VI.A.3 The Internationalization of Antitrust Policy

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1. *Background*

The internationalization of Antitrust Policy is based along three main lines. The first deals with the "ultractive" effects of some antitrust measures. One of the most important of these was the sentence inflicted by the European Commission, confirmed by the Court of Justice, on the US company Microsoft for abuse of its dominant position (see § VI.A.4 "Global Competition and Territorial Limits: The *Microsoft* Case" by T. Koziel); a decision that contributed significantly to the worsening relations between the United States and Europe with regard to the application of antitrust laws. The Antitrust Division of the US Department of Justice severely criticized the position of the European Commission. This situation bore a striking resemblance to an earlier clash between the two, when the EU refused to authorize a merger between General Electrics and Honeywell. The clash was hard: the American antitrust authority criticized its European counterpart for having protected competitors from the dominant firm and not having considered the interests of consumers, arguing that this tape of action fails to provide competitors with incentives to maximize their own efficiency. Beyond these different economic visions of antitrust policy lie political differences, including over the protectionist potential of the enforcement of antitrust law. The advent of a democratic administration brought about by President Obama's win has done much to decrease these differences between US and EU policy on these matters; indeed, the US has begun again of late to frown upon – and to punish –market monopolization practices.

The second line is international and specifically bilateral. It is based upon the use of "Positive Comity" agreements, which deal with cooperation on antitrust issues between economic areas such as the European Union and the United States. One such agreement between these two parties was signed in 1991; however, it was applied only once in the procedure of the Commission on the case of the Crs Sabre/Amadeus: non-discriminatory practices against the American Crs were accepted. The limit of this particular kind of cooperation is double: it does not deal with mergers; the antitrust authority that acts for the other one does not become the exclusive titular of the proceedings and the other authority can start another procedure that overlaps the former. In Europe, the Commission functions as the public actor in this process; the role of Member States is more hidden.

The third line is international and specifically multilateral. It is based on the international network of National Competition Authorities (NCAs): the International Competition Network (ICN). It is interesting to note that the main drivers of the internationalization process are the NCAs, and not States themselves. Even the World Trade Organization (WTO) is working on the effects of antitrust on international trade ("The Doha Agenda – Interactions between trade and competition policy"). In this context, the main goal is to create an international and multilateral framework for the regulation of antitrust policy; however, the actors participating in this process are

States themselves, within the broader framework of WTO negotiations. The negotiations relating "competition issues", at Cancun in 2003, failed. As a result, this topic has excluded to further negotiations. The global financial crisis, which started in 2008, is another obstacle to this development.

It is not difficult to grasp the reasons behind the attempt to internationalize the regulation of antitrust policy. It is, however, somewhat harder to understand why multiple avenues are being sought to achieve this, and why the activity of the ICN is the more advanced of these.

The above outline suggests a paradox. On one hand, inter-State agreements do not seem to take off: for example, the positive comity agreements do not seem to have been effective, and negotiations at the WTO have failed. On the other hand, the creation of global standards by the ICN seems to be more successful, but it is not accountable. The ICN is a private association of public authorities contributing to the production of rules: the effectiveness of these rules will be determined by the national activity of its members.

2. *Materials*

- Court of First Instance, Judgment no. 63/2007, of 17 September 2007, in case T-201/04, *Microsoft v. Commission* (http://www.curia.europa.eu/en/actu/news/news.htm);
- Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, 4 June 1998 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21998A0618%2801%29:EN:NOT);
- DoJ, Antitrust division, International Competition Policy Advisory Committee, Final Report, 2000 (http://www.usdoj.gov/atr/icpac/finalreport.htm);
- ICN Merger Working Group, ICN Recommended Practice for Merger Analysis, (http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf) ;
- ICN Merger Working Group, ICN Recommended Practice for Merger Notification and Review Procedures (http://www.internationalcompetitionnetwork.org/uploads/library/doc324.pdf) .

3. *Analysis*

The attention on the International Competition Network activities must be strong. In particular, the Merger Working Group is a good example of how much the ICN is globalizing merger review regime.

The ICN Merger Working Group (MWG) was established in 2001. Since then, MWG prepared a large quantity of documents and organized many activities. The MWG, ten years after its inception, has decided to evaluate its action submitting them to the authorities who are its members and to non-governmental advisors. Based on

the findings of this evaluation, it was found that the work of the MWG has been received very positively. In fact, MWG has contributed to increasing the quality of the system of merger control around the world. Among the members of the ICN, there is a widespread knowledge and use of tools such as ICN Recommended Practice for Merger Analysis and ICN Recommended Practice for Merger Notification and Review Procedures. Slightly lower but still high is familiar with the Merger Guidelines Workbook and the Investigative Techniques Handbook.

Now, the MWG wants to increase the dissemination and implementation of the results of their action increasing participation. Furthermore, the MWG will continue to develop its action in increasing the potential of Recommended Practice for Merger Analysis, doing new research on the mergers economic analysis and investigative techniques, by integrating the Investigative Techniques Handbook and the Merger Guidelines Workbook. The MWG finally is open to other issues, including cooperation between several authorities in merger control. MWG's work products have been widely used by national authorities for competition and not only. In particular, the RPs had a significant impact contributing to a radical change in the merger reviews regime around the world. Many competition authorities have expressed their intention to continue to follow the guidelines of the ICN MWG. For this reason, the MWG will continue to update and to develop its operational tools to maintain their relevance and usefulness.

There is a global unity in the merger reviews regime. In fact, there are few cases of legal barriers to the use and implementation of the products of MWG. It follows that the ability to spread and homogenization of the rules on merger control depends on the authoritativeness of the ICN, which is cause and effect in the NCA's propensity to adhere to its guidelines.

4. *Issues*

States, having international legitimation, do not favour the internationalization process of the antitrust policy: they prefer having a global competition regulated rather by politics than by law. Vice versa, the NCAs would prefer the juridification of fair competition. They face the States: they are organically dependent from the States but functionally independent. This underlines the skew between public powers and general interests caused by economic delocalization.

State positions prevail very often on the antitrust authorities positions causing many more conflict cases than coordination cases. The great relevance of antitrust "ultractive" measures shows that antitrust law enforcement is based on the clash between protectionist economic policies. Using them, the States try to maintain hegemonic positions in global competition.

Internationalization is based on the ICN activity and on cooperation so the consent of national Authorities is necessary. The Authorities can integrate despite of the orientations of the States in which they are structurally placed (but only if they are independent from politics). The more the working group deals with single sectors or problematic areas, the greater is the real value of ICN suggestions. We can notice it very easily as regards merger control. We have to consider that the terms "best practices" are inaccurate and misleading. It is known that the real content of the antitrust policy is defined by the Authorities through continuous series of adjudication measures with the same criterions. The first step is to frame the general norms; then,

normative contents are delegated to the executive plan and specified. The ICN can have a role in the phase of delegation. If the national Authority concurs in elaborating criteria – for example, revealing indexes of the dominant position of a firm in the relevant market – even in absence of strong compliance mechanisms such as "command and control", it is almost certain that the Authority will use that criteria. The ICN contributes in defining the evolution of the antitrust law and through horizontal connection between authorities it makes the corrections of market failures easier. Nevertheless, ICN decision-making process – based on consensus – is a weakening factor of the institutional functioning. How is the internationalization process shaped for privates? If the statement that I've already demonstrated about the ICN incidence on delegation is true, then the ICN has some public powers despite its subjective features. It is opportune to wonder if its activity is accountable and if it allows privates to participate in the process identifying frames best practices. From this point of view, things seem to be backward. It is the non-public subjectivity of the ICN that produces a strong underestimation of its real influence upon linked antitrust Authorities. For this reason, North American or European "notice and comment" practices and the consequent participation of privates plus the national authorities do not usually precede the emanation of the recommendation to the markets by the ICN working group.

5. *Further Reading*

a. Y.H. AKBAR, *Global Antitrust. Trade and Competition Linkages*, Ashgate Publishing (2003);
b. G.A. BERMANN et al. (eds.), *Transatlantic Regulatory Cooperation*, Oxford (2004);
c. O. BUDZINSKI, "The International Competition Network", 8 *Competition and Change* 223 (2004);
d. M. DABBAH, *The Internationalization of Antitrust Policy*, Cambridge (2003);
e. M. DABBAH, P. LASOK (eds.), *Merger Control Worldwide*. Second Supplement to the First Edition, Cambridge (2008);
f. P. LUGARD, *The International Competition Network at Ten*, Intersentia Uitgevers N.V., (2011);
g. M. MATSUHITA, "International Cooperation in the Enforcement of Competition Policy", (1) *Washington University Global Studies Law Review* 470 (2002);
h. R.J. WEINTRAUB, "Globalisation's effect on Antitrust Law", 34 *New England Law Review* 27 (1999);
i. B. ZANETTIN, *Cooperation Between Antitrust Agencies at International Level*, Oxford (2003).