INTERNATIONALIZATION OF COMPETITION LAW AND POLICY: THE DOMESTIC PERSPECTIVE

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Abstract: Recent decades have witnessed a marked internationalization of competition law enforcement and dialogue. Multinational, regional and bilateral efforts have contributed to the approximation of competition law regimes worldwide and to collaborative enforcement. However, notwithstanding these valuable developments, domestic social, political, industrial and market considerations still affect the scope and application of national competition laws. This article explores the meeting points between the domestic perspective of competition law enforcement and growing international collaboration and enforcement efforts. In doing so, it highlights the intrinsic national nature which is embedded in the DNA of competition law and the natural limits of international convergence and collaboration in this area.

Keywords: Competition law; international cooperation; convergence; developed and developing countries; export cartels; transfer of wealth; extraterritoriality.

I. Introduction

Recent decades have been characterized by increased internationalization of competition law enforcement. A record number of jurisdictions have adopted competition laws and invested in effective enforcement mechanisms.1 A remarkable effort at international level has resulted in the proliferation of collaborative networks, assimilation of law and policy and cross-fertilization. To the benefit of consumers worldwide, it has led to increased efficiency in tackling anticompetitive activities.

This trend reflects an almost global consensus on the benefits of free competitive markets. The international landscape is characterized by increasing discussions and

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joint activities at the multinational, regional and bilateral levels. At the multinational level, the Competition Committee of the Organisation for Economic Co-operation and Development (OECD), the Intergovernmental Group of Experts on Competition Law and Policy of the United Nations Conference on Trade and Development (UNCTAD) and the International Competition Network (ICN) have contributed to greater proficiency in the enforcement of competition laws.² Regional fora such as the Association of East Asian Nations and the African Competition Forum have promoted competition principles tailored to their needs.³ Bilateral agreements on competition law also have contributed to close cooperation and assimilation between trading partners.⁴

The increased convergence and collaborations are remarkable, especially when one considers the complexity and domestic nature of competition enforcement. Indeed, competition law and policy are rooted in the domestic landscape, culture, economic development and market reality. While sharing similar rhetoric, they advance a wide, and at times diverse, range of values. The visible international dialogue and collaboration may at times mask this reality, creating an imprecise impression of a homogenous landscape. Yet, these domestic variables affect and, at times, limit the nature of international cooperation and collaboration and also determine the zeal with which agencies pursue various infringements and set their priorities.⁵

In this article, we explore the domestic perspective, which is embedded in the DNA of competition law. By pointing to the intrinsic nature of competition law, we consider the interface between the domestic and international perspectives. In doing so, we illustrate the natural limits to international convergence and reflect on the realistic outcomes of collaboration.

It is important to clarify at the outset that our aim is not to question, nor discount, the significant benefits that stem from increased cooperation worldwide. International cooperation efforts have transformed the enforcement landscape of competition law and will continue to do so for years to come. They provide an invaluable contribution to the process of harmonization and to efficient enforcement. The discussion in this article is more nuanced: while recognizing the benefits of international efforts, we consider the way in which the domestic perspective affects these efforts and ultimately limits their outcome. Understanding the domestic and

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³ Maher and Papadopoulos (n.1), pp.78–84.
⁴ The EU alone has signed more than 80 bilateral agreements, some with general provisions concerning competition law, others dedicated solely to competition law. For the full list of bilateral agreements between the EU and other countries, see <http://ec.europa.eu/competition/international/bilateral/> (accessed 25 Jan 2014).
⁵ For example, the domestic perspective led to the proliferation of voluntary frameworks. See Ezrachi, “The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control” (2004) 36 George Washington International Law Review 433.
international dimensions assists in setting realistic goals and expectations and contributes to identifying the areas where convergence is desirable and practicable.

We begin our review with a discussion of the common, core aims of competition law and note the similar foundations, which underpin economic thinking. Following this, we explore a range of domestic variables, which result in a more complex reality. We consider the way in which domestic culture, politics and market characteristics affect the stated goals and implementation of domestic competition laws and dictate a process of soft harmonization.

II. Origins

As briefly noted in the Introduction (Section I above), competition law is aimed at maximizing consumer welfare by fostering a competitive market environment. Competition policy is generally understood to advance the competitive process in order to attain greater economic efficiency and consumer welfare. Ultimately, consumers reap the benefits of the competitive process in terms of lower prices, greater choice and improved quality of products and services. These have been identified as the “core competition objectives” and they relate to the economic underpinnings of competition law.

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8 OECD, “The Objectives of Competition Law and Policy” (29 Jan 2003) CCNM/GF/COMP, para.20; WTO, “The Fundamental Principles of Competition Policy” (WT/WGTCP/W/127) (7 Jun 1999, Background Note by the Secretariat), para.10; UNCTAD, “The Basic Objectives and Main Provisions of Competition Laws and Policies” (UNCTAD/ITD/15) (11 Oct 1995), para.1. While the ICN noted that divergence existed among jurisdictions, nonetheless certain central goals have been identified across the board, whereas all but one member agencies identified more than one goal as relevant. See ICN, “Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies” (May 2007) 2. In the ICN report, the following goals were identified in dissenting order depending on the number of times these were cited by the competent member agencies: ensuring an effective competitive process (both as a goal and as a means); promoting consumer welfare; maximizing economic efficiency; ensuring economic freedom; ensuring a level playing field for SMEs; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatization and market liberalization and promoting competitiveness in international markets. Ibid., Annex A. These identified objectives were reiterated more recently. ICN, Unilateral Conduct Workbook, Chapter 1: “The Objectives and Principles of Unilateral Conduct Laws” (April 2012).