

## Book Review:

# Searching for a Principled Order in an Ever More Complex Antitrust World

Ky P. Ewing

**Competition Rules for the 21st Century: Principles from America's Experience**

Kluwer Law International • 2003

**Reviewed by Donald I. Baker**

Ky Ewing's book, *Competition Rules for the 21st Century*, is a tour de force. It is must reading for anyone seriously interested in how competition laws could be more effectively and efficiently enforced in an ever smaller world in which competition enforcement regimes proliferate and competitive (and anticompetitive) effects reverberate.

The book seeks to push an increasingly numerous competition community in the direction of a coherent focus based on a rigorous factual analysis and a standard of consumer welfare. It cautions against embracing some of the more exuberant and populist elements of the American past. It expresses concerns about antitrust mandarins telling enterprises, courts, and each other what is good for the world.

Part of what makes the book so good is the painstaking assembly of ideas and statistics. The President of Harvard and the EU Commissioner of Competition are quoted on the same page in support of sensitivity to innovation and dynamic markets. Passages like these make the book a brief writer's bonanza.

The statistics cover such interesting subjects as the percentage of GDP spent on antitrust enforcement in various countries, and the proportion of national antitrust budgets spent on merger enforcement vs. cartel enforcement. Who would have guessed that Panama had the highest proportion of GDP on antitrust enforcement? Or that France would top the league on anti-cartel enforcement as a dominant priority? Not so surprisingly, we find that the United States has as many personnel devoted to antitrust enforcement as the next three teams in the antitrust enforcement league combined—EU, Japan, and Australia.

Ky Ewing advocates ten principles that he argues should govern antitrust enforcement anywhere (listed as eight principles on an erroneous page 225):

1. A focused purpose for enforcement.
2. Rigorous factual examination.
3. Rigorous evaluation of the competitive process with an eye to the nature of the particular competitive circumstances involved, innovation, potential competitive risks, and time dimensions.
4. Balancing of good and bad effects, and long- and short-term interests, with the costs of government intervention.
5. Avoidance of presumptions (particularly presumptions of anticompetitive effect) in lieu of inquiry.

■ **Donald I. Baker**

is a Partner, Baker & Miller, PLLC, Washington, D.C. He is Advisor to the ICN Working Group on Merger Notification and Procedures, and former Assistant Attorney General in charge of the Antitrust Division, U.S. Department of Justice.

6. Non-discrimination.
7. Transparency.
8. Accountability.
9. Minimalist intervention.
10. Humility.

These principles are important and correct, and worth emphasizing; but I would add two more which I think are at least as important:

11. Intellectual honesty and imagination, and
12. Political courage.

The last two can determine how effective a competition agency is in its own political environment and markets—which is for me more important than its standing in the Premier League of Competition Enforcement.

*We have a few areas—  
including mergers—  
where we probably  
have too much antitrust  
enforcement in the  
world, and Ewing finds  
these areas especially  
worrisome.*

We have a few areas—including mergers—where we probably have too much antitrust enforcement in the world, and Ewing finds these areas especially worrisome. His discussion of duplication and overlap in merger enforcement is worthy of attention by those in charge of agencies that are making the commitments of limited resources to particular transactions or sectors. To the extent that the enforcement agencies can make efficiency-based allocations of responsibilities for dealing with the same cartel, monopolistic abuse, or merger, everybody is better off. Both the private parties and the agencies can save resources.

But that is only part of what antitrust enforcement in a global economy is all about. I find it to be entirely appropriate for the European Commission—or even a smaller and less important agency—to take a different view of the Microsoft monopoly and appropriate relief differently from the U.S. Justice Department or to take a different view of the Boeing-McDonnell acquisition than the FTC did. But there is a risk that Ewing points out clearly:

The danger to the international trading system, then, is not so much the cost to companies of complying, but the very real possibility of attempts by one nation or another to thwart efficiency-enhancing mergers or acquisitions that will impact consumer welfare around the world. (page 196).

The same point would apply equally to monopolization and abuse of dominance cases under Section 2 of the Sherman Act or Article 82 of the Treaty of Rome. Given this potential for global consumer loss from excessive or insufficient enforcement, it becomes a particularly important obligation on each enforcement authority to make clear why it decided to act or decline to act and what it believes the appropriate rules are.

It often seems that the international differences in approach come from unstated assumptions. For example, modern U.S. antimerger enforcement tends to rest on the assumption that a merger is likely to be efficiency-enhancing to some degree, just because the companies want the transaction. Meanwhile, the EC assumption seems to be more neutral, and thus they are just a little less likely to see a downside risk in blocking a transaction that has some competitive problems. For me, it is very hard to fault the EC position—given the serious number of mergers that do not work out and the “buying binge” strategies of stock market manipulators like WorldCom. In any event, I think that these differences in assumptions would be an appropriate subject for additional exploration.

This is all part of a broader reality. The anti-merger rules of almost every jurisdiction require a predictive judgment about the likelihood and magnitude of future anticompetitive effects and efficiency gains. All this should be done in the context of a legal regime rather than a system of

bureaucratic “ad hoc-ery” or political favoritism. Contrary to Mr. Ewing’s warnings against use of presumptions (pp. 238–39), I think that some presumptions are necessary in the merger area just in order to maintain some veneer of legalism. The Merger Guidelines that have become so important in modern times are in fact a codification of presumptions—not all of which are necessarily right.

Like Mr. Ewing, I think harmonized substantive rules are important—but it is a long way from harmonized rules to *consistent decisions*. Professionals (as well as amateurs) born and educated into quite different legal and political systems are often likely to come up with different decisions in virtually identical cases. This is reality, however far it is from Mr. Ewing’s desires.

If there is any general fault with *Competition Rules for the 21st Century*, it is not what is found between the covers of the book, but what is not. The author’s basic thesis is that we need more care, coordination, and economic rationality in order to make the global market system more efficient and beneficial to consumers around the world. Ewing’s focus is almost entirely on national government competition agencies, the rules they apply and their decision-making processes. Yet, in fact, there has been an extraordinary modern history of coordination and cooperation among these agencies—as underscored by the current International Competition Network (ICN) and the growing web of antitrust cooperation agreements.

Rather, as I see it, the main sources of antitrust waste, confusion, and disharmony are coming from elsewhere, and appear to be getting worse. They deserve more attention than they seem to have received in what I hope will be referred to as the First Edition of *Competition Rules*. This would be my list of candidates for greater attention:

***Devolution (or Subsidiarity) in Europe.*** The EU has, in its new “Modernization” program, pushed a lot of new authority down on the national authorities and courts of Member States—including new Member States with no tradition of competition and limited numbers of personnel with any training or experience in how markets work. If anything short of great legal confusion occurs in the next few years, it will be a miracle.

***Federalism in the United States.*** A perceived vacuum in federal antitrust enforcement during the Reagan Administration generated a strong opportunity for state attorneys general and legislators to move into what had been essentially a federal preserve. Thus, the states now review and challenge mergers that have passed muster or been ignored at the federal review level (and at the very least state investigators can become a complicating factor in DOJ or FTC merger investigations).

***Private Litigation.*** Hard-pressed foreign competition agencies are increasingly advocating variations on an American staple—the private antitrust case. Thus, class action cases are now authorized in the major Canadian provinces, and new rights of private recovery are being authorized in the UK and other EU Member States. Meanwhile, the United States remains a beacon for potential plaintiffs because of the treble damage bounty system (which, ironically, Congress copied from the English Statute of Monopolies of 1620); and thus disputes abound over which foreign purchasers can seek the U.S. bounties rather than have to resort to their home courts for the perhaps less generous remedies under their own laws. It is interesting that the two U.S. international jurisdiction cases mentioned in the book are both private actions—one by several state attorneys general against the Lloyds’ underwriters and the other by the British target of a hostile takeover by a South African conglomerate.<sup>1</sup> Such “private attorneys general” are under no obligation to—and

---

<sup>1</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Consolidated Goldfields, PLC v. Antol Am. Corp. of South Africa*, 698 F. Supp. 487 (S.D.N.Y. 1988) (discussed at pp. 209–11).

don't—follow Ewing's helpful section on how to "Avoid Enforcement Conflicts (Nexus, Comity and Abstention)" (pp. 208–14).

**Over-Exuberant Assertions of Jurisdiction.** This subject has long pitted the United States against the world, and ultimately resulted in a series of "blocking statutes" aimed at U.S. plaintiffs being enacted by normally friendly countries, such as Australia, Canada, and the UK. In modern times, the worst jurisdictional abusers have been countries that have asserted *national* jurisdiction based on *worldwide* turnover, even where the local nexus was virtually non-existent. Brazil has been the biggest and hence most notorious of these jurisdictions; and yet there is nothing by way of text or statistics on Brazil in the book (probably because the Brazilian agency did not repond to an American Bar Association questionnaire on which Mr. Ewing relies for a lot of his data).

*The competition*

*agencies surely do not*

*have all the answers,*

*but they probably have*

*more principled*

*answers than most*

*(or even all) of their*

*political opponents.*

**Political Uncertainties.** In each national government, the competition agency is only a small part (sometimes a very small part) of the domestic political system—and the competition agency is usually engaged in ongoing bureaucratic battles with constituency-serving ministries engaged in trying to maximize the welfare of politically favored groups. Brussels is a little different because competition is so central to the EU's mission, but DG Competition's battles with constituency-directorates and national governments are a fundamental reality in the Union. Dealing with such opponents requires brains and courage; and, because I think that the intra-governmental battles over trade rules and subsidies are important, I would recommend a little less humility on the part of the competition agencies than Mr. Ewing seems to urge (at pp 242–43). The competition agencies surely do not have all the answers, but they probably have more principled answers than most (or even all) of their political opponents. I realize that strength and success on the political side of the competition process may cause occasional excess activism on the enforcement side, but it is a risk that I would be willing to run. Anyway, more discussion of the political dynamics would seem useful in this book—because it is probably politics that is the biggest threat to the rules-based competition law system that Mr. Ewing so clearly advocates.

Much has been achieved and much still remains to be done in the area of competition law and enforcement. This readable and insightful work can contribute to the ongoing dialogue, but it is too good to be read by only a few cognoscenti from the international antitrust network. To the extent that *Competition Rules for the 21st Century* influences actors in the agencies, courthouses, and corridors of power around the world, it could make a positive difference to consumers and dynamic enterprises almost everywhere. ●