

The Antitrust of Nations

Introducing Standards for International Antitrust

S I M O N E V E N E T T

In recent years, the global ramifications of domestic antitrust enforcement have steadily crept up the international economic-policy agenda. The dispute over whether Boeing and McDonnell-Douglas should be allowed to merge took the United States and the European Union to the brink of a trade war and moved antitrust policy from obscurity in the business section to prominence on the front page of newspapers around the world. Yet, despite such incidents, there is a growing record of bilateral cooperation among industrial countries, and US confidence in certain foreign antitrust regimes reached such a point in 2000 that leading antitrust officials began calling for a "Global Competition Initiative."

Some US experts look east for a starting point in their analysis of globalization and antitrust policy. The suspicion that foreign access to Japan's domestic markets has been effectively blocked by agreements among Japanese firms to buy solely from members of their own industrial groups, known as *keiretsu*, or to sell only to distributors who also refuse to market rival firms' products, fuels this alternative perspective. According to this view, Japanese antitrust authorities have

systematically declined to break up these inter-firm agreements to the detriment of US exporters, even though the authorities have the legal powers to do so. This interpretation of Japan's antitrust policy was influential in the United States from the late 1980s through the mid-

***Antitrust in the Global Trading System: Reconciling US, Japanese, and EU Approaches* by Peter Morici (Economic Strategy Institute, Washington DC, 2000)**

1990s and was responsible for, among other things, the Structural Impediments Initiative and the disputes with Japan over automobile parts and photographic film. When the latter disputes were effectively resolved in Japan's favor, this view lost considerable ground, and even though many US policy-makers still publicly subscribe to its tenets, few now act on them.

Having failed to address these perceived deficiencies in Japanese antitrust enforcement through unilateral trade-policy measures, scholarly attention shifted to advocating common international standards for antitrust laws and enforcement that would enhance access to foreign markets. Peter

Morici's *Antitrust in the Global Trading System* falls squarely in this camp.

Even if one does not agree with Morici's proposals, one must admit that he successfully demonstrates that national antitrust enforcement—and in some cases the lack of it—can damage the interests of foreign consumers and producers. An example illustrates this point: if two of the world's major platinum producers located in the same nation decide to merge, the combined firm is likely to gain more market power and to raise prices. The antitrust authority in the nation where the two firms are based will consider whether the enhanced profitability of the merged firm adequately compensates for the loss of home purchasers' welfare—and will ignore the effects on purchasers abroad. In a world of increasingly integrated markets, corporate actions typically have national and international ramifications, but national antitrust authorities usually only consider the former when making their decisions.

This characterization of the problem, however, misses an important point. After all, a corporate action that "spills over" national borders is rather like cross-border environmental pollution. Given the growing number of international

SIMON EVENETT is the Moderator of the Brookings Roundtable on Trade and Investment Policy.

agreements on the latter, how hard can it be to ameliorate some of the costs of the former? Unfortunately, the analogy breaks down because while environmental agreements often contain transfers by which the winners compensate the losers, in antitrust matters such compensation goes against the tradition of evaluating each corporate action case by case, forbidding trade-offs and other side payments. For example, a financial payment was never proposed as a means to overcome the European Commission's objections to Boeing's merger with McDonnell-Douglas. The absence of any accepted compensation mechanism gets to the heart of the difference between international cooperation on antitrust and on other matters with international dimensions.

To build his case for a new approach, Morici first reviews the antitrust laws in the United States, the European Union, and Japan. Japan's antitrust law alone is given two chapters; one reminds us that "[c]ompetition policy has been a principal tool, as Japanese governments have sought to manage the potentially destabilizing effects of competition on investment, production, and employment." Morici gives much less attention to the subjugation of European Community competition law to industrial policy—despite the fact that European legal scholars have long dwelt on this issue. This uneven treatment reinforces the perceived anti-Japanese thrust of his volume.

Having compared these divergent enforcement histories, Morici rightly judges that an international competition policy agreement (CPA) that puts the harmonization of enforcement standards at its core is unlikely to be negotiated. Furthermore, he correctly argues that adopting straightforward rules and abandoning discretion in antitrust enforcement is likely to reduce eco-

nomic efficiency as investigations tend to present different circumstances that require nuanced appraisals of the pros and cons of corporate actions. Maintaining some flexibility is a critical component for a CPA.

Antitrust officials are also aware of the divergent traditions in enforcement and have taken steps to enhance bilateral cooperation in investigations. Some countries have even signed agreements to codify such cooperation in recent years. Morici is unimpressed with these efforts, seeing considerable constraints on the extent of cooperation, especially in the vital area of exchanging the business information needed in investigations and potential court proceedings. However, other experts have seen this record of cooperation in a different light. Procedural cooperation, especially between the European Commission and the United States, has helped narrow differences in substantive standards during merger investigations. Likewise, the efforts of the Organization for Economic Cooperation and Development (OECD) have gone far to develop a consensus condemning international cartels. In the view of some specialists, such cooperation and consensus-building is, in the long run, more likely to result in a CPA than one negotiated from today's starting point. Because Morici advocates the latter, it would have been useful to explain why he feels the former trajectory offers little promise.

Morici ends his discussion of the current state of bilateral cooperation and national enforcement practices on a discordant note: "Many other issues impede the successful discipline of restrictive business practices that restrict or distort international commerce. These impediments emerge from a lack of adequate international consensus about who should address behavior having cross-border consequences

and what private practices should be subject to antitrust enforcement." Two chapters later, however, he begins a hypothetical discussion of a scenario in which "WTO member governments agree to move forward with a CPA." This statement raises the question of how we get from point A to point B, upon which Morici unfortunately does not elaborate.

The author proposes that a CPA be negotiated under the auspices of the WTO. Doing so enables him to couch the main obligations in terms of "market access"—the terms upon which firms compete in overseas markets. Unfortunately, Morici does not clarify this vague definition. He argues that the principal obligation of CPA members would be to "make illegal, and to take action against, restrictive business practices that deny or impede opportunities for other signatories' products and firms to contest markets on terms no less favorable than those enjoyed by domestic and other foreign products and firms." If a nation fails to do so, Morici's CPA would have provisions enabling foreign legal suits against these practices and a separate procedure for WTO dispute settlement. The main consequence of such an agreement would be to subordinate the efficiency objective of antitrust enforcement to this vague market access/contestability test, which apart from its obvious economic objections, is also unlikely to win over the vast majority of the legal antitrust community.

Morici is not alone in allowing market access concerns to color proposals for an international CPA. Given the twists and turns in US international economic policy-making, this point of view may once again dominate official US doctrine, and as far as international antitrust is concerned, despite the reservations outlined above, Morici is to be credited with providing the best exposition of this position to date. ■