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RULE OF LAW, STANDARDS OF LAW, DISCRETION AND TRANSPARENCY

RULE OF LAW SYMPOSIUM ISSUE IN HONOR OF JOHN ATTANASIO

*Eleanor M. Fox**

I. INTRODUCTION

RULE of law connotes democracy, equity, and efficiency. It implies that people are governed by law, not (arbitrary) man or woman. It connotes that people in the same circumstances are governed by the same rules. And it suggests a degree of certainty and predictability, facilitating the economic transactions that ultimately provide our bread or tacos, internet connections, and data transmittal that increase peoples' standards of living and make society better off. John Attanasio has spent his illustrious career facilitating the rule of law, and it is a pleasure to write this essay in his honor.

This essay reflects on the economic and market side of rule of law, particularly as applied to antitrust (or competition) law. Law is not all rules; economic law is often, if not usually, composed of standards. Standards usually entail a formula or paradigm. The same standard applied by two different people—for example, to determine if conduct or a merger is anticompetitive—can yield different results. The identically worded standard applied by individuals in two different countries is even more likely to yield different results. And an economic standard embellished by a public interest or industrial policy factor is yet more likely to yield different results. What does this flexibility mean for rule of law? Does it suggest that we need clearer, more stable, less flexible standards? Does it suggest that “public interest” and “industrial policy” should be jettisoned from competition analysis? I shall answer no and shall consider the limits within which standards meet the requirements of “rule of law.” I use the example of monopoly and merger law, and I contrast approaches of the United States, the European Union, China, and South Africa. I argue that nations appropriately have flexibility to give the same word—such as “anticompetitive”—different meanings, and that they appropriately have flexibility to tailor their laws in their own national interests, at least when

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they have regard for conflicting interests of other systems. The ideal of “rule of law in the world” should not push nations to adopt less flexible standards than they choose (and indeed one can hardly imagine jurists doing so). When nations and their agents carry out their assessments thoughtfully and transparently, against a backdrop of articulated standards, they satisfy the appropriate requirements of rule of law. But when the authorities obscure strategic maneuvers and forsake application of a standard-of-law paradigm in favor of a strategy to impose costs on other nations and their enterprises, they violate the soft norm of rule of law.

II. SOME BOUNDS OF RULE OF LAW

This essay is about standards, discretion, and compatibility with rule of law, using competition law as a window for exploration. Standards are by definition less certain than rules.¹ In competition law, or antitrust, there is a rule against cartels.² This is a clear rule, especially in the United States, and it has become increasingly clear and its limits increasingly well-defined in the various other antitrust jurisdictions of the world. Business people know that if they join a price-fixing cartel and they are caught, they risk high fines and jail.³

As for mergers, there is a standard.⁴ What is anticompetitive may be determined by applying the standard.⁵ Normally the standard is: does the merger create market power to the harm of consumers?⁶ This is a question of antitrust economics. Antitrust economics is not a science. Economists build models on the basis of assumptions; assumptions, for example, as to how well markets work to check market power. Within a single country, such as the United States, one economist’s assumptions are usually fairly close to other economists’ assumptions, but not always. Moreover, assumptions and therefore results can be affected by values and preferences. For example, people, who may be judges, who worry about growing economic power might put a thumb on the scale against large concentrations (such as the now pending merger of Time Warner and Comcast),⁷ and those who worry about intrusive government and trust business decisions to be efficient might put a thumb on the scale in favor of freedom to merge.

Antitrust law also entails a law against monopolization (United

1. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–60 (1992).

2. 15 U.S.C. § 1 (2004).

3. See *id.*

4. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N HORIZONTAL MERGER GUIDELINES (2010).

5. See *id.*

6. See *id.*

7. Cecilia Kang, *Comcast, Time Warner Agree to Merger in \$45 Billion Deal*, WASH. POST, Feb. 13, 2014, http://www.washingtonpost.com/business/economy/comcast-time-warner-agree-to-merger-in-45-billion-deal/2014/02/1307b778d60-9469-11e3-84cl-27626c53f5fb_story.html.

States)⁸ or abuse of dominance (European Union).⁹ A complicated set of rules and standards in the United States, European Union, and elsewhere informs whether the rules and standards are violated, and those rules and standards are constantly evolving. Notwithstanding a target that moves within a margin, huge fines may result from a violation.¹⁰

To complicate the problem of predictability, some nations' laws include public interest or national interest as factor for assessment.¹¹ Some of these laws spell out the admissible interests, such as jobs and effect on small business;¹² others do not.

I begin with the category of monopolization/abuse of dominance, without the complication of public interest, and compare the law of the United States and the law of the European Union; I proceed to the category of mergers and public interest and compare South Africa and China; then I conclude.

As background, I observe that competition law problems frequently span the world. What a firm does in New York may be felt in China and Africa. A merger of firms in the European Union may affect consumers in Sydney or Tokyo. All things being equal, the world community has an interest in the application of the same or similar rules and standards across the world, for ease of transactions, predictability, saving costs, inducing investments, and increasing standards of living. The divergence of standards is not a sin against rule of law. But does arbitrary and differential application, or unknowability of the law, violate the soft norm?

A. MONOPOLIZATION AND ABUSE OF DOMINANCE

I examine, here, examples from the law of the United States and the European Union.

The law of the United States and the law of the European Union regarding the conduct of a dominant firm are quite divergent. Both sets of laws purport to be for the consumer.¹³ But the bodies of law entail different presumptions, and often the authorities and jurists reach different results on the same facts.¹⁴ What is illegal in the United States as anticompetitive is almost surely illegal in the EU, but what is illegal in the EU as anticompetitive may well be legal in the United States and might even be encouraged as pro-competitive.¹⁵

The poster child pairs of cases are *Trinko* and *LinkLine* in the United

8. See 15 U.S.C. § 1 (2004).

9. See Consolidated Version of the Treaty on the Functioning of the European Union art. 102, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TFEU].

10. See 15 U.S.C. § 1 (2004).

11. See, e.g., Competition Act of Republic of South Africa of 1998 § 124.

12. See *id.*

13. See Eleanor Fox, *Monopolization and Abuse of Dominance: Why Europe is Different*, 59 ANTITRUST BULL. 129, 135 (2014).

14. See *id.* at 136–39.

15. See *id.*

States, and *Deutsche Telekom* and *TeliaSonera* in the European Union.¹⁶ In the United States, a dominant firm has the right to use its leverage to deprive competitors of important opportunities while in the European Union the dominant firm has a special responsibility not to do so. Moreover, in both the United States and the European Union, there are areas of the law that are unsettled and constantly evolving, and running afoul of the law may cost more than a billion dollars, as Intel can testify.¹⁷ The different results may be driven by different values, usually unstated, but there is no suggestion (at least not usually) that the different results are driven by discrimination against outsiders.

B. MERGERS

In merger antitrust cases, authorities and jurists must determine whether a merger is anticompetitive. We concentrate here on public and national interest factors. In some jurisdictions, as in China, the factors to consider in deciding whether a merger is anticompetitive include these elements.¹⁸ Specifically, in China, the factors to be considered include the effect on the development of the national economy,¹⁹ and the expressed purposes of the antitrust statute include protecting the consumer and public interests, and “promoting the healthy development of the socialist market economy.”²⁰ In other jurisdictions, such as South Africa, public interests are identified separately from competition interests. In South Africa, public interest factors include advancing the interests of historically discriminated against people, jobs, and small business.²¹ In South Africa the competition authorities are empowered to prevent a pro-competitive merger for public interest reasons, and they may authorize an anticompetitive merger for public interest reasons.²²

The highest profile public interest merger in South Africa is Wal-Mart’s acquisition of Massmart. The merger was not anticompetitive, but it was perceived as a threat to jobs, workers, and small business suppliers. The public interest aspects and effects were tried before the Competition Tribunal, with advocates for all sides and concerns being heard. Ultimately, the Tribunal allowed the merger with conditions, notably including the creation of a fund by Wal-Mart dedicated to building the capacity of the small South African suppliers to enable them to be part of the global

16. See *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438 (2009); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 E.C.R. 527; Case C-280/08P, *Deutsche Telekom AG v. Comm’n*, 2010 E.C.R. I-9555.

17. See Case T-286/09, *Intel Corp. v. Comm’n*, 2014 E.C.R. 472, available at curia.europa.eu/juris/liste.jsf?num=T-286/09.

18. See Anti-Monopoly Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) art. 1.

19. *Id.* art. 27(5).

20. *Id.* art. 1.

21. See The Competition Act of Republic of South Africa of 1998 § 12A.

22. *Id.* Competition Comm’n v. Wal-Mart Stores, Inc., 2012 110/CAC/Jun11 (S. Afr.).

value chain.²³ On appeal the court required a more exacting determination of how much money was needed to build the capacity and how the fund would carry out its training responsibilities.²⁴

In China, mergers are vetted by MOFCOM, the Ministry of Commerce.²⁵ As of February 2014, more than 700 mergers had been vetted by MOFCOM.²⁶ All but twenty-two have been cleared without conditions.²⁷ Of the twenty-two, two were prohibited.²⁸ The first was Coca Cola's acquisition of juice company Huiyuan,²⁹ a merger that was not anticompetitive (i.e., did not create market power) by most contemporary Western competition analyses.³⁰ Of the twenty mergers on which MOFCOM imposed conditions, nearly half were subject to conditions that were not easily recognized by Western experts as protecting competition, and in some cases the conditions appeared to significantly reduce the merger's efficiencies. For example, to clear its acquisition of Yihaodian, Wal-Mart agreed not to use the online platform of its merger partner, the biggest online supermarket in China,³¹ and in the case of some mergers such as Xstrata/Glencore,³² despite the improbability of anticompetitive effects, MOFCOM imposed conditions that would assure China a source of supply of natural resources from abroad. All decisions were couched in the language of competition.

23. *See id.*

24. *Id.*

25. Ministry of Commerce, People's Republic of China, *MOFCOM Holds a Special Press Conference on Anti-monopoly*, Mar. 4, 2014, available at english.mofan.gov.cn/article/newsrelease/press/201403/20140300507466.shtml.

26. Peter Wang, Sebastien Evard & Yizhe Zhang, *Antitrust Alert: China Moves Towards an Expedited Review for Mergers but Leaves Details Unclear*, JONES DAY (Feb. 24, 2014), <http://www.jonesday.com/antitrust-alert-china-moves-towards-an-expedited-review-for-mergers-but-leaves-details-unclear-02-24-2014>.

27. Yuni Yan Sobel, *Domestic-to-Domestic Transactions—A Gap in China's Merger Control Regime?*, THE ANTITRUST SOURCE, Feb. 2014, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/feb14_sobel_2_20f.authcheckdam.pdf.

28. Fay Zhai, Yuan Cheng & Renan Flanagan, *MOFCOM Issues Second Ever Prohibition Decision and Publishes New Merger Notification Guidance*, LINKLATERS (June 2014), http://www.linklaters.com/pdfs/mkt/beying/latest_mofcom_developments_alert_june_2014.pdf.

29. Andrew Batson, *China's Statement Blocking Coca-Cola Huiyuan Deal*, WALL ST. J. (Mar. 18, 2009 at 6:58 a.m.), blogs.wsj.com/chinarealtime/2009/03/18/china-s-statement-blocking-coca-cola-huiyan-deal.

30. The second was a big shipping joint venture which MOFCOM treated as a merger. *See* Simon Baxter, Frederic Depoortere, Ingrid Vandendorre, & Andrew Foster, *Navigating Chinese Merger Control: MOFCOM Prohibits P3 Shipping Alliance*, SKADDEN (June 19, 2014), <http://www.skadden.com/insights/navigating-chinese-merger-control-mofcom-prohibits-p3-shipping-alliance>.

31. Ministry of Commerce, People's Republic of China, Announcement No. 49, 2012 on Approval of Decision Made Upon Anti-Monopoly Review on Concentration of Operators for Purchasing 336% Equity of Niu Hai Holdings by Wal-Mart with Restrictive Conditions (promulgated, Aug. 13, 2012).

32. *See* Thomas Jones & Jessica Qiu, *What Do China's MOFCOM's Recent Merger Clearance Decisions Mean for You?*, CORRS.COM (May 13, 2014), <http://www.corrs.com.au/thinking/insights/what-do-china-s-mofcom-s-recent-merger-clearance-decisions-mean-for-you>.

III. ASSESSMENT

Cartel law is the antitrust law closest to a rule and closest to a rule for the world. As for the law governing abuse of dominance, there is significant divergence in the world and even a significant margin in which the law is not predictable within a single jurisdiction. This state of the law gives room for policy choices by the decision-maker on a case-by-case basis. As for merger law, the articulated standard is quite similar throughout the world. It is often identically or nearly identically applied, except for applications in China. China purports to apply competition standards neutrally, despite suspicions to the contrary. A number of jurisdictions expressly authorize or require consideration of public interest factors, especially in merger assessments. South Africa is a good example of a country that applies public interest factors transparently and with openness and due process to all stakeholders.

Rule of law does not mean that law across nations should be uniform. It does not mean that the law should be all rules and no standards, and it does not mean that the rule or standard should be written in stone. Flexibility where multiple factors are relevant to wise decision-making is a healthy quality of a free and vital society. But rule of law does imply transparency, access to knowledge of what the law is, metrics to predict what it is becoming, nondiscriminatory and non-arbitrary application of principles and formulae, and consciousness that we live in a world community and have a responsibility not to impose costs on our neighbors without justifications that would stand up in the court of cosmopolitanism.

There is a constant drumbeat in the West that China violates these principles.³³ Even so, one must be impressed by China's amazing strides in applying international principles of competition law. The glass is at least half full, not half empty. In competition law, the state of the world in applying rule of law is, in general, strong.³⁴

33. See Keith Bradsher, *No longer Business as Usual in China*, N.Y. TIMES, Nov. 10, 2014 at B1. See also D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J.L. & BUS. 1 (2013).

34. Convergence is facilitated by three international bodies—the International Competition Network, the Organization for Economic Cooperation and Development, and the United Nations Conference on Trade and Development. See Eleanor Fox, John Fingleton, & Sophia Mitchell, *The Past and Future of International Antitrust: Gaps, Overlaps and The Institutional Challenge*, in BUILDING NEW COMPETITION LAW REGIMES, 163 (David Lewis ed., 2013).