

Chapter 12

Corporate Social Responsibility and the Possibility of Private Transnational Governance in Competition Law

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ABSTRACT

Under economic globalization, anti-competitive acts transcend national borders and become a challenge for competition law as traditionally conceived. Most countries have been dealing with cross-border competition problems by using two basic methods: unilaterally extending national competition law's jurisdiction to acts conducted in foreign territory and cooperating in enforcing competition law. However, while the unilateral enforcement of competition law harms international comity, international cooperation in this area is constrained by conflicting national interests. Against the backdrop of such limits of statist mechanisms, this chapter examines the role of multi-national corporations in the enforcement of national competition law at a transnational level. It argues that when a multi-national corporation internalizes competition laws of countries as standards for its behaviors, the corporation can provide a mechanism to project those national laws at the transnational level by exercising its private power in a socially responsible way.

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INTRODUCTION

Under economic globalization, anti-competitive acts such as cartels, abuses of a dominant position, and illegal mergers transcend national borders and become a challenge for competition law as traditionally conceived. Most countries have been dealing with cross-border competition problems by using two basic methods: unilaterally extending national competition law's jurisdiction to acts conducted in foreign territory and cooperating in enforcing competition law. However, while the unilateral enforcement of competition law harms international comity (Phan, 2016), international cooperation in this area is constrained by conflicting national interests (Phan, 2018). Therefore, many of the transnational challenges of competition law that emerge from the global economic order and, more specifically, the nature of global value chains and international commerce, cannot be addressed through state law.

In the context that state-based methods dealing with cross-border competition law problems are not effective or prohibitively costly, this chapter suggests a private transnational regime to deal with the problems by arguing that multi-national corporations ("MNCs") can play a role in the enforcement of competition law in cross-border transactions through the application of contractor codes of conduct. This means when an MNC internalizes competition laws of countries, the corporation can provide a mechanism to project those laws at a transnational level using its private power. In doing so MNCs can help to enforce competition law in an international context that states are not likely to be able to provide in the foreseeable future.

This chapter contributes to the literature on transnational law from three perspectives. First, it examines a mechanism by which corporations can transform national law into transnational law. Second, while the literature on transnational law discusses private transnational rules such as best practices and good governance without explaining how these rules are made, this chapter analyzes a process that constructs some best practices and good governance. Third, this chapter shows that transnational law does not replace national and international law or diminish state regulatory authority or result in private hegemony. Transnational competition law discussed in this chapter helps to strengthen the regulatory power of states at the transnational level. It can enforce law of a less powerful country in the territory of a more powerful country and thus enhance justice and fairness in international society.

In addition, this chapter contributes to the literature on the roles of corporations in society by suggesting that some corporations may make business decisions that reflect what they think they should do in the public interest even if they are not obliged to do so. It does not claim that all MNCs will act in the public interest or embrace corporate social citizenship, but it examines factors explaining why some MNCs may do so. This chapter shows how corporations can, by internalizing widely shared social values, help to advance competition law at a transnational level. Although this

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