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Symposium on Antitrust Law and the Internationalization of Markets

David J. Gerber
Symposium Editor

Foreword
Antitrust and the Challenge of Internationalization
David J. Gerber 689

How does the internationalization of markets and of competition affect antitrust law and antitrust policy? In his Foreword, Professor Gerber offers a framework for evaluating the impact of the internationalization process and providing effective normative responses to it.

Geographic Market Definition in an International Context
George Hay 711
John C. Hilke
Phillip B. Nelson

Market definition is a key step in antitrust analysis. Messrs. Hay, Hilke and Nelson’s article is concerned with how geographic markets are defined where competition, at least to some extent, transcends national boundaries. On both theoretical and empirical grounds, the article urges caution in expanding markets to incorporate foreign capacity as has been suggested by some commentators. (Principal Paper)

Competing Through Innovation:
Implications for Market Definition
Thomas M. Jorde 741
David Teece

Jorde and Teece find the survey of geographic markets definition provided by Hay, Hilke and Nelson to be useful. However, those authors have erred in the conceptualization of market power, at least for firms where technological change is important and in international markets. (Commentary)

International Competition, Market Definition, and the Appropriate Way to Analyze the Legality of Horizontal Mergers Under the Clayton Act: A Positive Analysis and Critique of Both the Traditional Market-Oriented Approach and the Justice Department’s Horizontal Merger Guidelines
Richard S. Markovits 745

Professor Markovits develops a critique of all approaches to predicting the competitive impact of horizontal mergers that presuppose market definitions and make use of
market-aggregated data (including both the traditional market-share market-concentration approach and the Justice Department's Horizontal Merger Guidelines), explains why this critique is strengthened by the fact that foreign sellers are often effective competitors for the patronage of American buyers, and proposes a non-market-oriented approach to predicting the competitive impact of horizontal mergers. The critique is based primarily on the fact that market-oriented approaches require substantial amounts of resources to produce market-aggregated figures that have less predictive power than the non-aggregated data the approaches use to define the relevant markets. The critique also emphasizes the fact that market-aggregated data is totally insensitive to a large number of important determinants of the competitive impact of horizontal mergers—including many "supplementary" factors that both the traditional approach and the Guidelines fail to list, incorrectly define and misanalyze. The Article concludes that both the traditional market-share market-concentration approach and the Guidelines are not only wrong but essentially mindless in that virtually no theoretical or empirical support has ever been developed for either their crude versions or their more qualified and supplemented variants. (Principal Paper)

A PRIVATE REVOLUTION:
MARKOVITS AND MARKETS

Ian Ayres

Professor Ayres argues that market analysis should be used to assess the anticompetitive effects of a horizontal merger. The Justice Department Merger Guidelines represent an important advancement in defining markets in relation to competitors' ability to collude and the Herfindahl concentration index is a useful proxy for the "effective number of competitors in the market." Professor Ayres suggests that Professor Markovits' non-market approach might be harmonized with more traditional structural approaches for identifying mergers that are likely to lessen competition. (Commentary)

AYRES ON "MARKOVITS AND MARKETS":
A REPLY

Richard S. Markovits

Professor Markovits' reply (1) recapitulates his a priori argument for his basic conclusion that no matter how markets are defined, market-oriented approaches to predicting the competitive impact of horizontal mergers can never be cost-effective; (2) summarizes his own non-market-oriented approach to predicting the competitive impact of such mergers (an approach that does not require markets to be defined because it does not use market aggregated data such as market-share, market-concentration, or HHI figures); (3) explains why the basic conclusion just delineated does not depend—as Professor Ayres suggests—on the accuracy of any empirical propositions or the unnecessary inaccuracy of the way in which markets are defined; and (4) criticizes various empirical and theoretical arguments that Professor Ayres cites or makes himself when questioning some of Professor Markovits' claims or suggests that Professor Markovits should have made use of the existing literature. (Reply)

GERMAN ANTITRUST LAW AND THE INTERNATIONALIZATION OF MARKETS

Kurt E. Markert

Professor Markert focuses on the enforcement of the merger control provisions of West Germany's antitrust law. He mainly discusses geographic market definition and relevance of foreign competition in merger cases having a trans-border dimension. This is followed by an analysis of the impact of the proposed EEC merger control legislation on the future enforcement of German merger law. (Principal Paper)

COMMENT

Ulrich Immenga

The comment raises questions concerning the effects of foreign competition on domestic markets, new trends of extraterritorial application of Germany's antitrust laws, and the rising trend to competition between states and their industrial policies. (Commentary)
In Zenith Radio Corp. v. Matsushita Electric Industrial Co., Japanese television producers were charged with subsidization and collusive price predation on their export sales to the United States. Professor Elzinga analyzes the economic rationale behind the Sherman Act allegations. He also assesses whether the selling tactics of the Japanese firms square with the teaching of the New International Economics. (Principal Paper)

In the context of Matsushita, Professor Fisher examines several superficially appealing but analytically unsound propositions about predation. He argues that the predation hypothesis is even less plausible when coupled with conspiracy than would have been the case had the supposed predation been practiced by a single firm. (Commentary)

A number of articles in the recent symposium suggest that the ninth amendment creates difficult problems for originalists. Professor Maltz disputes this view, contending that standard originalist theory is entirely consistent with even the broadest view of the ninth amendment.

Professor Massey argues that the ninth amendment is both part of a Lockean Enlightenment tradition and part of an “Antifederalist Constitution,” one concerned with preservation of state autonomy and individual liberty through state guarantees. This account produces the conclusion that the unenumerated rights secured by the ninth amendment include individual liberties protected by state constitutions. As a result, state citizens have the power, through their state constitutions, to preserve areas of individual life inviolate from invasion by the federal Congress.

Professor Sherry comments primarily on Professor McConnell’s moral realist defense of a narrow reading of the ninth amendment. She suggests instead that both historical and jurisprudential sources support interpreting the ninth amendment as recognizing judicially enforceable unenumerated rights.
THE KENNETH M. PIPER LECTURE
THE KENNETH M. PIPER
LECTURESHP SERIES

The Kenneth M. Piper Lectureship Series is dedicated to the memory of Mr. Kenneth M. Piper, who made substantial contributions to the fields of personnel management and labor relations during more than two decades of service with Motorola, Inc. and Bausch & Lomb, Inc.

This year's Piper Series featured a lecture by the Honorable Harry T. Edwards, United States Circuit Judge for the Court of Appeals for the District of Columbia Circuit, who spoke on Judicial Review of Labor Arbitration Awards. Commentary on Judge Edwards' lecture was provided by Michael Gottesman, Partner, Bredhoff & Kayser; Bernard D. Meltzer, Distinguished Service Professor Emeritus of Law, University of Chicago; and Gerald Skoning, Partner, Seyfarth Shaw Fairweather & Geraldson.

The following article is based on Judge Edward's lecture. The editors and staff of the Chicago-Kent Law Review wish to express their continuing appreciation to Mrs. Kenneth M. Piper for supporting scholarship and discussion in this important area of the law.