International Perspective Competition Policy Asia Pacific Region Regional Economic Development policy to Planning to Investment Opportunities in Vietnam Hanoi

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Professor Allan Fels
Chairman
Australian Competition and Consumer Commission

1. Introduction

This paper discusses the nature and role of competition law (also known as antitrust or trade practices law) in the modern economy. Competition law is discussed in the broader setting of competition policy as a whole, that is all policies which affect the state of competition.

2. The Nature of Competition Law and Policy

Traditionally competition law has taken the form of antitrust laws. The first were enacted in North America at the turn of the century. The main USA laws are the Sherman Act 1890, the Clayton Act 1914 and the Federal Trade Commission Act 1914. Most OECD countries introduced competition laws after World War Two and all have done so by now. The most important body of competition law in Europe now is that of the European Union. Articles 85 and 86 of the Treaty of Rome form the core of competition policy although some other articles of the Treaty e.g. those relating to State aid also play a significant role in competition law. Australia and New Zealand adopted Trade Practices laws in 1974 and 1986 respectively.

Antitrust laws aim to prohibit:

- anticompetitive agreements eg price-fixing agreements between competitors
- anticompetitive practices eg resale price maintenance, anticompetitive exclusive dealing; and
- misuses of market power eg predatory pricing.

However, traditional antitrust laws form only one part, albeit important, of competition policy. The term "competition policy" refers to all forms of policy that affect the state of competition and the economy. Competition policy can therefore include various elements of trade law, tax law, intellectual property law, foreign investment law and a wide range of other policies.

3. Why adopt a competition policy?

In 1776 Adam Smith in The Wealth of Nations recognised the importance of market processes in achieving an efficient allocation of resources. According to Smith the pursuit in markets by individuals of their own interest generally served to maximise the interests of the public as a whole. However, Smith stressed that the pursuit of

individual interest only worked in the public interest if there was competition. His treatise contains numerous attacks upon the many forms of restrictions on competition that existed then (and many of which remain to this day).

Over two hundred years later it is generally accepted by most economists that a market economy does not work well in the absence of competition. Monopoly is associated with inefficiency of all kinds - technical inefficiency, allocative inefficiency and dynamic inefficiency. On the other hand the rivalrous struggle of competitors to gain the support of their customers tends to lead to cost minimisation, good quality and service, wide consumer choice, efficient resource allocation and technical progressiveness, innovation and dynamism. These conclusions apply as much in developing as in developed economies.

Most economists consider that competition policies can make a useful, practical, ongoing contribution to the achievement of efficient outcomes in the modern economy. As noted above, OECD countries without exception apply competition laws. More recently competition laws have been adopted in East Europe and the former Soviet Union as part of the transition to a market economy. Likewise in dynamic newly industrialised countries such as Korea, Taiwan and Mexico competition laws have been adopted and a number of Asian countries are considering the possible adoption of competition law.

Trade policy considerations are also becoming relevant. Trade liberalisation can be defeated if there are restrictive practices by the private sector in markets which have been opened up to international trade for example if retailers enter into agreements with domestic manufacturers not to accept imports. An effective domestic competition policy is therefore needed to supplement trade liberalisation if it is to work properly. Recognition of this point has led the World Trade Organisation (WTO) to include the topic of competition policy on its agenda for the coming years. The same topic is on the APEC agenda. Much of the heat in current frictions concerning trade laws especially between the US and Japan arises from allegations of the inability of US exporters to adequately penetrate Japanese markets because of alleged private sector restrictive trade practices in Japanese markets. Whether or not these allegations are well based they have generated substantial ill feeling and have formed part of the agenda of trade negotiations all round the world. It should be noted, however, that the key benefits to be derived from competition laws accrue to the country in which they are legislated.

4. The Nature of Antitrust Law

As indicated above, North America was first to introduce modern competition laws. They are enforced by the antitrust division of the Department of Justice and the Federal Trade Commission and by the courts. The most important feature of US antitrust law is that it is almost exclusively concerned with the objective of competition. The law prohibits various kinds of anti competitive conduct and it also contains provisions for divestiture of established monopolies. There are few or no exceptions to this objective. The fact that anti competitive behaviour may be justified because it brings benefits to the public is virtually irrelevant. There are only minor exceptions e.g. the fact that some mergers may bring considerable gains in efficiency is only taken into account in very special circumstances.

In Europe a rather different approach is taken. After World War Two many European countries adopted a form of competition law but this was generally based on an attitude of neutrality to monopolies. Monopolies were not seen as intrinsically harmful and the emphasis was placed upon the need to prevent them from abusing their power rather than achieving competitive outcomes. The achievement of economic efficiency and of broad public interest objectives often overrides the objective of achieving competition. Likewise, restrictive practices such as price fixing agreements between competitors were often permitted providing they were not shown to be against the public interest.

An important development in Europe has been the growing importance of competition policy adopted in the European Union pursuant to Articles 85 and 86 of the Treaty of Rome. The competition policy of the European Union focuses upon the misuse of market power and upon various restrictive practices. However, European competition policy was adopted as part of a wider set of policies to establish free trade within Europe. Consequently the chief focus is upon restrictions on competition that may limit trade between member countries. Over the course of time this has also led to some differences between European Union competition policy and competition policy in the United States. For example the European Union has exhibited a far higher concern with vertical trade restrictions such as exclusive dealing and parallel import restrictions as these are seen as limiting trade between member countries. The US has placed high emphasis on horizontal restrictions on competition and a lesser emphasis on vertical restrictive practices.

Generally European antitrust law has also shown higher faith in administrators making decisions than has United States where the rule of law applies more rigidly. This reflects historic attitudes of distrust of government in the United States compared with Europe. The USA approach is highly litigious with breaches of the law being prosecuted in Court both by the enforcement agencies and by private individuals. Although litigation occurs in Europe it is much less frequent than in the US. Moreover as a rule private litigation is not undertaken. Criminal and civil penalties including gaol sentences apply in the USA, whereas civil penalties only apply in Europe.

A third model of competition law has evolved in Canada, Australia and New Zealand. These countries steer something of a middle path between the USA and Europe.

These countries have generally sought to adopt stronger forms of competition policy than in Europe by having a higher degree of court enforcement of the law whilst allowing exceptions to competition law by enabling anti competitive behaviour to be authorised in certain circumstances if its benefits outweigh the detriment to competition. In Australian and New Zealand private litigation is generally allowable to enforce the law.

This paper generally focuses on the Australian model although the differences between the systems of different OECD countries should not be exaggerated. In particular the prohibitions in the laws of Australia are much the same as in the United States except for the public interest authorisation element. Much the same prohibitions apply in the European Union but with public interest exemptions.

5. The Prohibitions

Part IV of the Australian Trade Practices Act 1974 contains the typical prohibitions of an antitrust law. Before considering the prohibitions in detail it is worth noting that as a first approximation they can be summarised in the following simple proposition:

Any business behaviour which has the purpose or effect of substantially lessening competition in a market is prohibited. However, any such behaviour may be authorised by an independent commission following a public process if the public benefit from the behaviour is found to outweigh the detriment to competition.

At this point, however, the approach taken in some countries varies. Some prefer to have a broad prohibition of the kind above enacted in their law, leaving it to courts or regulators to rule on whether specific behaviour breaches the law while others prefer to specify in statute the exact forms of behaviour which are prohibited, thereby narrowing the scope of the judgments which courts and regulators have to make. Either way the differences between countries are not large, and so the Australian prohibitions are much the same as in other countries.

Horizontal anti-competitive agreements are prohibited. If competitors agree on prices this is prohibited outright (or "per se"). Law enforcers do not even have to prove that the agreements affect competition. Other agreements between competitors are prohibited provided they in fact substantially lessen competition. An example is an agreement between competitors to divide the market between themselves say on a regional basis and not to compete with each other in the areas they allocate to one another. Another example would be an agreement not to supply a particular customer (possibly because the customer is a potential competitor to them at another level in the market). Bid-rigging is also a breach of the law. To establish that there has been an agreement, there normally needs to be evidence of some form of communication between parties rather than mere evidence of parallel behaviour.

The Act also prohibits the misuse of market power. This behaviour occurs when a firm with substantial market power takes advantage of its position to deter or prevent new entry or in some other way to limit competition. An example would be a monopolist's refusal to supply a potential upstream or downstream competitor whose role in such markets depends upon the supply of the monopolist's product. Suppose for example that a retailer of gas in a particular city owns and controls the only pipeline from the gas field to the city and denies access to the use of the pipeline to a potential competing retail supplier in the same city. Another example is predatory pricing ie supplying product at below variable cost in order to drive out a competitor prior to raising prices to above normal profit levels.

Various kinds of vertical trade restraints are prohibited if they are likely to substantially lessen competition. An example is exclusive dealing ie the practice of a supplier of a good or service supplying a customer on condition that the customer does not obtain any supplies from the competitors of the supplier. Whilst this practice is not necessarily anticompetitive, it is on many occasions and if so it is then prohibited.

Another vertical practice that is prohibited is resale price maintenance. This is the practice of a manufacturer supplying a retailer on condition that the retailer does not reduce prices below a certain level.

Australia has recently abolished laws which prohibited anticompetitive price discrimination. There are strict prohibitions, however, in the USA, although these are the result of concessions to pressures by small business rather than of any competition policy analysis.

Perhaps the most important yet controversial element of competition law is its treatment of mergers. Mergers or acquisitions which are likely to substantially lessen competition are prohibited. This covers horizontal mergers between competitors and also a lesser proportion of vertical mergers (since these only lessen competition in particular circumstances).

Most of the above practices can be authorised by the Australian Competition and Consumer Commission if, following a public process of inquiry the ACCC is satisfied that the benefits to the public would outweigh the detriments of reduced competition. There is a right of appeal to the Australian Competition Tribunal.

As noted above, action to enforce the Act can be taken either by the Australian Competition and Consumer Commission or by private parties that can establish a relevant interest in the matter.

Remedies include:

1. Injunctions ie the Court orders the parties breaching the Act that their behaviour must cease;

2. Penalties. In Australia these are up to $10 million per offence and penalties against individual executives up to $500,000.

3. Damages actions.

4. Other Court orders including divestiture for anticompetitive mergers. There is not however a power to require divestiture for firms with market power even if they abuse it.

5. Limited administrative powers to regulators eg to obtain and accept consent orders.

The significance of remedies cannot be overstated. It is one thing to determine that behaviour is anticompetitive but it is crucial that there be adequate and appropriate legal remedies if the law is to have an effect.

Whilst economists devote considerable effort to the analysis of competition and the effects of various practices on the state of competition they often tend to ignore the important question of the law enforcement procedures involved in competition law.

As noted above an important feature of Australian and USA antitrust law is the capacity for private enforcement. Individual parties with an economic interest in the matter may take their own action to secure injunctive relief, secure damages, and other court orders. In most jurisdictions private actions constitute over 50 per cent of court actions. The availability of private actions keeps the enforcement of antitrust law alive at times when government reduce budgets of enforcement agencies. During the 1980's in the United States, the Reagan administration sought to cut back antitrust policy but private actions flourished in place of actions by the authorities. In addition the availability of private actions means that agencies do not devote their resources to resolving disputes between major businesses who are able to look after their own economic interests. Accordingly the agencies can focus more heavily on public interest questions and on the protection of consumers and in appropriate cases small businesses. There are some disadvantages from the availability of private actions because they can be undertaken for nuisance reasons but it is difficult to point to many obvious examples of this in Australia. In the United States where there is a treble damages regime, where representative actions are more customary and lawyers are paid on the basis of contingency fees and with unsuccessful plaintiffs not having to bear the costs of the losing party there has been some misuse of private action from time to time.

A further feature of competition law is that typically there are certain outright exceptions to its application. Some are the result of clear policy decisions eg labour markets, intellectual property, exports. Others concerning small and medium businesses are mixed administrative/political concessions. Others are political concessions eg in some countries parts of agriculture, the professions, government-owned businesses.

Business generally supports the trade practices law even if its application to individual business makes these businesses uncomfortable. Business is a major user of inputs and has a strong interest in them being supplied competitively and efficiently.

6. Overview

Having set out the key elements of antitrust policy it is worth analysing them in more detail. Whilst there is no doubt that antitrust law has had a major impact upon business behaviour it is only an aspect of the broader picture that arises in competition policy. First, antitrust policy does not overcome the numerous restrictions imposed on competition by other policies. These include, for example, international trade restrictions, regulations imposed by governments that have anticompetitive effects and so on. Second, many economists generally believe that the most important factor influencing competitive behaviour in a market is the structure of the market. Yet in many countries there is no power to seek divestiture to split up established business enterprises. In the United States there has been major divestiture action regarding oil, tobacco, chemicals, and telecommunications but this has not been a feature of other countries. What is noticeable in many OECD countries is the fact that major divestitures have occurred in recent times with respect to publicly owned enterprises. Divestiture policy here has been based on the views of government ministers and their departments rather than embodied in antitrust law. In East Europe this role has been complemented by an advisory role played by the competition authorities. Perhaps this is a model for economies in transition from socialist market economies. Third, there is

no policy that deals with excessive prices. Traditionally, price control has had no part in antitrust policy and antitrust policy has sought to achieve sufficiently competitive outcomes to avoid the need for price control. A recent Australian innovation has been to merge the Trade Practices Commission Fourth, the Australian trade practices law also prohibits misleading or deceptive conduct by persons engaged in businesses. This is also an important element of competition law. Consumers are unable to exercise choice adequately if they are informed in misleading or deceptive fashion about the nature of goods and services.

These limitations do not mean that antitrust policy is unimportant. On the contrary it has had large beneficial effects on conduct in capitalist economies. However, its role needs to be seen in the wider context of competition policy of which it is part. The most important priorities for competition policy are the removal of restrictions on international trade, the removal of government laws and regulations which limit competition and the adoption of comprehensive antitrust laws.