Editorial

More Than a Cookie Cutter: the Global Influence of European Competition Law

Marcus Pollard*

As I now leave the JECLAP editorial team, and depart from private practice and Europe for new challenges in Asia, it seems an opportune moment to reflect on the growing influence of European competition laws on the rest of the world.

Readers will be aware that in recent years there has been a significant proliferation of new and credible anti-trust agencies. Across Africa, Latin America, and Asia, many countries are actively taking steps to introduce competition laws or revise existing provisions to ensure they keep pace with the more sophisticated regimes active in, for example, South Africa, Brazil, China, India, and Singapore. In designing their new systems, many non-European agencies have turned to European principles (as opposed to United States) for their guiding influence. New agencies have been able to seek inspiration and be willingly influenced by the tome of Commission guidelines and block exemptions—as well as detailed publicly available decisions and the ever-burgeoning case law from the European courts.

European competition laws, both in substance and the procedural framework, have thus had a significant influence on the style and content of competition laws adopted in ‘new’ jurisdictions. For example, in my new home, Hong Kong, in drafting and adopting the Competition Ordinance the Administration, sought particular inspiration and reassurance from the substantive contours of Articles 101 and 102 TFEU. Naturally, it remains to be seen in such a new regime as Hong Kong, how far European concepts and principles will ultimately ‘trump’ more local or regional factors (eg from across the wider Asia-Pacific region) to make their way into the formal Guidelines/enforcement practices. Conscious of its role as a key international finance centre, Hong Kong competition law will need to chart a careful course to ensure that what may work well in the EU, can and does work well for the Hong Kong economy and for its seven million consumers.

In addition to case-specific international cooperation and the growing need for multijurisdictional waivers, further evidence of the ‘soft-power’ emanating from the Madou Tower can been seen in the type and volume of support given to emerging regimes. European regulators—both DG Competition and numerous NCAs—have in recent years devoted significant human and financial resources into capacity-building projects with a wide range of agencies outside of Europe. For example, in China, case handlers from the central agencies (MOFCOM, SAIC, and NDRC) and their provincial-level equivalents have had detailed technical support and regular exchanges with DG Competition officials and NCAs through the ‘European Competition Weeks’ programme funded by the EU. Similarly, at the national level, EU governments have devoted resources to supporting competition policy overseas as a means to influence the design and direction of those systems. For example, the German Federal Ministry for Economic Cooperation and Development this year concludes a three-year project in supporting the introduction of the ASEAN Economic Community Blueprint. Yet even when the building blocks and language of a new competition system may appear similar to the EU, there may be nonetheless divergent routes down well-trodden European paths. The experience of Singapore since the introduction of competition law in 2007 is appropriate in this context. Whilst a European practitioner may feel at home in reading the Singapore Competition Act 2004, the Singaporean government and the Competition Commission has not simply ‘copy-pasted’ EU law to the detriment of ‘local’ needs and circumstances. For example, rather than merely transferring over the AKZO presumption of dominance, the Singaporean authority considers there are no ‘thresholds’ for substantial market power but only that a market share of 60% is a ‘likely indicator’ of dominance. A rather more broad point of departure from the EU can be seen in the assessment of vertical restraints—vertical agreements, which are viewed...
as generally pro-competitive, are entirely exempted from scrutiny under the Singapore equivalent of Article 101.

However, it is clear that for both legal certainty and as a means to avoid unnecessary hurdles to cross-border trade ‘convergence’ of global competition laws is generally welcomed. The recent explosive increase in bilateral or multi-agency initiatives such as the ICN is important means to achieve such coherence and consistency in processes and substantive outcomes.

Yet, companies and their legal advisors, as well as overseas enforcement agencies, should be conscious that competition law, as in other fields of law, are not to be applied like cookie-cutters or a simple copy paste across jurisdictions. A word of caution, therefore, to those who would see ‘international best practice’ (increasingly a shorthand for European law) as meaning a simple application of European competition law in an overseas jurisdiction. One cannot unquestioningly apply ‘established’ European principles into other jurisdictions without a critical analysis of whether such a principle ought to apply in the specificities of that market.

Whilst in many aspects, European competition law reflects an ‘orthodox’ view of global antitrust principles, EC law has grown from a particularly unique different historic context and even today remains driven, in places, by a uniquely EU rationale, eg internal market considerations. Similarly, new agencies should cherish the opportunity to freshly examine certain European principles without the shackles of previous Commission decisions or Court judgments. There may be an array of minutiae of European principles that outside of Europe should merit a closer first principles analysis—giving new agencies the ability to question whether is it appropriate or desirable to take other jurisdictions down the path that the Commission and its collaborator, the European Courts have pursued. For example, in the cartel context, whilst the notion of what constitutes an ‘undertaking’ may now be relatively uncontroversial, there still remains, at least within private practice, a number of significant normative questions as to the extent of parental liability—and the circumstances under which no guilt liability is appropriate and/or to be presumed/enforced. As seen in certain Asian jurisdictions such as the PRC or Singapore, thus far, the type of cases pursued by those agencies have not had the need to specifically address those topics. It remains to be seen, therefore, if, when and how such thorny issues will be addressed.

Thus, as a parting thought to Europe, despite all the criticisms that may be laid at the door of EU competition law and policy, let us take some comfort, if not celebration, that it is our system of European laws that still leads the field in fundamentally shaping a converged and coherent global competition policy.

doi:10.1093/jeclap/lpu050
Advance Access Publication 2 May 2014