Cooperation, Comity, and Foreign Conduct

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6th China Competition Policy Forum
Shanghai, China
August 30-31, 2017

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Introduction

- Global commerce and trade have continued to increase in recent decades
  - Global supply chains mean many products cross international borders in whole or part
  - More mergers and acquisitions involve worldwide markets and/or assets in multiple jurisdictions
- As a result, anticompetitive conduct increasingly has international dimensions and effects
- Over 130 countries have competition laws
  - Consensus on importance of promoting competitive process

The U.S. Starting Point

- Goal of U.S. antitrust law is to promote domestic consumer welfare
  - Protection of competition, not competitors
  - Goal generally shared by competition laws worldwide
- Anticompetitive conduct or transactions outside of U.S. can harm consumer welfare within the U.S.
  - Same is true for other countries
- In principle, such foreign conduct can come within reach of U.S. antitrust laws

Limits on Authority Over Foreign Conduct

- Are there limits on this authority?
  - U.S. FTAIA extends coverage of U.S. antitrust laws to
    - import commerce, or
    - conduct with a direct, substantial, and reasonably foreseeable effect on commerce in U.S.
- Requires a reasonable nexus between the conduct and the harm to a country's consumers
  - This "effects doctrine" is recognized principle in laws of various countries (e.g., China AML Art. 2)

Limits on Authority Over Foreign Conduct

- U.S. antitrust agencies' enforcement policy follows these principles:
  - "In making investigative and enforcement decisions, the Agencies focus on whether there is a sufficient connection between the anticompetitive conduct and the United States such that the federal antitrust laws apply and the Agencies' enforcement would redress harm or threatened harm to U.S. commerce and consumers."
    - Antitrust Guidelines for International Enforcement and Cooperation, § 3 (2017)

Remedies for Foreign Conduct

- When conduct harms U.S. consumers in a manner that meets the FTAIA test, is there a remedy?
  - U.S. law can remedy conduct that harms U.S. consumers even if it occurs outside U.S.
    - Worldwide cartels that raise prices for U.S. consumers
    - Mergers and unilateral conduct that harm (or threaten to harm) U.S. consumers

Limiting Principles for Remedies

- The challenge:
  - U.S. remedies applying to foreign conduct or transactions can also have effects on competition in other countries - a result of interconnected global markets
    - Remedy addressing issue for U.S. may address issue for other countries in which it's a problem as well, so can provide benefits in some circumstances
      - E.g., Exclusive dealing in global markets that has anticompetitive effects in U.S. can also harm competition around the world
    - However, should one country's remedy control all?
      - Different view of law; respect for sovereignty of other nations
      - Different effects (e.g., harms in one country vs. benefits in another)

Limiting Principles for Remedies

- The U.S. principle:
  - U.S. agencies seek remedies “that include conduct or assets outside the United States only to extent that including them is needed to effectively redress harm or threatened harm to U.S. consumers.”
    - Antitrust Guidelines for International Enforcement and Cooperation, § 5.1.5 (2017)
    - Also consider comity
  - Goal is to tailor remedy appropriately to stop harm in U.S. without seeking broader than necessary remedies for conduct outside U.S.

Limiting Principles for Remedies: Examples

- Recent FTC examples:
  - Challenge to Polypore's acquisition of Microporous involving battery separators (2010)
    - Remedy included divestitures of factories in U.S. and Austria to ensure buyer could adequately supply U.S. market and have global scale needed to compete
    - FTC's remedy specifically upheld by appeals court
  - Consent agreement with Victrex (Invibio), a U.K. company, which had entered long-term contracts with nearly all users of a medical grade polymer ("PEEK") used in medical implants (2016)
    - Remedy prohibited exclusivity provisions for products sold in U.S. or sold abroad for use in products sold in U.S.
    - Did not include restrictions on contracts with customers purchasing solely for manufacture/use outside U.S.

Limiting Principles for Remedies: Comity

- Restraint on remedies is informed by comity considerations, which include:
  - Conflict with foreign law/policy
  - Effect on another agency's enforcement/remedies
  - Efficacy of foreign vs. U.S. enforcement
  - Overall effect of conduct on U.S. commerce

Limiting Principles for Remedies: Comity

- Conflict with foreign laws/policy typically not an issue, as 130+ nations have competition laws that prohibit the same types of conduct as U.S. antitrust laws
- However, serious consideration to:
  - effect on enforcement activities of another agency
  - view that U.S. should limit substituting its authority for that of counterpart agencies acting within their jurisdiction

Limiting Principles for Remedies: Implications

- These principles have implications for remedies in all antitrust cases; a couple of instances for specific illustration:
  1. Exploitative conduct (e.g., excessive pricing):
     - Excessive prices are an end result, not an effect on the competitive process
       - Note: U.S. antitrust laws do not condemn exploitative conduct such as excessive pricing as anticompetitive (only conduct that uses market power to exclude/limit competitors)
     - If a country has antitrust laws on excessive pricing (or other exploitative conduct), a remedy limited to a country's jurisdiction should be able to address fully the issue within the country

Limiting Principles for Remedies: Implications

- Specific illustration (con't):
  2. IP-related cases:
     - IP is territorial (i.e., patents are granted by and for specific countries);
     - IP-related conduct outside U.S. can have an effect on U.S. consumers;
     - But nature of IP requires specific consideration to determine how conduct involving non-U.S. IP affects U.S. consumers as part of necessity of considering remedies for conduct outside U.S.
       - For example, do limitations on exercise of IP overseas directly harm competition on products imported to U.S.?

Cooperation and its Relation to Comity

- Cooperation plays an important role, particularly in ensuring that comity principles can be effectively applied
  - Recognition that other agencies may be well positioned to address harms, especially within their borders
  - Helps to ensure remedies are consistent across borders wherever possible
  - Possibility of "positive" comity
- Effective and robust cooperation can enhance comity by building trust among enforcers, including when working on related investigations in their own jurisdiction

Thank you!

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