

13. Conclusion

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Any attempt to comprehensively summarize the content of this book is an all but impossible task given the very substantial differences between the nations discussed, and so this chapter will not try to do so.

In considering the current position of the competition policy environment in each of the countries discussed, it is interesting to note the variety of reasons for competition policy adoption. Some countries adopted as a result of endogenous choice, perhaps due to the advocacy of academic or political figures that reflected the notion that, in an increasingly globalized economic system, retaining an isolated and inward-looking domestic economy was simply no longer viable. Australia is an obvious example of this phenomenon. Adopting or strengthening an existing competition regime to assist the restructuring of the domestic economy is another circumstance that can promote reform. India might fall into this category. Often such a policy choice is a parallel development to the liberalization of an external trade regime. Pro-competition measures sometimes follow from bilateral trade agreements, as was the case in Singapore, or because of regional trade agreements as in ASEAN, where this provided a major impetus for both Malaysia and the Philippines to act. Application for membership of the World Trade Organization (WTO) and an attempt to attract foreign investment appear to have been incentives for Vietnam and also perhaps for China, though adoption was not a requirement of WTO membership.

We have also seen other situations in which competition laws have been introduced, including their imposition by an occupying power as was the origin of the Japanese law. Compulsion as a condition for a financial rescue package, made necessary by a financial crisis, was a catalyst for adoption in Indonesia. The same crisis also prompted adoption in Thailand. In South Korea the weak application of the law and its inherent deficiencies were perceived to be among the causes of the financial crisis in 1998 and a strengthened regime resulted.

As part of the pro-competition policy choice, the adoption of a legal instrument is the clearest indication that a country is in earnest in its

determination to genuinely pursue such an agenda. However, it would be a mistake to conclude that merely enacting a statute is conclusive evidence of the political will to create a viable enforcement mechanism or to achieve a substantial opening of previously closed or restricted domestic markets. Licensing or other regulatory rules, state or private monopolies, and pervasive cartels may all contribute to the failure of a pro-competition regime to foster real change.

As regards substantive competition law, most of the countries considered in the book have adopted the usual three prohibitions against abuse of a dominant position, anti-competitive agreements and anti-competitive mergers. The detailed scope of the precise legal rules and the procedures adopted vary substantially, but all the regimes studied here include at least this tripartite structure. Divergences between the statutes include whether the statute is a pure competition law or whether it also includes consumer protection provisions and/or rules against ‘unfair’ trading – passing off, trade fraud, misleading advertising etc. Whether these issues are included in the same statute varies greatly and is often determined by the structure of the legal system concerned and a miscellany of other factors. There is no definitive answer to the question whether it is optimal to adopt any particular legislative scheme.

As regards the enforcement mechanism, most countries adopt the EU administrative model, with Australia being the only prosecutorial system. The choice of the enforcement system is often determined by the nature of the underlying legal system, but whether the system is effective depends on a wide variety of factors, including the legal prohibitions contained in the statute, whether the objectives of the system are made explicit and clear in the law or by the enforcement agency in guidance, and whether adequate resources, including suitably motivated and qualified personnel, are made available to the enforcement agency.

As Professor Fels has demonstrated in Chapter 12, the ‘authorizing environment’ is also crucial in determining whether or not a pro-competition system can achieve its objectives. As defined by Professor Fels, the authorizing environment includes ‘the political environment that gives rise to the laws, regulations, resources and other political requirements that are the source of the authority, legitimacy and values that govern the work of the regulator’. Clearly, these factors vary widely between each of the countries studied in this volume. The political environments in the nations considered here cover the spectrum from robust liberal democracies to authoritarian communist regimes. The maturity and stability of the political systems studied is also very variable as is their transparency, integrity and plurality. These environmental factors impact the way in which the competition regulator is able to carry out its functions and the ‘envelope’

within which the agency is able to operate, setting invisible boundaries which fluctuate over time due to the variability and changes in the authorizing environment.

The interaction of the competition regulator with its authorizing environment will often determine how successful the agency is in achieving pro-competition goals. The environment may be hostile or accommodating and this can make a significant difference as to whether the regulator can promote a pro-competition agenda to the political class of legislators and administrators, the business sector, and the general public. Successful regulators must act as competition advocates to ensure that pro-competition arguments are heard by all the stakeholders in a particular society, as without their positive influence it is unlikely that pro-competition rules and regulations can be enacted and anti-competitive rules prevented, restricted, or repealed. Competition advocacy can, in this way, expand the 'space' within which the regulator operates. Where a regulator is successful in expanding its sphere of influence, it can advocate the benefits of change to government and the judiciary, the academic community, and the media, as well as to direct stakeholders in the business community and to the public at large.

Factors that enhance the success of regulators as competition advocates include the openness and transparency of decision making, the availability of media channels to facilitate debate and the existence of a critical mass of engaged and knowledgeable academics who can inform such debates. On the other hand, powerful vested interests or high levels of corruption can suborn officials, judges or politicians from carrying out their functions honestly and in the public interest, so obstructing competition agencies in their advocacy and enforcement roles. As we have seen, these factors show great variability between the nations studied, and the relative success of any given domestic regime will no doubt be closely correlated with the level of transparency and accountability of the relevant political system.

As for the future, the development of coherent, rational and effective competition policy with the robust enforcement of competition law to achieve enhanced levels of competition depends on the many political economy factors the authors have discussed in their respective contributions to this book. One thread though is clear – unless the political economy environment of the specific nation is supportive, it is highly unlikely that even a well-resourced regulator, with a rational and comprehensive law to enforce, will succeed.

Clearly, countries that exhibit any or all of the following factors – low levels of economic development, limited skilled human resources, weak institutional systems, high levels of corruption, significant concentrations of economic power, grossly unequal distributions of wealth, and political

ideologies that are ambivalent towards or suspicious of competition – are less likely to achieve substantial success in implementing a pro-competition agenda.

The development of competition policy and law in Asia is an issue that will continue to fascinate observers for many years to come as a result of the increasing importance of the region to the world economy. Most competition regimes in the region are at a very early stage of development and so further study will be needed to determine whether this experiment in adopting competition as an important organizing principle of Asian economies will bring effective change and the benefits attributed to the competitive process to the citizens of this large, dynamic and diverse region.

