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Mapping the (New) Limits of Antitrust

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The Global Limits of Competition Law is the first book in the new series Global Competition Law and Economics, edited by Ioannis Lianos and D. Daniel Sokol, and published by Stanford University Press. The aim of this new series is to analyse “how law, economics, and institutions respond to an increasingly global and interconnected antitrust community.”

While acknowledging that economic concepts are used as a common vocabulary in the ongoing international discourse on competition law, the series editors recognize that there are also other important features calling for analysis and understanding. For example, institutional framework and culture play an important role in competition law and policy. In their words, “Too often policy makers merely reference the ready-made solutions adopted by more established competition law systems . . . without due regard to local factors.”

Hence, this series carries a promise of being a valuable outlet for rigorous thinking about competition law from a broader perspective, both geographically and more importantly conceptually.

The first volume—The Global Limits of Competition Law—takes Frank Easterbrook’s seminal article The Limits of Antitrust as a point of reference to discuss various challenges competition laws face nowadays in the global context. This approach is reflected in the book’s structure. The volume is composed of a preface, an introduction, and 15 contributions divided into five parts.

Part One addresses the procedural rules in competition law. The reader finds here an excellent contextualization of Easterbrook’s writing and a topical discussion of the relationship—in the EU competition law context—between regulatory intervention and business freedom. Here the reader will also find an analysis of the tensions that exist between the investigatory and sanctioning powers of the European Commission and the due process standards protected by the European Convention on Human Rights. Part Two explores various economic limits of competition law. These include the challenges and inherent trade-offs involved in importing economic insights into the law, the complexities involved in addressing buyer power (monopsony), and the role of transaction costs economics in competition law policy. In Part Three, the discussion shifts to the analysis of the interaction of competition law with other areas of law. The reader is offered a discussion of possible means of dealing with anticompetitive government regulation, which may itself remain outside the scope of application of competition law. This is followed by the narrower investigation of the position of government restraints in the EU context (the state action doctrine). The subsequent discussions of overlapping

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1 The Global Limits of Competition Law, at vii (D. Daniel Sokol and Ioannis Lianos eds., 2012).
2 Id.
regulatory spaces relate to intellectual property law and to consumer protection. Part Four discusses institutional design. Here the reader will find a mapping and comparative analysis of the existing models of allocation of power between competition agencies and the reviewing courts. Another contribution critically discusses the predominant model of an independent competition enforcer responsible for competition advocacy. This is followed by a take on the much needed theory of remedies in competition law, from the EU perspective. The last section, Part Five of the volume, investigates various cultural ramifications for competition law and policy. It includes a general analysis of implications that cultural differences carry for competition law, based on, *inter alia*, Geert Hofstede’s framework, as well as more specific discussions in the Northeast Asian and Latin American contexts.

The editors managed to gather an excellent team of contributors with considerable expertise in antitrust. Their geographical diversity greatly adds to the volume’s value, by offering different perspectives on the discussed issues. The individual contributions tie in well, in addition to the connections reflected in the volume’s structure. For example, the issue of remedies—itself the main focus of Lianos’s contribution—is also addressed by Arianna Andreangeli in the due process framework and by Daniel A. Crane in the intellectual property context. Similarly, Sokol discusses competition advocacy from the perspective of addressing anticompetitive government regulation, and his piece connects with Frédéric Jenny’s discussion of the relationship between competition agencies independence and the relevance of advocacy.

The volume successfully maps various challenges faced by competition laws internationally, identifying numerous topical issues. It is both informative and thought-provoking. For example, Paolisa Nebbia’s insightful piece on the overlap between competition and consumer law shows how the latter may complement and enhance the effectiveness of the former. It is worth noting—as Nebbia does—that the enforcement of competition and consumer laws is often entrusted to a single agency.\(^4\) That is the case, for example, in Australia, Denmark, and Poland.\(^5\) Similarly, in

\(^4\) *See, e.g.*, *Competition & Consumer Protection Authorities Worldwide*, FED. TRADE COMMISSION, http://www.ftc.gov/oia/authorities.shtm (last modified Oct. 31, 2012). In academia, it is not unusual to study both regulatory regimes in a single organizational framework. For example, the Institute for Consumer Antitrust Studies, established in 1994 at the Loyola University Chicago School of Law, from its inception straddles both domains of antitrust and consumer law. *See INST. FOR CONSUMER ANTITRUST STUD.*, http://www.luc.edu/antitrust (last visited Jan. 6, 2013).

the United States, the Federal Trade Commission (FTC) is entrusted with enforcement of both antitrust and consumer protection legislation. Most recently, Finland decided to combine their two separate bodies responsible for competition and consumer law enforcement into a single agency as of January 2013. One may wonder whether similar steps are likely to be taken in other jurisdictions.

It is noteworthy that the volume’s editors decided to also include contributions concerning the antitrust limits relating to culture in Part Five of the volume. Although the importance of accommodating such considerations has been well underscored, this particular interface seems to still receive little attention in the mainstream antitrust discourse. While some research initiatives explore this dimension, more comparative research is needed and The Global Limits of Competition Law makes a valuable contribution in this regard as well.

One important tool in competition law enforcement toolbox is leniency. Cultural considerations need to be accommodated when formulating and implementing leniency programs, since program effectiveness will also depend on the shared cultural values in a particular jurisdiction. In his contribution on the cultural implications for competition law, Julián Peña mentions that in Latin America “the snitch is seen as the worst social pariah.” Thomas K. Cheng, offering more general

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8 For example, David Gerber talks about the need to “embed” competition laws in issues of community, and in particular social, historical and cultural contexts. David J. Gerber, Global Competition: Law, Markets, and Globalization 4–6 (2010).

9 See, e.g., Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law (Michael W. Dowdle et al. eds., forthcoming 2013).

10 Julián Peña, The Limits of Competition Law in Latin America, in The Global Limits of Competition Law, supra note 1, at 240. Interestingly, in a quite similar vein, Bryan Allison was a U.K. executive who served a jail sentence after admitting guilt for his involvement in the marine hose international cartel in the U.K. and the United States. Michael O’Kane, Does Prison Work for Cartelists?—The View from Behind Bars, 56 ANTITRUST BULL. 483, 484 (2011). When he was asked whether he was aware that by cooperating with the antitrust authorities, he could have escaped the prosecution, Allison responded: No, I don’t think I was. It was almost like sneaking at school. It’s not something one really does, Go shop your fellow conspirators; it’s a bit below the belt. I think it is more likely to happen now, but at the time, well, we are English; we don’t do that sort of thing.
observations, notes that in more collectivist and harmony-oriented cultures, criminal sanctions in competition law may be necessary to increase the attractiveness of leniency programs. My reading of these contributions coincided with the Australian Competition and Consumer Commission’s (ACCC) recent release of a short fiction film in the framework of its major awareness-raising campaign. The Marker is intended to show “what cartel conduct involves and the devastating impact that cartels can have on participants.” The main character, Martin, starts working for a company engaged in a cartel and as he gets to understand the situation, he becomes tormented by feelings of guilt. He ends up becoming a whistle-blower and starts cooperating with the competition authority. By the end of the film, he obtains full immunity and feels relieved. In contrast, his boss is banned from managing the company and has to pay a considerable fine. Martin’s “colleague,” working for the co-cartelist, goes to jail. Although The Marker sends a clear message, it is quite possible that Martin, if brought up and operating in a different cultural environment, would have behaved in a much different way. Perhaps if it was not Australia, but Latin America, Martin would not have felt guilty about his participation in a cartel. Maybe he would have actually been proud of it! In any case, the leniency program is just one of many aspects of the competition law enforcement apparatus which should be culture-tuned, and the contributors in The Global Limits of Competition Law make the reader aware of this need.

All in all, the volume is an excellent piece of scholarship. The contributors ventured into the uncharted waters in competition law, pointing to and analysing various challenges competition law faces in a global context. The editors do a good job in framing the discussion around many of the currently debated issues, making the volume a recommended read for the general antitrust audience, and a must-read for all concerned with the “international” dimension of competition law discourse.

Id. at 491.


13 Id.