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Antitrust Beyond Borders: Some Concluding Thoughts on the Globalization of Antitrust

David C. Gustman *

The seminar "Antitrust Beyond Borders," presented by Freeborn & Peters, in conjunction with the American Lawyer, truly reflected the international scope of antitrust. Those attending the seminar heard from lawyers with offices in four continents. The Eversheds law firm, which hosted portions of the seminar, has offices in 14 cities in Europe and Asia. The Macleod Dixon firm, also a host for the seminar, has offices throughout Canada, as well as Moscow, Caracas, Rio de Janeiro and Almaty, Kazakhstan. Freeborn & Peters, based in Chicago, currently has antitrust litigation with a global reach, involving both conduct and actors located throughout the world. Together, the participants represented competition and antitrust lawyers in North America, South America, Europe, and Asia. This fact alone reflects the appropriateness of the title of the program, "Antitrust Beyond Borders."

The presentations at the seminar also clearly established that antitrust is no longer only a local or regional issue for lawyers who practice in this area. The presentation by Scott Hammond of the Department of Justice, for example, emphasized the shift in the way the U.S. Antitrust Division examines cartel behavior and conspiracies, as a danger both from a national and an international perspective. Any astute observer of the phenomenon of the international reach of antitrust enforcement during the last five years is cognizant of the increased number of investigations, both U.S. and foreign, involving companies outside of the United States, the

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increased number of fines imposed on such companies, and the increased number of criminal convictions of citizens of other countries. The lesson clearly is that those lawyers who practice in the private sector have to be substantially more vigilant with respect to the international implications of antitrust law on their clients.

Significantly, on October 26, 2001, several countries announced that they were forming an international competition network. Such cooperation is representative of the way that authorities conduct antitrust investigations. The Assistant Attorney General of the United States in charge of antitrust, Charles James, has described international antitrust enforcement as moving into the 21st century with this international competition network. Additionally, the Chairman of this network will be a Canadian, Konrad von Finckenstein, the Commissioner of Competition at the Canadian Bureau of Competition. The countries involved will include the European Union ("E.U.") and its member countries such as France, Germany, Italy, and the United Kingdom, as well as countries as diverse and widespread as Australia, Japan, and Mexico. The public statements regarding this organization indicate that it will not be involved in typical international trade matters such as dumping, countervailing duties, and unfair trade, but rather, in the opening of international borders to truly global competition law enforcement.

We are now entering into what most people believe to be recessionary times. Recent newspaper accounts have noted that price deflation is currently a significant factor in the world's economy. In September 2001, reports showed that prices dropped faster in many commodities and products than at any time in the last forty years. With price deflation and the economic slowdown, the temptation to cheat by violating the antitrust laws tends to increase. For those companies facing a drop in product prices and subsequent loss of profit, decision-makers may be tempted to engage in anti-competitive conduct in order to get those prices back where they once were. Antitrust lawyers throughout the world are going to have to be more vigilant in counseling clients, as well as in developing more aggressive internal compliance programs in order to avoid government indictments and the civil actions that usually follow.

There was a great deal of discussion during the conference about the convergence of the world's antitrust laws today. Traditionally, the competition enforcement effort in the United States has been the most aggressive. Although the E.U. seems to be catching up with the U.S., various presentations emphasized the differences in the competition law systems that exist today. Consequently, there remains a significant debate among countries outside of the United

States concerning the criminalization of the antitrust laws. Likewise, there are still significant differences in damages, fines, and the standards of proof in antitrust enforcement worldwide. Any company involved in the international arena faces the prospect of doing business in ways that might be perfectly legal in one country but may be illegal in another.

Antitrust enforcement at the government level, however, will increase for the simple reason that it is becoming a way to secure significant fines. In this regard, the accomplishments of the U.S. Department of Justice in the last ten years have been striking, not only because of the size of the individual fines it has received, but also because the totals of the fines are so enormous. The Antitrust Division now has the appearance of being a profit-generating center, and organizations that generate profits are rewarded. Such organizations tend to receive more money for their budgets, which in turn enable them to hire more lawyers and more investigators. The result is an increased search for potential targets for antitrust enforcement. The Canadians and the Europeans have looked carefully at this phenomenon in the United States and there is little doubt that they would like to duplicate it. In fact, the antitrust cases worldwide involving vitamins and lysine are good examples. Antitrust enforcement agencies throughout the world have replicated the U.S. successes by prosecuting hard-core cartels in these industries and have themselves recovered significant fines.

One of the problems, of course, is that the vitamins and lysine cases involved truly hard-core cartels. There is a huge area of the landscape, however, where it is questionable whether the challenged conduct should be viewed as a *per se* violation of the law or whether it should fall within the Rule of Reason. Countries seeking to adopt the U.S. approach to antitrust enforcement should also be sensitive to the development of the law, and attempt to refine and shape the type of analysis they use to assess potentially anti-competition conduct.

The importance of the international approach to antitrust law is what brought together scholars, member of the private bar, and government prosecutors. All shared a belief that international enforcement of antitrust laws is one of the most important areas that practitioners in this field should be contemplating today. When the changes in the world's economy are combined with the increased scrutiny of the antitrust enforcement agencies, businesses will need assistance from these antitrust practitioners to navigate the troubled waters of the world's competition laws. We are in an era when antitrust may truly be said to be "beyond borders."
