ABA Antitrust Law Section International Comments: The Value of Retrospective Analysis

By Melanie Krebs-Pilotti and Anne Layne-Farrar

An old biblical proverb tells us that “as you sow, so shall you reap.” With this adage in mind, the co-authors of this article, working as part of the Antitrust Section’s International Developments and Comments Task Force (IDCTF), are busy harvesting a veritable bumper crop of information about competition, consumer protection, and data privacy law and agency reforms across the globe, resulting from the Section’s practice of offering comments on draft legislation and agency guidelines. Good seeds make a good crop, and our abundant harvest is the result of years of valuable hard work and retrospective analysis by a growing cadre of Section members.

ABA Antitrust Section Comments

Competition, consumer protection, and data privacy law is not static, and agencies around the globe can always benefit from further refinement of their substantive and procedural rules. One of the major functions of the Antitrust Law Section (the Section) is to offer agencies and legislators around the world views on how laws, guidelines, and regulations can be strengthened and improved as learned through committee member experience and observation. The Section’s comments, led by the IDCTF and supported by many Section committees and members, are comprehensive recommendations that set out key principles of law and economics as applied to specific issues. In efforts to support convergence around sound policies, comments frequently rely on internationally recognized practices, such as those promulgated by the ICN and OECD.

Section comments primarily aim to provide practical guidance based on the decades of experience of the drafting team and other Section members. Drafting teams are diverse, drawing practitioners from a range of nationalities and experience (academia, in-house, government, law firm, economic consulting, etc.). When possible, drafting teams seek the input of practitioners who work in the jurisdiction where the comments will be filed, while ensuring that the comments represent the perspectives of our Section members. The International Law Section usually co-sponsors the comments, and others, such as the Intellectual Property Law, Science and Technology Law, and Business Law Sections, sometimes join as well. Comments are typically written after debate and discussion within the drafting group, and undergo further refinement as they go through the Section approval process, culminating in review by the Antitrust Section Council and final approval in the ABA “blanket authority” process.

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The Role of the Retrospectives

President Dwight D. Eisenhower once remarked that “[f]arming looks mighty easy when your plow is a pencil, and you’re a thousand miles from the corn field.”\(^2\) Arguably, the same could be said about the Section’s comments – it is easy to offer advice and guidance to jurisdictions from the comfort of our armchairs, with little reflection on whether those comments have influence and are acted upon.

As Section members invest immense amounts of time and industry in drafting comments and the Section wants the comments to be as effective as possible, the Section naturally wants to understand the impact of these efforts. Consequently, several years ago the IDCTF began a retrospective process to attempt to evaluate the influence of Section comments. IDCTF members track developments in jurisdictions where we have filed comments, and when a jurisdiction’s final version of a new or amended law, rule, or guideline is issued, the comment drafting team analyzes the extent to which the final version incorporates the Section’s recommendations.

Because it can be difficult to measure overall trends from individual retrospectives, the IDCTF began compiling retrospectives in an annual report that gathers information from the many individual retrospectives and provides a comprehensive review of Section comments and their results. The reports enable Section leaders to evaluate the effectiveness of recommendations by comparing success rates by jurisdiction, region, and topic (e.g., cartel, merger, process, etc.). The IDCTF has issued a retrospective report each year since 2016. We expect the retrospective report to be a yearly tool for self-reflection and analysis.

What have we learned from the retrospective reports?

1. Demand for Antitrust Section comments and recommendations continues to grow.

Antitrust is a growth industry, not just in the United States but around the globe. As a result, the Section is busy meeting a heavy demand for comments as antitrust laws and agencies have expanded to almost 170 jurisdictions.\(^3\) Some jurisdictions are developing and implementing their laws for the first time, while more agencies and legislatures are in the process of amending and updating existing rules and procedures or are expanding their range of enforcement activities. Since 2011, the Section has filed just shy of 200 comments around the world and has made close to 1,000 specific recommendations to help recipient jurisdictions enact the most effective policies and to promote convergence and sound enforcement worldwide.

In 2018, the Section filed 30 comments in 20 jurisdictions. 2019 was also a productive year, with 24 comments filed in 13 jurisdictions. There is often a significant lag between when Section comments are filed and when a jurisdiction finalizes a new rule or guideline. The discussion below presents data trends according to the year that the retrospective information became available for an enacted rule or guideline.

\(^2\) Dwight D. Eisenhower, Address at Bradley University (Sept. 25, 1956).

As shown in Figure 1 below, Section comments are increasingly directed towards agencies located in Latin America as well to South Africa. In 2019, a majority (51%) of recommendations discussed in the retrospective reports were directed to South American countries, in contrast to prior years where Asia comprised a greater share. The South African Competition Commission was the recipient of 10% of Section recommendations in 2019, a significant increase from earlier years when no or few recommendations were directed towards any agency in Africa. We look forward to tracking whether this wider distribution of recommendations continues in coming years.

![Figure 1](image)

Section comments continue to address more conventional antitrust topics (including mergers, abuse of dominance, and cartels/leniency), but the IDCTF has in recent years also observed an uptick in the range of comment topics to include data protection, digital platforms, sector-specific guidance on unfair trade practices, guidelines for referrals of cartel cases to prosecutorial agencies, and procedural fairness in agency investigations.

2. The adoption rate of Section comments is generally consistent over time.

As shown in Figures 2 and 3 below, a record number of recommendations were analyzed in the 2019 retrospective report, and the adoption rate of Section recommendations has remained generally constant over time.
Since 2011, approximately 40% of Section recommendations have been adopted by the recipient agencies. The overall adoption rate of Section comments in 2019 was 32%, a slight decrease from prior years, but generally on par with the historical average.

3. *Section comments and recommendations continue to be valued by foreign governments.*

The retrospective reports can offer valuable insights into the success of the Section’s comments, but caution is warranted as it can be difficult to discern the extent to which the adoption results of Section comments evidence causation rather than correlation. While we believe that Section comments carry weight with their recipients, it is hard to prove that our comments are a
deciding factor for action that an agency may have decided to undertake on its own or in conjunction with others’ comments.

At the same time, the 2019 retrospective report also indicates that the impact of Section comments is useful in ways not fully captured by adoption rates. Several agencies have explicitly requested that the Section provide input, and many have agreed to extend their comment deadlines to accommodate the Section’s review process, reflecting their desire to receive the Section’s input. After receiving comments, many agencies have expressed appreciation or have even responded in detail to our recommendations. In some instances, agencies have notified us that decisions to not adopt Section recommendations were for reasons unrelated to the substance of the comment.

Conclusion

The retrospective reports detail the potential of Section comments to positively shape competition, consumer protection, and data privacy laws across the globe and support convergence around sound policies. With the increasing number of agencies that are drafting new or revising their laws and guidelines, the opportunity for comments continues to grow, and it is heartening to receive positive feedback that underscores the value and impact of this work. At the risk of using one farming adage too many, we end with the note that so long as demand for comments continues, the IDCTF will to do its best to lead these efforts, “making hay while the sun shines.”