

Does Cyberspace Need Antitrust?

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I. Introduction

Somewhere in Canada, a shopper sat at home and ordered the latest bestseller from <http://www.bn.com>. While Canadian antitrust authorities pondered whether the Chapters chain of booksellers constituted a monopoly, our Internet shopper gave lie to claims of monopolization. Early internet enthusiasts claimed that "the internet interprets censorship as damage and routes around it," meaning that the distributed nature of the web makes the policing of it rather difficult. DARPANET, the precursor to the internet, was designed to withstand a nuclear strike against any of its nodes by routing information around the damage. Economists specializing in industrial organization theory could as easily quip that the internet interprets local monopolies as arbitrage opportunities for careful shoppers, allowing them to route around the higher prices.

While our Canadian shopper waited for her new book to arrive, the European Commission deliberated whether MCI and Worldcom should be allowed to merge. Though neither company had a substantial presence in Europe, the EC was able to ensure that MCI divest its internet backbone infrastructure before the companies could consummate their merger. The Commission noted that the proposed merger "between two US telecommunications companies would have worldwide effects. The Internet is global in nature; Internet access and service providers, Internet content providers, end-customers, all demand universal connectivity to the worldwide web. ...[T]he impact of

this merger between these two US companies affected not only US consumers but also inter alia European Union consumers."¹

The two examples highlight the double-edged nature of e-commerce and internet applications for antitrust. While the internet massively increases the size of the relevant market for a host of transactions, subverting would-be monopolists and encouraging worldwide competition, it also increases the jurisdictional scope of national antitrust authorities. Many countries and the European Commission use an economic effects rule to determine jurisdiction. Since a website may engage in purely electronic transactions without knowing where its customers are physically located, it may be subject to the jurisdiction of dozens of antitrust authorities around the world.

Jurisdiction and extraterritoriality issues are not a new problem in antitrust enforcement. The 1945 *Alcoa* decision extended the Sherman Act's reach beyond America's borders to apply to commercial activity affecting American commerce, regardless of its physical location. Thus, for example, if prices in the U.S. are affected by commerce occurring only in foreign jurisdictions, U.S. antitrust law applies.

For much of the twentieth century, antitrust effectively remained an American institution as few jurisdictions outside America had substantive competition laws; extraterritoriality problems were mostly found in the enforcement of the Sherman Act beyond the borders of the United States. Today, however, over ninety countries have antitrust statutes and more are drafting competition codes;² together, over 86% of world trade takes place in jurisdictions with antitrust statutes.³ In this chapter, we discuss the workings of international antitrust enforcement, how the internet affects and is affected by antitrust legislation, and the challenges that internet suppliers and consumers face in the global antitrust environment.

¹ Commission of the European Parliament 2002, p. 4.

² Janow 2002, p. 1.

³ Palim, 1998, notes that as of the end of 1996, the 70 countries with competition laws comprised 79% of world output and 86% of world trade. More countries have adopted competition laws since then.

II. International Antitrust

II.

While antitrust was not invented in the United States,⁴ during most of the twentieth century it effectively remained an American institution. For the first half of the century, the Sherman Act applied only within American borders,⁵ but the 1945 *Alcoa* ruling extended its reach to foreign conduct affecting American commerce.⁶ Until the early 1990s, “international antitrust” largely referred to the problems associated with extraterritorial enforcement of American antitrust law against overseas corporate activity.

Alcoa defined the American stance on the jurisdictional limits of antitrust. In that case, Canadian and European aluminum companies colluded to restrict aluminum production, limiting the amount of aluminum ingot that they would export to the United States. Judge Learned Hand’s Second Circuit Court ruled that the foreign cartel was subject to action under the Sherman Act because its activities both intended to and subsequently resulted in substantial negative effects on American commerce. This “effects test” became enshrined in American antitrust law over the latter half of the century.⁷ While some rulings attempted to inject comity considerations into the effects test,⁸ the Supreme Court’s ruling in *Hartford Fire*⁹ strongly limited the application of comity to those cases in which foreign law conflicts with American law to such an extent that the foreign company cannot comply with the statutes of both countries. *Alcoa*’s effects test remains the determinant of jurisdiction.

Extraterritorial enforcement of the Sherman Act has not gone without complaint from the foreign jurisdictions affected. Several countries have put in place blocking legislation to impede American antitrust enforcement. Additionally, “claw-back” legislation allows

⁴ Lipsky, 2002, p. 59. Lipsky points out that price-fixing grain dealers could be put to death in Periclean Athens, more than two millennia before the Sherman Act.

⁵ See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-57 (1909).

⁶ See *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 443-44 (2d Cir. 1945).

⁷ Udin (2001) provides a good summary of the “effects test” and of the cases that relied on and further strengthened its application. See also Gifford and Sullivan (2000).

⁸ See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d (9th Cir.1976). The Ninth Circuit proposed certain comity considerations for determination of jurisdiction.

⁹ See *Hartford Fire Ins. Co. v. California*, 509 U.S. (1993).

foreign defendants in American antitrust cases to seek damages in their home country's courts from the plaintiff in the American antitrust action.¹⁰ However, these types of problems in extraterritorial enforcement are not the main concern of this chapter; they are now the boilerplate of international business and antitrust textbooks.¹¹

Of more recent concern is the worldwide proliferation of antitrust statutes. Assistant Attorney General Charles James quipped in a recent address that "antitrust has been one of the United States' most successful exports."¹² While countries with McDonald's restaurants still outnumber those with antitrust statutes, James was not hyperbolizing. As recently as 1973, only 27 countries had adopted competition codes.¹³ As of the end of 1996 that number had grown to seventy, 61% of which had instituted their codes in the 1990s.¹⁴ The most recent figures put the number over ninety, with twenty more countries in the process of drafting codes.¹⁵ Because many of these countries' codes also employ an economic effects test to determine jurisdiction, any given transaction may be subject to scrutiny by dozens of antitrust authorities.

The proliferation of antitrust authorities presents far more difficult problems than those posed by an extraterritorially activist Federal Trade Commission. Multiple agencies now can and do claim jurisdiction over a variety of corporate activities, most notably over mergers. Over 60 countries now require or provide for pre-notification merger filings.¹⁶ Consequently, large merging companies sometimes now need to file such notifications with over a dozen jurisdictions. The compliance costs for merging companies can be

¹⁰ See Canada's "Foreign Extraterritorial Measures Act" and the United Kingdom's "Protection of Trading Interests Act", for example. See also "The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement." *Journal of International Law and Business* 2:2 (Autumn 1980).

¹¹ Textbooks discussing extraterritoriality and antitrust include Ball, McCulloch et. al., 2001 and Folsom, Spanogle and Gordon, 2000. The interested reader may also wish to consult the Autumn 1980 symposium issue "Transnational Issues in American Antitrust Law" of the *Journal of International Law and Business* for an early overview of the topic. Davidson (1998) discusses the extension of claw-back and blocking provisions to other extraterritorial enforcement actions.

¹² James, 2001, p. 4. Note, however, Gerber (1998) who argues that EC competition law is indigenous rather than a U.S. import.

¹³ Edwards (1974), p. 112-3.

¹⁴ Palim (1998), p. 105-6.

¹⁵ James (2001), p. 2.

¹⁶ ICPAC (2000), p. 2.

burdensome, especially in cases in which the relevant antitrust authorities provide contradictory rulings.¹⁷

In order to minimize frictions in the application of antitrust laws, the United States has pursued bilateral agreements with Australia, Brazil, Canada, Germany, Israel, Japan, Mexico and, most notably, the EC.¹⁸ At minimum, these agreements provide for notification and consultation on cases where the interests of both parties are involved. Agreements with several jurisdictions, including the EC, also include positive comity provisions allowing each jurisdiction to request that the other enforce its own laws to remedy activity taking place within its borders.¹⁹

By most accounts, cooperation between antitrust authorities is strong and growing.²⁰ However, no amount of inter-agency cooperation can prevent conflict when the antitrust agencies of different jurisdictions have irreconcilable differences regarding the purpose of antitrust legislation. Two merger cases involving the U.S. and EC serve here as exemplar: Boeing/McDonnell Douglas and GE/Honeywell. In Boeing/McDonnell Douglas, the FTC determined that the merger posed no anticompetitive threats, while the EC objected to exclusive supply contracts despite efficiency-enhancing characteristics of those contracts.²¹ Daniel Gifford and Thomas Sullivan argue that the EC ruling may constitute an attempt on the part of the EC to raise Boeing's costs in order to provide an advantage to Airbus, the well-connected and well-subsidized European consortium airplane manufacturer.²² Following EC threats of enforcement action, Boeing abandoned its exclusive supply contracts.

Similarly, in GE/Honeywell, strong cooperation between the Department of Justice and the EC preceded divergent rulings. Because the merging parties waived confidentiality rights, Justice and EC shared all information provided by GE and Honeywell.

¹⁷ Paul (2000).

¹⁸ James (2001).

¹⁹ Janow (2000), p. 33.

²⁰ See Evenett (2000b) pp. 18-20; Parisi (1999), Janow (2000). See also von Finkenstien's (2002) address at the opening conference of the International Competition Network (ICN). The ICN provides a forum in which competition agencies can consult with one another and develop "best practices" recommendations. See also Janow (2002). For a contrary perspective, see Guzman (1998).

²¹ See Gifford and Sullivan (2000), Klein (1997).

²² Gifford and Sullivan (2000), p. 116.

Consequently, communication and cooperation between the two agencies was “tremendous.”²³ Nevertheless, Justice approved the merger while the EC disallowed it. While both agencies agreed that the merged company would offer improved products and lower prices, Justice deemed the resulting efficiencies as justifying the merger while the EC worried that those efficiencies would harm the merged company’s competitors.²⁴ Assistant Attorney General James contrasts EC competition law with American law by noting that the purpose of American antitrust laws “is not to protect business from the working of the market; it is to protect the public from the failure of the market.”²⁵ While we disagree with his assessment of American antitrust law,²⁶ the contrast is accurate. Goals other than efficiency underlie much of European competition law.²⁷

Leaving political considerations to one side for the moment, antitrust policy is based on economic theory. And, economists in different parts of the world do not fully agree with one another. Karl Aiginger, an economist from Austria, and his co-authors, find that American economists specializing in industrial organization are more likely than their European counterparts, for example, to view the behavior of oligopolists as conforming Bertrand or Cournot predictions rather than pure collusion – that is, to restrict output and raise price not by as much as would a pure monopolist but, rather, in a non-collusive way that reflects each oligopolist’s strategic guess about how the other oligopolists in its industry will behave.²⁸ Consequently, American economists are more likely to be skeptical of antitrust action in oligopolistic markets. European IO economists disagree systematically with Americans on a wide range of questions of importance to antitrust

²³ James (2001), p. 5.

²⁴ James (2001), pp. 5-6, Lipsky (2002) p. 63.

²⁵ James (2001) p. 6, citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). Note, however, that EC policy may be shifting. As of this writing, the European Court of Justice has overturned two EC merger prohibitions. As a result, Commissioner Monti is moving towards reform of the EC merger control process. Whether this reform proves substantive remains to be determined.

²⁶ See Bork (1978), as well as McChesney and Shughart (1995) for more thorough analysis of American antitrust law.

²⁷ See Gifford and Sullivan (2000) for discussion of non-efficiency goals in EC, US and Japanese antitrust law.

²⁸ Oligopolistic markets are those which are dominated by a very small number of firms. In the Bertrand model, even a market with only two firms will result in the competitive outcome as each firm can win the entire market by slightly underpricing the other; the result then is that both firms price at marginal cost. In the Cournot model, each firm takes the other’s output as given and optimizes accordingly; output is higher and prices are lower than in the pure monopoly case.

policy.²⁹ Theories long-since discarded in the United States remain quite in vogue elsewhere. While American economists and antitrust authorities now tend to be skeptical of predatory pricing arguments, their European counterparts worry greatly about the use of predatory pricing.³⁰ Fundamentally divergent approaches to antitrust policy can quickly arise from these differences.

Additionally, public choice considerations – viewing government officials as being just as self-interested as are people in the private sector – lend skepticism to public-interest theories of antitrust regulation. While recent cases like *Boeing* point to protectionism as a driving force behind antitrust enforcement actions, the phenomenon is not at all new. While antitrust legislation might be seen as a substitute (by ensuring that domestic firms are subject to vigorous competition) for open international markets,³¹ the empirical record does not bear up that analysis. Instead, antitrust seems to serve as a substitute for tariffs. Shughart, Silverman, and Tollison³² find that foreign competition correlates *positively* with antitrust agency funding in the United States. Additionally, Mark Palim³³ finds that countries adopting competition codes do not see them as substitutes for international competition. The recent proliferation of antitrust statutes occurred during a wave of globalization and lower tariffs. This suggests that antitrust statutes might serve

²⁹ Note Aiginger et. al., “Compared to European IO economists, the Americans are less likely to want to restrict research joint ventures, more optimistic about the positive effects of mergers on profitability, less likely to interpret the higher price cost margins of large firms as a consequence of market power, somewhat less likely to expect collusion in markets with only a few firms, more likely to believe that market power is a short run phenomenon, more likely to believe that the importance of predation has been widely exaggerated, more likely to believe that consumer protection laws generally reduce economic efficiency, more likely to favor reducing the influence of regulatory authorities, less likely to believe that the deregulation of telecoms has lead to new monopolies, more willing to count producers’ surplus in addition to consumer’s surplus in regulatory policy, less willing to use competition policy to attack tacit collusion, less likely to condemn the exchange of information among competitors, more likely to believe that international competition has made the regulation of monopolies and outdated policy, more likely to believe that effective concentration has been reduced in the last two decades by globalization, and less likely to think of the goal of antitrust policy as inducing firms to equate price and marginal or average cost.” (p.XX). The authors of this chapter lie firmly on the Western side of the Atlantic.

³⁰ Niels, Gunnar and Adriaan ten Kate. 2000 “Predatory pricing standards: is there a growing international consensus?” *The Antitrust Bulletin*, Fall. 787-809.

³¹ See DiLorenzo (1985). In the absence of foreign competition, antitrust statutes can keep dominant domestic firms in check.

³² Shughart, William F., Jon D. Silverman and Robert D. Tollison. 1995. “Antitrust Enforcement and Foreign Competition.” In McChesney and Shughart, eds, The Causes and Consequences of Antitrust: The Public Choice Perspective.

³³ Palim, Mark R.A. 1998. “The Worldwide Growth of Competition Law: an Empirical Analysis.” *The Antitrust Bulletin*, 43:1 (Spring), p. 105-145.

as an additional method of protecting domestic firms from foreign competition when other methods of protectionism are waning.³⁴

III. e-competition. Antitrust and the Internet

The only difference between economics and e-economics is a hyphen. Economic principles hold as strongly in a wired world as they do in the world of brick and mortar. Mythologies have developed around the economics of the internet, some of which see the internet as demanding more activist antitrust policy, others of which argue that the internet obviates the need for antitrust. We find the arguments for strengthened antitrust enforcement do not hold up to serious scrutiny. On balance, economic arguments favor reduced antitrust activity as a consequence of the internet. However, antitrust is a political institution and matters politic seem likely to favor increased activism.

Cartels are Restrained in a Global Digital Marketplace

Traditional antitrust concerns surrounding cartels, price signaling, and other violations of antitrust law can emerge as easily in e-commerce as in traditional business. However, the internet can mitigate some of these problems. Because individual consumers shopping from home can now quickly access a global marketplace, cartels and price-fixers must become global in scope to be truly effective; local cartels cannot extract rents from internet-savvy consumers that are larger in magnitude than shipping costs from outside the boundaries of collusion. And as shipping costs fall, the scope for less-than-global cartelization shrinks – for all a consumer need do to escape a local cartel’s attempt to charge monopoly prices is to order the desired merchandise or service from outside of the local-cartel’s geographic area.

³⁴ Evenett, Lehmann et al., pp. 14-15.

Digital Dominance is Checked by Low Marginal Costs

Economists Richard McKenzie and Dwight Lee³⁵ raise interesting caveats for antitrust analysis in the digital world. They point out that market dominance cannot be exploited in digital markets in the same way as in the market for physical products. A dominant firm in ordinary markets can increase prices by restricting output; because of their inability to exploit similar economies of scale, competitors cannot simply increase their production to make up the difference. In digital markets marked by infinitesimal marginal costs of production, competitors can quickly and easily increase output to match the reduction in the dominant firm's output. Should Microsoft attempt to exploit its dominant position in the provision of office software, Corel could quickly reap the benefits by expanding its output; doing so would cost Corel next to nothing.

Limits of “Network Effects,” “Tipping,” “Lock-In,” and “Leveraging”

Some authorities worry that the internet may pose a new antitrust concern – the possibility that network effects may lead to the establishment of global monopolies. Four interrelated economic concepts drive these arguments favoring strong antitrust vigilance in internet markets: network effects, tipping, lock-in, and the leveraging of monopoly power from one market into others.

Markets in which consumer valuation of a product depends on the number of other people also using the product are described as being subject to network effects. A telephone is of little value if no one else has one; similarly, the Microsoft operating system would not be as desirable if it only commanded a small percent of the market. Once the installed client base for a product reaches a certain size, consumers reason that it will become the standard and the market “tips” in favour of the dominant product. At that point, the market becomes “locked in” to the new standard; superior products may exist, but unless consumers can coordinate to switch to the alternative product, the existing standard will remain dominant. The owner of a standard can then “leverage” its existing monopoly to erode competition in other markets.³⁶

³⁵ McKenzie, Richard B. and Dwight R. Lee, 2001. “How digital economics revises antitrust thinking.” *The Antitrust Bulletin*, Summer. 253-98.

³⁶ See Klein (2000) for discussion of these issues.

We have reason to be wary of network effects arguments favoring strong antitrust enforcement activity. Even if a firm's product has achieved total market dominance, its market power remains rather limited. Should the firm seek to exercise market power, it could encourage entry. Given low marginal costs of distribution once the fixed costs of development have been paid, a rival can quickly establish a network by essentially giving away the initial version of its software and recouping its fixed costs through later sales of upgrades.³⁷

The "leveraging" argument is equally suspect. Some critics of Microsoft have claimed that Microsoft has leveraged its Windows monopoly into the browser market. By integrating its browser into the Windows software, Microsoft is alleged to have foreclosed the market to competitors. Of course, customers preferring Netscape or other browsers can simply (and frequently costlessly) download alternate browser software. However, the argument suggests that customers are simply too lethargic to search out alternatives to the software already provided with the computer. If we take the leveraging argument seriously, we should also worry that Microsoft is attempting to extend its reach into the market for search engines. Users mistyping an internet address in Microsoft's Internet Explorer are quickly routed to Microsoft's own search engine to assist them in finding their website. However, Google is the search engine of choice on the internet, not MSN Search. Microsoft provides no links to Google on its desktop, nor does Internet Explorer automatically link to Google, but almost eighty percent of internet searches are conducted using Google's engines.³⁸ Microsoft exerts as much "leveraging" to push customers to its MSN Search product as it does to push customers to use its browser. Internet Explorer passes the market test and MSN Search doesn't; "leverage" doesn't enter into the equation.³⁹

Even were we to grant for the moment the argument that network effects can lead to locked-in monopolistic markets, the question of remediability quickly comes to the fore. Paul David, the foremost proponent of "lock-in" based theories of market failure,

³⁷ Additionally, as software is a durable good, a firm must compete with its own existing product base – consumers can always choose to continue using older versions of the software. The digital monopolist can never rest on its laurels; it could quickly find itself with a 100% share of a market with no sales.

³⁸ McHugh (2003).

³⁹ Note also Liebowitz and Margolis (1999).

suggests comprehensive measures delaying adoption of any technological standard in order to ensure that the right path is set upon before path dependence sets in.⁴⁰ However, it is quite unclear that such delays could survive cost-benefit analysis. While the benefits are only probabilistic and depend critically on the delay actually resulting in the adoption of a more efficient standard, the costs of delay are certain – they must consist of the discounted value of the network benefits that would have accrued during the period of delay. And, we have no reason to believe the most efficient standard can be chosen outside of a market discovery process.⁴¹

Precisely because networks and product familiarity are valuable to consumers, a well-working market will supply these valuable aspects. But it is perverse then to conclude that the market has failed because the successful supplier of a network or of an especially high degree of comfortable product familiarity could, if it chose, raise its prices and restrict its output for a time. Of course it could; such ability is an inevitable consequence of success at pleasing consumers in these ways. (If a firm were unable, even in the short-run, to raise its price even slightly without losing significant market share, then this fact would mean that consumers attach no or only minuscule value to the network or to product familiarity.)

However, ability to raise prices above costs in the short-run (and to increase short-run profits) does not imply that the firm has real monopoly power. If a firm refrains from exploiting consumers today with higher prices because this firm worries that doing so would cause consumers to shift their patronage to other firms tomorrow, then, in our view, this firm is no monopolist. A genuine monopolist behaves monopolistically. A firm that doesn't behave monopolistically, even though it might be able to do so for a time, is a firm that is foolish or altruistic or fearful of rivals' responses.

Government policy need not concern itself with foolish or altruistic firms; the former write the script of their own doom and the latter are agents of philanthropy (for as long as their shareholders' wealth and good-will last). Nor should government concern itself

⁴⁰ David (2002).

⁴¹ See Cowen, Tyler and Eric Crampton, eds. 2002a. *Market Failure or Success: The New Debate*. Oakland, CA: The Independent Institute.

with firms fearful of rivals' responses, for such firms are competitive, even if no currently existing competitor is on the scene.

A general principle applies here, which is this: the best evidence of monopoly power is the actual exercise of monopoly power – most notably, raising prices and restricting output. Reality provides very few, if any, actual examples of firms achieving sustained monopoly power – as evidenced by harm to consumers (rather than to competitors) – without government-enforced barriers to entry. The ratio of fears of monopolization to actual monopolization is quite high.⁴²

Because history supplies so few examples of the successful private achievement of monopoly power, a sound rule is to require evidence of actual price hikes and output restrictions as necessary (although not sufficient) pre-conditions to launching antitrust actions.⁴³ Such a rule will eliminate much of the anti-competitive uses of antitrust that mar its history without significantly increasing risks to consumers of suffering exploitation by a monopolist.

This rule is especially appropriate for the Web and other industries that enjoy exposure world-wide. The number of actual and potential competitors is immense, as are competitors' sources of financing. All it takes is one among millions of people familiar with the Web to have a creative idea on how to serve consumers better than the currently dominant firm is serving consumers. The larger the market, the larger the pool of creative talent and entrepreneurship available to keep it competitive and dynamic.

The network features of this market do not necessarily work against the forces of competition. Of course, it is precisely the difficulty of imagining the massive coordination necessary to replace one network with another that makes competition in such markets seem unlikely. But the empirical evidence gathered by Liebowitz and Margolis shows that competition among actual networks is remarkably robust.⁴⁴

⁴² Boudreaux, Donald J. and Burton W. Folsom. 1999. "Microsoft and Standard Oil: radical lessons for antitrust reform" *The Antitrust Bulletin* (Fall).

⁴³ Our recommendation accords with Richard Epstein's principle that complex worlds are best governed by simple rules. See Epstein, *Simple Rules for a Complex World* (Harvard University Press, 1995).

⁴⁴ Liebowitz, Stan J. and Stephen E. Margolis. 1999. *Winners, Losers and Microsoft: Competition and Antitrust in High Technology*. Oakland, CA: The Independent Institute.

Reflection shows that these empirical findings should not be as surprising as they might at first appear. Competition in network economies occurs at the level of the network. Precisely because the gains from becoming the “dominant” network supplier are so large, the competition to become this supplier will be unusually intense. Entrepreneurs and investors have every incentive to search for ways to displace the currently “dominant” firm – and, knowing this fact, the currently “dominant” firm has every incentive to keep its prices and product quality as attractive as possible to consumers.

Of course markets might fail. No entrepreneur in the world might recognize the potential for profit. Or even if several cash-strapped entrepreneurs *do* recognize the potential, every single investor worldwide might refuse to finance any such ventures. But so, too, might political and legal processes fail to detect the true state of the market. Indeed, politicians, bureaucrats, and judges are much less likely to make sound decisions about such markets than are entrepreneurs and investors. The latter specialize in taking the pulse of, and in investing in specific markets; the former specialize in legal and political endeavors. Moreover, entrepreneurs and investors put their own wealth at stake on the actual outcome of their decisions; government and judicial functionaries have a much less personal stake in the whatever antitrust decisions they make.⁴⁵

IV. Who Rules the Web?

In *Alcoa*, Judge Hand found as “settled law” that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and that these liabilities other states will ordinarily recognize.”⁴⁶ While this ruling certainly facilitated the prosecution of anticompetitive behaviour beyond America’s borders, it raises a dangerous precedent. There remain very few activities that some state does not reprehend, and all are now a mouse click away from every jurisdiction in the world. The

⁴⁵ Boudreaux and Crampton (2003) discuss the importance of personal stakes and individual decisiveness.

⁴⁶ 148 F.2d at 443.

other papers in this volume provide excellent resources on the implications of this for free-speech and other important matters.

The consequences of Hand's decision, and the extension of the economic effects rule to jurisdictions encompassing the vast majority of the world's production and trade, will prove damaging to e-commerce and to the internet. Antitrust remains a highly politicized part of economic policy, and history suggests that antitrust legislation frequently serves to protect domestic firms from foreign competition. As e-commerce increases global competition, pressure for increased antitrust activism against foreign firms seems likely to increase.

The International Competition Policy Advisory Committee warned against this use of antitrust in its 2000 "Final Report." As Committee Co-Chair Rill suggests, "the threat of seriatim balkanization of e-commerce by multiple, inconsistent, and uncoordinated national regulators threatens economic growth and can be used to impair competitive entry and expansion."⁴⁷ Guarding against this type of state activity has become a matter of increasing concern for the FTC. Indeed, the FTC has begun urging individual states to remove protectionist barriers against internet competition.⁴⁸ However, such actions are much more difficult against foreign states. Much as the United States uses anti-dumping provisions to protect domestic interests ranging from logging to steel, so too can foreign jurisdictions launch spurious antitrust complaints against American companies threatening their firms through internet-based competition.

In many cases, foreign antitrust complaints against e-commerce firms will be relatively minor. For many small countries, ability to enforce antitrust remedies against e-commerce firms may be limited to prohibiting those firms from legally dealing with residents of the country. For instance, a small country's antitrust agency will have a difficult time enforcing a remedy calling on a foreign Fortune 500 company to divest portions of its business, but it may be able to shut the firm out of its markets. And, while shutting the firm out may actually be the goal of these actions, the negative consequences

⁴⁷ ICPAC (2000), p. 292.

⁴⁸ The FTC held a public workshop on state impediments to E-Commerce in October of 2002. Comments from that workshop are available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>. See also FTC (2002).

of such actions will largely fall on the imposing jurisdiction. In such cases, antitrust provides a way of protecting domestic firms from foreign competition without falling afoul of the General Agreement on Tariffs and Trade (GATT) or World Trade Organization (WTO).

More troubling are cases in which the litigating jurisdiction is capable of enforcing its remedies on firms outside its borders. Among jurisdictions with the power to extraterritorially enforce rulings, the ruling of the most restrictive jurisdiction is likely to prevail.⁴⁹ Traditional protectionist mechanisms have been quite limited by comparison; while countries have been able to impose tariffs on products crossing the border, they have not been able to force actual restructuring of industries abroad. While the EC could impose tariffs on the imports of American aircraft, they could not dictate the structure of the American aircraft manufacturing industry. The economic effects rule in international antitrust provides that ability.

Of course, countries will be somewhat constrained in applying explicitly protectionist extraterritorial remedies. Extraterritorial enforcement hinges on the agreement of the company's home country; absent that cooperation, enforcement action is limited to preventing the offending firm from selling its wares within the jurisdiction. If cases like Boeing/McDonnell Douglas arise too frequently, cooperation between the US and EC on antitrust matters will deteriorate considerably and clawback and blocking statutes will again become the norm in international antitrust. However, not all cases involve such prominent and well-connected firms.

Because e-commerce allows local consumers to route around the rents earned by local monopolies, we can expect firms whose rents are in danger to lobby strenuously for their protection. If antitrust authorities employed a pure efficiency standard and if political considerations were never a part of antitrust analysis, this would pose little threat to the e-commerce firm. Unfortunately, the world is not nearly so benign.

⁴⁹ See Muris, 2001.

What's to Be Done?

Given antitrust's long history of abuse, along with an even longer history of markets proving to be remarkably adept and creative at protecting consumers from private monopolies, any proposed antitrust treatment of cyberspace should be examined skeptically. What forms of international antitrust might be best able to withstand skeptical examination, given the practical reality that governments will exercise some form of antitrust scrutiny over cyberspace?

Harmonization is one option, but one that we emphatically oppose. Harmonization, by its nature, eliminates jurisdictional competition – which would be especially ironic for antitrust. Even without interest-group pressures that might bias antitrust rules away from protecting consumers and toward protecting politically influential firms, harmonization's success requires that the single standard chosen and applied interjurisdictionally be sound. If it isn't – if those who select the standard err when doing so – the lack of alternative, competing antitrust regimes makes discovering the single-standard's weaknesses unlikely.

Multilateral accords among national governments present another possibility for providing global antitrust regulation. One advantage of this approach is that much of the institutional structure is already in place in the form of the WTO.⁵⁰ The multilateral trade agreement put into effect by signatory nations through the WTO can be supplemented with a chapter dealing with antitrust issues.

Specifically, we encourage signatory governments to agree to an origin-based policy of regulation. That is, governments should agree that the antitrust policy applied in any particular instance is the policy of that jurisdiction, and only of that jurisdiction, in which the defendant firm has the greatest substantive presence. The location of the firm's headquarters is a good candidate for establishing greatest substantive presence, although alternative criteria – such as country of incorporation – are available. The particular criterion chosen for establishing greatest substantive presence is less important than

⁵⁰ Note Janow's (2003) caution, however: the WTO may be too broad an institution to successfully deal with competition policy. The International Competition Network may be the more suitable body. Janow (2003) provides cogent analysis.

adopting such a policy that will shield international firms from the uncertainty of being subject to myriad agencies enforcing different, often conflicting, antitrust policies. And such an approach will maintain jurisdictional competition among antitrust regimes – a result that antitrust enthusiasts should vigorously applaud.

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