-digit interest rates, and double-digit inflation evoked a wave of economic conservatism led by Ronald Reagan. Reagan Administration antitrust enforcement officials—all long-time scholars of antitrust mission creep and of questionable uses of the U.S. antitrust enforcement system—ushered in the era of economic rationality. The U.S. began to take seriously the chilling effect that antitrust enforcement can have on legitimate business conduct, and the more extreme approaches to antitrust were largely purged from the U.S. system.

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Those extreme approaches, exemplified in the U.S. in the 1960s, are not missed and appear highly unlikely to return. The U.S.—and indeed the world—

have chosen the path of free markets and democracy and have rejected "command-and-control" economic systems, state economic enterprise, and strict regulation of particular industrial sectors such as transportation and telecommunications. Privatization and deregulation are the watchwords. The balance between market freedom and government control of market failings is a difficult act of compromise that will be with us forever. But how will antitrust strike that balance in a way that enhances world economic prosperity?

It may only be a matter of time until GE-Honeywell-type standoffs—albeit on a smaller scale—are common in international economic and diplomatic relations. Perhaps the prerogatives of antitrust enforcers will be pushed beyond acceptable limits, as they were in the U.S. prior to the movement toward economic rationality. It is conceivable that the American "triple-double" might be repeated on a global scale, leading to the same kind of reform pressures that arose from the American electorate in 1980. But this scenario seems drastic and unlikely. Because of the constant and active interchange among world antitrust authorities, the new antitrust regimes of the world are not ignorant of the American experience. The polycentric antitrust world of today seems unlikely to move with any great cohesion in any one direction. These facts suggest that all the world's antitrust enforcement officials are unlikely to march off the same cliff at the same time.

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Antitrust promises to be a diverse and exceedingly complex international area for the foreseeable future. As in any period of rapid expansion in an emerging fundamental industry—the automobile or telephone industry of the early twentieth century, the computer industry of the 1980s and early 1990s, the Internet of today—excitement and chaos freely intermingle. The demand for activity is there, but the forms and manifestations of the activity, including the chaos resulting from the frenetic pace of novel contributions from many sources, seem unsustainable in the long run.

Perhaps, the ICN will bring order out of chaos. Perhaps, a new paradigm or model of antitrust enforcement will surface. It is certainly conceivable that a multilateral enforcement institution—now heavily disfavored by the U.S. and other key governments—will emerge. Or, perhaps, antitrust jurisdictions will converge on a "leadership" model, in which the largest industrialized jurisdictions will try to adopt a common enforcement approach and ask other jurisdictions to follow. But will the developing countries simply defer to the jurisdictions that are home base for the most successful multinationals and the wealthiest societies? Perhaps implicit in the current international antitrust farrago is a new form of North-South tension.

Other models of international antitrust cooperation are emerging. As pointed out recently by William Kovacic, General Counsel of the U.S. Federal Trade Commission (FTC) and the FTC staff official responsible for international antitrust matters, various groups of nations that form customs unions or free-trade areas have been including or considering the inclusion of competition rules in their basic charters. Within this trend one can identify, among others, APEC (Asia-Pacific region), COMESA (Eastern and Southern Africa), CARICOM (Caribbean), FTAA (Western Hemisphere except Cuba), MERCOSUR (South America), and NAFTA (North America). Even the Andean Pact, which long predated the global antitrust explosion, contains some basic antitrust rules, although they are little used. By mutual support and by work-sharing, such groups might help provide an appropriate balance between the need for basic antitrust rules and the heavy demands of financing, administering, and assuring sound policy guidance for the sophisticated institutions needed to enforce such rules.

Finally, nations active in antitrust enforcement might consider the model provided by the National Conference of Commissioners on Uniform State Laws (NCCUSL). This private non-profit U.S. group was formed in 1897 in response to the perceived need for uniform state-law approaches to important matters affecting commerce within the United States. The emergence of the need coincided with the transformation of the U.S. from a collection of distinct, localized, agrarian communities to a unified and industrialized transcontinental economy. NCCUSL consists of expert commissioners appointed by state government, including private legal practitioners, law professors, and, sometimes, judges and even legislators. Although legal reform requires legislation, the success of the format is sometimes attributed to the fact that the proposed uniform law is worked out primarily by experts in the field, rather than directly negotiated between governments. The Uniform Commercial Code is widely regarded as a clear and important success of NCCUSL. Perhaps the "expert negotiation-government adoption" model can be replicated at the international level with regard to antitrust rules.[6]

Aside from the question of the appropriate institutional framework, at least two basic areas seem ripe for exploration in tailoring antitrust to preserve the competitive flexibility needed to maintain a vibrant and progressive economic environment. First, antitrust rules should maintain a disciplined focus on the critical role of innovation and new technology—by far the most important source of long-run productivity growth. Substantive antitrust rules should recognize the need to allow experimentation in all phases of commercial activity and to avoid punishing or demonizing successful innovators. Second, new antitrust regimes should be more conscious of rule-of-law concerns so that businesses know the rules of the game in advance, parties caught in the enforcement net have a fair chance to defend themselves, and decision making is objective, balanced, and in the best interests of maintaining a sustainable competitive economy.

CONCLUSION

Few areas in the international sphere seem as murky as antitrust. Antitrust has always been an insider's game, where policy discussions are conducted in the arcane language of its practitioners, enforcement officials, and a narrow circle of interested academics. The subject stays far from the front page except when a landmark case, such as *United States v. Microsoft Corp.*, a spectacular infraction (price-fixing by the world's vitamin producers), or celebrity infringers (leading fine art auction houses) permit antitrust to invade media and public consciousness. It is exceedingly difficult to focus the attention of both political leaders and the public on such intricate matters of microeconomic policy. Attention is more easily attracted to media events such as international peace negotiations, championship sporting events, economic summits, or scenes of disaster. Only once in a generation are front pages and leading stories devoted to antitrust. The restoration and maintenance of acceptable growth levels in the world economy may depend on finding and winning popular support for intelligent answers to the unique and profound questions surrounding the current state of international antitrust.

The next time a major antitrust event becomes worthy of global headlines, political leaders and other opinion-shapers should help focus attention on the speed, power, and potential consequences of the global antitrust explosion. They should also guide public sentiment toward responsible ways of reducing the burdens of the multiple demands of antitrust rules, litigation, and administrative proceedings in dozens of jurisdictions, thereby improving the fairness and clarity of the complex antitrust enforcement process and helping global businesses innovate and serve consumers within a clear legal framework. ■

NOTES

1 *United States v. Standard Oil Co.*, which led to the 1911 break-up of John D. Rockefeller's oil monopoly, *United States v. AT&T Co.*, which dismantled the Bell System in 1984, and other cases in between are all based on the same fundamental laws and traditions as *United States v. Microsoft Corp.*

2 The parties have appealed the Commission's decision to the Court of First Instance and could appeal any adverse ruling by that court to the European Court of Justice (the EU's court of final appeal). Since the transaction is abandoned, the appeal can only protect the parties from adverse future rulings that rely on errors in the Commission's decision—they cannot resurrect the abandoned transaction. The full appellate process is expected to take several years.

3 It is unclear whether the Reagan Administration objections were the cause of the eventual agreement between the EU and IBM.

4 Sherman Act violations can be prosecuted as felonies in the U.S., and damage awards to injured private parties—businesses or consumers—are automatically tripled. While criminal enforcement and private damage actions are rare outside the U.S., monetary fines can be enormous. The EU permits fines up to 10 percent of the offender's worldwide revenue.

5 Unfortunately perhaps, the focus of governmental organizations examining competition matters tends to drift toward issues related to mutual enforcement assistance. What are the best means of pursuing antitrust investigations and prosecutions? How can different jurisdictions help each other gather evidence and share it? While these questions are certainly worthwhile, it is important that focus is also placed on the risks and potential adverse effect of overlapping and uncoordinated antitrust enforcement activity throughout the world trading system.

6 There are important differences at the international level (for example, there is no "Congress" to legislate resolutions that the states are incapable of working out), but NCCUSL has several features worthy of emulation.