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Looking to "Bricks and Mortar" Establishments and Agency Networks in the Lack of International Antitrust Law

GAUTHAM A.B.[1], RESHMA RANJITH[2], ROOBEN JACOB STANLEY[3] AND SEENATH P.S.[4]

ABSTRACT

In certain areas of international trade law, it may not be possible for a traditional global body to directly enforce shared worldwide standards and procedures (possibly due to a lack of sufficient political backing). The ICN experiment shows how a voluntary international network of agencies (with the help of invited experts) can work together on a trust-based basis through "soft law" actions in order to agree on useful outcomes that, in reality, lessen conflicts amongst regimes that are not (and, occasionally, should not be) harmonised. For many other areas of international trade law, standardising standards and procedures may be too much to ask for, but there are other elements of the ICN model that could serve as an inspiration. In these cases, it is argued, it is worthwhile to think about how to cultivate an epistemic community that includes not only agencies/enforcers but also carefully chosen experts from professional practice and academia. Compiling and disseminating pertinent research and reports ought to be a feasible initial step. The decades-long antitrust experience demonstrates the feasibility of establishing a mutually learning culture and a welcoming platform for discussion, both of which foster innovation.

Keywords*: DOJ : The Antitrust Division of the Department of Justice ; ECN : The European Competition Network ; ICN : International Competition Network.*

I. INTRODUCTION

Due to possible effects on the competitiveness of the globalised market, the continued lack of a global antitrust (or competition law) regime is noteworthy. Antitrust enforcement agencies that use various national and regional standards and procedures have difficulties in the absence of a worldwide system with standardised rules and procedures. One worry is that fragmented enforcement may be an ineffective means of addressing cross-border anticompetitive actions that negatively impact consumers. For companies that trade internationally, the need to adhere to many substantive norms and enforcement procedures also results in inefficiencies. In

[1] Author is a Practicing Advocate at Nedumangad Court, Kerala, India.
[2] Author is a Practicing Advocate at Kollam Court, Kerala, India.
[3] Author is a Practicing Advocate at Kayamkulam Court, Kerala, India.
[4] Author is a LL.M. student at CSI College For Legal Studies, Kottayam, India.

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practice, national (or regional) antitrust is applied extra-territorially. This has been described as a default response of "unilateral jurisdiction"[5]. This study examines alternate remedies that involve institutions, with the understanding that unilateral jurisdiction is an inadequate answer. It covers a wide range of terrain, from conventional "brick and mortar" institutions to an optional virtual worldwide network of antitrust agencies. Since the European Union (EU) regime best represents the most convergent supranational antitrust paradigm, it is analysed first. However, in its capacity as a regional regime, it manifests limitations internationally. Thus, focus shifts to institutional initiatives with a stronger global foundation. The research limits itself to looking at two drastically different global institutional setups in order to provide a starker contrast. The World Trade Organisation (WTO) and General Agreement Tariffs and Trade (GATT) are analysed with respect to their (relatively brief) direct contribution to global antitrust, and it is concluded that they should be commended for igniting interest in novel institutional arrangements like the International Competition Network (ICN). Designed to encourage intense collaboration among its members with the goal of, at the very least, lowering friction and, more ambitiously, achieving more standardisation across disparate local regimes, the ICN is a virtual worldwide network of antitrust enforcement agencies.

II. ANTITRUST IN THE GLOBAL MARKETPLACE

Local enforcement of antitrust law follows national or regional boundaries. Due to the globalised nature of markets, national antitrust laws may have an effect on companies and antitrust agencies that are based outside of the laws' borders. When confronted with cross-border cartels and other transnational anti-competitive activities, antitrust enforcement agencies are required to actively pursue bilateral or multilateral interactions with enforcement agencies operating in other jurisdictions, as their substantive norms and enforcement toolkits may differ greatly from one another. The difficulties faced by agencies operating in different political environments have been recognised in the observation that "rising populist concerns and differences in competition laws, increase tensions among competition agencies and the risk of divergent approaches to enforcement"[6]. The absence of international antitrust law could have negative effects on businesses, such as increased expenses associated with adhering to different antitrust regulations across different jurisdictions. One such example is when parties to a proposed merger are required to notify national antitrust regulators in various jurisdictions about

[5] Gerber, D. (2010), Global Competition: Law, Markets and Globalization, OUP.
[6] Pham, D. and Pecman, D. (2019), "The next frontier of international cooperation in competition enforcement", in Charbit, N. (Ed.), Fréderic Jenny: Standing up for Convergence and Relevance in Antitrust- Liber Amicorum, Concurrences.

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their deal. These agencies may have distinct practical requirements (such as documentation) and, occasionally, differing substantive criteria. There are already antitrust laws in over 120 jurisdictions. This figure illustrates the context's global reach as well as the distribution of antitrust laws worldwide. While the "unilateral jurisdiction" approach might be the most widely used in reality, it is not a perfect replacement for an international system. Some of its drawbacks identified by Gerber include the reality that the national laws were not designed to operate extra-territorially, have limited capacity to deter anti-competitive conduct on global markets and encourage jurisdictional conflicts without providing an effective means to resolve them[7].

III. ANTITRUST INSTITUTIONS

Generally, enforcement authority over the prohibition of anti-competitive unilateral, bilateral, and/or multilateral corporate activity is granted to national antitrust organisations. Certain states grant antitrust organisations the additional particular authority to authorise or forbid mergers. Nevertheless, there is significant variety in the national antitrust institutional architectures established throughout the globe[8]. Because of this variance, it is challenging to provide a clear, concise description of all antitrust enforcement models. The challenge arises from variations in the distribution of enforcement authorities among specific units within the entire enforcement institutional structure. Significant distinctions might occur regarding the authority to look into possible infractions, determine if an infraction has occurred, issue legally enforceable orders (which might include financial penalties), and decide cases involving challenges to administrative decisions. Three foundation models make up Fox and Trebilcock's taxonomy of antitrust enforcement. South Africa, Chile, and Canada are the countries that use the "bifurcated agency model." Examples of the "integrated agency model" are China and Japan.

Certain jurisdictions have two different kinds of models. For instance, in the United States, the Department of Justice's (DOJ) Antitrust Division represents the "bifurcated judicial" form, while the Federal Trade Commission represents the "integrated agency" type. However, as Fox and Trebilcock acknowledge, the three categories do not fully encompass the variety of antitrust enforcement strategies, even with the nine jurisdictions chosen for their study. Certain jurisdictions include parts from various models while developing their own. For instance, Australia and New Zealand include aspects of all three models, but India combines features of the "integrated agency" and "bifurcated agency" models. It is a difficult but crucial task to assess how well competition law institutions are performing. Kovacic presents an intriguing viewpoint

[7] Gerber, D. (2010), Global Competition: Law, Markets and Globalization, OUP.
[8] Maher, I. and Papadopoulos, A. (2012), "Competition agency networks around the world", in Ezrachi, A. (Ed.), Research Handbook on International Competition Law, Edward Elgar.

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that highlights the importance of antitrust institutions' operations to society as a whole. According to him, the competent performance of antitrust agencies' duties directly affects not only the outcome and efficacy of the substantive antitrust laws, but also the public's trust in public governance, which in turn strengthens the legitimacy of public administration. Their main issues, which affected multiple systems, were: excessive delays; inconsistent performance; lack of predictability; and insufficient knowledge of economics and law. In "younger and resource-starved jurisdictions, as well as in small economies without a critical mass of competition cases," the latter scenario is particularly plausible. Investigatory, enforcement, and adjudicative stages may exhibit "lack of reasoned decision-making, lack of publication of decisions, and lack of independence from political interference" in certain jurisdictions. The aforementioned provides an overview of the diversity in national antitrust institutions' designs and operations. The conversation then shifts to specific instances of antitrust organisations that function outside of a single country. It addresses the framework of EU competition legislation before looking at models with a broader global basis.

IV. EUROPEAN UNION MERGERS

As was previously mentioned, in the 1980s, a standalone merger rule (EUMR) was established. It was intended to serve as a "one stop" shop for handling the unique requirements of transactions involving acquisitions and mergers. "Concentrations" with an EU component are required by the EUMR to be reported to the Commission for pre-implementation evaluation. A deadline that the Commission must meet to complete its Phase I evaluation is one of the Regulation's most significant provisions for the parties. A Phase II investigation is started if the Commission concludes from that evaluation that there are significant questions about the transaction. After that stage, the Commission makes a determination regarding whether to declare the transaction to be unconditionally or conditionally compatible with the common market, or to be incompatible with it. The Commission's judgement may be appealed to the GC and then to the CJ. The extensive enforcement powers of the Commission were described in detail in the previous analysis of the supranational aspect of the EU model. Its unique administrative powers allow it to implement EU competition law's primary prohibitions. It has the authority to look into cases, determine whether there have been violations, and apply remedies, which may include fines. Furthermore, it implements important measures including pledges, settlements, and leniency. It performs the function of regulating mergers involving the EU. It also undertakes essential policymaking duties. It served as the impetus for a number of laws that seek to enhance more harmonious enforcement at the federal level, including the ECNÍ Directive, the Damages Directive, and the Modernization Regulation. They haven't, however,

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been able to accomplish the same degree of transnational functioning thus far. This fact needs to be recognised since it highlights the challenges in obtaining the approval needed for a supranational legal framework. Nevertheless, the European Competition Network (ECN) makes the EU model an ongoing source of inspiration. The European Competition Network (ECN) is a noteworthy instance of creatively organised relationships between national and local antitrust regulators.

V. Reflections on International Competition Network

Below are some thoughts on the ICN. It is crucial to stress that the author's personal comments and subjective observations are a result of her participation in annual conferences and working groups with the ICN as an NGA since 2015. In less than 20 years, agencies from more than 120 jurisdictions joined the ICN thanks to its liberal membership policy. That rate of growth is astounding because it shows a high degree of voluntary "buy-in" from people all across the world. Nevertheless, the China Antitrust Agency is not a member. However, some NGAs who are employed by Chinese colleges and private practices participate in the ICN. One undervalued benefit of the ICN is perhaps the increased inclusivity that the NGA dimension makes feasible. NGAs are selected from a large pool. Outside of the office Heads of agencies have the potential to become NGAs, and their ongoing participation can enhance institutional experience and memory. Incorporating NGAs from a broader range of backgrounds enhances agency operations by providing supplementary knowledge and a detached viewpoint, while also expanding stakeholder involvement. However, incorporating NGAs too much could cause problems. In this regard, there may be a perception that NGAs have preferential access to agencies, particularly if they are associated with think tanks, private law firms, or economic consulting firms whose employers, or clients, in the case of in-house counsel, may be subject to official interactions (investigations or merger notifications) with antitrust agencies. Even though NGAs are not permitted to attend certain sessions during the annual conference, they can still take advantage of opportunities to interact with agencies during breakout sessions and social activities. Instead of being nominated centrally by the ICN, agencies nominate NGAs. Agencies can find assistance in the NGA toolbox created by the ICN.

VI. Conclusion

The context of this study is the lack of a global antitrust regime. Beginning with the premise that the default unilateral jurisdiction approach is not entirely adequate, this study examined a few organisations that are functioning in the area that a global antitrust regime has not yet taken up. This paper created a broad analytical lens that permitted analysis of a wide range of forms

(including networks), codes (including soft law), and cultures (including epistemic communities) by adopting a broad understanding of institutions (influenced by political science techniques). The EU model's enforcement of antitrust within a supranational legal order, a transnational governance network, and a region was highlighted in the model's examination. Following several decades of efforts to achieve substantive convergence and, more recently, to prevent procedural divergence, the EU now represents the most unified strategy for enforcing antitrust laws outside of a single national jurisdiction.

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