
1. Themes

John Duns, Arlen Duke and Brendan Sweeney

The growth in the number of antitrust regimes in the past 25 years has been nothing short of phenomenal. In the 1980s approximately 20 countries had some form of antitrust regulation. Enforcement was by no means consistent or wholehearted. Now over 120 jurisdictions boast an antitrust regime.¹ While enforcement is still inconsistent, the trend towards antitrust is, when viewed broadly, nothing less than an example of global convergence. The convergence, however, is to a set of ideas not necessarily a precise set of rules. Broadly speaking, the aim of this book is to take a look at that convergence from a comparative perspective. As so many antitrust regimes have had little time to settle their rules the comparison is heavily weighted towards the developed capitalist economies, particularly the United States and the European Union, although the rules and procedures of emerging jurisdictions receive close attention in the final Part of the book. As the book is designed to be a research handbook, all chapters present descriptive material aimed at making the issues discussed accessible while also engaging with contemporary debates and issues.

Of course, contrasting views on various aspects of competition law is not solely the province of interstate analysis. Vigorous, internal debate continues to be the order of the day even (and perhaps particularly) within the United States which has had over a hundred years of antitrust experience. The different approaches adopted when assessing market power provide a good example of such contrasting views or approaches.

The book is divided into four Parts. Chapter 2, in Part I, provides a view of competition law through the lens of globalisation. The chapter traces the history of ‘global’ competition rules, a story that demonstrates the vagaries of shifting, state imperatives. This raises the question whether global rules are either necessary or indeed feasible.

Part II investigates the substantive provisions that are common to nearly all competition law regimes. Part III examines enforcement issues, in particular the criminalisation of cartel conduct and the growing use of

¹ See the website of the International Competition Network, the membership of which has grown from 16 in 2001 to well over 100 today.

4 *Comparative competition law*

private enforcement. Part IV considers the emergence and growth of competition regimes outside the developed states.

PART II: THE SUBSTANTIVE LAW

Most competition law regimes proscribe a range of conduct that includes anti-competitive horizontal and vertical agreements, abuses of market power and anti-competitive mergers. Common to understanding each of them is the notion of a 'market'. Therefore this Part begins by examining the notion of market; it then proceeds to a discussion on each type of conduct typically prohibited by competition law regimes.

Despite the growing sophistication of econometric modelling, determination of the market remains a cornerstone of competition regulation. It remains important for differentiating lawful from unlawful conduct in both horizontal and vertical agreements, in isolating abuses of market power and in determining the outcome of mergers. Chapter 3 examines the concept of market as it has developed in the more developed competition regimes. Thus, the author discusses the purpose of market definition, the nature of markets, the theories that surround the delineation of markets and the future of market definition as a central tool of competition analysis.

The pre-eminent concern of competition regulation is the proscription of hard-core cartels. This is also the area in which there is most agreement between states. In fact, convergence towards the goal of eradicating hard-core cartels has been quite remarkable. Nevertheless while there is broad agreement that hard-core cartels do substantial economic harm, identifying such cartels can be problematic. Problems begin with the threshold notion of collusion or agreement: what constitutes collusion and how is it proved? How should parallel conduct, particularly in oligopolistic markets, be treated? Chapter 4 explores how the United States and to a lesser extent the European Union have approached this threshold issue.

Chapter 5 examines the content of horizontal agreements. As the author points out the variety of horizontal agreements is infinite, running from the clearly anti-competitive to the clearly pro-competitive. So a system of categorisation is required. The object is to seek a workable balance between 'the need for business certainty on the one hand [and] an effective assessment of whether the agreement is anti-competitive on the other'. The modern trend is to move away from a simple binary categorisation (per se/rule of reason) and to recognise that horizontal agreements exist along a competition continuum.

Competition law regimes invariably contain a provision aimed at prohibiting abuses of market power. However, the object or objects of such provisions are not always clear. Is the main concern with allocative efficiency or is it with some other outcome such as wealth transfers? This lack of a clear organising principle affects the definition of market power and its application. Drawing on the vast literature that has examined this issue of market power the author of Chapter 6 contrasts the two dominant approaches, the classical approach of the Chicago school and the strategic approach. The author concludes by examining how Australian courts have approached key examples of market power conduct, refusals to deal, bundling, predatory pricing and raising rivals' costs.

One of the most perplexing issues confronting competition policy is the intersection between competition law and intellectual property rights. At its core intellectual property law recognises a right to exclude. This right to exclude has obvious potential to conflict with competition law's prohibition on anti-competitive exclusion. How this tension is being resolved is the subject of Chapter 7. The author examines the tension through a variety of activities – refusals to license, settlements, product hopping, standards setting and patent pools. In each case the author compares the situation in the United States with that in Europe.

Merger regulation, which forms part of almost all competition law regimes, differs from other forms of competition regulation in a number of respects. First, it necessarily employs an *ex ante* approach. The speculative nature of *ex ante* analysis coupled with the possible long-lasting structural consequences of merger remedies increases the likelihood and repercussions of regulatory errors. Secondly, the globalisation of commerce has resulted in a significant number of mergers being international in character. This has tended to highlight national policy differences. While most states have similarly worded merger laws, significant differences exist in how the laws are interpreted and applied. These differences extend not only to the basic objectives of a merger regime, but also to the types (and weight) of evidence used to inform decisions. There are also important procedural differences. Chapter 8 examines these issues.

Chapter 9 examines non-price, vertical restraints. No other area of antitrust regulation has been subject to such 'dramatic shifts' in the way in which antitrust regimes approach the subject. Given the wide variety of possible restraints the author first sets out a taxonomy of restraints. While this creates problems of classification, it enables some consistency in decision making. States disagree over the manner in which various categories of restraint should be handled. For example, the European Union's commitment to a single market has influenced how European

authorities have approached territorial restraints. As with other areas of antitrust concern, the trend in the developed states is away from *per se* illegality and towards a rule of reason analysis. How states tackle this issue is the subject of Chapter 9.

Chapter 10 investigates price-related vertical restraints, often referred to as resale price maintenance. The notion of the resale price being set by the supplier clashes at a fundamental level with the antitrust notion of the market as price setter. For this reason historically a rigid approach was taken to the practice of resale price maintenance; it was proscribed absolutely. This view came under sustained attack by scholars from the so-called Chicago school of antitrust who argued that resale price maintenance, like other forms of vertical restraint, is invariably imposed for pro-competitive reasons. However, the claimed pro-competitive effects and efficiencies are not universally accepted. Thus, in the US it was not until the 1990s that maximum resale price maintenance was recognised as qualitatively different from minimum resale price maintenance. This chapter analyses the changing attitudes to, and sophistication in dealing with, resale price maintenance in the US and compares it with the situation in the European Union.

PART III: ENFORCEMENT AND SANCTIONS

A notable feature of competition regulation has been the concern with appropriate penalties and remedies. In relation to cartels the issue tends to centre round the notion of deterrence. Thus, while other goals such as compensation are important, the key is deterring cartels. This Part begins with a discussion of public enforcement (Chapter 11). Two contemporary aspects of competition enforcement are then considered, namely the trend towards criminalising cartel conduct (Chapter 12) and the growth of private enforcement (Chapter 14).

Another notable feature of competition regulation has been the growth in cases that have an international aspect. Many cartels, for example, are no longer purely domestic affairs inflicting purely domestic harm. Just how states respond to the jurisdictional issues this creates is discussed in Chapter 13.

No matter what form competition laws take, the proper functioning of the institutions entrusted to enforce such laws is a (or in most jurisdictions the) key factor determining the law's efficacy. Chapter 11 introduces the reader to the various institutional structures adopted to enforce competition laws and assesses the merits and weaknesses of such arrangements. Detection strategies adopted by, and investigatory powers

given to, enforcement agencies are also examined. Drawing on the highly influential theory of responsive regulation, the chapter explains the various methods adopted to promote compliance with competition laws before examining political influences and the increased importance of international cooperation.

Chapter 12 examines an important aspect of public enforcement, the trend towards criminalisation of hard-core cartel conduct. This trend is quite noticeable, particularly in many developed states. It owes much to the prosecutorial zeal and the proselytising efforts of the US Department of Justice. However, convergence is neither universal nor inevitable. As the authors point out, criminalising conduct lies close to the heart of state sovereignty: thus, while a trend towards criminalisation is apparent it may not be on a sound footing if it lacks bottom-up domestic support.

The growth of domestic competition regimes coupled with the internationalisation of many markets and the multinational nature of many firms has given rise to problems of enforcement coordination across borders. A key aspect of this has been the search for an appropriate level or theory of extraterritorialism. This is the subject of Chapter 13. While states have adopted different rules, there is widespread recognition that state sovereignty no longer demands a strict territorial approach to jurisdiction. There is also a growing recognition that expansive extraterritorialism is not compatible with a world of competition regimes. This is most notable in the recent trend in the United States to constrain the extraterritorial application of the US antitrust laws.

The role of private enforcement in competition regulation is an issue that has generated considerable debate both domestically and internationally. As with so many areas of competition regulation, the United States has been at the forefront of the push for greater private enforcement. Of course, this is not surprising having regard to the nature of antitrust law in the United States, where private parties have always had a significant role in enforcement. However, the practice in most other states has been an almost total reliance on public enforcement: indeed, private enforcement has been regarded with suspicion. Chapter 14 examines the history, objectives and consequences of private enforcement, and how the attitude to it is changing in many states.

PART IV: COMPETITION LAW IN SELECTED JURISDICTIONS

As already noted, the growth of competition law regimes has been quite remarkable, from 20 in the 1980s to over 120 today. Countries as diverse

8 *Comparative competition law*

in their political, social and economic structures and institutions as China, India and Brazil now have competition regimes. Even among the 20 countries that had a competition regime in the 1980s, some existed more on paper than in practice. Japan is an example that readily comes to mind. So far for obvious reasons this study has tended to concentrate on the United States and the European Union. Part IV is designed to address this imbalance by examining the competition regimes in Japan, China, and three South American countries (Brazil, Chile and Colombia).

Chapter 15 investigates competition law in Japan. Although Japan has had a competition regime since 1947, it is only in the last two decades that it has flourished. According to the authors, while there have been significant advances in the development of substantive competition standards, the real change in Japan's competition regime has been in the area of enforcement. Undoubtedly the Japanese experience has lessons for developing Asian countries.

The evolution of competition law in China is examined in Chapter 16. That evolution has been relatively speedy and shows little sign of abating. Given the economic, political and social differences between China and the Western developed economies, China presents as an interesting study in legal transplantation. The result is what the author refers to as a legal transplant with Chinese characteristics. The result is a competition regime making steady progress in the face of some significant limitations and distortions.

Competition laws have been widely adopted within South America, but they have not been widely enforced. The South American experience demonstrates the importance of political, economic and social realities to the implementation of competition regimes. Without a commitment to free markets, competition regulation struggles to gain any effective purchase. When it does gain purchase it will necessarily reflect local conditions. In Chapter 17 the authors compare the situation in three South American countries (Brazil, Chile and Colombia) from the perspective of goals, administration, sanctions and substantive standards. In each of these countries competition law has moved from a shaky beginning to a reasonably robust presence.