SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Canada-United States Law Journal

Volume 26 | Issue

Article 46

January 2000

Discussion Following the Remarks of Ms. Valentine and Mr. Von Finckenstein

Discussion

DISCUSSION FOLLOWING THE REMARKS OF MS. VALENTINE AND MR. VON FINCKENSTEIN

QUESTION, PROFESSOR KING: I had a question that is twofold. I wanted to ask Debra about cooperation in state antitrust matters, and the extent of your relationship with them. They ring their heads on antitrust matters recently. At the same time, I wanted to ask both of you whether it would help to have a uniform statute in both Canada and the United States? Are there any advantages in a uniform statute? Can you go further than you do? Are there differences that would make a difference in prosecution?

ANSWER, MS. VALENTINE: It is interesting that you ask the question about the states, actually as I was listening to this morning's panel on the extent to which one should bind or involve states in trade rules and negotiations, I began thinking about the role of the states in antitrust issues. I have got to be a little bit careful politically.

First of all, we cooperate with the states quite effectively. Some of the bilateral agreements that we have in some of the concepts that we would like to work towards for information sharing with foreign countries are, in part, based on some protocols that we have with the states. Some of that, even in the merger area, goes to making life easier for firms. So, if we are looking for a merger and the states also want to look at a merger, the states will designate a lead state that will then, if the parties waive confidentiality, give that state the information that we get from the parties who are involved. Then the merging parties do not have to go around visiting fifty state officials and working in fifty-one places around the country. Our country does believe in federalism; and I do think over time, if you look at the way antitrust enforcement has worked, it may well, in fact, be a benefit.

There was a period in the 1980s when the federal government was not enforcing antitrust laws in a terribly vigorous way. If one believes truly in a minimal degree of competition enforcement to ensure open markets, one might well find it was useful or good that the states somewhat stepped into the breach. On other hand, we were up testifying on the Hill just two days ago, and for the first time I heard Barney Frank, a very liberal Democrat from Massachusetts, say, "I am beginning to get concerned about the role of the states in antitrust enforcement. Is this a good thing or bad thing?"

When a merger affects local markets, you see this particularly in the supermarket area, it is often very, very important to have the state enforcers in there. I think what Barney Frank was thinking about was the Microsoft

antitrust case, obviously, which has been so much in the headlines. It is quite clear there that the judge wants one recommendation for remedies from all the Plaintiffs, the Justice Department, and the nineteen states. These people are struggling to come up with one set of recommendations. I do not know whether they will or not.

I think his question was, if you are truly dealing with something that has a national or international impact, what is the proper role for the states who are largely concerned with the impact in their smaller geographic area? There may well have been slightly more parochial concerns. What one did see in the Microsoft case was that in states where Microsoft is based, they took a certain position. States where Microsoft's competitors are based took other positions. I will not attribute motives to anyone.

This is a question that is very hard for me. I do like my fellow state enforcers, as a government official. They are very good, particularly on the oil mergers, Exxon/Mobil and BP/Amoco/Arco. As you may well know, the states filed briefs when we filed the case against Toys "R" Us, a fascinating dealer restraint case. It is a vertical and horizontal conspiracy. In any case, we also had states filing briefs, and doing similar work. You know it often makes sense, but I do think that as the world globalizes and we are doing more cooperating at the international level that one may want to start rethinking all of this. Konrad said that we would love to start working with Australia and New Zealand. What Australia and New Zealand have done so brilliantly is to ensure that the competition enforcers are the ones who are addressing the competition issues across all industries; and there are not sectoral or regulatory enforcers. They do not really have a Federal Communications Commission (FCC). It is the competition agency dealing with the competition issues in all those areas.

The Ice Pack Report also goes into an interesting discussion about whether the competition agency should be doing the competition issues rather than the regulatory agencies, but, again, I cannot say too much about that.

ANSWER, MR. von FINCKENSTEIN: In the Canada/U.S. concept, I do not think we need one law. The laws, in substance, are really quite similar. However, on the criminal side, we essentially work in parallel proceedings, because our procedures in criminal law are quite different. You do not want our investigators to be summoned by a court from the other country, then refuse to go because under our law we cannot disclose without a mistrial. So, essentially, you exchange as much you can. You have two separate investigations so you do not get caught up in procedural problems.

On the civil side, on mergers, I think the big issue with both agencies or the three agencies is that you have remedies that conflict. As more and more

of the mergers are cross-border, they involve facilities on both sides. Where there are remedies, there is a potential that if some remedy is ordered on one side which applies across the border that gives you, first, an extraterritorial and political issue. Second, it may be difficult to remedy what the other jurisdiction prescribes or wants to prescribe, or perceives the impact to be on its domestic market.

Now, so far we have been very good at keeping each other informed by working in tandem and constructing a remedy with which we both can live. But it is becoming more of a problem. I think that if we do not have a joint law, then we should have a protocol on how to deal with merger remedies. There has been no attempt to develop anything because so far we have done it on an *ad hoc* basis. However, I think North American integration may drive us to that.

COMMENT, MS. VALENTINE: I guess I do fundamentally agree with Konrad, that we probably do not need one law, because our laws are sufficiently close and compatible that we are not really seeing problems. I do think in the merger area that if you do not have one law the extent to which you can converge procedures and coordinate procedures the better off you are. In many ways, we both have timing for filings of mergers. We only have one form, but we have almost the equivalent of a short form.

I think sixty percent of our mergers receive what is called early termination within that first thirty-day period. After sixteen days, sixty percent of them are all signed off on. You get down to a much smaller percent that get the second request. I think it is procedural coordination that is the most important there. Because again, businesses want to get these transactions cleared, done, and through. I am not quite as pessimistic. I think a protocol or some sort of an insurance that we can all agree upon is definitely right.

What I find amazing is that – whether it is Canada or the E.U., even though there are slight differences in the law, perhaps, most particularly with the United States and the E.U. in the vertical area, when you get down to the nitty-gritty facts of any particular investigation, it is amazing how frequently the enforcers come out the same way. Even in these cross-border things, you will often find that there are effects in many countries, particularly in the pharmaceutical area or the food area. You will have national markets, because there are so many national regulations. It will have to be cleared by the FDA or the EPA or whatever, if it is a pesticide. You will still find national markets and a need to address your own national markets. On the other hand, you will see other problems cropping up on the other side of the border, the need to license a particular patent, or to divest a factory in your area, will probably not conflict with the remedy needed in the other area.

QUESTION, MR. BAILEY: This is for Debra.. Konrad made the point about Canada's position vis-à-vis the WTO. I was just wondering what your thoughts are on prospects for some sort of eventual WTO negotiations on competition policy?

ANSWER, MS. VALENTINE: I was thinking, we agree on everything in the competition area. This is one of the few areas where there is something of a divergence in our positions. I firmly believe in advocating principles throughout the world. We very much believe in the educative and advocacy process that is going on in competition trade and policy in Geneva.

On the other hand, this is both an area where we think that you have got to learn to walk before you can run, and certainly, before you can run in tandem. As you heard from my initial statistics, not even all the OECD countries were enforcing competition laws ten years ago. It literally has been only in this last decade that we got eighty countries on the books with competition laws; half of the WTO members did not even have competition laws. But what is even more interesting and complicated about this area – and we are seeing this in the labor and environmental areas as well – is that competition laws govern private behavior.

WTO rules generally have concerned government obligations. And so, when you start thinking about competition at the WTO, you see competition principles coming in. In a very healthy sense, with something like the telecom barrier or TRIPS, it is a different kettle of fish to be developing competition rules that conceivably could be binding on private actors, which is why Konrad properly shied away from the dispute settlement concept. I think if we do ever go forward in the WTO, what we are looking at and talking about are things like whether governments should have competition laws; and whether governments should have a competition agency enforcing those laws in a non-discriminatory manner. But, as Konrad already said, our competition laws are absolutely firm and nationality blind in terms of enforcement.

I guess this is where we would probably start to diverge. We are a bit more leery. There must be laws that are consistent with economic efficiency. But we could not even agree with the E.E.C. or Canada about vertical restraints that should be prohibited, and ones that should not be prohibited. So it is hard to get down to terribly specific standards. This is partly why we have been saying that we should just go slow and figure out what makes sense. That is not to say that someday, in principle, you should apply a rational competition law, and if your competition law has non-competition elements, like preserving working opportunities, protecting small businesses, or favoring national champions, you should be explicit about that. I think it is going to take us quite a while. Our feeling is that not all competition

problems are trade problems, and not all trade problems are competition problems, and sorting out the government versus the private is going to be the real trick.

COMMENT, MR. von FINCKENSTEIN: We are really not that far apart. It depends on what you call principles and procedures. We should have such things as an anti-cartel rule; we should have merger review; we should have abuse of dominance; and we should try to characterize what those principles are. Procedurally, it has to respect national treatment. You have to have an independent body doing it on a transparent basis. That is the level of generality that you are talking about, just so that you get essentially a dissemination of basic competition principles, laws, and procedures. Then, I agree with you, Debra, absolutely. Competition essentially deals with private activity; it is not government. Therefore, if you have that, I do not think you need a dispute settlement mechanism.

I certainly disassociate myself categorically from any ideas that are floating around about competition, or general competition code fully enforceable under the WTO dispute. That is not what I was talking about.

QUESTION, MR. PATZER: Rob Patzer with the Federal Environment in Canada. I was very intrigued with the level of cooperation you have achieved. I worked in the area of environmental law enforcement for a number of years. We have worked very hard to enhance cooperation between ourselves and the Environmental Protection Agency, particularly under the North American Agreement on Environmental Cooperation, the side agreement to NAFTA,[1] but have only come close to achieving the kind of cooperation you have. I am very impressed. You are to be congratulated.

I was curious about the International Antitrust Enforcement Agreement and the companion legislation that has been tabled in Canada. I believe, Konrad, you said that it allowed for information sharing where confidentiality requirements are the same. I was just wondering about the level of similarity between the confidentiality requirements in the two countries; if any possible changes might have to be made to access the privacy legislation in each country to allow full exchanges of information?

ANSWER, MR. von FINCKENSTEIN: The American act provides that the United States can enter into an agreement with another competition agency so long as it provides a level of confidentiality protection equivalent to that in the United States. That is essentially what it says. In Canada there was a private bill introduced about a week ago proposing that the competition agency be given the authority to enter into agreements with other

---

[1] North American Agreement on Environmental Cooperation, U.S.-Can.-Mex. 32 I.L.M. 1480 (Sept. 14, 1993).

competition authorities along with certain criteria that they specify. One of them is level of confidentiality, and those are to be negotiated.

This is a very good initiative by the members of Parliament, but as you know, private member bills in Canada rarely see the light of day. The Minister of Industry then announced that bill and another one actually contained essentially the same thing as the legislative agenda of the Competition Bureau, and I suggested that there should be full discussion on those and, perhaps the government bill. We have written a discussion paper which will be published on Monday, and there will be discussion all summer long on this conducted by the public policy forum. In the end it may emerge as a government bill, which would then essentially give the government of Canada the authority to enter into agreements with countries like the United States, allowing the civil exchange of information, whether it be in mergers or abuse-of-dominance cases. What the level of confidentiality is would have to be negotiated on a country-by-country basis. In effect, the agreement that is authorized would determine the level of disclosure.

It is not so much having access to information. The information that is exchanged between the two agencies is stated within the agency and cannot be leaked. That is the real concern on the U.S. side and that is the concern on our side. We would be very selective in the number of countries with which we enter into such an agreement. We would want to make sure that they have established good competition law administration and are able to keep the information secret. Obviously, we have no problem with the United States, but we might have problems with some others.

ANSWER, MS. VALENTINE: On the U.S. side, there are essentially two criteria. One is that the other country must have an essentially comparable antitrust or competition law, which makes sense. If we are going to help you, we want you to be able to help us. That is just an equal and fair dealing concept, particularly in the competition area, where you are dealing with businesses. You do have a lot of confidential business information. So, it is reasonable to expect a country to have a comparable set of confidentiality protections for information that the government gets which guarantees that information that we provide to the other country will not then be passed on to state-owned enterprises, which might be competing with some of these companies that we are both jointly investigating, we want to investigate, or to be used for other potentially nefarious purposes. We have never actually had to settle the question of what a comparable set of protections for confidential information would be, so the only agreement we have is with Australia.

I have a guy on my staff, one of those real nitpicky guys who looks at every single thing. He finds 500,000 trees in the forest to worry about. He goes online and gets the Australian laws. They have virtually, to a tee, the

same protections for when you get information from companies. You cannot pass it on to other Federal agencies except in rare circumstances when the other entity certifies that it is for law enforcement purposes. They cannot use it unless in Court and even then it must be kept under seal . Their law was almost identical to ours. It was absolutely crazy. He still went through every single aspect. I kept saying that I am not sure you want to set the bar that high. There will not be another country in the world that has such comparable protection. So I am not quite sure how that will eventually work out. But we must be assured of some even-handedness and equality of treatment. No one is going to sign up with Burma tomorrow because who knows what would happen to the information. It might be given to arms and drug traffickers. It is best to keep away from that.

COMMENT, MR. von FINCKENSTEIN: Canadians are extremely worried. They do not want us to be the vehicle for information going to the United States and getting into pirated hands and thereby being exposed to terrible damages. So, once we have the authority, it will not be an easy treaty to negotiate.

COMMENT, MS. VALENTINE: I keep telling Konrad, just have us come up, subpoena us, and we will testify. I have never given a piece of information to the private sector, but there are other concerns.