1. Introduction and outline

I INTRODUCTION

More and more countries are adopting some form of competition policy. Very often the approach has been to follow those countries with the longest traditions in this area (such as the USA) or, more recently, as a requirement for joining a regional grouping (such as the European Union – EU). In common with other laws the scope of competition policy has been national. While competition authorities may strive to treat all firms equally, whether domestic or foreign, the reach of their decisions has, for the most part, stopped at the national frontier. The criteria used to arrive at a decision on a competition issue have been national rather than international.

A simultaneous change has been the widening and growth of international markets. Several interrelated factors have contributed to this remarkable development. Firstly, continued tariff reductions in the successive General Agreement on Tariffs and Trade/World Trade Organisation (GATT/WTO) rounds have promoted the rapid growth of world trade. For example, whereas average tariff levels in 1940 were 40 per cent, following the completion of the Uruguay Round in 1995 the average was reduced to under 5 per cent (Fox and Ordover, 1995). Attention has tended to shift therefore to non-tariff barriers to trade. Secondly, while international trade has continued to grow, foreign direct investment has recently grown much faster. As Safarian shows, throughout the 1980s and early 1990s (with a slight blip around 1991–2) foreign direct investment was rising more rapidly than either foreign trade or domestic production (Safarian, in Waverman et al., 1997). An important part of this investment took the form of international mergers and acquisitions, strategic alliances, joint ventures and research consortia. Thirdly, the international flow of investment has been aided by the marked reduction in controls over capital movements, and like much else, the revolution in information technology.

This rapid and increasing integration of national markets has led to some prominent international competition cases that have highlighted the new character of some old problems, and have also heightened political tension between major trading nations.

The increased attention given to non-tariff barriers to trade has also underlined the continuing controversy over anti-dumping policy. Empirical studies helped to confirm what many observers have long maintained:
anti-dumping actions, whatever their original intention, have become a means of protecting domestic industry, and in some cases a facilitating device for collusion. There have been many calls for major reform of the policy: see for example Messerlin (1995), Hoekman and Mavroidis (1996a), Niels and tenKate (1997), and Pierce (2000).

Together these developments appear to make a strong case for an international effort to co-ordinate competition policy. At its first meeting in Singapore at the end of 1996 the WTO set up a working party which was given two years to set out an agenda and analyse the central issues. In the course of its deliberations it considered a large number of detailed proposals for greater co-operation, including the creation of a new world organisation. It is clear from the analysis accompanying many of these proposals, however, that a major impediment to increased co-operation is likely to be the widely different interpretations that can be given to a particular set of economic circumstances: for example, vertical restraints, collaborative research and development, efficiency gains and wider effects of large mergers, and the amount of information disclosure dominant firms should be obliged to make. These differences reflect the fact that the guidance offered by economic theory for an international competition policy is more ambiguous and open to alternative interpretations than that for international trade policy. International co-operation on the former is thus likely to be even more difficult than it has been for the latter.

II COMPETITIVE ANALYSIS AND TRADE POLICY

Restrictions on trade in the form of tariffs and non-tariff barriers (such as quotas, subsidies, voluntary export restraints, and discriminatory government procurement policies) are imposed by governments. In contrast, restrictions on competition (such as collusion, collective boycotts, predatory behaviour and monopolisation) are imposed by firms. At first glance it might seem that as traditional forms of protection are abandoned, the smaller is the need for competition policy, whether national or international. The increased scope for imports and market entry by foreign direct investment may not only weaken positions of domestic dominance but also destabilise domestic cartels. According to this argument trade policy advances, in the form of tariff reductions, are a substitute for competition policy. After a formal analysis of this question Neven and Seabright in Waverman et al. (1997: 401) concluded that the two policies are very imperfect substitutes. There will be many contexts when increased vigilance on the part of competition authorities will be necessary, not least because as world trade increases 'a growing proportion of the gains and losses from anticompetitive behaviour will tend to spill across...
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national borders’. Precisely because firms may have to promote their own private protection through non-tariff means, detection of anticompetitive behaviour may become more difficult and, once detected, more troublesome for the authorities to punish because the firms involved may be registered elsewhere and have plants in many different countries. In other contexts anticompetitive behaviour by domestic firms may be tacitly accepted by home governments anxious to appease a powerful business lobby. At an analytical level the competition policy issues remain unchanged but the outcomes may be fundamentally different if an international rather than purely national perspective is taken.

In many ways this is the heart of the problem. Countries with the most highly developed and well established competition policies (now being used as models by developing and transition economies) have in the past taken a purely national view of the issues. This is most glaringly illustrated by the exemption of export cartels from the reach of competition policy. The USA along with Germany, Japan and until very recently Britain all exempt export cartels. Agreements between firms to raise prices and share markets that would be condemned unequivocally if applied to the domestic market are thus allowed when applied to foreign markets. Although empirical research suggests that export cartels have not been of great quantitative importance (Scherer, 1994: 46) their significance lies more in the message they convey to others about attitudes to competition policy questions. If an export cartel allows participating companies to raise prices above competitive levels for foreign consumers, rents will be earned and employment secured at home. The rationale of the exemption has usually been to allow small companies to share the possibly substantial costs of mounting an effective foreign sales campaign. What evidence there is, however, suggests that export cartels have by no means been confined to small and medium-sized firms. A narrow, chauvinistic attitude rather than a wider, cosmopolitan view is conveyed.

A more recent and equally controversial exemption – collaboration – has been driven by somewhat similar motives, although here the issues are more complex. It is acknowledged that in certain industries at the frontiers of technological advance, the amount of resources required to sustain an effective research and development programme are beyond the scope of a single enterprise. Collaboration between a number of companies not only allows them to share the burden but also uses scarce scientific talent more effectively. The negative side of the argument is that the restraints imposed by competition policy have inhibited or prevented such collaboration in some countries, thus putting them at a disadvantage compared with others who take a more benign view. Complete or partial exemption from the competition laws may follow (as in the USA and the EU) on the grounds that otherwise an international comparative advantage would be lost. The policy problem,
however, is to ensure that the benefits from the technical advance are not outweighed by collusion engendered by exemption from the competition laws.

Despite these complexities there is probably more agreement on the adverse effects of ‘naked’ collusion than on the other issues addressed by competition policy. Many jurisdictions also have provisions to inhibit or prevent the abuse of market dominance by a single firm. It may therefore be claimed that there is no need for an extra international dimension: the national policy is sufficient to deal with any questions of abuse. In some cases this may be true. Long ago, for example, an antitrust judge in the USA clearly expressed the principle that the application of the antitrust laws proceeded regardless of the nationality of the firms concerned. However a number of recent cases in different countries suggest that there are legitimate concerns. In particular where a domestic market is dominated by one firm, market access for foreign firms may be highly restricted or impossible because of the very close association between the dominant firm and its distribution network. Although it may be open to a determined foreign firm to establish its own network, for a variety of reasons (explored in Chapter 4) this may be difficult and costly. Thus the foreign firm may always be at a disadvantage.

Vertical exclusion, due to the strategic behaviour of dominant firms, may have been the most frequently heard complaint, not least because of the number of allegations made by US firms about blocked access to Japanese markets. However horizontal exclusion by dominant firms has been discussed in a domestic context for many years without there being any clear-cut conclusion. For example, the use of predatory pricing by a dominant firm may occur in some circumstances, but far less frequently than might once have been thought. More discreet, non-price methods may be available to disarm or dissuade an optimistic entrant. Where the issue of predatory behaviour has really entered the globalisation debate has been in relation to anti-dumping policy. For many observers the way anti-dumping actions are applied is protectionist rather than preventing damage to domestic firms from anticompetitive behaviour. Indeed dominant domestic firms may be able to use anti-dumping policy as a means of excluding foreign competition when other methods fail. Critics point to the more lax standards frequently employed in anti-dumping actions compared to the stricter standards used by competition policy officials in predatory pricing cases. On antitrust criteria it is claimed very few, if any, antidumping actions would succeed. Trade policy issues are usually kept separate from those of competition policy. On this question, however, many economists are prepared to argue in favour of an alignment of the two along stricter competition policy lines.

A third area of competition policy has recently received more than its share of attention in the debate over market globalisation. Mergers sometimes seem
to raise all the significant competition issues at the same time. A substantial
domestic merger may be assessed by the national competition authority using
purely domestic criteria. If, for example, it is anticipated that the merger might
bring domestic benefits by exploiting a position of enhanced market power in
a foreign market, the domestic authority might feel inclined to allow it. They
have no obligation to consider the international ramifications. Equally
complicated and increasingly common as globalisation widens so many
markets, is the large international merger which may have an impact far
beyond the frontiers of the two countries most directly involved. Teasing out
the competitive implications in all countries directly and indirectly involved is
likely to be highly complex. Currently no one competition authority has an
immediate interest in carrying out such an exercise. However, the companies
have no choice: they must defend the merger in each country affected. There
are many examples of companies facing the costs of defending their merger
proposals in multiple jurisdictions some of which may appear quite remote
from the primary market of the firms involved.

These policy concerns – collusion, horizontal and vertical exclusion, and
mergers – form the core of most competition policies. Individual countries
may differ widely on the criteria they use, the level of diligence involved and
the types of penalties employed, but the scope of policy is likely to be broadly
similar. Most countries will also try to treat domestic and foreign firms equally
within their jurisdiction. Other government policies may have different objec-
tives. A whole battery of ‘state aids’, including direct and indirect subsidies,
partisan government procurement policies, complex and bureaucratic import
regulations, and widely advertised ‘buy domestic’ campaigns, may
disadvantage or exclude foreign firms. These policies have always been
present to a degree, but market globalisation has brought them and their effects
on competition into a much sharper focus.

III OUTLINE OF THE BOOK

The book is divided into three parts. The remainder of Part I provides a
framework for the subsequent discussion. Thus Chapter 2 sets out briefly the
theoretical underpinning for competition policy and free international trade,
including the continuing controversy over the precise role of government. Part
II is concerned with the impact of market globalisation on what are usually
thought of as traditional antitrust concerns. A chapter each is devoted to
collusion and other restrictive practices (Chapter 3); government sponsored
‘voluntary’ co-operation (Chapter 4); vertical restrictions and market access
(Chapter 5); pricing strategies of dominant firms (Chapter 6); and international
mergers (Chapter 7). For most topics the economic analysis is followed by a
introductory discussion of recent cases. This allows us to emphasise differences in legal procedures between the various countries involved.

Part III considers the feasibility of the development of a truly international competition policy. It includes in Chapter 8 a formal analysis of the possibility of having any policy based on international criteria administered through an international agency. Chapter 9 then considers the various attempts that have been made since the end of the Second World War to establish such a policy. In the light of the limited success of these efforts, the concluding chapter discusses the prospects for more effective co-operation in the future.