COMMENT

International Antitrust Convergence: A Positive View

BY RANDOLPH W. TRITELL

DURING THE PAST 15 YEARS, the number of jurisdictions with a competition law has exploded from approximately 25, of which few were seriously enforced, to some 100 today. With economic activity increasingly transcending national borders, and jurisdictions applying competition laws to firms and conduct outside their borders, achieving at least a reasonable degree of coherence and convergence in the application of competition laws is important for both competition agencies and firms. Particularly given the significant role the United States has played in encouraging the spread of competition laws, the U.S. antitrust agencies have a strong interest in promoting convergence toward sound enforcement of those laws.

Meaning and Goals of Convergence

Two important objectives of international antitrust policy at the Federal Trade Commission are: (1) promoting cooperation among competition agencies; and (2) convergence of competition policy and enforcement by agencies around the world. The term "convergence" is used, rather than "harmonization," which implies uniformity of legal provisions or their application.

Harmonizing competition laws or policy in the foreseeable future is impractical and, moreover, probably undesirable. Its achievement would be possible only through a supranational body or a multinational code. The rejection, primarily by developing countries, of proposals to negotiate competition disciplines in the World Trade Organization's Doha Round demonstrates that the world is not ready for multilateral competition rules. There are simply too many jurisdictions with too many differences in levels of economic development, legal systems, histories, and cultures to envision a unified worldwide competition system any time soon. Moreover, such rules would be static, while competition policy is evolving dynamically. Preserving the ability to experiment with different rules and procedures and to adapt them to the local environment is critical to enable competition law and policy to evolve, as has occurred throughout the history of the U.S. antitrust laws.

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At the same time, leaving every jurisdiction to develop and apply its competition laws and policies in a vacuum would likely be a recipe for chaos. Firms engaged in cross-border mergers could be subject to scores of merger reviews, each with its own procedures and substantive standards, imposing significant costs and conceivably deterring firms from pursuing procompetitive transactions. Agreements and single-firm policies with cross-border effects could be subject to inconsistent legal obligations, potentially thwarting efficient exploitation of more open markets.

The U.S. agencies believe the most promising means for promoting best practice and avoiding conflict is a process of "soft" convergence. Soft convergence occurs not because it is mandated by rules, but because competition agencies and national lawmakers believe it is in their best interests to move toward policies used by other jurisdictions or promulgated internationally in best practice standards. Convergence is facilitated by providing opportunities for agencies to work together on matters and by sharing experiences in international fora devoted to promoting sound policy.

Convergence implies moving toward the same result, but it matters that the result is the "right" one. It might be easy, for example, to agree to converge toward a norm that all mergers that would result in a firm with over a 50 percent market share should be blocked, but it would also be wrong. Thus, the challenge is to seek convergence toward identified best practices.

Convergence Between the United States and the European Union

Given the role of the United States and the European Union in the world economy and the prominence of their competition enforcement regimes, there is an understandable focus in the business and competition communities on antitrust convergence between the U.S. agencies and the European Commission. Commentators often focus on the differences between the two systems, in particular noting the conflicting results in the respective reviews of the General Electric/Honeywell merger and the *Microsoft* case.[1] This paints a false picture. In the dozens of cases, particularly mergers, per year that the U.S. agencies and the EC's Competition Directorate review in parallel, the agencies cooperate closely and, with only rare exceptions, analyze the issues in the same or similar manner.[2] In almost all merger cases that raise competition concerns in both jurisdictions, the United States and European Commission, typically with confidentiality waivers provided by parties, negotiate compatible relief.

Mergers that are approved subject to different conditions in the United States and the European Commission inevitably prompt allegations of disharmony. However, the differences are almost always attributable to variations in market conditions in the two jurisdictions—i.e., although the firms and products or services may be global, the relevant geographic markets and competitive conditions are different, necessitating different remedies.[3]

The U.S. agencies and the EC recognize that there are some differences in their policies and that these differences can have serious consequences, as in the *GE/Honeywell* and *Microsoft* cases. They further understand that it is important that we seek to address and minimize conflicts. To address differences in merger policy, the FTC, DOJ, and DG-COMP established a working group in 1999. The group has worked on merger remedies, merger review procedures, and analysis of conglomerate mergers, among other issues. The results have included closer merger remedies policies, as reflected in the 2001 EC Remedies Notice,[4] a joint statement of best practices in coordinating merger reviews,[5] and at least a better understanding of our respective approaches to conglomerate mergers. The U.S. agencies and DG-COMP also established a working group on the treatment of intellectual property issues in competition cases. The working groups hold videoconferences and meetings to compare our respective approaches and seek opportunities to bring our policies into greater conformity.

The U.S .agencies and our counterparts in Brussels are committed to pursuing further convergence between our systems and their application in specific cases, and to help lead global convergence efforts.

Convergence Among Developed Country Competition Authorities

Convergence is, of course, an issue beyond the United States and the European Commission. EU Member States review many international transactions, and the competition rules of other developed country competition regimes often affect international mergers and business arrangements. Although the wording of their laws and regulations differ, there is a high degree of commonality among many competition policies pursued by developed countries. In general, they share a commitment to using competition policy to promote consumer welfare, and there is a mutual resolution to combat hard-core cartels. Merger analysis and guidelines show a high degree of convergence, borne out by compatible substantive treatment of almost all cross-border mergers.

Procedural rules, including merger notification thresholds, information requirements, and timing of review, show greater differentiation, although the ICN Recommendations (discussed below) appear to be helping to narrow the gaps. Treatment of single-firm conduct, for example, with respect to low pricing and alleged exclusion of rivals, and of intellectual property rights, reveals the greatest differences in analytical approaches.

There are several vehicles to promote convergence among developed country competition authorities. A network of bilateral agreements facilitates cooperation and convergence. The United States has eight "soft" cooperation agreements that provide a framework for exchanging non-confidential information.[6] In addition, it has entered into enhanced "positive comity" agreements with the European Commission and Canada, and one agreement, with Australia, under the International Antitrust Enforcement Assistance Act that enables the parties to share confidential investigative information under specified conditions and to obtain information for the other party's competition agency through compulsory means.[7] Many other jurisdictions have entered into bilateral agreements that facilitate cooperation. The European Competition Network provides a forum for specific case coordination and policy convergence among the competition agencies of the 25 EU members.

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Developed country agencies hold bilateral consultations, within or outside the framework of formal agreements, to promote cooperation and convergence. The U.S. agencies meet regularly with counterparts from the EC, Canada, Japan, and Korea. They have also established working groups with the Fair Trade Commissions of Japan, Korea, and Taiwan on the treatment under competition law of intellectual property rights.

On a multilateral level, the Competition Committee of the Organization for Economic Cooperation and Development (OECD) has been an important venue for developed country competition agencies to promote convergence. The Committee's 30 members plus six observers meet three times per year to explore topics of mutual interest, allowing members to learn of each others' approaches and pursue best practice. For example, the Committee recently held programs on "competition on the merits" in monopolization cases, and merger remedies. The OECD has adopted several Council Recommendations concerning competition policy, including on enforcement cooperation, hard-core cartels, merger review procedures, and structural separation in regulated sectors.[8] The OECD also promotes convergence through peer review of its members' competition policies. The reviews consist of a detailed written analysis of countries' laws, institutions, and cases, followed by a thorough oral examination and, ultimately, a report containing policy recommendations. The OECD Competition Committee has committees that explore competition issues in regulated sectors and on enforcement cooperation, particularly in anticartel and merger enforcement.

Convergence with Developing Countries

Most of the growth in antitrust laws has been and continues to be in developing countries, typically as part of a transition towards more market-based economies. Developed countries, directly and through international organizations, such as the OECD, WTO, UNCTAD, and financial institutions, have invested substantial resources in assisting with the development of competition laws and their implementation. Recognizing the different circumstances in developing, as opposed to industrialized, countries and among nations with newer competition regimes, "no one size fits all" is an oft-repeated mantra. Nonetheless, there are some central precepts of modern antitrust common to most if not all efforts to impart sound competition policy to newer agencies. Examples include: the goal of promoting consumer welfare; the importance of economics in competition analysis; the need to deter and punish hard-core cartels; the value of separating social and employment policy from competition policy; and non-discrimination on the basis of nationality.

The extent to which developing countries have accepted and incorporated these policies, and the extent to which they view it as important that this type of convergence occurs, is open to question. Some developing countries query whether competition policy, as opposed to industrial policy, is the optimal strategy for promoting economic growth at their stage of development. At a recent meeting of the OECD's Global Forum on Competition, which included competition officials from over 30 developing countries, there was near unanimity that consumer welfare is the proper goal of competition policy. Yet, some jurisdictions, like South Africa, explicitly incorporate noncompetition objectives into their competition law, and others do this less overtly in their enforcement policies and decisions. At a more subtle level, developing countries are urged to adopt somewhat different models of competition policy depending on the national systems or policy preferences of the assistance provider.

Given that some 75 jurisdictions have premerger notification systems, and many agreements and unilateral practices are subject to the competition rules enacted by developing countries, at least some degree of analytical convergence is desirable. The U.S. agencies promote convergence with developing countries primarily through two means, bilateral technical assistance and the International Competition Network (ICN).[9]

Since 1990, the U.S. antitrust agencies, primarily through programs funded by the Agency for International Development, have provided assistance to over 35 countries on five continents.[10] Today, we have programs active in Mexico, India, ASEAN and Andean Communities and their member states, South Africa, and Central America. These include long-term resident advisors, as well as short-term missions, encompassing drafting competition law provisions and guidelines, establishing an agency, investigating a case, and all substantive aspects of competition law enforcement. The U.S. agencies are also engaged in a dialogue with Chinese officials regarding their draft competition law. Not all of these efforts prove to be successful, for example, because agencies are not provided with sufficient tools or resources to carry out their work or because learning dissipates with personnel turnover. However, in many instances, such as in our recently concluded program in Central and Eastern Europe, it is clear that agencies have absorbed and are doing their best to implement sound competition enforcement policies.

The ICN was founded in 2001 to provide a venue for all competition agencies worldwide to discuss issues of mutual interest with a view toward promoting cooperation and policy convergence.[11] It is a "virtual" organization, with no permanent staff or headquarters that now includes almost every competition agency in the world. Members work with each other and with international organizations and private sector advisors from the legal, business, academic, and consumer communities on discrete projects designed to promote best practices in competition enforcement. Current activities include multi-jurisdictional mergers, cartels, competition policy implementation, and a new project on antitrust in the telecommunications services sector.

The Merger Working Group has developed 8 Guiding Principles and 13 Recommended Practices for Merger Notification and Review Procedures. The Principles and Practices are designed to reduce differences in the procedures for notifying and reviewing multijurisdictional mergers, and making merger review more efficient and effective for agencies and merging parties. For example, the Recommended Practices provide for an appropriate nexus, based on local sales or assets, between the transaction and the reviewing jurisdiction, and for objectively determinable notification thresholds, i.e., not based on the parties' market shares. Like all ICN work product, they are nonbinding, but over half of ICN member jurisdictions, including many developing countries, have already made changes to their laws and procedures that bring them into greater conformity with the ICN standards. The ICN has also, among other things, produced a handbook for investigative techniques in merger review, a "tool kit" for effective methods of competition advocacy, and a report identifying the benefits and drawbacks of modes of providing technical assistance.

The ICN is already proving to be an important forum to communicate ideas among competition officials, and to promote best practice. The close working relationships among agencies from developed and developing countries makes the ICN a promising vehicle to continue to achieve soft convergence among the antitrust policies of the world's competition agencies.

Conclusion

Antitrust agencies around the world recognize the desirability of increased convergence toward best practice and have made significant strides toward achieving this objective. Nonetheless, much remains to be done to promote understanding of sound competition policy and avoid damaging conflicts. Through increased and deeper bilateral relationships, effective technical assistance, and productive work in multilateral fora, the prospects for increased convergence during the coming years appear to be bright. ■

[1] For example, the description of an upcoming competition program of the U.S Chamber of Commerce (in Brussels on Sept. 14, 2005), states:

> Over the past five years, the European Commission has increasingly parted company with its American counterpart on specific enforcement decision, most notably in their challenges to the proposed GE/Honeywell merger and to Microsoft's operating system and media software bundle. With little foreknowledge, global businesses must anticipate which enforcement authority will view the concerned activity in a harsher light and act accordingly.

[2] For example, just during 2004 the FTC was involved in three such cases: *Sanofi-Synthelabo/Aventis*, http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_67.html#m_3354 (EC press release and decision), http://www.ftc.gov/opa/2004/07/sanofiaventis.htm (FTC press release and decision); *Sony/BMG*, http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_66.html#m_3333 (EC press release and decision), http://www.ftc.gov/opa/2004/07/sonybmg.htm (FTC press release); and *Cytec/UCB*, http://europa.eu.int/comm/competition/mergers/cases/index/by_nr_m_71.html#m_3558 (EC press release and decision), http://www.ftc.gov/opa/2005/03/cytec.htm (FTC press release and decision).

[3] This can be seen in several settlement of pharmaceutical industry mergers that raise different issues in the U.S. and EC markets, e.g., *Sanofi-Synthelabo/Aventis*, *supra* note 2; Air Liquide/BOC (2000) (parties settled

with the EC but not the FTC); *Guinness/GrandMet* (1997) (settlements in U.S. and EC, but different U.S. market conditions necessitated separate relief in the rum market).

[4] Commission Notice on Remedies Acceptable Under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No. 447/98, 2001 O.J. (C 68) 3, http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf.

[5] Best Practices on Cooperation in Merger Investigations, http://www.ftc.opa/2002/10/euguidelines.htm (Oct. 30, 2002).

[6] The agreements are with Germany (1976), Australia (1982), the EC (1991), Canada (1995), Brazil, Israel, and Japan (1999), and Mexico (2000).

[7] The agreements are available at http://www.usdoj.gov/atr/public/international/int_arrangements.htm.

[8] http://www.oecd.org/document/59/0,2340,en_2649_37463_4599739_1_1_1_37463,00.html.

[9] Regional and other multilateral organizations, such as the Asia-Pacific Economic Cooperation (APEC) and UNCTAD, also promote convergence in competition policy.

[10] *See* Submission of the United States to the OECD, The United States Experience in Competition Law Technical Assistance: A Ten-Year Perspective (2002), http://www.oecd.org/dataoecd/37/61/1833990.pdf.

[11] Information about the ICN, as well as all ICN work product referred to in this comment, is available on the ICN's Web site, http://www.internationalcompetitionnetwork.org.

COMMENT

ANTITRUST CONVERGENCE:

The View Without the Rose-Colored Glasses

BY CHARLES S. STARK

THOSE WHO SAY CONVERGENCE has come a long way are right. If we look at the United States and the European Union, the two most important stops on today's antitrust circuit, the extent to which the two regimes have found common ground in recent years is remarkable.

But we are a long way from convergence if our reference point is not where we once were, but where we ought to be if our objective is a coherent, efficient, and smoothly functioning system. For the reasons I'll set out here we may never get there. We will be coping for the foreseeable future with second-best solutions to the problems that arise from the absence of convergence.

My premise is that convergence is a good thing as a general matter, although it is more important in some contexts than in others. As a general matter, global convergence would make life easier for everyone. Companies and their advisors would only have to learn one set of rules. Predictability would be enhanced. Operations would be simplified, because companies would not have to behave differently in different jurisdictions to comply with different antitrust rules.

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Convergence is, of course, more important for conduct and for transactions that are transnational—global mergers, international licensing, conduct of arguably dominant global firms operating in global markets, for example. It is less important for rules that govern what is essentially local conduct or local transactions, where companies are local or where multinational companies can readily conform to local rules without affecting their operations elsewhere. But the first category certainly is a large enough one for us to be concerned about the absence of convergence when that is what we observe.

Before we can assess the extent to which we have or have not achieved convergence, we need to be clear about what we mean by convergence. There are, I think, at least three areas on which we need to focus:

- ***Ultimate objectives.*** What is the antitrust regime trying to accomplish? Here, it is fair to say that the United States and the European Union have largely reached convergence on consumer welfare, whatever that may mean in the particular case, as the object of the exercise.
- ***The rules and analytical approach.*** Here we are talking about what companies look to in determining whether their conduct will be challenged, and what the agencies look to in determining whether to challenge business conduct. In this respect there has been an enormous amount of convergence, and there are significant respects in which convergence has not been achieved, and in which it may or may not be achieved in the foreseeable future.
- ***The case-by-case bottom line.*** Do the U.S. and the EU agencies come out on the same page in assessing the legality of particular conduct or transactions and in determining appropriate remedies? Here the record is mixed. We have examples like the recent *Oracle* case, in which the European Commission reversed its initial challenge to Oracle's acquisition of PeopleSoft after the U.S. court decided in Oracle's favor.[1] But we also have the famous differences between the U.S. and European agencies in cases such as *GE/Honeywell*[2] and *Microsoft*,[3] and the diametrically opposite principles applied by the U.S. and European courts in evaluating British Airways' fidelity discounts to travel agents, challenged in both jurisdictions by its rival Virgin Atlantic.[4]