Navigating Global Antitrust Rules for Japanese Firms

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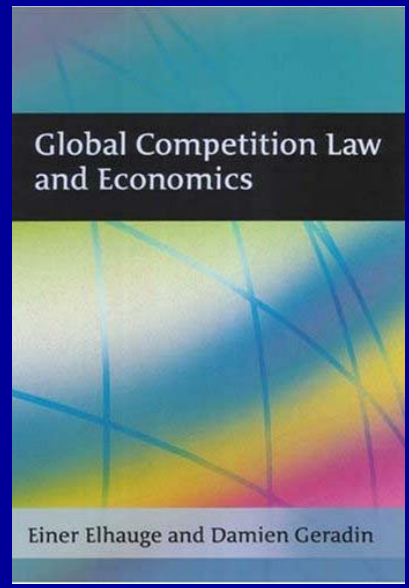

Overview

- The purpose of this talk is to contrast US antitrust law and EC competition law in a number of areas with a focus on:
  - The US and EC competition law enforcement structures
  - Section 1 / Article 81 restrictive practices with a focus on horizontal agreements
  - Section 2 / Article 82 abuses of dominance
  - Merger control

Globalization

- In the more recent past, Japanese companies have had to pay special attention to antitrust rules since:
  - They are increasingly active on global markets and thus their behavior falls under the competition law of many different jurisdictions, especially as a growing number of nations have adopted competition rules
  - A number of enforcement agencies have taken a much tougher stance on certain practices (cartels)

Enforcement structures (1)

- While US and EC competition laws tend to converge on substantive aspects, the ways in which such laws are enforced differ significantly:
  - In the US, antitrust law is primarily enforced through private actions. Firms found in breach of antitrust laws can be condemned to treble damages.
  - FTC and DOJ can also initiate antitrust actions. DOJ can bring criminal prosecutions.

Enforcement structures (2)

- Enforcement of EC competition rules is primarily done by competition authorities (either at EU or national level) following administrative procedures.
- Situation is evolving in the EU as:
  - Some Member States' competition rules now provide for criminal sanctions for certain categories of violations
  - DG COMP wants to stimulate the development of private actions for damages

Horizontal agreements

- Both US and EC competition laws operate a distinction between:
  - Agreements that are *per se* illegal since they have the object of restricting competition and present no pro-competitive benefits (e.g., cartels)
  - Agreements that may have both pro- and anti-competitive effects and which are examined under a *rule of reason* (or in the case of EC competition law Article 81(3)) (e.g., joint R&D agreements)

Cartels (1)

- Cartels are subject to per se prohibitions under US and EC competition rules.
  - Recent trends in US cartel law enforcement:
    - Tougher criminal enforcement (Over past 5 years more than 41 defendants received jail sentences for antitrust violations, including foreign defendants from Canada, France, Germany, Japan, Korea, the Netherlands, Norway, Sweden, Switzerland and the UK.)
    - DoJ seeking extraditions when appropriate
    - Success of leniency program
    - *Empagran* judgment and implications

Cartels (2)

- Recent trends in EC cartel law enforcement:
  - Imposition by DG COMP of very harsh fines (e.g., € 992 millions on members of the elevators cartel). The issue is whether these tough fines will have the intended effect of curbing cartels.
  - Success of the leniency program
  - Creating the conditions for more effective private action in antitrust enforcement.
    - Is EU legislation on private actions realistic?
    - Will some Member States take the lead?

Abuses of dominance

- Both US and EC law cover unilateral conduct by firms holding some degree of market power
- US and EC law don't make it illegal to simply possess the requisite degree of market power
- However, unlike EC law, US law does not only prohibit anti-competitive conduct that helps to maintain or enhance monopoly power a firm already has, but also prohibit anti-competitive conduct that creates monopoly power or a dangerous probability of acquiring it
- Moreover, while Section 2 of the Sherman Act only covers *exclusionary* abuses, Article 82 EC covers both *exclusionary* and *exploitative* abuses

The first element: Establishing market power

- Defining product and geographic markets are essential to assess market power / dominance
  - The role and the limitations of the SSNIP test
- Both US and EC agencies and courts tend to rely on market shares as a proxy for assessing market power / dominance
  - The role and limitations of market shares as a proxy
  - Alternative mechanisms to assess dominance

The second element: Establishing an abuse

- The key issue: How can we distinguish abuse of market power from competition on the merits?
- Given the uncertain nature of current definitions of exclusionary behavior under Section 2 / Article 82 EC, a number of tests have been made by way of clarification:
  - the “consumer welfare” and the “limiting production” tests
  - the “profit sacrifice” and the “equally-efficient competitor” tests, which are rejected by Elhauge who proposes an alternative test:
    - → "whether the conduct enhances market power by improving defendant efficiency or by impairing rival efficiency."

Form vs effects based analysis

- While it seems US courts have been traditionally willing to look at the effects of most unilateral conducts from dominant firms (with some conducts, however, being per se illegal), the European Courts took a very formalistic approach in abuse cases.
- The recent DG COMP Discussion Paper is, however, signaling that the Commission is willing at the effects of unilateral conducts rather than per se condemning some conducts without looking at their effects on the market.

Static vs dynamic efficiency

- US agencies and courts have generally sought to protect dominant firms' incentives to invest and create long-term competition (see, e.g., *Trinko*), whereas DG COMP and the European courts have traditionally given more significance to static efficiency and short-term competition. This can be observed, for instance, in the refusals to supply / license case-law.
- The importance of dynamic efficiency is however increasingly recognized in EC antitrust.

Mergers

- Most large mergers require multi-jurisdictional filings, which can be a source of delay and uncertainty as agencies may take different views on a given transaction
- While the US and the EU are generally in line in their assessment of global mergers, there have been major transatlantic disputes, such as in *GE / Honeywell* case

The substantive test

- Until May 2004, the EC applied a “creation or strengthening of a dominant position” test to assess mergers. This test did not, however, allow DG COMP to control unilateral effects.
- Both US and EC merger rules now apply the same substantive test to determine whether a given merger is likely to “substantially lessen competition”.

Can we expect the development of a global antitrust regime ?

- For the past 50 years, efforts have been made to develop international competition rules, which would bind all or most nations. These efforts have failed and it is not expected that global competition rules will develop in the near future.
- There is, however, a growing convergence between antitrust regimes as most agencies now speak the common language of economics.
- Convergence will be further advanced by initiatives, such as the International Competition Network (ICN)
- Many nations with competition rules have also concluded cooperation agreements to facilitate enforcement activities

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