

INTERNATIONAL COMPETITION LAW SERIES

An International Antitrust Primer

A Guide to the Operation of United States,
European Union and Other Key Competition Laws
in the Global Economy

Third Edition

Mark R. Joelson

KLUWER LAW

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With Love for Tato, Helen, Daniel, Marisa and Anny
And in Memory of Allan and Eleanor Kahn

Preface

Near the front door of the building that houses the Federal Trade Commission (FTC) in Washington, D.C., there stands a large stone statue comprising a man and a horse. The man is poised by the side of the horse, pulling on the reins and mustering every bit of his strength to restrain and control the great animal. The horse, his nostrils flaring, is unruly and angry, striving to break loose from the man's grasp. Seen in context, the message imparted by this scene is clear: the horse represents commerce, in essence powerful and unrestrained, while the man represents government, striving to keep the business giant in harness and on a path which will serve the society and the consumer.

The task depicted by this allegory was a relatively straightforward one when the FTC was created in 1914. The anxiety over unfair business practices that led to the creation of the FTC centered on the dangers posed by American firms, and the proposed cure was regulation from the nation's capital. In our twenty first century world in which business is global and regulation is often "extraterritorial", it has all become much more complicated. There are thousands of companies plying their trades to and from every part of the globe, with national boundaries erecting little interference to this commerce. This liberalized trade is, of course, very desirable. But it has consequences and one of those consequences is that there now exist, around the world, more than 100 regulatory agencies that have been established to channel and control this commerce on the basis of rules of fair and free competition.

The playing field for this commercial activity is described by Thomas L. Friedman in his 2005 best seller *The World Is Flat*: "Clearly, it is now possible for more people than ever to collaborate and compete in real time with more other people on more different kinds of work from more different corners of the planet and on a more equal footing than at any previous time in the history of the world – using computers, e-mail, networks,

teleconferencing, and dynamic new software.” The challenge for the men and women attempting to harness the horses of commerce constructively is now a great deal more difficult.

This Third Edition of “An International Antitrust Primer” comes five years after the publication of the Second Edition. The latter followed an interval of 27 years from the publication of the initial edition which Earl W. Kintner and I authored in 1974. That 27 year period was one of enormous progress in the development of competition law around the world. As I observed in the preface to the Second Edition, in those three decades, antitrust had traveled from a time when only a few national and regional authorities, the United States and European Economic Community chief among them, took seriously the need for promulgating and enforcing competition laws, to reaching the point in which more than 90 nations maintained or were in the process of drafting antitrust legislation.

The globalization of commerce worked a transformation in the way in which competition law was perceived around the world. It meant that the few regimes that had championed antitrust enforcement no longer had to legitimize their positions by explaining to others’ satisfaction the need for competition law. It also meant that a common desire had at last been formed to create internationally acceptable and effective means of enforcing antitrust law everywhere.

Indeed, it is the fast developing nature of this field that has prompted a new edition of our Primer, containing substantial revision and additions, only five years after the previous version was laid to bed in mid-2001. Important developments in international cooperation, in national competition rules and in the competition legislation of that vital supra-national regime, the European Community, have outdated the 2001 edition. As antitrust continues its global march and the search for harmonization and coordination progresses, it is ever more important that the current state of competition law, its direction, and its relevance to everyday business transactions, be understood and appreciated beyond the realm of the antitrust specialist. This Third Edition of the Primer, like its two predecessors, is an effort to contribute to that process of education and understanding.

Once again, this book is not meant to be a contribution to the extensive literature, some of it multi-volume, which covers all of the jurisprudence that has developed under the United States, European, and other competition laws. This volume is not sufficiently detailed to be included in that genre. It is a “primer” designed to provide an explanation of competition law, as a regime of both domestic and international law, for use by the businessperson, journalist, student, or lawyer, who does not specialize in this field, but desires to be familiar with it in outline. The principal focus of this book is on describing the main provisions and case law of some key national and regional competition regimes, including their application to international transactions.

As in the previous editions, in order to make the book’s content as informative as possible and its size manageable, I have limited the detailed

coverage of the subject to a very few of the national competition laws extant. For purposes of this Primer, it seems more instructive and interesting (for both writer and readers) to offer a relatively detailed explanation of the developments in a few important jurisdictions, rather than covering many jurisdictions by offering a brief summary of a great number of national antitrust laws. Furthermore, although I am keenly aware of Emerson's admonition that "a foolish consistency is the hobgoblin of little minds", I have decided to focus this edition on the antitrust laws of the same six regimes that were covered in the Second Edition: the United States, the European Union (EU), Canada, Mexico, the United Kingdom, and Japan.

The European Union and the United States continue to be the major economies which are in the forefront in the enforcement and refinement of comprehensive competition laws. The EU has recently expanded to a membership of 25 countries and has completed an extensive modernization and partial decentralization of its competition law processes. It has also enacted a new merger control regulation for the purpose of prohibiting "concentrations" which significantly impede effective competition in the common market or a substantial part of it. The United States has strengthened and clarified its antitrust laws by increasing the penalties for Sherman Act violations and through several important Supreme Court decisions. Canada and Mexico, the partners of the United States in the North American Free Trade Agreement, have continued to add sophistication to their antitrust regimes and to expand their abilities to deal with international cartels and mergers.

A discussion of the United Kingdom's competition law reforms embodied in the Enterprise Act 2002 is included because the U.K. is one of the larger Member States of the European Union which has recently redesigned its national regime to be consistent with the decentralized enforcement framework provided by the EU. In addition, the U.K., in a marked departure from the EU competition law format – which is applicable only to enterprises ("undertakings") and includes no criminal sanctions – has adopted legislation making "dishonest" participation in cartel activity by individuals a criminal offense punishable by imprisonment and/or substantial fines.

Japan has strengthened its Antimonopoly Act by increasing the rate of surcharges imposed on violators, has given the Japan Fair Trade Commission new powers for criminal investigations, and has introduced a leniency program as an incentive to induce participants in cartel and bid-rigging activity to come forward to disclose the activity to the authorities. The space limitations of this single volume work prevent us from providing coverage to a number of other important countries which have shown impressive antitrust enforcement or development efforts in the last few years, including Australia, South Korea, Brazil, France, Germany, and Hungary, to name just a few.

This book does not endeavor to cover consumer protection laws, such as rules governing advertising or deceptive marketing practices. Most legal systems differentiate between competition and consumer protection laws by

employing different rules and, at least to some extent, distinct administrative regimes in the two areas.

Although the major premises of the competition law of the regimes under consideration have been considered and the leading cases examined for the most part, many refinements, hypothetical fact situations and legal issues have necessarily been omitted. The overriding objective has been to simplify the subject matter, insofar as simplification does not jeopardize accuracy, and to provide a discussion of the most important issues. The reader should also keep in mind that we are dealing here with a fast moving area of legal development, subject to regular legislative revision, as well as to changes in judicial interpretation. Therefore, this book cannot be regarded as a timeless fount of pertinent knowledge. Nor is it intended to enable the lay person to be his or her own antitrust lawyer. Nonetheless, this reference work may enable the businessperson to seek further advice before irretrievable action has been taken and thus to shape his or her activities intelligently and lawfully. For all concerned, I hope that this book will serve as a useful and interesting guide to an important and fascinating field.

In an effort to enhance the book's readability, especially for the non-lawyer, the text contains no footnotes and discusses the case law without including the full case citations. However, the citations for the cases referred to in the U.S. and European law chapters can be found in the Selected Bibliography, which is Appendix I. The other Appendices include a list of the competition law enforcement agencies around the world, the text of the underlying U.S. and EU antitrust laws, the Antitrust Enforcement Guidelines for International Operations of the U.S. Department of Justice and Federal Trade Commission, and EC Council Regulation No. 1/2003 modernizing the implementation of Articles 81 and 82 of the EC Treaty.

M.R.J., *March 2006*

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M.R.J.

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