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## How Should Competition Law Be Taught?

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In a recent review of *Global Competition Law and Economics*, a book I co-wrote with Damien Geradin, John Kallaugher raises some interesting questions about the very premises of the book.<sup>1</sup> These questions seem worth addressing because they go well beyond an assessment of the book to raise fundamental pedagogical issues about the best approach to teaching competition law in the 21<sup>st</sup> century.

The fundamental differences are threefold. John Kallaugher argues that competition law courses should:

- (1) favor vocational training over analytical and economic issues;
- (2) limit their scope to a single legal jurisdiction; and
- (3) focus on procedure rather than substance.

The premises of the book are precisely the opposite, and conform to my own views about how best to teach a competition law course. First, competition law courses should focus on underlying analytical and economic ideas, rather than on vocational memorization of particular doctrinal formulations, mainly because it is the underlying ideas that drive the actual resolution of cases. Those ideas are

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<sup>1</sup> The book is E. ELHAUGE & D. GERADIN, *GLOBAL ANTITRUST LAW & ECONOMICS* (Foundation Press 2007). The review is J. Kallaugher, *Review of Elhauge & Geradin's Global Competition Law and Economics*, 3(2) *COMPETITION POL'Y INT'L* 241-48 (Autumn 2007).

thus central to good antitrust lawyering, as well as to a sophisticated understanding of the content of modern competition law. Second, competition law courses should abandon the blinkered focus on one legal jurisdiction, because the reality of modern international markets means that business and law firms must understand the combination of laws that apply to conduct and mergers, and ideas and trends in legal development constantly flow between jurisdictions. Third, competition law courses should focus on the substance of how cases are resolved, rather than fixating on procedural rules, because it is the substantive analysis that is more distinctive to competition law, harder for lawyers to learn on the job, and in the end determines how businesses can act.

Before addressing these more fundamental issues, I should offer a word of appreciation for John Kallaugher’s kind praise for the quality of the book. He calls it a “very strong work,” commends the editing and choice of materials, and compliments the thoughtfulness and clarity of the questions, commentary, and economics analysis.<sup>2</sup> He also acknowledges that the book does a good job of explaining the basic analytical framework common to U.S. and EC law.<sup>3</sup> Rather, “the real issue” to him is “what a course on basic antitrust law is meant to achieve.”<sup>4</sup> That is an issue on which we have a real difference, and because he has been so charitable on the book’s quality, I focus on that fundamental issue, which can be broken down into three sub-issues.

First, John Kallaugher argues that the “primary goal” of a competition law course should not be “to help students understand and apply the analytical model,” but rather should be “vocational training.”<sup>5</sup> On this, I could not disagree more: law schools should aspire to being much more than vocational trade schools whose job is to just teach doctrine. This would be so even if we adopted the narrow careerist perspective that we did not care whether students understood the deeper theoretical and policy issues about competition law, as long as we taught them skills they could use as practicing lawyers. The reason is that good lawyering depends on understanding the underlying analytical and economic models. Lawyering without such an understanding is bad lawyering, because formalisms that lack firm grounding in functional theories are unhelpful and unpersuasive in practice. The lawyer who argues nothing but for-

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<sup>2</sup> See Kallaugher (2007), *supra* note 1, at 242-43 and 247.

<sup>3</sup> *Id.* at 244-45.

<sup>4</sup> *Id.* at 245.

<sup>5</sup> *Id.* at 245-46.

malisms and spins of case quotations will lose to the lawyer who offers a functional theory that can make economic sense of the doctrine in a way that adjudicators find attractive. The lawyer who does not understand the underlying antitrust analysis and economics cannot effectively cross examine expert witnesses or understand the key issues in her own case, and the adjudicator who does not understand the underlying ideas will make bad decisions that worsen market performance and harm consumer welfare.

Nor does it make sense to focus on doctrinal details at the expense of the underlying theoretical issues, because the doctrinal details change from year to year and jurisdiction to jurisdiction. Such a focus would thus fill students' minds with what is most likely to become obsolete. Further, in competition law the legal doctrines often consist of vague formulations, like "dominant position", "monopoly power", "abuse of dominance", or "exclusionary conduct", that are devoid of real content unless one understands the underlying analytical model and economics.

Even if one were merely interested in doctrine for vocational reasons, I think there would be little basis to his claim that this book would not be useful to a student likely to practice in the United States.<sup>6</sup> The book includes every antitrust topic covered by the leading U.S. antitrust casebooks, and just about every case (other than those whose interest is mainly historical), as well as adding many cases other U.S. casebooks do not include. Perhaps he would also say that none of the U.S. antitrust casebooks prepares students for antitrust practice, but if so, that just underscores that the underlying issue is a fundamental difference about the best approach for preparing students for practice.

Second, John Kallaugher argues that competition law is not really global.<sup>7</sup> Here, I think he confuses being global with being uniform. The book certainly acknowledges that competition law is not uniform. The difference is much less than one would think from superficial differences in doctrinal formulations. But focusing on the underlying analytical and economic issues does reveal some real areas of substantive difference. This does not undermine a global approach, though, because firms on international markets must conform their conduct to antitrust regulation by multiple nations and, as he acknowledges, the various nations share a common analytical approach. His premise that being global must mean being uniform is odd, because he acknowledges that U.S. contract law is a single body of law, even though it is not uniform. Likewise, his claim that product safety law illustrates the inadvisability of a multi-jurisdictional approach seems odd, because in fact multi-state approaches are taken to teaching product safety law in the United States.

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6 *Id.* at 248.

7 *Id.* at 243-44.

He also makes the related claim that “no lawyer can claim to practice global antitrust law or offer advice on a truly global basis.”<sup>8</sup> This claim is thoroughly disproven by the modern reality of competition law practice by global law firms. Not only does each leading antitrust law firm stress its global practice, it is clear that they are actively taking their sophisticated understanding of antitrust analysis and applying it to great advantage in other nations. Indeed, I understand that the international extension of antitrust practices is one of the major growth areas in modern law firms. In my own experience, analysis of mergers and challenged conduct in jurisdictions throughout the world turns much more on underlying conceptual and policy analysis that is common to all the jurisdictions, than on specific doctrinal formulations that differ.

John Kallaugher also argues that a global approach obscures the unique aspects of individual systems.<sup>9</sup> In fact, the supposed examples he points to involve issues where he missed the portions of the casebook that addressed those aspects.<sup>10</sup> More important, if we have slighted any unique aspects, then that simply reflects our failings as authors, rather than the inevitable result of taking a global approach. Indeed, I have found precisely the contrary: presenting the materials in a global framework *highlights* the unique aspects of individual systems because contrast throws them into sharp relief. For example, as a U.S. antitrust teacher, I could never quite get students to seriously debate whether predatory pricing doctrine should have a recoupment element and be extended to above-cost price cuts, and thus could not really drive home the importance of those elements to the nature of U.S. antitrust law. But because each contrasts with the different conclusions of EC law, the unique features of each jurisdiction are very much put in sharp relief, and far better understood.

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8 *Id.* at 244.

9 *Id.* at 246-47.

10 For example, he says we failed to deal with the structure of Article 81(3) EC analysis (*id.* at p.247, n.10). In fact, we do so many times (see DAMIEN & GERADIN (2007), *supra* note 1, at 63-65, 93-96, 109-14, 180, 220-23, 310-11, 313, and 667-71). He claims we missed the point that, given lower thresholds for dominance, Article 82 may cover the same ground as attempted monopolization (Kallaugher (2007), *supra* note 1, at 247, n.9). In fact, we made that point explicitly (DAMIEN & GERADIN (2007), *supra* note 1, at 233). He also asserts the book errs by saying the excessive pricing doctrine comes from the courts rather than the treaty (Kallaugher (2007), *supra* note 1, at 247, n.9). In fact, we are explicit that “Article 82(a) ... expressly states that an abuse may, in particular, consist of unfair prices or output limitations” (DAMIEN & GERADIN (2007), *supra* note 1, at 233). So we didn’t miss the point at all. The part he seems to miss, though, is that the “may” and “unfair prices” language could have been interpreted by the Court to be discretionary or applicable to more limited phenomenon.

Third, John Kallaugher asserts that competition law issues are not usually substantive, but rather procedural.<sup>11</sup> To him, “[i]n 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).”<sup>12</sup> Once again, we have quite a difference in perspective. Perhaps procedural issues account for more billable hours, but the issues that actually determine outcomes are the substantive ones. And it is the results that clients pay for, and that ultimately matter.

It also seems to me that, in choosing what to teach in a competition law course, it is important to consider which issues are most distinctive to competition law and most need systematic treatment in a course. Procedural issues are common to many courses and can be picked up much more easily in practice. The substance of competition law is unique and much harder to pick up on the fly.

None of this is to deny that procedure is important. Indeed, our book does devote one of the eight chapters entirely to procedure, and stresses throughout how different procedures and remedies might explain U.S.-EC differences in substantive law. However, it is certainly true that the book reflects a deliberate decision to focus on substantive issues. In this, it represents a change from old EC competition law books, which seemed oddly uninterested in substance and instead focused on rather dull technicalities of procedure. But it seems to me that approach never made much sense, and in any event the era for it has long since passed.

John Kallaugher also raises some other more specific objections, but as he rightly points out, the disagreement on specific points is not the “real issue.” The real issue is does one favor, as he does, an approach that stresses vocational training over analytical and economic issues, limits itself to a single jurisdiction, and focuses on procedure rather than substance. If those are one’s preferences, then I must cheerfully acknowledge ours is not the book for you. It is, rather, quite proudly, a book that stresses analytical and economic issues as essential to good antitrust lawyering, that considers a global perspective as reflecting the reality and future of antitrust, and that focuses on substance rather than fixating on procedures. In short, the choice boils down to whether one thinks antitrust courses should be vocational, parochial, and procedural or instead theoretical, global, and substantive. The latter three elements are, I think, central to a well-designed antitrust course—no matter what book one uses to teach it. ▼

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<sup>11</sup> Kallaugher (2007), *supra* note 1, at 244, 247.

<sup>12</sup> *Id.* at 244.