



Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy

Edited by Richard A. Epstein and Michael S. Greve

*Seemingly arcane questions of jurisdiction have emerged as a massive problem in antitrust law. When business activities stretch across state and national borders, which laws do companies have to comply with? And what happens when multiple suits over the same alleged actions are brought in multiple courts under differing standards? Instead of creating new avenues of competition, globalization has produced a veritable antitrust proliferation, increasing the chances of protectionist policies and exploitative practices. In *Competition Laws in Conflict*, leading experts explore routes to an improved institutional design for antitrust law in the national and international contexts.*

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The growth and integration of national and global markets have held out the hope that the world would become more competitive and antitrust policy less important. Instead, globalization has produced massive antitrust policy proliferation. Close to one hundred countries (and some international bodies, such as the European Union) now enforce overlapping and conflicting antitrust laws. Within the United States, the law enforcement function is uneasily parceled out among the federal government, increasingly aggressive states, and private parties acting under a mix of federal and state law.

When corporate transactions routinely cross borders, anti-competitive practices will often

prejudice consumers and producers in many jurisdictions. States have powerful incentives to tolerate domestic industries that exploit outsiders, or even to encourage such practices. Even short of rank protectionism, a system under which each jurisdiction gets to apply its own competition rules to global transactions will produce grave political conflicts while raising producers' compliance costs to intolerable levels. High-profile antitrust disputes, from the prosecution of Microsoft in state, national, and international forums to the transatlantic disagreement over the European Union's merger policy, illustrate the burgeoning difficulties.

In a world of multiple antitrust authorities, whose law should govern any given case—and under what rules of engagement? The professional consensus on these institutional design questions is far more limited than it is with respect to substantive antitrust doctrines. In *Competition Laws in Conflict*, leading experts explore routes to improve institutional design within national and international contexts. The editors' introduction provides a theoretical framework for the basic jurisdictional problems, and their postscript reviews the contributions in light of that framework and provides general policy recommendations.

Competition or Cooperation?

Jurisdictions compete with one another on countless margins—prominently, by selecting legal rules that promise to attract productive citizens and firms. Under suitably defined conditions, such competition is preferable to a uniform, centralized

legal regime. Can one then envision an efficient “competition of competition laws”?

In their chapter, Wolfgang Kerber and Oliver Budzinski disentangle the various meanings of “competition” in this context. Under “yardstick competition,” autarkic states (those lacking any other exchange or relation) compete, in a metaphorical sense, by learning from the innovations that other autarkic states make in formulating and implementing antitrust policy. Kerber and Budzinski then gradually relax the stringent assumptions of the autarky model by first permitting goods and services, then firms and individuals, to cross borders. Under the most relaxed assumptions, firms are permitted a free choice of competition law, much as U.S. corporations may choose an exclusive state charter.

Kerber and Budzinski show that all forms of jurisdictional competition are highly problematic in the antitrust context. Cross-border trade may induce jurisdictions to utilize antitrust policy for strategic ends, and the collective pursuit of such objectives by many nations will almost invariably reduce global welfare. The ability of firms to choose applicable antitrust laws by relocating to this or that jurisdiction will tend to exacerbate the incentives for strategic behavior. In the end, even yardstick competition may be comprised: strategically acting states will only learn to exploit each other more effectively.

Kerber and Budzinski propose an international multilevel system that would permit productive institutionalized learning and, at the same time, resolve the jurisdictional conflicts and limit the transaction costs, as well as the opportunities for strategic behavior, that bedevil the existing, near-anarchic regime. They hope that political institutions can find the appropriate mix of centralization and decentralization in light of economies of scale, the scope of competition problems, and the heterogeneity of policy preferences among member-jurisdictions. Their program requires a high degree of confidence in stable bureaucratic organization and cooperation, the application of impartial expertise in designing institutions and executing policies, and the ability of political institutions to operate in a public-interested fashion.

International Antitrust

The “international” contributors to *Competition Laws in Conflict* disagree profoundly about the possibility of mobilizing those resources on a global scale. At one extreme, Andrew Guzman calls for harmonization—that is, the articulation and enforcement of a uniform

body of antitrust laws by the World Trade Organization (WTO). At the other extreme, Paul Stephan favors international autarky in which each state pursues whatever antitrust law it chooses, restrained only by its treaty obligations with individual nations. An intermediate position, urged by Michael Trebilcock and Edward Iacobucci and separately by John McGinnis, defends an extension of the current WTO regime, which embraces a “national treatment” principle that prohibits discrimination against foreign producers without specifying the content of national antitrust law.

Guzman’s plea for harmonization rests on the conviction that local trade policies are unnecessarily duplicative and inconsistent and that they suffer from an incurable home court advantage that is quick to register the local gains from specific antitrust policies while ignoring their external costs. He hopes that all divergent interests will be brought to the table at a single point in time so that consistency and simplicity will be joined with coherence that ad hoc interventions and agreements cannot achieve.

One obvious note of doubt, here sounded by Judge Diane Wood in a sobering essay, is that Guzman may overestimate the capabilities of international organizations. Opinions over an ideal competition policy differ greatly. National governments are often willing to make concessions in favor of small businesses and infant industries, and the hard question is why they should be denied that (dubious) right for autonomous choice in some international regime in which one size is made to fit all.

Consistent with this theme, Trebilcock and Iacobucci as well as McGinnis argue for a nondiscrimination rule: each nation may pursue its own antitrust policy so long as it does not impose additional burdens on foreign nations. The principle is easier to implement than substantive harmonization, and it ensures that gains generated internally are shared by foreign firms who operate within the country.

The authors defend different versions of the national treatment principle. Trebilcock and Iacobucci would restrict its extraterritorial operation to inbound commerce and treat antitrust rules that affect outbound commerce as a trade rather than an antitrust question. McGinnis fears that such a regime would dilute exporters’ incentives to lobby for open borders. He would welcome WTO jurisdiction only (and precisely) with respect to national antitrust rules that operate as a protectionist trade barrier. Despite that important difference, the authors are united in their desire to constrain the authority and discretion of international institutions.

As these authors acknowledge, however, even a formal antidiscrimination rule proves problematic. Neutral laws often conceal partisan and parochial agendas. McGinnis is willing to go far in entrusting international bodies with the authority to police evasions, but his resolve carries the price of permitting such bodies to burrow deep into domestic policy arrangements.

Doubts of this sort prompt Paul Stephan's far more skeptical stance against international cooperation. His preferred regime would allow each nation to set and enforce its own domestic policy and to give extraterritorial effect to its substantive laws. Stephan readily acknowledges the cost (any given practice could be subject to review in many different countries) but argues that the costs of coordination would be even higher. Intriguingly, Stephan also argues that at least in knowledge-intensive economic sectors, overly protective policies may create short-term strategic gains only at the price of long-term losses in innovation and competitiveness. If that is right, some countries may have a powerful incentive to adopt global welfare-enhancing policies on their own accord.

The United States

While the "international" contributors argue over the appropriate jurisdictional rules and the ability of multi-jurisdictional bodies to establish and enforce those rules, no similar disagreement marks the "domestic" contributions to *Competition Laws in Conflict*. The authors of the Sherman Act sought to extend—and limit—its reach to anticompetitive conduct in interstate commerce (while leaving local conspiracies to the states), but state and federal antitrust authorities now extend concurrently over the entire range of private transactions, from the local lemonade stand to the multinational merger. The contributors who address the subject uniformly lament this state of affairs and urge some jurisdictional sorting.

Bruce Johnsen and Moin Yahya demonstrate that the extension of American antitrust law to local events is unwarranted. Relying on modern economic scholarship, they formulate an intelligible "geographic market power" test that would place purely local anticompetitive conduct beyond the scope of federal enforcement. Their judicially manageable test tracks the intuitive distinction between "national" and "local" economic affairs that informed the authors of the Sherman Act back in 1890.

Tougher problems arise: first, over the active state sponsorship of anticompetitive practices that exploit sister-states and second, over the state enforcement

of federal rules in a multijurisdictional setting. With respect to the former, Judge Frank Easterbrook's famous essay on "Antitrust and the Economics of Federalism" (the only reprint in this volume) urges a radical revision of the "state action" doctrine so as to bar states from abusing their antitrust immunity for the purpose of exploiting sister-states' citizens and producers. With respect to concurrent state enforcement, William Adkinson's essay on the strange fate of "indirect purchaser" suits under federal antitrust law suggests the demoralizing conclusion that the federal government appears to lack an authoritative means to shut down ill-conceived state enforcement proceedings. The Supreme Court's *Illinois Brick* decision barred such lawsuits under federal law in the interest of coherent antitrust policy. Powerful interests, however, insisted on broad private antitrust enforcement. That demand proved insufficient to produce a congressional override of *Illinois Brick*—but more than adequate to produce multiple defections at the state level, which the Supreme Court duly blessed. State "*Illinois Brick* repealers" present the very problems of inconsistent law enforcement that the original decision meant to curtail—except, as Adkinson shows, on a much greater scale.

Richard Posner's and Michael DeBow's chapters on the problems of state antitrust enforcement highlight a different facet of the problem. The decision by some states in the *Microsoft* antitrust proceeding to hold out for additional concessions even after the federal government had decided to settle the matter prompts Judge Posner to advocate a wholesale repeal of state attorneys' *parens patriae* authority to litigate antitrust cases on their citizens' behalf. Michael DeBow's compilation of state antitrust actions over the past two decades suggests that *Microsoft*-style interventions are exceptions to a pattern of modest and harmless, if somewhat parochial, state antitrust enforcement. Hence, DeBow urges a more limited proposal to curb the potential for state overreach. (He would permit state *parens patriae* actions involving purely in-state horizontal restraints, while strengthening federal oversight over all antitrust lawsuits seeking injunctive relief.) DeBow volunteers, however, the grim thought that *Microsoft* might prove a harbinger rather than an outlier.

Three Lessons for Antitrust Reform

First, keep it simple. Instead of aiming at a comprehensive—but usually elusive—solution, it is usually best to tackle, first and energetically, incontrovertible institutional errors. The domestic policy proposals

presented by Easterbrook, Johnsen and Yahya, DeBow, Posner, and Adkinson all fall squarely into this category of remedies for glaring inefficiencies. The problems here are political, not intellectual.

Similarly, Judge Wood shows that the international arena offers opportunities for a low-cost elimination of inefficiencies and exploitation. This need not involve any grand multilateral bargain. For example, the United States invented export cartel exemptions, a clearly inefficient and odious practice. We do not need the WTO or the EU to un-invent that practice; we can—and, in our judgment, should—revoke it unilaterally, just as we can unilaterally promote free trade. In addition, Judge Wood lists antidumping laws, agricultural policy, and certain sectoral arrangements (such as telecommunications) as prime candidates for a piecemeal but productive international antitrust agenda.

Second, an international nondiscrimination or national treatment principle in antitrust merits serious consideration. At the same time, the U.S. experience counsels great skepticism with respect to the ability of multijurisdictional bodies to get the jurisdictional rules right and to resist an inherent tendency toward creeping (or galloping) harmonization and centralization. Trebilcock and Iacobucci rightly warn against constructing an international antitrust regime from the vantage of the hardest possible case, the international mega-merger. A modest rule that settles half the problems with a tolerable rate of error is vastly preferable to an ambitious system that produces monstrous errors over the entire range.

Third, several contributors—especially those with administrative antitrust experience (Judge Wood and William Kovacic)—make a persuasive case for a sustained effort to build a consensus on what practices should be legal and which ones should not. “Soft” harmonization may help to reduce friction and, perhaps, the range of substantive disagreement. It is hard to see the downside to this form of institutional learning, and there is room for an incremental migration toward free trade and competitive markets.

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