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Introduction to Global Issues in Antitrust and Competition Law

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Global Issues in Antitrust and Competition Law

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INTRODUCTION

This volume is a global reader. It presents materials and cases on the global issues of antitrust and competition policy. It may be used on its own or to supplement domestic antitrust casebooks.

It might seem strange to consider the treatment of global issues as a *supplement* to antitrust casebooks, for, in one important sense, antitrust *is* global. Markets commonly cross national boundaries. Mergers are as likely as not to combine firms from different nations and in any event to affect markets in many nations. Acts and conspiracies in New York, Washington, Tokyo, Zurich, Frankfurt, Johannesburg, Beijing, Delhi, or Sao Paulo may affect people around the world. Nonetheless, the great body of antitrust law is national. Two mature—although always changing—bodies of antitrust law, European and American, have become the most visible models for the world. Most antitrust casebooks are centered on national law. This volume puts the global dimension at center stage.

More than 100 jurisdictions have antitrust (or competition) laws. The large majority of these laws were enacted after the Berlin Wall fell in late 1989. The antitrust nations span the world, from US, Canada and Mexico to Brazil, Argentina and Chile; the EU and the nations of Europe; to many nations in Africa, Asia and the Middle East, Australia, and New Zealand. Recent entries into the family of antitrust prominently include China and India, and it is sometimes said that the recent entrants may eventually shift the balance of influence in antitrust.

Global issues are themselves diverse. They include:

1. Analysis: How to think about analysis of any conduct or transaction that has transnational dimensions. For example, how to define the market; what foreign production to include within it; how to analyze effects of conduct or transactions in view of foreign competition or potential competition.

2. Jurisdiction: What principles define and limit jurisdiction of commissions and courts over conduct or transactions that take place abroad or that have principal effects abroad?

3. Coherence: In view of international markets, international transactions, and international effects, what have antitrust authorities done to coordinate their efforts and minimize conflicts? What institutions have been developed to consider international problems? Is there a need for greater coherence, and should it be

orchestrated at a higher level; for example, through an international competition law or framework?

4. Globalization, antitrust and trade: Globalization has shrunk the world. Freer trade, combined with Internet and other communication technologies, has made distant markets quicker and easier to access. It has increased opportunities for firms to find low-cost sources of labor and supply. It has increased opportunities for firms to find markets. It has made firms more mobile. Globalization has revealed the strong links between trade and competition. Historically, state restraints have been the domain of trade law and private or business restraints have been the domain of antitrust law. Are the lines blurring? If foreign markets are closed to imports, are they closed by state or private restraints? by private acts supported by state restraints, or vice versa? Do we need coherence between rules of trade and rules of competition? Should we have a global trade-and-competition regime?

5. Comparative antitrust: For US and EU, it is now generally accepted that antitrust/competition law should be designed and enforced to remove impediments and help make markets work, for the benefit of consumers and the efficient and potentially efficient and innovative firms that are trying to serve them. There is room also to protect suppliers from boycotts and exploitation (e.g., buying cartels); but there is no room in US or EU antitrust law to promote nationalism and to sanction protectionist industrial policies at the expense of consumers. The non-protectionist, non-discriminatory* stance of US and EU competition laws helps to undergird the effective functioning of world markets and as well to link the hundred national and regional antitrust regimes. But not all antitrust jurisdictions are committed to this view of antitrust. Moreover, jurisdictions may disagree on key perspectives and modes, such as to how best to realize or preserve efficiency. In addition, differences in degrees of economic development and differences in economic and political environment and institutions can result in different rules, standards, or emphases. This global reader will engage with these issues and give comparative examples.

The plan of this book is as follows. In order to track, more or less, most antitrust casebooks, we organize our discussion under the usual topics of antitrust: cartels, monopoly and abuse of dominance, agreements other than cartels—horizontal and vertical, and mergers. We then treat the critical subject of restraints by the state—an area in which antitrust regimes are increasingly involved. Finally, we cover enforcement systems, jurisdictional issues, and the ultimate over-arching issue, global governance.

* This connotes: no discrimination based on nationality.

Logistical details of the book

Before the start of the book, we note a few conventions.

In the case edits, deletions of paragraphs are shown by three asterisks. Deletions of words less than a full paragraph are shown by three dots. We have omitted many case citations, internal references to recitals, paragraph numbers, and footnotes without designating an omission. Brackets at the beginning and sometimes within the text of cases indicates the editors' summary.

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