

ANTITRUST IN DEVELOPING COUNTRIES: COMPETITION POLICY IN A POLITICIZED WORLD

New York, October 27, 2017 | 4th Annual Conference – New York University

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PROGRAM

8:00 am REGISTRATION & BREAKFAST

8:30 am WELCOME REMARKS

Trevor W. MORRISON | Dean, New York University School of Law, New York

INTRODUCTORY REMARKS

Eleanor M. FOX | Professor, New York University School of Law, New York

8:40 am OPENING KEYNOTE

Makan DELRAHIM | Assistant Attorney General for the Antitrust Division, US DOJ, Washington, DC

9:20 am **IMPACT OF THE NEW NATIONALISM ON COMPETITION AND ECONOMIC DEVELOPMENT IN DEVELOPING COUNTRIES**

Tembinkosi BONAKELE | Commissioner, South African Competition Commission, Pretoria

Adriana GIANNINI | Partner, Trench Rossi Watanabe - Baker McKenzie, São Paulo

Frédéric JENNY | Professor of Economics, ESSEC Business School | Chairman, OECD Competition Committee, Paris

Ioannis LIANOS | Professor, University College London

Susan NING | Partner, King & Wood Mallesons, Beijing

Moderator: **Eleanor M. FOX** | Professor, New York University School of Law, New York

10:50 am Coffee Break

11:05 am **PHARMACEUTICALS: PRICING AND ACCESS**

Paul CSISZAR | Director of Pharma and Health Services Antitrust Unit, DG COMP, Brussels

Felipe IRARRÁZABAL PHILIPPI | National Economic Prosecutor, FNE, Santiago, Chile

Susan JONES | Head of Corporate Legal Antitrust, Novartis, Basel

James KILLICK | Partner, White & Case, Brussels

Moderator: **Harry FIRST** | Professor, New York University School of Law, New York

12:35 pm LUNCH KEYNOTE

Martha Martinez LICETTI | Competition Policy Team Leader, World Bank Group, Washington, DC

1:45 pm **MERGERS: IMPACT ON DEVELOPMENT**

Rosie LIPSCOMB | Senior Competition Counsel, Google, San Francisco

Simon ROBERTS | Professor, University of Johannesburg, Johannesburg

Anthony WOOLICH | Partner, HFW, London

Jason WU | Vice President, Compass Lexecon, Princeton

Moderator: **Daniel RUBINFELD** | Professor, New York University School of Law, New York

3:15 pm Coffee Break

3:30 pm **INNOVATION AND TECHNOLOGY: THE NEXT FRONTIER ON ANTITRUST FOR DEVELOPING COUNTRIES?**

Gönenç GÜRKAYNAK | Managing Partner, ELIG, Attorneys-at-Law, Istanbul

Elizabeth KRAUS | Deputy Director for International Antitrust, US FTC, Washington, DC

Joanna TSAI | Vice President, Charles River Associates, Washington, DC

Koren W. WONG-ERVIN | Director of IP & Competition Policy, Qualcomm, Washington, DC

Moderator: **Frédéric JENNY** | Chairman, OECD Competition Committee, Paris

5:00 pm **ENFORCERS' ROUNDTABLE: WHAT'S UNDER THE RADAR?**

Roger ALFORD | Deputy Assistant Attorney General, US DOJ, Washington, DC

Tembinkosi BONAKELE | Commissioner, Competition Commission of South Africa, Pretoria

Felipe IRARRÁZABAL PHILIPPI | National Economic Prosecutor, FNE, Santiago, Chile

Cristiane SCHMIDT | Commissioner, CADE, Brasília

Randolph W. TRITELL | Director, Office of International Affairs, US FTC, Washington, DC

Moderator: **C. Scott HEMPHILL** | Professor, New York University School of Law, New York

6:30 pm **CLOSING WRAP-UP: NEW YORK MINUTE**

Eleanor M. FOX | Professor, New York University School of Law, New York

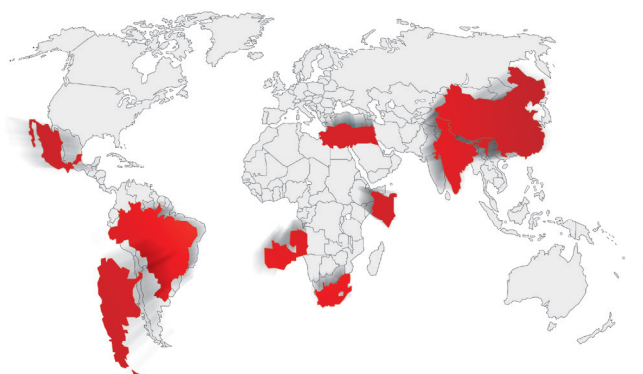
Harry FIRST | Professor, New York University School of Law, New York

6:40 pm **COCKTAIL RECEPTION IN HONOR OF PROF. FOX: AALS LIFETIME ACHIEVEMENT AWARD**

C. Scott HEMPHILL | Chairperson, Association of American Law School, Section on Antitrust & Economic Regulation; Professor, New York University School of Law

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FOREWORD

The 4th edition of the Conference “Antitrust in Developing Economies” organized by Concurrences Review in partnership with New York University School of Law was attended by 140 persons on October 27, 2017, at the NYU School of Law’s Greenberg Lounge. Attendees encompassed enforcers, academics, economists, attorneys, and students that engaged in a lively debate about developing economies’ competition law systems.

The keynote speaker for this year’s conference was Makan Delrahim, who gave his first public speech as the new Assistant Attorney General for the U.S. Department of Justice Antitrust Division during the event.

Conference discussion examined the effect on competition law and enforcement in developing

countries resulting from today’s surge in nationalism, innovations in technology, recent international mergers, and increases in pharmaceutical drug prices. The conference also featured a roundtable discussion with developing country competition enforcement officials regarding current enforcement issues.

We would like to thank the panel sponsors –Baker McKenzie, Charles River Associates, Compass Lexecon, ELIG Attorneys-at-Law, HFW, King & Wood Mallesons, and White & Case - who helped make this event such a success from both scholarship and networking perspectives.

We hope to see you for the fifth conference, in 2018. Meanwhile, we invite you to review the highlights from the 2017 conference, as set out in this booklet. ■

Nicolas Charbit

Nicolas Charbit

The Editor
Concurrences Review

Harry First

Harry First

Charles L. Denison Professor of Law
Co-Director, Competition, Innovation,
and Information Law Program
New York University School of Law

Eleanor M. Fox

Eleanor Fox

Walter J. Derenberg
Professor of Trade Regulation
New York University School of Law

CONFERENCE SUMMARY

New York University School of Law and Concurrences Review hosted the 4th Edition of the “Antitrust in Developing Countries” conference at NYU School of Law in New York City on Friday, October 27, 2017. Trevor Morrison (Dean, New York University School of Law) welcomed over 140 enforcers, in-house counsels, attorneys, professors, and students from 24 countries around the world to the conference, which delved into the newest antitrust challenges for developing countries including Brazil, China, Turkey, and nations in South America and Africa.

OPENING KEYNOTE SPEECH MAKAN DELRAHIM

The conference opened with a keynote delivered by **Makan Delrahim** (*Assistant Attorney General, US Department of Justice, Antitrust Division, Washington, DC*), regarding the economic liberty and the rule of law in the context of international competition policy.

Mr. Delrahim focused his speech on three topics: First, how competition enforcement plays an important role in the free market system; second, the progress that the Antitrust Division of the Department of Justice (Antitrust Division) has made in sharing the value of effective competition enforcement throughout the world; and third, his views on future developments in international competition enforcement. Throughout his address, Mr. Delrahim emphasized the fundamental role of the rule of law and procedural fairness in the application of competition law.

In emphasizing the connection between entrepreneurial spirit and the foundation of the U.S., Mr. Delrahim asserted that a well-functioning free market economy is the engine of opportunity that enables entrepreneurship and rewards innovation, and that competition enforcement plays a critical role in ensuring that this engine remains in good order for the benefit of all.

Mr. Delrahim further stressed the importance of U.S. competition enforcement by highlighting its core values. Historic examples of market failure caused by collusion and consolidation, demonstrate how important a competition

regime is to the long-term stability and success of the free market. Sound competition enforcement maximizes efficiency and supports the integrity of the market and competition on the merits. In this sense, the values of competition policy are core American values.

Competition law has an inherent equilibrium; it implies a wariness of infringing on economic liberty, alongside a willingness to intervene to correct market failure. Because imposition on liberty is inherent in government intervention, the enforcement framework carries with it all of the benefits and constraints of the rule of law, including public promulgation of laws, equal treatment for all, and impartial adjudication by independent courts. This framework provides predictability to market performers, and allows them to organize their behavior in accordance with law.

Mr. Delrahim underlined two important principles of U.S. competition enforcement. First, because competitive markets are generally self-regulating, only minimal government interference is necessary. Competition enforcement should maximize economic liberty subject to the minimally necessary government interference. Competition itself reduces the need for intrusive, industry-wide regulation. Therefore, U.S. competition enforcement must strive to strike the right balance between over- and under-enforcement as distinguished from the methodology applied in planned economies or highly regulated systems. Second, U.S. competition enforcement strives to safeguard the integrity



of the competitive process itself. Hence, cartel activity, which undercuts consumers' faith in the free market system, remains a core priority of the Antitrust Division.

Mr. Delrahim introduced a second theme: sharing the value of effective competition enforcement throughout the world. U.S. businesses and consumers benefit from both effective domestic and international competition enforcement.

Mr. Delrahim highlighted the progress in international cooperation in competition enforcement, praising the International Competition Network (ICN) and the OECD on their achievements in advancing international collaboration and promoting global convergence. He encouraged the ICN to continue to promote convergence around shared principles and provide a forum for dialogue on areas of disagreement and the rationales underlying differences, especially with regard to the intersection of intellectual property and competition. Mr. Delrahim also recounted the progress in entering into bilateral cooperation agreements and plans to devote agency resources to explore where they might be further strengthened. He welcomed further case cooperation in overlapping investigations, asserting that such cooperation helps alleviate the potential for conflict and enhances the effectiveness and efficiency of competition enforcement.

Finally, Mr. Delrahim shared some thoughts on future international engagement in competition enforcement. He urged that non-discrimination, procedural fairness, and transparency in competition enforcement be universally recognized as procedural norms for

competition law enforcement, emphasizing the danger of using competition law to favor domestic companies or discriminate against foreign firms. Mr. Delrahim asserted that competition enforcers should create an environment where the rules are clear and enforced fairly, which is crucial to a level playing field. The legitimacy of competition agencies' decisions is strengthened by a collective commitment to transparent and fair decision-making processes.

In seeking to achieve these goals, Mr. Delrahim envisioned progresses in trade agreements, international engagement and assistance, and bilateral relationships. In trade agreements, the Antitrust Division will work to craft competition chapters that fulfill the objective of affirming basic rules of procedural fairness in competition enforcement. Mr. Delrahim also looked forward to strategizing how the Antitrust Division might best prioritize its technical assistance and support to developing competition authorities. He invited newer agencies to contact the Antitrust Division directly with requests for assistance. ■

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The report has been prepared by the editors and rapporteurs above. The views expressed are those of individual speakers' and not necessarily those of their respective agencies or companies.

PANEL 1

IMPACT OF THE NEW NATIONALISM ON COMPETITION AND ECONOMIC DEVELOPMENT IN DEVELOPING COUNTRIES

The first panel, moderated by **Eleanor M. Fox** (*Professor, New York University School of Law*) explored the rise of nationalism in competition enforcement and the relationship between international trade and competition law.

Frédéric Jenny (*Professor of Economics, ESSEC Business School, Chairman, OECD Competition Committee, Paris*) began by observing that, as an economist, he is inclined to examine international trade and competition in tandem, for competition law is in many respects being driven by international trade agreements.

Prof. Jenny spoke about the mismanagement of globalization, and the resulting negative reaction caused by unfulfilled promises of benefits expected in the late 1990s and early 2000s. Trade and competition law make unrealistic assumptions about the operation of the real world. As a result, many predicted benefits of trade and competition do not materialize. As an example, Prof. Jenny pointed to the assumptions made by the theory of globalization regarding the mobility of labor. While high levels of mobility may exist in industries requiring high technical education, assumptions about similar levels of mobility in less sophisticated industries are unrealistic. In many countries, the rise of nationalism is largely associated with those people who are less mobile and who do not have the ability to migrate into another activity or move for better employment. When policy-makers borrowed ideas of global trade and competition theory and applied them to real-life situations, there were naturally disappointments as the full benefits were never realized as expected, leading to the idea that perhaps competition does not work.

Many countries that have entered into trade agreements have complained about inequalities inherent in such instruments. This has given rise to a widespread feeling that the job losses are due to imports that do not compete on equal footing.

Prof. Jenny identified three forms of reaction to this discontent. First, retrenchment; the closing of doors and the undoing of international trade agreements. Despite being the populist view in both the U.S. and EU, such a reaction will likely prove costly for all involved. Second, transformation, through the control of economic power. This reaction advocates for the redefinition of competition policy and the prevention of the accumulation of undue economic power. In this context, competition policy would serve a distributional objective. Third, adaptation, a reaction that acknowledges the global benefits deriving from trade as well as the costs associated with internationalization.

Tembinkosi Bonakele (*Commissioner, South African Competition Commission, Pretoria*) echoed Prof. Jenny in stating that the promises of globalization have not been fully realized and policies to soften the impact on losers have not been implemented, leading to an increase in nationalism in developing countries.

Mr. Bonakele took note of the effect of global mergers on developing countries. Since there is no global regime to analyze the impact of international mergers affecting many different countries, each country is left to conduct its own merger analysis and consequently has little concern for effects occurring outside its borders. The merging firms are often bigger than the developing countries, and developing countries have little power to oppose transactions with substantial negative impacts. Mr. Bonakele also observed that many multinational firms merge with national champions in developing countries to gain a foothold into the new market in question. Competition authorities in developing countries can do very little when faced with the power and might of these multinational firms.

Mr. Bonakele went on to further discuss issues of international trade. Despite the original intention that international trade would benefit all involved, it has been used as a tool to advance national interest in a crude manner. As the West is often looked to as an example, the West's use of nationalism has been followed by developing countries. More specifically, Mr. Bonakele saw the rise of nationalism within competition enforcement as having an impact on how developing countries perceive the competition law as a whole.

Ioannis Lianos (*Professor, University College London*) began by giving a historical background to the social dimensions of trade and competition law, noting that since the financial crisis in 2007, the status of this social dimension to competition and trade law has become a critical issue.

Prof. Lianos observed a link between market power and inequality. The issue of inequality related to substantial market power concerns both the developing and the developed world alike, pushing the surge of nationalism. In seeking to address how competition policy could be used to deal with such an issue, Prof. Lianos stressed the need for competition law to travel beyond traditional analysis and deal with the social costs or pecuniary externalities caused by market power. He emphasized the importance of competition law developing broader tools to understand the variety of competitive interactions that occur. Prof. Lianos also suggested the inclusion of a public interest test in competition analysis, not only in the context of mergers but also in the field of unilateral conduct.

Prof. Lianos concluded by stating that, in any case, procedural change needs to occur to take account for a social dimension to competition analysis. It would be beneficial to allow NGOs and other public interest organization to participate in the research and development of these new procedures.

Susan Ning (*Partner, King & Wood Mallesons, Beijing*) began by taking note of the perception that China is a socialist market economy that drives the modernization of an ancient civilization. Furthermore, there seems to be a conflicting view where China is portrayed as the second largest economy in the world by the IMF, despite China still considering



itself a developing country. There is also a perception that the Chinese economy is very dynamic and efficient, despite many distorted market structures and interferences by the central and the local government in the micro-economy.

In this context, China is currently reviewing its system of competition law. The Chinese government aims to make significant developments for deregulating certain sectors, promoting the awareness of competition rules in a market economy, and complying with recognized competition standards. In light of this, Ms. Ning considered China to be at a transitional period for competition law, where the government is turning from a history of planned economy to a market economy.

Ms. Ning expressed the mixed feelings of China with regard to globalization. China has benefited greatly from its entrance in the WTO, but it has also suffered from trade defense measures imposed by other countries. In the opinion of Ms. Ning, this mixed sentiment about globalization also concerns foreign investment policy. China is welcoming foreign investment but such investment has also brought about greater regulation in certain sectors. Reforms have been made since 2016, and investment has been greatly encouraged. However, China has been criticized heavily for taking into account industrial policy as a part of its merger review.

Ms. Ning concluded by noting that China is making important improvements, not only in the field of competition law but also with

regard to trade and investment law. China has a strong commitment to complying with the principle of non-discrimination, and the removal of trade and technical barriers. China has a strong willingness to reform both at domestic level and in its trade relations internationally.

Adriana Giannini (*Partner, Trench Rossi Watanabe, Baker McKenzie, Sao Paulo*) started by posing two questions: How can competition and trade law improve people's lives, and does nationalism play a role in favor or against this.

Ms. Giannini observed that, unlike the surge of nationalism in Europe, the roots of Brazilian nationalism are not found in economic hardship or immigration but in the fight against corruption. The momentum from this form of nationalism is spreading to neighboring countries such as Columbia and Peru.

Ms. Giannini remarked that the consequences of this nationalism for competition law are twofold. First, more investigations relating to corruption are being undertaken. More broadly, the authorities are taking a harder stance in the enforcement of competition law.

Ms. Giannini observed that Brazil is vulnerable to external forces, such as large international mergers, that cause harm Brazilian consumers. Brazil is unable to face the power of these merging parties with its limited resources, so a plausible alternative suggested was the convergence of competition policy at an international level. ■

PANEL 2

PHARMACEUTICALS: PRICING AND ACCESS

The second panel of the conference, moderated by **Harry First** (*Professor, New York University School of Law*), addressed current issues in the pharmaceutical sector, with specific regard to whether competition authorities are well situated to deal with excessive pricing cases.

Paul Csiszar (*Director of Pharma and Health Services Antitrust Unit, DG COMP, Brussels*) began by stating that excessive pricing cases should be exceptional and that the European Commission's primary focus should be on the exclusionary, rather than exploitative, behavior of dominant firms. Nevertheless, Mr. Csiszar emphasized that the excessive pricing of pharmaceutical products is unacceptable in civilized society, and that as result, the issue not whether excessive pricing poses a problem, but rather what is the best means of dealing with it.

Mr. Csiszar took note of the fact that various legislative structures address excessive pricing differently in different jurisdictions. For example, unlike the U.S., Article 102 TFEU expressly provides that abuse of dominance may consist of the direct or indirect imposition of unfair purchase or selling prices. Thus, EU law provides competition authorities with a legal basis for intervention in cases of excessive pricing. Furthermore, the pharmaceutical sector is particularly vulnerable to excessive pricing due to the consistent demand for pharmaceutical products, regardless of price. The famous invisible hand that maintains competitive forces in the market is vulnerable to failure.

Mr. Csiszar also struck a cautious note, emphasizing the difficulty in fashioning a clear test for determining when prices become excessive. In the last 20 years, there has been a small number of cases concerning excessive prices in the EU, signaling that the primary concern of EU competition enforcement is with exclusionary conduct of dominant firms. However, Mr. Csiszar asserted that competition authorities should concern themselves with excessive pricing cases where both market structures and sector regulators have failed. This is especially the case in the EU, owing to the explicit inclusion of excessive pricing in Art 102.

Felipe Irrázabal Philippi (*National Economic Prosecutor, FNE, Santiago, Chile*) spoke about how the Chilean competition authorities react to excessive pricing cases.

Mr. Irrázabal Philippi stated that one of the focuses of Chilean competition enforcement relates to the highly sensitive market of healthcare. Despite this focus, there has only been one excessive pricing case brought under Chilean law, a case unrelated to the

pharmaceutical or healthcare markets. The Court found that excessive pricing was capable of constituting an infringement under Chilean law, however, Mr. Irrázabal took note of the high legal standard required by the Court to demonstrate such an infringement. To prove that the prices are excessive, one must demonstrate that the firm charging excessive prices has strong market power and that the price is set significantly above a particular benchmark (the Court did not elaborate on what the appropriate benchmark could be).

Mr. Irrázabal outlined a number of different criticisms of the current Chilean position on excessive pricing. There have been doubts expressed as to the authority and role of Chilean competition authorities with regard to excessive pricing cases. More recently, there have been suggestions that, among other things, a position of super-dominance must be shown before a case for excessive pricing can successfully be made. For enforcement authorities, there is often caution about bringing infringement cases where there is not a high probability of victory, owing to the importance of establishing strong precedents for future enforcement. In light of the recent developments in Chilean competition law, Mr. Irrázabal predicted that future Chilean enforcement cases will contain expensive litigation, sophisticated economic arguments, and unpredictable legal principles.

Susan Jones (*Head of Corporate Legal Antitrust, Novartis, Basel*) highlighted the existing divergence between multiple jurisdictions with regard to excessive pricing cases, and the effect that this can have on the practice of an in-house counsel.

Ms. Jones observed that, through international cooperation, new developments in competition law are now being rapidly disseminated throughout the world. However, national factors play a role in the different application of competition law in different jurisdictions. In light of these differences, Ms. Jones emphasized the need for competition authorities around the world to provide levels of predictability and certainty for firms to enable compliance with various competition regimes. There are difficulties in developing areas of competition law where the legal principles have not been clearly defined.

Ms. Jones noted that, until recently, excessive pricing cases in the EU were rare, due to traditional concern for over-enforcement and an initial faith in the free market economy. However, in more recent times, European competition authorities have shown a greater willingness to engage in excessive pricing cases. Ms. Jones went on to discuss cases occurring at both a national level and cases of the European Commission, asserting that the two-prong test set out in *United Brands* gives insufficient guidance for an excessive



pricing test in practice. Furthermore, Ms. Jones illustrated how an excessive pricing case enforced at a national level can cause significant tension between a national competition authority and a price regulator.

James Killick (*Partner, White & Case, Brussels*) shared his skepticism over the involvement of competition authorities in excessive pricing cases.

For developing countries, there are better ways to regulate excessive pricing than through the means of competition enforcement. In this regard, Mr. Killick emphasized the time-consuming nature of competition cases, observing that price regulators would be better suited to deal rapidly and efficiently with such excessive pricing concerns. Additionally, if competition authorities are made responsible for the enforcement of excessive pricing cases, they will

be limited by their inherent nature in the number of cases they can bring, and consequently, the number of excessive pricing practices they can prohibit. Mr. Killick stressed that excessive pricing cases should only be brought by competition authorities in exceptional circumstances, expressing concern over the recent number of excessive pricing cases undertaken in the EU.

Mr. Killick spoke about the recent fine imposed by the UK Competition and Markets Authority (“CMA”) on the pharmaceutical manufacturer Pfizer and on the distributor Flynn Pharma for excessive pricing. He shared his concern regarding the narrow product market definition and the unusual approach taken in defining the appropriate benchmark against which the pricing in question was to be measured. ■

LUNCH KEYNOTE SPEECH

MARTHA MARTINEZ LICETTI

The Lunchtime Keynote was presented by **Martha Martinez Licetti** (*Competition Policy Team Leader, World Bank Group, Washington, DC*), who discussed the crucial role of competition policy in the creation of economic, inclusive and equitable growth, as well as the need to prevent the politicization of competition law.

Ms. Licetti began by giving some insight into her background and the positions that have informed her vision of effective policy in the context of developing countries, including her current World Bank Group position and her previous role as a practitioner in competition enforcement Peru. In According to Ms. Licetti, the transition from studying law to becoming an economist has helped her to gain insight into the interconnection between law and economics.

Through offering an example of the new purple tea market in Kenya, Ms. Licetti proceeded to demonstrate how competition policy can be used to boost economic opportunities and improve public welfare. Ms. Licetti further emphasized the relevance of competition policy in a global and politicized environment, where countries are questioning the benefits of integration and its related effects on trade, cross-border investment and economic opportunities. One of the key messages conveyed in Ms. Licetti's speech was the need to ensure that economic and social gains from integration are not undermined by anticompetitive business practices or distortive government intervention.

Although concentration and market power alone do not have anticompetitive effect, in practice, the combination of concentration and market power, distortive government intervention, and anticompetitive behavior of powerful firms result in significant anticompetitive effects in certain industries in developing countries. Ms. Licetti asserted that consumers cannot fully benefit from the

gains of trade and investment where there is distortive government intervention in the marketplace, as well as political cronyism and favoritism which exacerbate the lack of competition. To allow for the full benefit of trade and investment, the playing field needs to be levelled and unfair competition must be eliminated in a manner that goes beyond mere written policies and regulations. Competition policy must have a real impact on the ground in the form of lower consumer prices, less unemployment, reduced poverty, and increased wages, opportunity, and entrepreneurship.

Ms. Licetti shared empirical evidence which reinforced the positive links between competition policy and inclusive growth in developing countries. Analysis undertaken by the World Bank Group demonstrates that competition will positively promote the productivity growth in developing countries and will directly affect public welfare through the decline in prices for consumers, the increase in the rate of employment, and the positive increase in wages. Although a growing body of literature exists in this area, there is still a need for more research. Ms. Licetti drew attention to the important work being done by the World Bank Group to increase the focus of policy-makers on competition issues, including the quantification of the impact of competition reforms and the active generation of new evidence on how competition lifts average income levels and shifts welfare in favor of the poorest in society.

Ms. Licetti called for a holistic approach to competition reform, acknowledging that competition policy in developing countries does not operate in a vacuum. She urged national authorities to increase their awareness and understanding of the political economy, ensure that competition policy informs national and public policy, and create impactful change that will lead to practical and effective results at ground level. ■



PANEL 3

MERGERS: IMPACT ON DEVELOPMENT

The third panel, moderated by **Daniel Rubinfeld** (*Professor, New York University School of Law, New York*), addressed issues beyond traditional competition concerns that competition agencies in other jurisdictions may consider when undergoing merger analysis.

Rosie Lipscomb (*Senior Competition Counsel, Google, San Francisco*) began by observing that public interest considerations in merger analysis by developing countries is not a new development. However, she noted that the world has moved into a new era, one of rising nationalism and protectionism with regard to domestic firms. Furthermore, the difference in treatment in different jurisdictions has created uncertainties, and it is questionable whether competition law is well placed to take account of public interest concerns in merger analysis.

Ms. Lipscomb then reflected on recent international mergers, highlighting the difference in treatment that has occurred in different jurisdictions, specifically with regard to public interest considerations. For example, in the acquisition of SABMiller by Anheuser-Busch InBev, Ms. Lipscomb drew attention to the treatment of the merger by the South African Competition Commission. In addition to remedies to address competition concerns raised by the South African Commission attached a number of public interest commitments to its approval. Ms. Lipscomb favored the approach of the South African Competition Authority as compared with other developing countries insofar as it separated competition and public interest analysis.

However, in illustrating the difference in treatment of among developing and developed countries, Ms. Lipscomb took note of the fact that «public interest» factors are not part of the analysis in Europe and the U.S.

Ms. Lipscomb gave further examples of mergers where non-traditional factors were taken into consideration, ranging from concern for small businesses to consideration of privacy or data protection issues. Ms. Lipscomb also drew attention to the approach in the U.S. in only including

competition considerations in the antitrust agencies' merger review. Ms. Lipscomb shared her skepticism over the appropriateness of competition authorities including public interest considerations in their analysis, asserting that other parts of government may be better placed to deal with such concerns.

Simon Roberts (*Professor, University of Johannesburg, Johannesburg*) began by taking note of the numerous and diverse aspects to the public interest consideration in merger

analysis. According to Mr. Roberts, the approach taken by South Africa to merger analysis is one that should be followed by other developing countries.

The South African test with regard to merger analysis can be summarized in four relevant areas: effects on a particular industrial sector; effects on employment; the effects on the competitive ability of small businesses controlled by historically disadvantaged persons; and the effects on the ability of national industries to compete in international markets. Mr. Roberts took note of a shift in the analysis of the South African Competition Authority. Whereas it originally placed greater emphasis on the effects on employment, it is moving towards a greater concern for the effects on industrial policy.

Anthony Woolich (*Partner, HFW, London*) outlined a practical approach as a private practitioner with regard to seeking approval for an international merger in multiple jurisdictions.

First, Mr. Woolich emphasized the importance of identifying the different jurisdictions that will require notification, and the benefit of familiarizing oneself with the individual requirements of these jurisdictions at a very early stage in the approval process. In light of the procedural and analytical differences that may exist, Mr. Woolich stressed the need for a cautious approach to the approval process. Furthermore, he shared his belief that when transactions may pose significant issues, or when a jurisdiction may impose a unique set of requirements, it is crucial to enlist the expertise of an economist at the earliest point possible.

In evaluating the advantages and disadvantages to public interest considerations in merger analysis, Mr. Woolich observed that, under UK law, the permissible considerations in merger analysis have been narrowed generally to exclude public interest considerations, except in cases involving national security, plurality of media and diversity of view or financial stability. The purpose of such an exclusion was to de-politicize merger analysis in the UK. In this regard, Mr. Woolich noted that public interest considerations had added an element of unpredictability to UK merger review, as well as a series of arguably politically driven decisions. That said, the UK government is now proposing to increase reviews on the basis of national security for example in cases involving acquisition of infrastructure.

In conclusion, Mr. Woolich expressed doubts as to whether a single global competition regime is politically feasible in the near future. However, he found that we are at a point where cooperation among the different competition authorities around the world will continue to increase.



- 1 Panel
- 1 Daniel Rubinfeld
- 3 Rosie Lipscomb
- 4 Simon Roberts
- 5 Anthony Woolich
- 6 Jason Wu

Jason Wu (*Vice President, Compass Lexecon, Princeton*) focused his analysis on merger review under Chinese law. He emphasized that China is still a developing country and that MOFCOM has emerged as one major regulatory agency responsible for reviewing global mergers.

Dr. Wu explained that competition enforcement in China involves increasingly rigorous economic analysis. However, consideration is also given to public interest issues as required by China's Anti-Monopoly Law. It is hard to define public interest concerns with certainty, but national security, social stability, industry development, and employment are all taken into consideration.

Dr. Wu gave his views on China's biggest foreign takeover - the \$43 billion acquisition of Syngenta by ChemChina. Both competition and public interest considerations were considered in the merger

review, the latter likely coming from state agencies other than MOFCOM. Despite significant issues raised by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC), as well as concerns publicly expressed for consequences on Chinese farmers and consumers, the merger was approved. According to Dr. Wu, this approval was in light of the economic potential of the relevant GMO technology at issue and its potential role in providing food security for China, as well as China's interest in taking a leading role in relation to the relevant innovative practices.

Finally, Dr. Wu suggested that the recent Chinese Communist Party Congress offered a positive message in laying out a clear and consistent competition policy. However, he called for cautious optimism, as the extent to which this policy will be implemented in practice remains to be seen. ■

PANEL 4

INNOVATION AND TECHNOLOGY: THE NEXT FRONTIER ON ANTITRUST FOR DEVELOPING COUNTRIES?

The fourth panel, moderated by **Frédéric Jenny** (*Chairman, OECD Competition Committee*) explored the unique challenges competition law must confront with regard to considerations of innovation in cases involving high technology, particularly in relation to developing countries.

Gönenç Gürkaynak (*Managing Partner, ELIG, Attorneys-at-Law, Istanbul*) began by noting that competition authorities have an inconsistent approach with regard to the consideration of dynamic efficiencies in competition analysis. Innovation is the most significant driver of public welfare, yet according to Mr. Gürkaynak, competition authorities pay lip service to the evaluation of dynamic efficiencies without committing to their consideration as a policy goal.

Mr. Gürkaynak further asserted that competition authorities are more alert to innovation considerations when they are calculable, for example, in the agricultural and pharmaceutical sectors. But when innovation is harder to observe, authorities become more skeptical, missing that fact that innovation considerations are still present, just less calculable. Currently, the tools used by competition authorities to analyze these innovation considerations are inadequate. Until such a time as these analytical tools become sufficient, Mr. Gürkaynak suggested that competition authorities should err on the side of caution. Mr. Gürkaynak gave examples illustrating the inappropriateness of applying traditional analytical tools for determinations of anticompetitive conduct to situations in which innovation factors should be critical to the overall competitive determination. With regard to developing countries, Mr. Gürkaynak stressed the need for competition authorities to do more than pay lip service to innovation considerations and dynamic efficiencies, and that little will be gained if developing countries merely follow the policy of developed jurisdictions.

Mr. Gürkaynak also expressed his doubts as to the appropriateness and effectiveness of comity principles as he has yet to see true deference given by one country in favor of another.

Joanna Tsai (*Vice President, Charles River Associates*) shared an economist's view of dynamic efficiencies in merger analysis. Despite noting that there are a number of difficulties in the consideration of dynamic efficiencies, Ms. Tsai emphasized that these difficulties do not provide grounds for competition authorities to ignore such considerations. Merger analysis is inherently flawed if competitive effects are assessed without accounting for possible pro-competitive efficiencies. Ms. Tsai stressed the importance of a full, facts-based approach to merger analysis.

The extent to which mergers increase or decrease the levels of innovation involves a very fact-specific inquiry. The difficulty of an evidence-based approach to the consideration of dynamic efficiencies does not mean that such an approach should be abandoned. In disagreeing with the previous statements of Mr. Gürkaynak, Ms. Tsai stressed that adequate tools exist for the purpose of analyzing dynamic efficiencies, such tools merely need to be honed and modified to deal with industry-specific needs.

With regard to the problem of assessing dynamic efficiencies by competition authorities in developing countries, Ms. Tsai emphasized that the issue is often with the quantification of such efficiencies. It is important to ensure that the relevant analytical tools are in place before turning to the issue of their application.

Elizabeth Kraus (*Deputy Director for International Antitrust, US FTC*) recognized that merger review in dynamic markets with disruptive innovation is a difficult, fact-intensive exercise and acknowledged that the analytical tools available to enforcement authorities are not always as precise as one would desire. She noted that the FTC's review includes an assessment of efficiencies, including dynamic efficiencies, as appropriate. But that a vigorous assessment of dynamic efficiencies is actually rather rare in practice, and surmised that this may be, in part, because the FTC incorporates dynamism into its analysis throughout its merger assessment—from defining product markets to assessing market entry.

Ms. Kraus expressed concern for ensuring that enforcers do not disrupt innovative markets unduly and stressed that enforcement involves a fact-specific inquiry in which efficiencies are balanced against competitive harms. Historically however, in FTC-litigated matters, parties have had difficulty in establishing offsetting efficiencies, and, with regard to dynamic efficiencies overcoming the challenge that these efficiencies may be deemed vague, speculative, or unverifiable. Ms. Kraus took note of the importance of the FTC's commitment to understanding emerging developments in innovative markets, evidenced through research and workshops, as well as the development of the FTC's in-house expertise, e.g., the Office of Technology, Research and Investigations.

Ms. Kraus also highlighted the challenges for developed and developing countries with regard to government regulation that limits entry and incentives for innovation, and the importance of competition advocacy in helping those across government to understand the benefits of competition as a driver for a more innovation-based, dynamic economy. She also identified



challenges posed by high-tech mergers for competition authorities in developing countries, including limitations in the legal system and available tools, such as a lack of pre-merger review and the inability to compel disclosure of documents, as well as insufficient experience and background in market economics. Yet new competition authorities have been able to make significant refinements to their regimes over time.. According to Ms. Kraus, the global exchange of views and collaboration between enforcement authorities is beneficial to developing and promoting best practices and understanding in support of domestic voices favoring sound competition law and enforcement. Regarding the risk of the strategic use of competition laws, Ms. Kraus asserted that public interest analysis is a noble endeavor but a lack of transparency can lead, at a minimum, to the perception that cases are being brought on industrial policy grounds rather than competition grounds. This creates the perception that the agency itself is politicized, thus raising issues of credibility.

Koren W. Wong-Ervin (*Director of IP & Competition Policy, Qualcomm*) urged a pragmatic approach to analyzing the implications of new forms of market competition - such as multi-sided markets. She said the analysis is complex and requires enlisting PhD economists to apply the necessary analytical

tools. The question is often not what should be done, but rather what can be done to study new forms of innovation.

Ms. Wong-Ervin noted that specific challenges in the assessment of effects and efficiencies in dynamic markets for enforcers in developing countries stem from the fact that developing countries are primarily implementers, not innovators, and as such, enforcement authorities are not accustomed to analyzing dynamic industries where competition is for, not in, the market. The promise of the possibility of monopoly profits incentivizes innovation and in dynamic markets. Short-term market power and high rates of return are not market failures to be disrupted by competition law, they are natural features of dynamic markets and necessary to incentivize continued growth.

Ms. Wong-Ervin asserted that the analysis of competition cases on any basis other than consumer protection through the preservation of the competitive process is a misuse of competition laws. The use of non-competition factors can lead to competency and credibility issues. As a result, the U.S. should continue to advocate for effects-based analysis of consumer welfare. Ms. Wong-Ervin also noted the differences in legal traditions between the U.S. and EU, their different views as to the dangers of type 1 and type 2 errors, and the differing levels of trust placed on the self-correcting nature of the free market. ■

PANEL 5

ENFORCERS' ROUNDTABLE: WHAT'S UNDER THE RADAR?

The final panel, moderated by **C. Scott Hemphill** (*Professor, NYU School of Law*), highlighted developments in the enforcement of competition law and challenges faced by competition authorities throughout the world.

Cristiane Schmidt (*Commissioner, CADE, Brasilia*) spoke about two current areas of focus in Brazilian competition enforcement.

First, CADE is encouraging innovations that address the unique challenges associated with software and big data. Ms. Schmidt gave the example of the current use of algorithms to detect public procurement cartels. Despite these innovations, many challenges remain with regard to enforcement in digital markets. Second, Ms. Schmidt noted that most anticompetitive complaints received by CADE relate to the private health sector. Although many resources have been spent condemning anticompetitive conduct, the sector is characterized by a number of different anticompetitive aspects. CADE plans to bring together health authorities and relevant stakeholders to achieve sustainable reform.

Ms. Schmidt also discussed the current developments in relation to leniency programs and cartel enforcement. CADE has established a leniency program, along with six other Brazilian institutions. Although the proliferation of these leniency programs does not directly impede CADE's success, Ms. Schmidt noted the potential for uncertainty if investigations into the same issue by multiple agencies lead to different conclusions. Furthermore, the independence of these leniency programs undermines their ability to convey the requisite level of trust to potential informants. An agreement struck among these institutions could provide a potential solution.

To deal with the issue of CADE's low rate of collection with regard to fines imposed, Ms. Schmidt suggested that specialized competition courts could provide greater efficiency in the enforcement of these collections. Since 2015, there have been ongoing discussions about the creation of such specialized courts. According to Ms. Schmidt, these courts may be established as early as 2018.

Tembinkosi Bonakele (*Commissioner, South African Competition Commission, Pretoria*) began by highlighting the economic challenges currently facing South Africa. In addition to the stagnant conditions, the country's economy remains racially skewed, defying the promise of post-Apartheid, and is characterized by an insignificant SME sector. As a result, the empowerment and inclusion of black people into the mainstream economy is a priority of virtually all macro-economic policies, and one of the goals of competition policy in South Africa.

With regard to the detection and punishment of cartels, South Africa has been relatively successful. Despite this, cartel issues persist. Mr. Bonakele highlighted current issues relating to the criminalization of cartel activity, asserting that institutional problems have stalled the implementation of criminal cartel sanctions. Although there are increased expectations with relation to the imposition of prison sentences for cartel activity, institutions are not ready to impose such criminal sanctions.

Mr. Bonakele reported that new legislation is being prepared. It is likely to give additional powers to the South African Competition Commission, particularly in relation to tackling the issue of market concentration. Lastly, Mr. Bonakele discussed some innovative projects in which the Competition Commission is engaged, including the creation of a voluntary code of conduct to stimulate self-regulation in the automobile market.

Felipe Irrazabal Philippi (*National Economic Prosecutor, FNE, Santiago*) highlighted the difficulty in Chile of advocating for market economies and effecting long-term pro-competition reforms. Capitalism does not enjoy wide support among the populous which, along with intense public and political pressure, adds a layer of difficulty to the effective long-term enforcement and development of competition law principles.

With regard to legislative changes, Mr. Irrazabal discussed the recent replacement of the longstanding voluntary merger notification system with a mandatory system. The new law also grants the Competition Authority the power to conduct market studies. Mr. Irrazabal noted the addition of a number of experts to the Chilean Competition Commission to assist in undertaking market studies.

Roger Alford (*Deputy Assistant Attorney General, US DOJ, Washington, DC*) discussed the need to overcome institutional challenges in competition enforcement through increased comity between relevant authorities and concurrent jurisdiction.

With regard to the U.S., Mr. Alford emphasized the need to strike a comfortable balance between over- and under-enforcement. With the proliferation of competition enforcement authorities, Mr. Alford cautioned against a movement towards divergence as opposed to convergence. As a general approach, he recommended that competition enforcement should focus on consumer welfare and the promotion of competition. Independent issues are best dealt with by different instruments.

Mr. Alford emphasized the importance of collaboration between different jurisdictions, particularly in relation to the implementation of



leniency programs. For example, there are missed opportunities in failing to promote the use of technology to facilitate communication and procedural efficiency. Also, given the trend towards creative, hard-law mechanisms (such as free trade agreements), which feature competition provisions, it is important to think more creatively about using other hard-law mechanisms for further development and cooperation. The rise of populism in the U.S. and EU has forced the question of whether current methods of competition enforcement are appropriate.

Randolph W. Tritell (*Director, Office of International Affairs, US FTC, Washington, DC*) addressed the challenge of the populist critique of consumer welfare-based competition policy and of the use of competition enforcement to further industrial policy goals. Regarding the populist critique, he asserted that skepticism of its bases is warranted, including the alleged increase in concentration, consequences of concentration, prevalence of abusive conduct, and ability of current competition laws and policies to respond to such alleged phenomena. Regarding industrial policy, Mr. Tritell noted that U.S. competition enforcement focuses exclusively on consumer welfare and that using antitrust enforcement to accomplish other objectives distorts competition policy and hampers convergence.

In response to a question regarding institutional challenges, Mr. Tritell emphasized the need for procedural fairness transparency in relation to competition the investigations and agencies' decision-making of competition authorities. Procedural fairness

is critical not only for parties but for agencies, as it leads to better informed decisions; The its absence or perceived absence of proper processes will can casts doubt over the legitimacy of such proceedings. Given the cultural, political, and historical diversity among different jurisdictions, ensuring such procedural predictability presents challenges. Mr. Tritell emphasized the efforts of the FTC and DOJ to bringing these issues to the forefront of international dialogue, as well as the initiatives undertaken in by the OECD and ICN.

Mr. Tritell noted that, while other jurisdictions may take into account industrial policy and public interest concerns, the U.S. approach to competition enforcement focuses exclusively on the protection of consumer welfare and the promotion of efficiency. According to Mr. Tritell, an approach to enforcement involving a wider array of considerations raises very serious concerns in relation to equal treatment and inconsistent decision-making.

In the segment on innovative enforcement tools, Mr. Tritell discussed the potential for multiple competition authorities to collaborate on aspects of their engage in joint investigations and the coordination of remedies, which. Thproducesere are obvious benefits for that occur from such collaboration, both for the authorities and for the parties involved, the FTC's aspiration to conclude more "second generation" cooperation agreements, and the increased attention to consideration of comity given the increase in overlapping investigations. ■

VIDEOS

During the Conference, some speakers summarized their ideas in short videos. Watch the videos on Concurrences.com (Conferences > October 27, 2017).



Eleanor M. FOX | Professor, New York University School of Law, New York



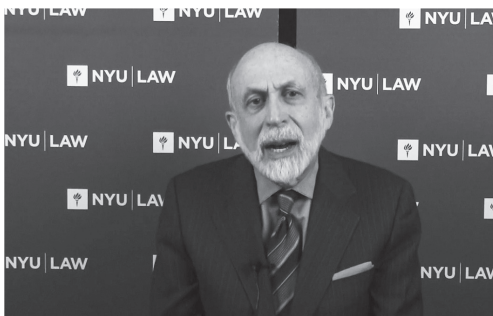
Tembinkosi BONAKELE | South African Competition Commission, Pretoria



Susan NING | Partner, King & Wood Mallesons, Beijing



Gönenç GÜRKAYNAK | Managing Partner, ELIG, Attorneys-at-Law, Istanbul



Harry FIRST | Professor, New York University School of Law, New York



James KILLICK | Partner, White & Case, Brussels



Simon ROBERTS | Professor, University of Johannesburg, Johannesburg



Cristiane SCHMIDT | Commissioner, CADE, Brasília

PRESS REPORTS

JUSTICE DEPT. TO BOOST ANTITRUST STAFF DEVOTED TO GLOBAL COMPETITION

BY LIZ CRAMPTON, BLOOMBERG LAW®

Head of the Justice Department's antitrust division used his first official public appearance to promise to reshuffle resources to concentrate on international cooperation.

Makan Delrahim, the assistant attorney general for the DOJ's antitrust division, said Oct. 27 the department will increase the ranks of attorneys working under Deputy Assistant Attorney General Roger Alford. Delrahim has tapped Alford to confront trade and international antitrust issues. Although the department generally can expect "belt-tightening" in funding, Delrahim said he will make sure the international section "has all the resources it needs."

Delrahim's speech, delivered at New York University Law school, was his first in the new role that he's held for one month. After receiving bipartisan support in the Senate Judiciary Committee this summer, he was confirmed along party lines in September.

International coordination among competition regulators is a special interest for Delrahim, who views antitrust

enforcement as critical to ensuring a fair global market. He stated at his Senate confirmation hearing in May that, if confirmed, he would advocate for uniform, economics-based antitrust standards across the world.

...

Last month's finalization of a competition chapter in the renegotiation of the North American Free Trade Agreement is a promising model for future trade agreements, Delrahim said.

...

Prospects for a new NAFTA's passage are dim. The most recent round of talks broke with several items unresolved and expressions of frustration from the negotiators. Talks will now extend into next year. Still, Delrahim assured that the competition chapter marks progress in creating an international framework for antitrust policy.

"We will see what happens to NAFTA itself, but the work that went into it was not a waste of time," he said. ■

DOJ'S ANTITRUST CHIEF PREACHES BALANCE IN FIRST SPEECH

BY MATTHEW PERLMAN, LAW 360®

The newThe recently confirmed head of the U.S. Department of Justice's Antitrust Division, Makan Delrahim, gave his first public remarks in his new role on Friday, saying the agency will strive to strike a balance between liberty and effective competition enforcement under his leadership.

Makan Delrahim, shown on Capitol Hill in May, said Friday the biggest challenge faced by antitrust authorities is that they must balance vigilance with a need to avoid hurting competition by providing too much enforcement.

...

DELRAHIM EXPRESSES SKEPTICISM ABOUT EXCESSIVE USE OF CONSENT DECREES

BY CLAUDE MARX, MLex®

The US Justice Department's top antitrust official said Friday they will take a more skeptical view of using consent decrees and said there isn't necessarily an ideal number of companies in each market.

"Behavioral consent decrees are not the preferred mode of law enforcement bodies," Assistant Attorney General for Antitrust Makan Delrahim said following a speech to an international antitrust conference. *

He had said during his speech that the division will examine the approximately 1,400 consent decrees in effect to see if

past decrees still have relevance. He added that he sees his role "as a law enforcer, not a regulator through consents." . . .

It was the first speech that Delrahim gave since taking the job following his delayed confirmation by the US Senate last month. Previously he had been a White House lawyer, the top staffer on the Senate Judiciary Committee, a deputy assistant attorney general and a lawyer in private practice. He said he was honored to have been confirmed but joked that he "might have been more honored" if it had been done faster. . . .

US ENFORCEMENT UNDERCUTS ITS RHETORIC, SAYS SOUTH AFRICAN ENFORCER

BY PALLAVI GUNIGANTI, GCR®

Developing countries get a different message from the US government than Makan Delrahim's claims about the importance of non-discrimination in competition enforcement, South Africa's competition commissioner said today.

In the opening keynote speech of the Concurrences conference today, Department of Justice antitrust division head Makan Delrahim criticised the use of discriminatory competition enforcement against foreign companies to protect national champions. He praised Brazil's competition authority for taking the difficult stance of even-handed enforcement.

. . .

Speaking on the next panel, however, the head of the Competition Commission of South Africa said countries that look up to the US for economic advancement have perceived the US government is interested in protecting local markets and jobs. Tembinkosi Bonakele offered statistics that he said demonstrate antitrust is used for strategic purposes, and noted that the DOJ acknowledges that its biggest prosecutions are against foreign companies.

"The idea of non-discriminatory [enforcement], which I fully agree with and has been well argued by the DOJ head of antitrust this morning, I think is unfortunately not borne out by evidence," Bonakele said.

. . .

DELRAHIM EMPHASISES TRADE AND “INNOVATIVE” ENFORCEMENT

BY PALLAVI GUNIGANTI, GCR®

Assistant attorney general for antitrust Makan Delrahim on Friday said he sought new ideas for competition enforcement, particularly about its intersection with trade policy, and to convert the “soft law” of international cooperation into “hard law” safeguarding US companies from unfair foreign prosecution.

In his first public speech as head of the Department of Justice’s antitrust division, Delrahim said he “will renew efforts to evaluate” 15 existing agreements for bilateral cooperation with foreign competition authorities, as well as the competition chapters in trade agreements.

...

He contrasted the understanding of trade law today with his prior stint at the Antitrust Division, as international deputy during the George W Bush Administration: “we recognised the significance of trade law, but there was a common belief that trade law had minimal overlap with antitrust law.” “This is no longer the case; there is an intersection between trade and antitrust that most people would recognise today,” he said.

...

“Some of you who have known me over the years may know that I like to be innovative in the enforcement of the programme, make sure that we’re doing what we can in the most efficient way,” he said. Delrahim was the opening keynote speaker for the Concurrences conference at New York University, which ended on Friday. ■

DON’T LET POPULISM UNDERCUT ANTITRUST, US OFFICIALS SAY

BY HETTIE O’BRIEN, GCR®

The success story of global competition enforcement shouldn’t be undermined by populist cries to politicise antitrust regimes, the heads of international affairs for both the US Federal Trade Commission and the US Department of Justice’s antitrust division warned last week.

Deputy assistant attorney general Roger Alford said at a conference in New York that the growth in the number of competition authorities – from roughly 30 agencies 30 years ago to the current 130 – “brings tremendous challenges”.

...

Randolph Tritell, director of the FTC’s Office of International Affairs, who also spoke on the panel, echoed Alford’s

thoughts. “None of the [populist] critique has changed the way in which the FTC or the DOJ currently enforces antitrust law, because our enforcement is constrained by the bounds of our statutes and case laws,” Tritell said.

...

Alford and Tritell spoke at Concurrences’ and New York University’s conference on antitrust in developing countries, alongside Tembinkosi Bonakele, commissioner of the Competition Commission of South Africa, Chile’s National Economic Prosecutor Felipe Irazábal Philippi and Brazil’s Administrative Council of Economic Defence commissioner Cristiane Schmidt. The panel was moderated by Scott Hemphill, a professor of law at New York University. ■

INTERVIEWS

“THE INTRODUCTION OF FAIR COMPETITION REVIEW, CONCEIVED BY THE HIGHEST LEVEL OF THE CHINESE GOVERNMENT, REPRESENT A SIGNIFICANT CHANGE IN THE GOVERNMENT’S THINKING ABOUT THE ROLE OF THE STATE AND ITS RELATIONSHIP WITH THE ECONOMY...”

SUSAN NING

Eleanor Fox > Concurrences Review, August 8, 2017

Susan Ning (Partner, King & Wood Mallesons) was interviewed by Eleanor Fox (Professor, New York University School of Law). They participated in the panel «Impact of the New Nationalism on Competition and Economic Development in Developing Countries.»

Eleanor Fox: Susan, as one of the most prominent anti-monopoly lawyers in China, you have closely observed the Chinese authorities in their enforcement activities. Can you tell us what you observe about applications of law or statements of policy by the Chinese authorities that might be regarded as nationalistic - that is, applying a principle of what helps China economically or strategically rather than a principle limited to what helps competition?

Susan Ning: Generally speaking, “competition” remains the top priority for China’s anti-monopoly authorities in their enforcement activities. Only in the context of specific industries, I noticed that there were occasions when more favorable treatments were given to China’s domestic enterprises. This is mainly due to the fact that historically the state has been playing a centralized also proactive role in China’s economic development. As Prof. Wu Jinglian stated, “industrial policy is the prevailing policy tool of the central government in China. In the 1980s century, Chinese government introduced Japan’s ‘vertical’ industrial policy into its ‘macro-control’. Under the name of the industrial policy, Chinese government used to directly intervene in the micro-economy”.

In response to this challenge, the Chinese government introduced the fair competition review system in 2016 to gradually reconcile industrial policies with competition policies, and to liberalize certain regulated markets. This system provides a comprehensive review of all the government measure in place (or in future) by the prescribed competition standards. This review will not only remove the very roots of administrative monopoly, and also promote the awareness of all the government officials at different levels to fully recognize the importance of competition policy in a market economy.

Eleanor Fox: Of course, China’s AML requires that the authorities give regard to China’s socialist market economy.



Is that the same thing as mandating that China should be nationalistic in its anti-monopoly enforcement whenever that is good for China?

Susan Ning: The answer to this question rests again in China’s recent history. From the age of planned economy to the «Reform and Opening-up», China, as the world’s rapidly rising economy, is in the process of transforming from a highly centralized planned economy to a market economy. This reflects the fact that China is still a developing country and at a transitional stage, distorted market structure and pervasive state control remain in certain areas of the national economy. Against the backdrop, it is not difficult to understand in the area of anti-monopoly enforcement, Chinese AML authorities have to adopt certain balancing approaches when facing conflicts between competition policy and industrial policy.

Eleanor Fox: We are seeing a current surge of nationalistic tendencies by many nations in the world. Do you think these current tendencies have any impact on competition law and its application, and do you think they will have any impact on economic development of emerging economies such as China?

Susan Ning: I don’t think the nationalistic tendencies would have any substantial impact on China. As mentioned in my response to Question 1, the Chinese governments increasingly understand the importance of market competition. The introduction of fair competition review, conceived by the highest level of the Chinese government, represent a significant change in the government’s thinking about the role of the state and its relationship with the economy. As such, we would expect a more vigorously developing China’s market featured with more liberalization and openness to overseas players. ■

“IT APPEARS THAT MOFCOM CONSIDERS AN SOE AS A MARKET PARTICIPANT, AND SUBJECTS SOE MERGERS AND ACQUISITIONS TO THE SAME REGULATORY REVIEW RULES AND REGULATIONS...”

JASON WU

DANIEL RUBINFELD > Concurrences Review, August 29, 2017

Jason Wu (Vice President, Compass Lexecon) was interviewed by Daniel Rubinfeld (Professor, New York University School of Law). They participated in the panel «Mergers: Impact on Development.»

Daniel Rubinfeld: Could you give an update on how MOFCOM is dealing with global mergers, including the quality of the economics and legal staff?

Jason Wu: MOFCOM has emerged as one major regulatory agency responsible for reviewing global mergers, together with its US or European counterparts. Since China's Anti-Monopoly Law (AML) was enacted in 2008, MOFCOM has reviewed roughly 2000 cases, blocking 2 transactions, imposing remedies on roughly 30 deals. The intervention rate is largely consistent with its US and European counterparts.

Interestingly, MOFCOM requires economic analysis of competitive effects, an approach widely employed by US and European antitrust agencies. MOFCOM has a team of case handlers, who have shown greater interests in findings of economic expert reports submitted by parties at stake. MOFCOM has also hired outside economic experts to opine on complex global mergers.

MOFCOM has adopted economic analyses (such as UPP, price concentration analysis) that are commonly used among the international antitrust community. It has become more transparent in its decision process by publishing its decisions on some global merger cases such as Thermo Fischer/Life Technologies. Those decisions indicate that MOFCOM has placed more weight on economic and econometric analysis before reaching a conclusion.

Daniel Rubinfeld: How is MOFCOM treating mergers that affect state-owned enterprises?

Jason Wu: We have seen increasing number of mergers involving SOEs. Since there is no intervention in mergers involving SOEs, we have limited information on how MOFCOM handles SOEs. It appears that MOFCOM considers an SOE as a market participant, and subjects SOE mergers and acquisitions to the same regulatory review rules and regulations. It is possible that the ministries that oversee the SOE involved in a merger may carry special weight in MOFCOM's evaluating process.

Foreign enterprises, especially those large transnational corporations, have a long history of dealing with regulatory reviews by MOFCOM's counterparts in the US and Europe. As a result, they



are often more proactive in both filing a timely notification with MOFCOM and submitting relevant data and information to facilitate MOFCOM's decision process. In contrast, AML is new to many Chinese enterprises including SOEs, and thus it is not surprising to see the lag for those entities to adapt themselves to the new regulatory environment.

Daniel Rubinfeld: To what extent, if any, do merger remedies focus on the development of start-up industries in China?

Jason Wu: The Internet start-up industries have expanded incredibly fast in China. Mergers and acquisitions involving those Internet based entities have also attracted the attentions from China's antitrust agencies such as MOFCOM. Nevertheless, we have not seen any significant regulatory actions regarding those entities. One challenge involving start-up is that many of the Chinese start-ups use VIE (Variable Internet Entity) ownership structure which is not currently recognized in related investment regulations. If MOFCOM takes on merger review involving VIE entities, it indirectly validates such a structure.

MOFCOM recognizes the difficulty in dealing with the fast-developed Internet-based start-ups. MOFCOM is cautious with its enforcement actions against those Internet start-ups. It is aware that current international antitrust law and practice was largely developed in the pre-Internet era. The Internet has brought in new aspects of competition from those traditional industries. Often, start-up industries involve complex and dynamic competition, capable of delivering significant benefits from innovation to consumers. These start-ups often serve as intermediaries that connect multiple industries and markets, making the economic analysis of start-ups more challenging.

Economic studies of the Internet start-ups industries will be more complexed than traditional industries. MOFCOM appears to recognize the challenges of market definition involved in the new products/services, and the associated market share calculations. ■

“RATHER THAN SEEKING CONVERGENCE WITH DEVELOPED COUNTRY PERSPECTIVES ON COMPETITION LAW, DEVELOPING COUNTRIES NEED TO PLAY A MORE PROMINENT ROLE IN UNDERSTANDING HOW COMPETITION LAW POLICY CAN BE USED TO ADDRESS POVERTY, INEQUALITY AND UNEMPLOYMENT.”

TEMBINKOSI BONAKELE

Ioannis Lianos > Concurrences Review, October 4, 2017

Tembinkosi Bonakele (Commissioner, South African Competition Commission) was interviewed by Ioannis Lianos (Professor, University College London). They participated in the panel «Impact of the New Nationalism on Competition and Economic Development in Developing Countries.»

Ioannis Lianos: Competition authorities are increasingly interested in assessing the effects of mergers or other conduct on innovation. How is this concern over the promotion of innovation affecting the substance of competition law enforcement, and in particular the extraterritorial application of competition law, as innovation is often taking place in the context of global value chains? How should one resolve conflicts over competing visions over the impact of competition on innovation, as it seems to be, for instance, the case between the EU and the US, and possibly BRICS countries?

Tembinkosi Bonakele: One of the aims of competition law is to encourage innovation. Firms and individuals are incentivised to innovate due to the protection conferred on their innovations by intellectual property laws (IP). Therefore, at least theoretically, competition and IP laws ought to be complementary. However, the conflicts between competition law and innovation/IP laws are increasingly coming into sharp focus within the context of global value chains. One such example is the recent global mega-mergers in the seeds and agro-chemicals sectors. These mergers illustrate how multinationals can leverage their significant innovation and research resources by extending their IP protections through ‘ever-greening’ of patents, reciprocal IP cross licensing arrangements with close rivals, joint ventures and collaborative research and development. This level of collaboration suggests that the seed/agro-processing markets are likely more concentrated than is currently understood. From a



policy perspective, competition authorities in both the EU and US seem supportive of this level of concentration based on the theory that such concentration increases innovation, notwithstanding their (unintended) global unilateral effects to which developing countries are especially vulnerable, given the centrality of agriculture for the sustenance of communities in their economies. The vulnerability of developing countries is further exacerbated by the fact that they are trying to regulate multinationals which have access to resources that dwarf the GDPs of many developing countries, and are able to lobby hard politically, against any interventions aimed at their activities.

Against this backdrop, the way forward for BRICS and other developing countries is to continue efforts to establish their own research platforms to enable the true impacts of the trade-off between innovation and competition law to be better understood from a developing country perspective. Furthermore, there is scope for greater global co-ordination amongst competition law agencies to ensure that global transactions are investigated and remedied in a co-ordinated manner.

Ioannis Lianos: Broader public policy concerns, than consumer welfare narrowly defined, are increasingly taken into account by various competition law systems around the world, in both developing and developed countries when assessing mergers and, in some instances, anticompetitive

conduct. There is also increasing demand for a broader canvas of principles and values in order to assess business conduct, as this is demonstrated by the development of the concepts of «social» and «green» capitalism. Should competition law authorities explore more systematically this trend and eventually move to a public interest standard in assessing anticompetitive conduct, at least in some economic sectors (for instance involving primary goods, such as food, shelter, or with considerable environmental impact etc.)? What would be the implications for the global governance of antitrust?

Tembinkosi Bonakele: Many countries already apply tests beyond the typical competition law tests in merger assessments, but they do not declare those tests in an open and transparent way. In contrast, South Africa's merger regulation explicitly includes a public interest test and guidelines have been issued setting out how the test will be applied during merger assessment.

Should public interest cover some old and emerging social issues such as green issues or the environmental impact on food security, shelter and so on? I think there is scope for these to be part of an assessment of merger transactions, but their location need not necessarily be with a competition agency and they can be properly assessed through a different regulatory agency in a transparent manner. Countries should be allowed to structure their agencies the way they deem fit.

Within South Africa's context, in order to address historical inequalities and economic and political imbalances, competition legislation specifically provides for both competition law and public interest standards in the merger assessment process. It bears specific mention that the courts have recently confirmed that both the competition law and public interest tests are of equal prominence in any merger determination process. In a developmental context, economic exclusion exacerbates inequality, poverty and unemployment and competition policy in conjunction with industrial policy (introduced through public interest) can break down barriers to entry and unleash innovation and new entry, which are pivotal to the unleashing of economic growth and development.

Although public interest considerations in merger assessment would appear, largely, the preserve of developing countries, developed countries and most notably, the European Union, seem to be re-considering their stance towards public interest considerations in merger assessment. Moreover, the impact of globalisation appears to be giving rise to a new wave of 'new nationalism' in developed countries (and the United States is no exception). This has ushered in more inward looking perspectives to international trade and ironically, may give rise to the use of public interest considerations in 'tit for tat' exchanges in

transactions taking place within an increasingly geopolitical context. Thus, the implications for the global governance of anti-trust may be convergence.

Ioannis Lianos: In recent years the competition authorities of BRICS countries and other large emergent economies have been increasingly active in competition law enforcement, adjudicating high profile cases of global importance. The experience gained may be a source of inspiration for competition authorities in other emergent and developing countries, and could also be an important source of learning and wisdom for the competition authorities in developed countries. Do you consider that BRICS and other larger emergent competition authorities should strive to ensure global convergence with the EU and/or US models of competition law, as this is put forward by some, or should they opt for different models, experimentation being an important source of collective learning for both developing and developed countries? Should convergence, or experimentation, be the main/driving principle for the global governance of competition law?

Tembinkosi Bonakele: In the developed world, competition law is applied within a context in which it is presumed that markets are naturally competitive, self-correcting and don't require policy interventions to address failures. However, that presumption cannot hold true in a developing country context where markets are undeveloped, highly concentrated, non-inclusive and unemployment and inequality are high. In this 'developmental context' competition law is applied within a context in which it is presumed that firms with market power exploit it. Therefore, in developmental context, competition law more than just efficiency, but human and socio-economic development as well.

Rather than seeking convergence with developed country perspectives on competition law, developing countries need to play a more prominent role in understanding how competition law policy can be used to address poverty, inequality and unemployment. This will require developing countries through the auspices of representative regional platforms such as BRICS, to enhance co-operation, share experiences and develop legal and competition law expertise from a developmental perspective.

Thus, it is important to appreciate that approaches to competition law in the developed and developing worlds are diverse and that divergence should be tolerated and informed by context. This does not take away the need for global co-operation and sharing best practices. There are also instances where harmonisation may be desirable, like in regions with or striving for common markets. ■

“...IMPOSING REMEDIES THAT HAVE EXTRATERRITORIAL IMPLICATIONS MAY LEAD TO SERIOUS SUBSTANTIVE CONFLICTS AMONG COMPETITION AUTHORITIES, AS THERE IS A WIDE VARIETY OF APPROACHES TAKEN GLOBALLY IN TERMS OF COMPETITION LAW MATTERS INVOLVING INTELLECTUAL PROPERTY RIGHTS.”

GÖNENÇ GÜRKAYNAK

Frédéric Jenny > Concurrences Review, October 10, 2017

Gönenç Gürkaynak (Managing Partner, ELIG, Attorneys-at-Law) was interviewed by Frédéric Jenny (Chairman, OECD Competition Committee). They participated in the panel «Innovation and Technology: The Next Frontier on Antitrust for Developing Countries?»

Frédéric Jenny: What is your assessment of the quality or relevance of decisions by competition authorities in developing countries in high tech/dynamic markets?

Gönenç Gürkaynak: High-tech markets are characterized by rapid innovation and development of new products, platforms and services, as well as reduced production costs resulting from intense competitive pressures in such markets. In this context, competition can be described as both a catalyst and a driving force for innovation in these dynamic markets. Hence, preserving competition should be a top priority in these markets, since enhanced competition would both fuel innovation and ensure that the markets remain open and accessible to all.

The impact of the enforcement actions of competition authorities on high tech/dynamic markets can be deemed as critical, because they may end up leading to significant error costs. Especially in terms of markets with dynamic competition and innovation, the decisions of competition authorities carry the risk of increasing regulatory error and magnifying the weight of any error costs. Innovation can make a critical difference for developing countries in terms of allowing them to meet urgent developmental challenges



“head-on” and enabling them to achieve faster growth. To that end, enforcement actions by the competition authorities are of even higher significance in terms of developing countries, as their innovation capacities must be built early in the development process, so that they can gain the necessary learning capacities and build on those capacities in order to catch up economically and technologically with developed countries.

As the competition enforcement authority of a developing country, the Turkish Competition Authority's approach to high tech/dynamic markets has mostly comprised the assessment of market conditions and competitive landscape in the relevant product market, and has not yet extended to dynamic efficiencies (i.e., innovation efficiencies). Indeed, in a recent decision concerning technology markets, the Turkish Competition Board took into account that the relevant product market in question was indeed an innovative and dynamic market. The Turkish Competition Board emphasized that defining the relevant product market becomes an especially

complex question in markets concerning high-technology-based multilateral platforms with dynamic structures, as opposed to traditional product markets. To that end, the Competition Board left the relevant product market definition open/unspecified in that particular decision. Unfortunately, further information about the details of the case could not be provided, as it would include confidential client information.

Similarly, it should be noted that the Turkish Competition Board has not yet focused on innovation efficiencies in its examination of merger decisions. The key reason underlying this approach may be that the standards applied to merging parties who wish to put forth innovation as a merger defense is so high that they are not able to raise this issue in merger control cases. As a result, since merging parties are unable to use innovation efficiency as a defense mechanism in practice, the Turkish Competition Board has rarely examined innovation within the scope of its merger control regime, and has yet to accept it as a worthwhile efficiency arising from a merger/concentration.

Frédéric Jenny: There is a concern that abuse of dominance provisions may be used by competition authorities to partially expropriate owners of IP rights and/or to regulate the fees charged by patent owners. Based on your practice, do you think that these concerns are overblown or that those problems deserve careful attention?

Gönenç Gürkaynak: Under current Turkish competition law, there is no specific provision regulating the unilateral conduct or refusal to license within the scope of IP rights. Indeed, past experience leads us to conclude that there is no specific reason for IP-based dominance to be treated differently than any other form of dominance under Turkish law.

Any abuse by an undertaking that is in a dominant position in a market for goods or services (throughout Turkey or within a particular region) is considered and treated as abuse of dominant position under Article 6 of the Law No. 4054 on the Protection of Competition ("Law No. 4054") (akin to Article 102 of the Treaty on the Functioning of the European Union). General competition law provisions in Turkey concerning abuse of dominance would also be applicable to agreements whereby the holder of IP rights licenses such rights and allows another undertaking to capitalize on its IP rights.

Under Article 6 of the Law No. 4054, all undertakings are bound

by the obligation not to abuse their dominant positions in the market. Therefore, the general provisions of Article 6 would also apply to "refusal-to-license" situations, as well as to unfair and discriminatory licensing and licensing of trademarks, which can all be considered as different types of abuse of dominance, as far as IP rights are concerned. The abuse of dominant position can occur in cases of discrimination in connection with licensing fees, discrimination in providing trademark licenses, or offering different terms to purchasers with equal status for the same/equal rights, obligations and acts, if any of these acts are found to be abusive by the competition authorities.

In practice, the issue of unilateral conduct involving the exercise of intellectual property rights have been raised and examined by the Turkish Competition Board numerous times. The Turkish Competition Board has closely scrutinized such arrangements and practices under Article 6 of the Law No. 4054. Its most recent decision concerning allegations of «abuse of dominance through refusal to supply» within the scope of IP rights was the Türk Telekom decision (dated June 9, 2016, No. 16-20/326-146). In that decision, the Turkish Competition Board reiterated and reaffirmed its earlier position on this issue. To that end, although in some jurisdictions concerns may arise with regards to competition authorities' assessment of abuse of dominance provisions as a way to partially expropriate owners of IP rights and/or regulate the fees charged by patent owners, as far as Turkey is concerned, the established practice of the Competition Board appears to be rational, consistent and transparent with respect to abuse of dominance cases involving IP rights. Finally, it is fair to say that the Turkish Competition Board's recent decisions include a rather detailed assessment and explication of the criteria to be taken into consideration for determining whether or not there has been a practice of abuse of dominance in a particular case.

Frédéric Jenny: There has been talk about the fact that some competition authorities in Asia have imposed remedies in IP related competition cases that have extraterritorial implications. Do you think that this problem is likely to become more frequent and do you see ways to avoid conflicts between competition authorities in this area?

Gönenç Gürkaynak: As a result of the growth of the global economy and the rapid developments in technology, there has been a trend and increasing tendency among competition authorities towards exercising their authority to regulate business conduct that occurs outside their national borders. The main

reason for this approach may be that, in certain markets, when an anti-competitive conduct occurs in one country, it has a significant impact in markets in different jurisdictions, and therefore, such conduct should be regulated and fought on an extraterritorial basis. However, imposing remedies that have extraterritorial implications may lead to serious substantive conflicts among competition authorities, as there is a wide variety of approaches taken globally in terms of competition law matters involving intellectual property rights.

The extraterritorial implications of competition enforcement decisions can also cause conflicts in terms of the principles of international comity. Indeed, in light of the principles of comity, individual jurisdictions should take into account the legislative, executive or judicial acts of other jurisdictions. However, it is important to note that these principles should be interpreted as enabling competition authorities to take different approaches to competition law issues, without necessarily allowing them to impose the costs of those approaches on other jurisdictions. In fact, if a single competition authority imposes a global prohibition on a certain act/conduct that is generally accepted as pro-competitive in other jurisdictions, such an enforcement decision involving global remedies may have significant negative effects on competition and total welfare in other jurisdictions. Indeed, any competition agency that adopts and enforces global remedies is not generally acting with the purpose of providing competition law solutions to global harms, but rather is expected to achieve a much narrower goal: to protect domestic manufacturers who export their goods and services.

Turkish competition law accepts and incorporates the «effects criteria» pursuant to Article 2 of the Law No. 4054. Under Article 2, if an undertaking's conduct affects the markets for goods and services in Turkey, that conduct is deemed to affect the relevant Turkish market, and thus to enable the Turkish Competition Authority to exercise its regulatory jurisdiction. The Turkish Competition Board has defined the relevant geographic market as “worldwide” in a number of merger cases; however, these cases did not involve global remedies with extraterritorial implications. Indeed, there are two recent decisions of the Turkish Competition Board in which the Board assessed the relevant markets from a global perspective. In one of these decisions (granted in 2016), the Turkish Competition Board stated that, although the exact geographic market definition could be left open/unspecified, the Turkish Competition Board

would still take into account the fact that the dynamics of the worldwide market significantly affected the Turkish market. Again, further information about the specifics of this case could not be provided, as it would include and compromise confidential client information.

It is fair to say that international companies will continue to face stiff scrutiny by competition authorities, and extraterritorial investigations and enforcement actions are likely to increase in the future. Recent developments in Asia, whereby the Korea Fair Trade Commission (“KFTC”) imposed remedies and a fine of USD 854 million on Qualcomm in December 2016 for abuse of dominance through the violation of its FRAND commitments (i.e., fair, reasonable, and non-discriminatory terms), can attest to this probable outlook. In its official statement concerning the investigation, the KFTC explicitly stated that if, in the future, a foreign competition authority makes a decision that conflicts with its remedial orders, Qualcomm can request a reconsideration of the remedial orders imposed by the KFTC. Similar to KFTC, on October 11, 2017, Taiwan Fair Trade Commission has announced its decision that imposes Qualcomm a fine of approx. USD 773 million along with remedies to amend certain clauses in its agreements. Taking account of these developments and the ongoing investigations by the US Federal Trade Commission (regarding Qualcomm's conduct with respect to patents), as well as the EU Commission (regarding allegations about Qualcomm's exclusionary practices through conditional rebates provisions), it is fair to say that we should soon catch a glimpse of how this issue plays out and resolves itself, particularly with respect to the principles of international comity.

One way to address this phenomenon from the outset is to ensure cooperation and effective coordination among competition authorities from different jurisdictions, so as to avoid divergent approaches being taken with regard to the same conduct. However, bearing in mind that there are different economic considerations of efficiency and total welfare in each country, introducing limits to the geographic/territorial reach of remedies (such as limiting remedies to the jurisdiction of the competition authority issuing the decision) can prove to be most appropriate method for mitigating the risk of over-deterrence, and still honoring the principles of international comity. ■

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