Preface and acknowledgements

If development economics has taught us anything, then it is that institutions matter. And yet writing which examines the functioning of particular institutions and the factors that influence the trajectory of their development, including their success or failure, is relatively rare. In the world of competition law there is a huge treasure trove of scholarly literature dealing with case law and with substantive issues in competition law and economics, but, albeit with significant exceptions, little that focuses on the institutions responsible for applying the law. It is, perhaps predictably, an area where practitioners – and by that I mean largely agency officials – lead the rich community of antitrust scholars. Institutions like the Organisation for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) have, for some time now, produced a growing library of institutional peer reviews and the International Competition Network (ICN) is deeply concerned with questions of agency effectiveness. The essays in this book focus on institutions. The authors are, for the most part, either practitioners or scholars who have a particularly strong record of engagement with agencies.

The most significant development in international competition law in recent times is the extraordinary burgeoning of national competition authorities. While competition statutes and their accompanying institutions were, until the 1990s, the preserve of a small number of the most developed economies, they are now commonplace across the globe, from Australia to Zambia and most countries in between.

This volume is effectively the companion to a book authored by the editor. That book – *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table*, also published by Edward Elgar – is concerned with the development of the South African competition agencies. A principal thesis of that book is that while global markets and essential similarities in the character of many national markets do permit a degree of homogeneity in national competition laws and the approaches of enforcers and adjudicators, particular national circumstances, both historical and contemporary, are enormously influential. They are, or should be, the factors that underpin governments’ key policy objectives; they account
for the public’s very understanding of the notion of competition; they
determine whether and to what extent non-competition objectives are
incorporated into the legislation and the decisions of adjudicators; they
determine the reach of competition law; they influence the extent to
which the conduct of dominant firms is investigated and prosecuted; they
lend legitimacy – or otherwise – to merger regulation.

To the extent that it is possible and helpful to generalise – and
the essays in this book demonstrate the limits of useful generalisation –
the spread of competition law enforcement is largely a product of the
economic liberalisation that swept the globe in the last quarter of the
twentieth century. The reduction of barriers to international trade and
investment – or, expressed otherwise, the internationalisation of many
key markets – coupled with the sweeping away of rules that stifled the
development of markets in many national economies exposed the rank
idealism that underpinned the celebration of ‘free’ markets. If markets
were to function efficiently they required enforceable rules, and front and
centre of the rules required were those governing competition.

However, those who seek the origins of national competition laws
purely in the imperatives of economic efficiency will also find that many,
if by no means all, national competition laws are rooted in considerations
of fairness and equity. In some countries, particularly those in which
markets had been comprehensively suppressed, liberalisation simultan-
eously led to sharp price increases, the disappearance of social safety nets
and the rise of a conspicuously wealthy elite; and so competition
authorities were established, or at least expected, to re-introduce a
semblance of protection and equity. In countries where protectionism and
strong elements of state ownership had given rise to a business class
strongly supportive of a previous repressive regime, competition laws
were introduced, in part at least, to level the playing field between these
established business interests and other social interest groups, such as
new business entrants and, particularly, small and medium-sized enter-
prises.

Purists may disapprove. They may insist that protecting the poor and
hungry or small farmers and retailers from competition or neutralising
powerful dominant firms, even those whose dominance has been secured
by past privileges and connections, will come at the expense of the very
economic efficiency that competition law is intended to promote, and
may ultimately be at the expense of the very interests that they ostensibly
aim to support. They would certainly insist that even if government
deemed it appropriate to support particular interest groups then this
should not be done by burdening competition law with multiple and
conflicting objectives.
However, these imperatives are powerful and the legitimacy and, hence, efficacy of the competition law and its enforcement may well be contingent upon it finding an accommodation with these conflicting values and objectives, if indeed they are in conflict. My point is simply that these historical and contemporary environmental factors will inevitably inform the drafting and the application of a statute as socially and economically significant as that governing market rules. This does not mean that the economic textbooks should be discarded any more than that the accumulated wisdom acquired through decades of enforcement, scholarship and jurisprudence be ignored by the newer competition regimes. It simply means that economic rules are applied in concrete and particular contexts, including equity considerations and objectives, which cannot be ignored either.

This collection comprises five country studies – of Hungary, Mexico, South Africa, Thailand (with a comparative perspective on South Korea) and Zambia – and two essays that explore multinational issues in antitrust. From every conceivable perspective the countries chosen represent a diverse range of national economies and societies. However, the choice of these five – or six if the South Korean component is factored in – is dictated by particular features of both their economic and political environments that bear significantly on the nature of the competition law project and the prospects of its success.

The essays will speak for themselves and no attempt will be made to summarise or synthesise them here. However, in each instance the form that the competition law project took and its successes and failures are deeply rooted in particular characteristics of each of the countries in question. These range from Hungary’s place in the erstwhile Soviet bloc; periods of severe economic crisis and a historically powerful business elite in Mexico; Thailand’s periodic swings between a government dominated by a thoroughly corrupt, anti-reform business elite and reformist, repressive military rule; Korea’s adherence to powerful, state-driven industrial policy and subsequent and largely successful attempts, in which the application of competition law played an important role, to reverse this state-centred approach to economic development; and in Zambia the simultaneous presence of a resource-extractive formal sector dominated either by foreign-owned multinational corporations and state ownership, on the one hand, and a largely informal small business sector. While the particular South African features that influenced its competition law are extensively dealt with in Enforcing Competition Rules in South Africa: Thieves at the Dinner Table, the South African essay in this collection analyses recent court decisions whose lack of appreciation of
some of the key features of competition law has challenged and undermined an otherwise largely successful introduction of a competition law regime that enjoys significant public support. It serves to underline that in promoting a competition culture, it is the courts and the legal system that may be least capable of departing from deeply engrained and inappropriate practices and approaches, characterised by an overbearing emphasis on procedure and a black letter approach to the interpretation of social and economic statutes.

The volume is rounded off by two studies of key multinational themes in competition law. Both are concerned with the institutional response in the arena of competition law to the internationalisation of markets, essentially with the question of how nationally fragmented competition rules deal with markets that traverse national boundaries. The first of these two essays is principally concerned with global institutions – in particular the International Competition Network (ICN) whose very composition ensures that while it is bound to recognise the powerful imperative that international markets give towards convergence in the application of national competition law, it must simultaneously recognise the salience of national circumstances and concerns. The final essay in this volume considers the possibility of utilising regional agreements between countries as a mechanism for strengthening the application of competition law, particularly in developing country regions.

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