

BOOK REVIEWS

The Global Limits of Competition Law (Global Competition Law and Economics), by Ioannis Lianos and D. Daniel Sokol, (Stanford University Press, 2012), pp.312, ISBN: 978-08-047-7490-1.

Competition policy accepts competition as the preferred structure to organise an economy. The US Supreme Court, for example, has explained that “[t]he heart of our national economy has long been faith in the value of competition,”¹ and, most recently, that “fundamental national values of free enterprise and economic competition,” are embodied in the antitrust laws.²

The problem, however, is that competition law is both (1) limited and (2) has its limits. That is, it is limited because its sphere of influence is mostly private and negative. With few exceptions, competition law regulates private activity rather than public activity. This is true despite the fact that government restraints are particularly “durable and harmful to competition across the globe.”³ And it is mostly negative in that its focus is on prohibiting conduct rather than separately creating conditions for competition to prosper.⁴

Competition law has its limits because it is difficult to determine whether certain conduct in certain contexts is competitive or anti-competitive. When agencies and courts err and prosecute or prohibit conduct that is actually competitive, they not only harm competition in that instance, but create ripples of competitive harm by deterring otherwise competitive conduct.

Ioannis Lianos and D. Daniel Sokol are the editors of the first book in the Stanford University Press Series, Global Competition Law and Economics, entitled “*The Global Limits of Competition Law*.” The title, of course, celebrates Judge Frank H. Easterbrook’s seminal article, “*The Limits of Antitrust*,” published just over 25-years ago.⁵ Easterbrook’s article was groundbreaking because

it emphasized the asymmetrical costs of errors from antitrust enforcement: “[J]udicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.”⁶ This book—a collection of articles by distinguished competition commentators throughout the world—similarly cautions its audience about the limits of competition, exploring economic, institutional, cultural, and other factors. But it also does a lot more. Alongside articles detailing competition laws’ limits, are articles that explain how we can unleash the potential of competition policy. Perhaps a more fitting name for this enlightening book is “*The Global Limits And Potential of Competition Law*.”

The book contains 15 separate articles, written by a global cast of authors, dividing roughly into five different parts: (1) The Competition Law Process; (2) The Economic Limits of Competition Law; (3) Competition Law and its Synergies with Other Areas of Law; (4) Competition Law and Institutional Design; and (5) Competition Law and Culture. The division of topics is accurate, but somewhat artificial and articles within each topic are certainly not comprehensive. That is not a criticism, as the book was not designed as a treatise. Readers should thus not expect to utilise this book as a thorough reference on Global Competition law. Instead, each article provides a taste of the broader topic at varying levels of generality. Indeed, the articles varied quite a bit, in both writing style and focus.

This reader tackled the book by starting on page one and reading to the end, but the book’s structure is also conducive to reading the articles out-of-order, or to picking only articles of interest. That is because the articles are completely independent of each other, and are merely grouped by broad subject-matter. There are, however, advantages to reading all of the articles, in whatever order the reader chooses: First, and most importantly, competition law is becoming more-and-more global in its focus every year, but most attorneys, judges, academics, and agency officials are heavily entrenched in one jurisdiction, with some but limited knowledge and experience in others. Indeed, most of the articles in this book are written from the perspective of one particular jurisdiction. The advantage to reading the entire book, therefore, is that the reader will expose oneself to several topics within competition law from the viewpoints of many different jurisdiction and their often differing approaches. As more time passes in this relatively-young world of global competition law, its participants will likely develop more jurisdictionally-diverse experience and knowledge. This book can contribute to that education because it presents several interesting articles by top-rate authors on various relevant competition law topics.

¹ *Nat’l Soc’y of Prof’l Eng’rs v United States*, 435 U.S. 679, 695 (1978).

² *Federal Trade Comm’n v Phoebe Putney Health Sys., Inc.*, 568 US (2013), Slip Op. p. 7.

³ D. Daniel Sokol, “Anticompetitive Government Regulation” in Ioannis Lianos and D. Daniel Sokol (eds), *The Global Limits of Competition Law* (2012), p.83.

⁴ An obvious response is that competition law allows competition to prosper by prohibiting anti-competitive actions. That is true, but a competition policy regime can, as many of the articles in the reviewed book explain, do so much more to support competition.

⁵ Frank H. Easterbrook, “The Limits of Antitrust” (1984–85) 63 Tex. L. Rev. 1.

⁶ Sokol, “Anticompetitive Government Regulation” in Lianos and Sokol (eds), *The Global Limits of Competition Law* (2012), p.83.

The second reason to read the entire book is that an article that at first glance may not seem as interesting or relevant to the reader, may surprise with its insights and value. For example, this reader knew that he would enjoy D. Daniel Sokol's article entitled "*Anticompetitive Government Regulation*," because anti-competitive conduct by or through the state is a strong interest, and experience with Professor Sokol's previous articles have been very positive. And the article was excellent: The writing was solid, and the article made a strong contribution, particularly with its discussion of the nature of government restraints, and what competition agencies can do to limit these restraints.

By contrast, this reader did not have any expectations about Julian Pena's article "*The Limits of Competition Law in Latin America*," based upon limited experience with the subject-matter. But the article was, in fact, one of the most interesting and insightful articles in the book. It is the book's final article, listed under the unique topic, "Competition Law and Culture." This well-written article discusses a seldom-discussed "limit" of competition law—the lack of support for competition itself in Latin America. It is a reminder that accepting competition as the preferred structure to organise an economy is necessary for an effective competition policy. Without cultural, political, economic, and institutional support for that idea, competition agencies and laws will not likely succeed. Thus, competition policy itself is normative, in that it must—to a certain extent—accept the value of competition to organize the distribution and creation of goods and services.

A theme that arose from reading all of the articles that is not in any one article (perhaps a synergy to combining the articles) is that global competition law has advanced a great deal in recent years, but it still has a lot of potential for improvement. It is not in its infancy—that was the pre-economics era—but it is also not yet at maturity. The book's articles collectively express this idea through varying angles.

For example, some articles describe how competition law, policy, or institutions can do more to support overall competition. To illustrate, Frederic Jenny, in his article "Competition Authorities: Independence and Advocacy," examines the independence of competition authorities and points out the important role that advocacy of that authority within a government can play in improving competition. He explains that this role is particularly important "with respect to public interventions in market mechanisms" because "economists have long suggested that the benefit of restrictive laws and regulation is concentrated on a small number of (often very vocal)

economic actors," even though the "costs of such public restrictions to competition are spread among many consumers and often nearly invisible."⁷

D. Daniel Sokol's article also effectively analyses competition-authority advocacy, suggesting that more resources should focus on public restraints, and that competition authorities should prioritise the ex post review of public restraints because there are real cost savings to removing certain of these restraints.⁸

Thomas K. Cheng, in his article, "*How Culture May Change Assumptions in Antitrust Policy*," explains that competition policy can improve if it takes cultural norms into account in particular jurisdictions.⁹ He argues, for example, that "[c]artels in countries with more trusting culture will tend to be more stable," thus mechanisms to "break down the trust among cartel members may be less useful in these countries."¹⁰

Other articles discuss the still uncertain place of competition law, relative to other areas of law or within institutional settings. These articles point out some of the literal "limits to competition law." For example, Daniel A. Crane explains "IP's Advantages over Antitrust."¹¹ The intersection of intellectual property and competition law provide some of the most interesting and complex questions that have yet to reach consensus. In this context, Crane explains the relative limits to competition law by arguing that intellectual property law can out-perform it as a regulatory tool: "First, whereas antitrust law requires a search for a violation of a norm—essentially a crime or a tort—IP can address issues of market power by molding substantive IP rights prospectively." Secondly, relative to antitrust law, "IP's remedial structure is more finely tuned to address complex problems of market power." Finally, IP cases provide "natural fault lines that allow superior substantive resolution of issues relating to access to IP."¹² Crane's arguments won't be the last words on these controversial issues, but they are a strong contribution to the debate.

Similarly, Damien M.B. Gerard suggests in his chapter, "A Global Perspective on State Action," that competition law regulation of state action might take a back-seat to "trade law, whether at [the] national/federal or supranational/global level."¹³ He argues that the "trade law system of analysis appears better suited to achieve the right balance between the pursuit of allocative efficiency objectives and the necessary deference for governments' sovereign choices."¹⁴ While there may be some benefits to shifting these issues to trade law, there are also drawbacks—namely that it would inevitably lead

⁷ Jenny Frederic, "Competition Authorities: Independence and Advocacy," in Ioannis Lianos and D. Daniel Sokol (eds), *The Global Limits of Competition Law* (2012), p.167.

⁸ Sokol, "Anticompetitive Government Regulation" in Lianos and Sokol (eds), *The Global Limits of Competition Law* (2012), pp.8398.

⁹ Thomas K. Cheng, "How Culture May Change Assumptions in Antitrust Policy," in Ioannis Lianos and D. Daniel Sokol (eds), *The Global Limits of Competition Law* (2012), pp.205–220.

¹⁰ Cheng, "How Culture May Change Assumptions in Antitrust Policy" in Lianos and Sokol (eds), *The Global Limits of Competition Law* (2012), p206.

¹¹ Daniel A. Crane, "IP's Advantages over Antitrust" in Ioannis Lianos and D. Daniel Sokol (eds), *The Global Limits of Competition Law* (2012), pp.117–26.

¹² Crane, "IP's Advantages over Antitrust" in Lianos and Sokol (eds), *The Global Limits of Competition Law* (2012), p.118.

¹³ Damien M.B. Gerard, "A Global Perspective on State Action" in Ioannis Lianos and D. Daniel Sokol (eds), *The Global Limits of Competition Law* (2012), pp.99n–116.

¹⁴ Gerard, "A Global Perspective on State Action" in Lianos and Sokol (eds), *The Global Limits of Competition Law* (2012), p115.

to a less objective standard and inject more “politics” in determining which anti-competitive government regulations survive and which do not.

In another approach, some of the articles advocate for improvements in areas within competition law. For example, in “Complications in the Antitrust Response to Monopsony,” Jeffrey L. Harrison examines how courts have treated Monopsony, which focuses on anti-competitive conduct by buyers rather than sellers.¹⁵ He provides a helpful overview of monopsony theory, and the similarities and differences with standard monopoly theory—including easy-to-understand charts with supply-and-demand curves. Harrison then explains how the US courts are a bit “off” in their treatment of monopsony, and how the rule can better conform to the economic theory.

In another article working within competition law—and explaining how it can better achieve its goals—Herbert Hovenkamp in “*Antitrust and the Close Look: Transaction Cost Economics in Competition Policy*,” advocates for a greater role for transaction cost economics in competition law.¹⁶ Transaction cost economics “generally assumes that business firms organize their activities so as to maximize their value, which they can do both by economizing and also by obtaining higher prices.”¹⁷ The fundamental “unit of analysis” for this approach is the “transaction, rather than the much broader set of goods or services that constitute a market in ordinary economic analysis.”¹⁸ It analyses transactions in the context of a limited range of trading partners, “depending on knowledge, previous investment, or technological commitment and past history.”¹⁹ After explaining the approach, Hovenkamp effectively applies it to various competition issues, particularly the problem of double marginalisation.

Finally, the final three chapters introduce a new perspective to competition law: Competition Law and Culture. These articles (including two discussed above) provide insights that should especially interest policy-makers, and provide, even if indirectly, a counter-argument to global standardisation of competition law.

This book has a little bit for everyone—academics, practicing attorneys, policy-makers, and students. It also cuts across major competition jurisdictions—from the United States to South America to Europe to Asia. The book’s disparate approaches, subjects, and viewpoints are a major strength, and collectively celebrate both the limits and potential of competition law.

I enjoyed reading this book. It reminded me that we are privileged to practice in an area of law with such great potential for growth and improvement.

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Competition Law in Lithuania, by Jaunius Gumbis, Marius Juonis, Laura Slepaite and Karolis Kacerauskas, (Kluwer Law International, 2011), pp.168, ISBN: 978-9-04113-688-6.

In an increasingly globalised world, it is now more important than ever for legal practitioners to keep abreast of the fundamental operation of and developments in competition and antitrust regulation in jurisdictions beyond their own.

Intended originally as a text for the *International Encyclopaedia of Laws/Competition Law*, the broad scope of issues covered by the authors in *Competition Law in Lithuania* provide a useful resource for practitioners seeking an insight into the regulation of competition in Lithuania. Similarly, it will be of interest also to competition agencies, academics in law and researches with interests in Lithuania.

Competition Law in Lithuania is succinct in style. That is not in any way to suggest that it is a summary or bullet point publication. Quite the contrary, the succinctness of the book is helpful since it allows the reader to focus quickly on core points. The book is clearly structured and written in an approachable language. It provides a concise introduction to Lithuanian competition law. The book contains everything one might want to find in a work of this type—the relevant background, a detailed discussion on substantive provisions as well as a comprehensive description of the enforcement system. The book offers up-to-date and comprehensive coverage of the most recent leading cases and legislative changes.

Competition Law in Lithuania is subdivided into three main parts. The authors begin by giving the reader information on the economic, legal and historical background of the development of competition law in Lithuania. The first part of the book then proceeds to a detailed examination of the relevant substantive provisions that make up competition law in Lithuania. The authors examine and discuss the meaning of various competition law concepts, such as undertaking, relevant market, agreements and concerted practices or market power and dominant position. The institutions in Lithuania and their roles in enforcement of competition law within Lithuania are also described in the first part

¹⁵ Jeffrey L. Harrison, “Complications in the Antitrust Response to Monopsony” in Ioannis Lianos and D. Daniel Sokol (eds), *The Global Limits of Competition Law* (2012), pp.54–65.

¹⁶ Herbert Hovenkamp, “Complications in the Antitrust Response to Monopsony” in Ioannis Lianos and D. Daniel Sokol (eds), *The Global Limits of Competition Law* (2012), pp.66–80.

¹⁷ Hovenkamp, “Complications in the Antitrust Response to Monopsony” in Lianos and Sokol (eds), *The Global Limits of Competition Law* (2012), p 67.

¹⁸ Hovenkamp, “Complications in the Antitrust Response to Monopsony” in Lianos and Sokol (eds), *The Global Limits of Competition Law* (2012), p 69.

¹⁹ Hovenkamp, “Complications in the Antitrust Response to Monopsony” in Lianos and Sokol (eds), *The Global Limits of Competition Law* (2012), p 69.