Volume 3 | Number 2 | Autumn 2007

Competition Policy International

Review of Elhauge & Geradin's *Global Competition Law and Economics*

John Kallaugher

Published in Competition Policy International (print ISSN 1554-0189, online ISSN 1554-6853),
Autumn 2007, Vol. 3, No. 2. For articles and more information, visit www.globalcompetitionpolicy.org.

Review of Elhauge & Geradin's *Global Competition Law and Economics*

John Kallaugher

Professors Einer Elhauge and Damien Geradin begin the preface to their new casebook, *Global Competition Law and Economics*, by observing that "[n]o one would think of writing a casebook on Massachusetts antitrust law."[1] They then suggest that for similar reasons an approach to antitrust law based on a single legal system is also becoming outmoded. Businessmen, lawyers, and lawmakers must, according to the authors, understand not just their own system but also "the other regimes that form part of the global legal framework that regulates competitive behaviour." This leads them to conclude that "[m]odern antitrust law is thus global antitrust law."[2] While they acknowledge that significant differences remain between U.S. antitrust law and EC competition law, they see these differences as reflecting "different presumptions about how to resolve theoretical or empirical ambiguities," arising in a commonly accepted analytical framework. The authors are therefore convinced that the "combination of laws from varying nations in actual practice provides a truer picture of the overall regime of com-

1 Einer Elhauge & Damien Geradin, Global Competition Law and Economics (Hart Publishing 2007) [hereinafter Elhauge & Geradin]. The book was also published in the United States under the title, Global Antitrust Law and Economics (Foundation Press 2007).

2 *Id*. Although the title of the book refers to "Global Competition Law," the authors choose "antitrust" as the blanket expression for competition or antitrust laws in the text.

The author is a Partner with Latham & Watkins in London and a Visiting Professor at University College London where he teaches "Comparative US Antitrust and EC Competition Law" to LL.M. students.

petition law that now faces multinational players."[3] They present their work as "a book designed to replace more parochial books on *basic* antitrust law by giving a more realistic sense of the range of issues and analyses relevant to modern antitrust law wherever practised."[4] (Emphasis in the original)

Given these bold claims, it is appropriate in reviewing this work to consider the validity of the authors' premise that modern antitrust law constitutes, in some meaningful way, a global legal regime. It is also appropriate to discuss the extent to which the materials as presented in the book vindicate the authors' conviction that a global approach is the best way to present basic antitrust law to students. Before dealing with these fundamental questions, however, a short description of the book itself is in order.

I. The Book

Global Competition Law and Economics is a case book that will find its primary market among students and teachers of antitrust law. The book may also be useful to practitioners who wish to review the basic case law in a particular area. Its general value as a reference work is limited, however, because, with some exceptions, it does not attempt to survey the academic literature or excerpt secondary materials other than those prepared by one of the authors.

Following an introductory section that includes useful overviews on the law and remedial structure in the United States and the European Community, the book is set out in eleven chapters addressing general themes such as "Which horizontal agreements are illegal?," "Vertical agreements that restrict dealing with rivals," or "Agreements that arguably distort downstream competition in distributing a supplier's products." Each chapter is divided into smaller sections (e.g., "horizontal price-fixing"). Within these smaller sections, the authors present passages from the leading cases, as well as passages from the guidelines issued by the U.S. enforcement agencies, European Commission interpretive notices, EC block exemption regulations, and the Article 82 EC discussion paper. These primary materials are interspersed with detailed questions, short summaries of other cases, and explanatory commentary. In some sections, U.S. and EC law are set out separately, but sometimes they are presented as a single body of law, leaving the questions and commentary to point out any differences between the systems. Following the U.S. and EC legal materials, each section usually has a short, final subsection that discusses the law in other jurisdictions.

The cases and other primary materials are generally well-chosen and well-edited. The extensive questions should help the student to understand the implica-

3 *Id.* at vi.

4 *Id.*

tions of the materials. The sometimes lengthy explanatory commentary is thoughtful and clear. Economic concepts, in particular, are presented in a clear and largely jargon-free fashion. In short, this book has substantial merit as a university text, depending on one's view of the authors' underlying approach.

II. Is Modern Antitrust Law Really "Global Antitrust Law"?

Twenty years ago, no one would have seriously suggested that antitrust law or competition law constituted a worldwide legal order. The differences between the U.S. antitrust law and EC competition law were fundamental and appeared to reflect fundamental differences in policy goals. Today, convergence is "in the air." The introduction of merger control at the EC level has led to a shift to an explicitly economics-based approach in Europe. The abolition of the old exemption system has removed the most fundamental structural difference between the two systems. Enforcement officials in the United States and the European Community are in regular communication. EC regulators, practitioners, and academics have received a respectful reception at U.S. hearings on the antitrust-intellectual property interface and on the rules applicable to unilateral conduct. Furthermore, as Elhauge and Geradin emphasize in their preface, there is substantial agreement on the goals of antitrust and competition rules—promotion of consumer welfare—and on the analytical framework appropriate for applying those rules. Nevertheless, the question remains whether convergence has reached a point where it is useful to treat U.S. law and EC law as a single system of law in the same way that an American book on contract law would treat the contract law of the various states as a single body of law.

TWENTY YEARS AGO, NO ONE WOULD HAVE SERIOUSLY SUGGESTED THAT ANTITRUST LAW OR COMPETITION LAW CONSTITUTED A WORLDWIDE LEGAL ORDER. THE DIFFERENCES BETWEEN THE U.S. ANTITRUST LAW AND EC COMPETITION LAW WERE FUNDAMENTAL AND APPEARED TO REFLECT FUNDAMENTAL DIFFERENCES IN POLICY GOALS. TODAY, CONVERGENCE IS "IN THE AIR."

The example provided by Elhauge and Geradin in their preface may assist in answering this question. The reason that no one would think of publishing a casebook on Massachusetts antitrust law is that Massachusetts antitrust law is primarily based on the U.S. Sherman Act and other federal antitrust law.[5] Advice on Massachusetts antitrust law is often based on precedent from the Supreme Court and other federal courts. In the absence of specific Massachusetts precedents or rules, legal argument before the Massachusetts courts relies on those federal precedents. A lawyer from California or New York feels comfortable advising clients

5 U.S. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2000 & Supp. IV 2005).

that operate across the United States on antitrust issues on the basis of the federal antitrust laws, recognizing that on some issues (usually dealing with consumer or dealer protection) attention to local state law may also be required. Thus, Massachusetts antitrust law can really only be understood as part of a national system. It would not make sense to try to teach Massachusetts law separately and few students would be interested in a course that was so limited.

The same analysis is also applicable to national competition law within the European Community. In many EU Member States, the law developed under Articles 81 and 82 of the EC Treaty is directly applicable under the relevant national law. Even where EC competition law is not directly binding, concurrent application of EC law and national law means that a practitioner needs to be able to apply both national and EC law. The various national laws and EC competition law, therefore, do form a system. It would not make sense to teach national competition law in individual EU Member States on its own, even in countries such as Germany where the national law is well-developed, unless the students already had a thorough grounding at the EC level.

It is clear that the same level of integration does not exist between the U.S. and EC antitrust systems as exists between the law of an individual U.S. state and U.S. federal antitrust law. This does not necessarily invalidate the Elhauge-Geradin approach, but it does mean that the logic of going beyond a concentration on the U.S. antitrust system or the EC competition law system as the focus for a student text is not self-evident. The challenge facing a business that must comply with antitrust rules affecting agreements with customers in multiple jurisdictions is, in principle, not different from the challenge involved with complying with rules governing advertising or product safety. In each case, the public policy concerns are the same and the basic analytical approach will usually be the same, yet we would not necessarily consider the law on advertising standards or product safety law to constitute a "global" legal system. The need to clear large international transactions in multiple jurisdictions also does not necessarily make antitrust law "global." In the vast majority of cases, the issues raised by such filings are procedural (e.g., filling in the proper forms, obtaining the required information, delaying the "closing" until clearance is obtained). Where substantive issues do arise, they are more likely to be local than international in scope.

It is undeniably useful for lawyers trained in one system to be capable of also working in a different system. It is arguably essential for lawyers working in an international environment to be aware of the significant points of difference between their own legal system and other systems in which they have contact. But this does not make antitrust law global. Ultimately, no lawyer can claim to practice global antitrust law or offer advice on a truly global basis.

In fairness to Elhauge and Geradin, the approach that they take in their book does not really depend on their contention that antitrust law is global. The true basis for their approach appears to be the contention that modern antitrust law,

wherever it is practiced, is based on a common analytical framework supported by a common body of scholarship. Here they are on much firmer ground. The primacy of welfare goals and economic analysis as the basis for achieving those goals is, indeed, broadly accepted.[6] The basic structure of analysis is largely the same worldwide. For example, all jurisdictions differentiate between competitor agreements and single-firm conduct. All jurisdictions recognize that traditional cartels are harmful, but accept that some horizontal agreements are beneficial. All jurisdictions recognize that proving market power is an essential element in finding a welfare loss outside the realm of pure price-fixing or market-division arrangements. And all jurisdictions look to market definition as a key tool for assessing market power in most circumstances. Furthermore, the agreements or conduct that give rise to antitrust policy concerns are largely the same. The biggest challenge that faces any teacher of antitrust law is helping students to understand and apply this basic analytical framework. Presenting EC competition law and U.S. antitrust law as a single body of law reflecting "a range of issues and analyses" could provide an effective way to meet that challenge.

THE BIGGEST CHALLENGE THAT FACES ANY TEACHER OF ANTITRUST LAW IS HELPING STUDENTS TO UNDERSTAND AND APPLY THIS BASIC ANALYTICAL FRAMEWORK. PRESENTING EC COMPETITION LAW AND U.S. ANTITRUST LAW AS A SINGLE BODY OF LAW REFLECTING "A RANGE OF ISSUES AND ANALYSES" COULD PROVIDE AN EFFECTIVE WAY TO MEET THAT CHALLENGE.

At this point, the real issue becomes what a course on basic antitrust law is meant to achieve. Is the goal of a basic antitrust course to give students the basic skills they need to practice as lawyers in a law firm, a business or in regulatory agency? Or is the goal of a basic antitrust course simply to give students the analytical tools for dealing with antitrust problems, in the expectation that they can pick up the specific legal rules later on? If the primary goal is indeed simply to help students understand and apply the analytical model (which, as already noted, is the most difficult part of teaching an antitrust course), then there can be no objection to presenting antitrust law as a global phenomenon. This approach is particularly appropriate if the great majority of students in a course will work in countries where neither U.S. nor EC law is directly applicable. In other cases, however, there is still some expectation that a basic antitrust law course will give a student the ability to apply the law in practice. To the extent that a basic antitrust course is still, at least in part, vocational training, there may be a risk that the global antitrust approach could make it more diffi-

6 Acceptance of welfare maximization and economic efficiency as the reference points for competition policy is still not universally accepted, however. See, for example, recent critical remarks by the Chairman of the Germany Monopoly Commission and Director of the Max Planck Institute in Hamburg. J. Basedow, *Konsumentenwohlfahrt und Effizienz—Neue Leitbilder der Wettbewerbspolitik?*, 57 WIRTSCHAFT UND WETTBEWERB 712 (2007) (concluding that welfare and efficiency cannot be exclusive goals of competition policy and that "free competition" is a key policy goal in itself).

cult for students to achieve the level of practical understanding provided by a more traditional course.

III. Does the Global Approach Work?

There are two real risks associated with use of a global antitrust approach for a basic course on antitrust law, where the goals of the course include the vocational element identified above. The first is that in presenting materials from two systems to demonstrate a range of approaches to a common issue, the approach or range of approaches appropriate in either jurisdiction may be obscured. The second is that the global approach could de-emphasize the unique aspects of either system. *Global Competition Law and Economics* illustrates both of these risks.

An example of the first risk is the topic described by the authors as "Standards for Finding a Horizontal Agreement or Concerted Action."[7] The authors provide 64 pages of materials on this topic, including lengthy excerpts from eleven U.S. cases and four EC cases. They use these materials to explore a range of issues regarding the difference between parallel behavior and collusion, and the circumstances in which agreements or practices may facilitate oligopolistic conduct. These materials do illustrate one of the benefits of the global approach, since they permit students to consider a range of practical issues that even a U.S.-based course might not cover so fully. But despite the short introductory text summarizing the approach of the two systems, a student may be challenged, on the basis of these materials, to define what a "concerted practice" actually means under Article 81 EC.

A second example that demonstrates the risk that a global treatment may obscure the legal approach appropriate in a specific jurisdiction is the treatment of refusals to deal. This is an area where most commentators see fundamental differences in the approach under Article 82 or Section 2 of the U.S. Sherman Act. Yet the questions and commentary in *Global Competition Law and Economics* present the leading U.S. and EC cases as taking a basically common approach. This may reflect the authors' view that the essential facility doctrine in the U.S. courts remains viable and that U.S. antitrust law does not bar antitrust liability for refusal to license intellectual property rights. But the authors do not consider whether it matters that the U.S. cases involve monopolization in the downstream market, where the EC cases all involve leveraging of market power in the input market. The authors also do not consider whether the *Trinko* approach to defining antitrust liability in the context of a regulated industry would apply in the European Community.[8] It is at least arguable that the focus on common

7 Elhauge & Geradin, *supra* note 1, at 734-73.

8 *See* Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

themes makes it more difficult for the student to define the specific EC legal rules in this context.

With regards to the second risk—de-emphasizing the features specific to either jurisdiction—the authors make an effort to cover those areas where either U.S. law or EC law is silent. They discuss, for example, excessive pricing and collective dominance under EC law and attempted monopolization under U.S. law.[9] The bigger problem, however, is the relation of legal rules to the procedural and political context of each jurisdiction. An example of this problem is the question of procedure in merger cases. For most practitioners, the biggest difference between EC merger law and U.S. law is that the EC procedure is primarily based on written submissions and leads to an administrative decision prohibiting or allowing a merger, while U.S. procedure is document-based and leads to a decision by the relevant agency on whether to seek injunctive relief. This fundamental difference in procedure explains most of the differences between U.S. and EC law in this area. Yet in over 200 pages of materials on mergers, the authors devote only a brief introduction to procedural issues and do not address the impact that differences in procedure may have on substantive analysis. The focus of the authors on the common structure of substantive analysis thus arguably obscures an issue that is central to understanding the law as practiced in either jurisdiction and important from a traditional comparative law perspective as well.[10]

It should be stressed that these kinds of problem are largely inherent in the global antitrust approach. While a more traditional comparative law approach (treating each jurisdiction's rules separately but in parallel) might make the rules in each jurisdiction clearer, it would probably result in a different and less interesting work. Adding further information and commentary to the text that deals with the issues noted above would only make an already lengthy text longer still, without necessarily rendering it clear. The question, therefore, arises whether these difficulties invalidate the approach used in *Global Competition Law and Economics*.

This reviewer is not convinced that the authors have succeeded in rendering existing parochial texts obsolete. Nonetheless, this remains a very strong work.

---

9 Elhauge & Geradin, *supra* note 1, at 360. In discussing excessive pricing, the authors slip in describing the control over unfair prices in the European Community as a position developed by the courts, rather than as one mandated by the EC Treaty itself. This may reflect their general tendency to view differences between the jurisdictions as policy judgments rather than as (sometimes accidental) differences in legal structure. In discussing attempted monopolization, the authors may miss one potentially significant point from a comparative perspective—does the lower threshold for possible dominance under Article 82 EC not, in fact, make many Article 82 cases really cases of attempted monopolization?

10 A similar issue may be raised by the failure to deal in detail with the structure of an Article 81(3) EC analysis in the context of either horizontal or vertical agreements. Combined with the tendency to treat U.S. per se analysis as essentially similar to analysis in EC cases under Article 81, the focus on supporting the common analytical structure may make it more difficult for the student to discern the formal analysis required to perform a self-assessment under Article 81.

It is particularly suited for use in courses where students are less likely to practice in the United States or European Union following conclusion of their studies. For U.S. or EU students, this book could also be the foundation for an interesting and sometimes provocative course. It will take a lot more work from both teacher and students, however, to derive from these materials the information necessary to practice in either jurisdiction.