

## COMPETITION LAW IN THE BRICS COUNTRIES

*Adrian Emch, Jose Regazzani and Vassily Rudomino (Wolters Kluwer Law and Business, 2012)*

In his essay on 'Politics and the English Language' George Orwell listed six rules meant to prevent most instances of poor writing. The first one was to: 'never use a metaphor, simile or other figure of speech which you are used to seeing in print'. In short, Orwell disliked clichés. Fortunately for these reviewers, Orwell's sixth rule allows one to '[b]reak any of these rules sooner than say anything outright barbarous'. Therefore, this review will purposely resort to clichés, namely that: *globalisation has been the most salient feature of competition law enforcement for the past two decades*. In the words of Terry Calvani (himself a fitting example of the effects of globalisation in competition practitioners, having been both a Commissioner of the US Federal Trade Commission and a Member of the Board of the Irish Competition Authority), 'today there are more than one hundred countries with competition law regimes [...]. Unquestionably, some of these enforcement agencies do little more than attend international conferences, but many have active enforcement agendas'.

Building upon Herbert Hovenkamp's expression: 'the antitrust enterprise', one might say that antitrust has become a global enterprise. This is no longer exclusively the case for merger review, under which multi-jurisdictional filings have created continuous employment for competition practitioners for decades now, but also for multiple facets of competition law. For instance, companies and, in particular, those enjoying significant market power must reconcile their need to streamline distribution with differing competition policies. Competition authorities, regardless of the economic importance of their home jurisdiction, should take interest into foreign developments. For instance, the increasingly international nature of cartel law would have practitioners focusing on a single jurisdiction risk saving their clients from a custodial sentence at home, only to have them serve it elsewhere. Private enforcement also generates new challenges as any finding or document made public in one jurisdiction could be used by plaintiffs to substantiate a claim in another jurisdiction. Thus is it no surprise that the European Commission is increasingly intervening as *amicus curiae* in defence of non-discoverability before US courts.

*Businesses, and their legal advisors, would be imprudent in overlooking the BRICS*. Though it has become (incidentally, also, a cliché) to state that the EU is the world's largest trading bloc, the BRICS would overtake the EU if considered together. According to the 2012 BRICS report, '[t]ogether the BRICS account for more than 40 per cent of the global population, nearly 30 per cent of the land mass, and a share in world GDP (in PPP terms) that increased from 16 per cent in 2000 to nearly 25 per cent in 2010 and is expected to rise significantly in the near future'. By itself, Brazil represents an economy larger than the UK; Russia and India are comparable to Canada and Australia. China, of course, is the second largest economy in the world.

For further perspective, one should take notice of Fareed Zakaria, a journalist, who referring to two industries with which antitrust policy is familiar, wrote that '[t]he biggest movie

industry, in terms of both movies made and tickets sold, is Bollywood, not Hollywood. Even shopping, America's greatest sporting activity, has gone global. Of the top ten malls in the world only one is in the United States, the world's biggest is in Beijing'. Additionally, even in the context of the current economic downturn, the BRICS are expected to significantly outperform Western economies in terms of GDP growth. Specifically, for 2013 *The Economist* forecasted a 4% growth for Brazil, 6.5% for India's and 8.6% for China (to be compared with a 0.5% growth for the Eurozone and a 2% growth for the USA).

One common challenge which the BRICS economies face is, in the words of the latest BRICS report, 'the need for institutional development without which sustainable growth cannot be sustained'. The development of well-functioning competition policies will constitute a key indicator in this regard. Competition policy may be associated with or benefit from other initiatives such as the development of an alternative to the World Bank. Russian Foreign Minister Sergei Ryabkov is reported to have stated that '80% of issues on [the BRICS'] agenda are economic and only 20% refer to international politics'. The BRICS' focus on economic issues, rather than political, might allow for a comprehensive framework for markets. In broader terms, building structures allowing for consistent rule of law across the BRICS can only strengthen their position.

The publication of this book, just prior to the coming into force of Brazil's new competition act and the signature of the Memorandum of Understanding between China and the EU, could not be timelier. Additionally, the BRICS are actively cooperating in the domain of competition law, for instance through conferences in 2009 (in Kazan, Russia), 2011 (in Beijing) and in 2013 (in Delhi, India).

While there is no shortage of sources regarding these countries' respective competition laws, China's in particular, Messrs Emch, Regazzini and Rudomino have cleverly structured their work. There is not, to our knowledge, a comparable source where the law is stated, in relation to each of a set of jurisdictions, first by national regulators, then by private practitioners. We suspect that it will be the introductory chapters regarding each jurisdiction, written by national regulators, which will be of particular interest to businesses and their advisers. This might be the case considering that some of the BRICS' competition authorities have not always been as transparent as desirable. Moreover, the chapters written by practitioners provide a concise and up-to-date explanation on how the competition regulations in question are enforced (including, in some cases, no small amount of criticism against the authorities), providing an adequate synthesis on each jurisdiction.

The final chapters of the book contain 'horizontal' overviews of the laws of the BRICS in relation to (1) cartels, (2) unilateral conduct, and (3) mergers. These chapters will no doubt be of interest to competition scholars, legislators and enforcers. For instance, the fact that Russia, China and Brazil have custodial sentences for certain cartel infringements could contribute to the debate regarding the criminalisation of competition law. Scholars may be particularly interested in the final chapter of the book, written by a former US Federal Trade Commissioner Chair and General Counsel, William E Kovacic. While generally sceptical of future policy contributions by the BRICS, Mr Kovacic makes insightful policy-oriented reflections devised from the comparison of the BRICS antitrust laws, from which regulators and legislators in other emerging economies could benefit. Both Mr Kovacic and Marc Reysen, a private practitioner who contributed to the book, highlight the enforcement problems deriving from the sheer size of the territories and the economies involved. Both authors rightly emphasise the importance, in this regard, of (1) the adequate staffing of the competition authorities from the BRICS countries, and (2) the importance advocacy efforts by regulators. One might take the position that competition law enforcement in the BRICS countries is as much about applying the rules as it is about successfully changing the

manner in which business is conducted. In this regard, we recall the words of Stephen Breyer, an Associate Justice at the US Supreme Court: 'The right ruling makes a country great because the event is seen by all'.

It is particularly surprising, in the light of the above-mentioned enforcement problems, that the question of federal or decentralised system of enforcement of competition law, which is prominent in the US and the EU (albeit different with implementation), has been overlooked. The inevitable flaws that any single volume is likely to present do not prejudice the usefulness of this book. In the experience of these reviewers, it is unreasonable to rely on a single source for all aspects of competition law, even in relation to a single jurisdiction. Therefore, producing work on five very different competition law regimes is, by its very nature, a daunting task. To undertake this in little more than 300 pages may seem like overreaching to some. Overall, the book will not (and, in all fairness, is not meant to) substitute itself to specialised local counsel. The selection of these countries might be contested, however that question is more relevant to the notion of BRICS altogether. Furthermore, almost all law books are born, to a certain extent, outdated and that certainly will be the case for any work dealing with rapidly evolving countries such as the BRICS. For example, the book could not take into consideration Brazil's latest draft guidelines regarding antitrust settlements. Finally, the book is notably silent on entire areas of competition law, in particular in relation to non-hard core cartel horizontal arrangements, distribution law, and any extradition arrangements in force with countries which criminalise cartel conduct, such as the US or the UK.

Future editions will benefit from an increased corpus of decisional and judicial enforcement of the new competition statutes of these countries. As William Kovacic candidly admits: '[n]o jurisdiction should expect to get it right the first time, or even the Nth time [...] No agency ever became proficient simply by studying the theory of competition law [...] The best time to make provisional conclusions about the success of implementation –especially the construction of a strong institutional culture – may be 20 years from the passage of the first law'. It would, therefore, be unfair to require otherwise from the authors of this book, which constitutes a very helpful addition to the available literature on the competition law in emerging economies.

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