Chapter 1

Introduction

1. Geographical expansion and increase in significance of competition law

Competition law has come to receive phenomenal attention in recent years. The field has become incredibly vast and it has come to experience a geographical expansion – in a relatively short period of time – not seen in the case of any other branch of law. Competition law is no longer an exclusive feature of the statute book of countries in the developed world: a large number of developing countries have come to adopt some form of competition law domestically and in an even larger number competition law currently ranks very high on the national agenda.[1] Many of these countries are at an extremely early stage of economic development; some of them have a notably limited experience with the concept or mechanism of a free market economy; and there are those in which even as recently as five years ago the adoption of a competition law was simply unthinkable, yet it has become a reality. Such developments are highly significant and have impacted – in most cases positively – on international trade, the way countries regulate their domestic markets, and on how firms behave and operate globally.

In parallel with the phenomenal increase in significance and geographic scope of competition law however, the question of *what is competition law all about* has mushroomed. The debate that began a number of decades ago on what the goals of competition law are or should be and what its exact role in an economy or society is remains very relevant; in some respects, the debate is even particularly heated especially when considering the interface between competition law and neighbouring fields, such as intellectual property rights[2] and industrial policy. It seems unlikely that this debate

[1] Chapter 6 below will consider the position in developing countries.

[2] The competition law/IP interface has attracted an incredibly vast amount of interest especially in recent years. How these two branches of law are 'linked' (if at all) and whether they are in conflict or operate in harmony are queries to which no definite

will see an end or that a 'cool-down' period will be reached in the near future. If anything, the debate is widely expected to grow and heat up even more so with the recent turbulence in the global economy and the doubts this has raised over the ability of the free market and its forces to function without government intervention.

Competition law expertise and the number of people specialising in the field has also increased considerably in recent years. This increase in expertise is very welcome and should be encouraged, especially since it could facilitate a 'globalised' understanding of competition law which is helpful in the academic arena, practice and in the work of competition authorities. However with the increase of expertise naturally come different perspectives and different attitudes and, in more ways than one, such an increase in expertise will do nothing but fuel the debate over the role of competition law and policy. On the whole, a lack of consensus remains on how one should answer the basic questions of: what should the goals of competition law be; what role should be accorded to it in an economy; and what are the exact benefits that should be sought when applying it? To this list one could understandably add the question of whether competition law should give way in certain cases to other policies or priorities (such as national security interests, employment considerations and international competitiveness of the local economy), even where the situation at hand raises competition problems.

It is important to realise however that it is *natural* for there to be lack of consensus in a field such as competition law. Even if this lack of consensus were to emerge in the form of sharp disagreements, this in fact is healthy and in some cases even necessary. Competition law has been around for many decades and arguably many centuries,[3] yet it continues to be surrounded with notable ambiguities and many of its 'components' and 'functions' remain largely unexplored and misunderstood. This must therefore persuade one to accept that a serious debate is needed in the field in order to better understand this highly interesting branch of law and the kind of role competition law and policy should perform; a serious debate will also help explore questions and issues in the field which until now have remained almost untouched.

answers have been given. The interface has been surrounded with controversy especially in the European Union (EU) and the USA.

[3] See M. Dabbah, *Competition Law and Policy in the Middle East* (Cambridge University Press, 2007), ch. 2.

2. A notable trend so far

Some form of competition law has been adopted in over 120 jurisdictions, all of which differ significantly in terms of their domestic or regional circumstances; though many of these jurisdictions share some important similarities. A notable trend that has come to develop in competition law literature, practice and understanding has been to view this type of law in different parts of the world with the same lenses. It is uncertain whether this indeed is sensible however, as the discussion in the following chapters will show, a huge gulf exists first and foremost in cultural perspectives across the globe on the concept and process of competition and, as a consequence, on the function and role of competition law itself. It is difficult to argue therefore that competition law throughout world regions such as Australasia, the Middle East and Africa, Europe and the Americas should be understood in the same way. Yet, experience shows that this is exactly what has been happening and what has become almost normal practice in the field: rules, practices and theories that are developed in certain parts of the world – mostly in the European Union (EU) and the USA – have come to be *forced down the throat* of countries in developing parts of the world, often with the aid of international organisations. In many cases, this has resulted in the latter facing serious difficulties, whether in relation to understanding the substantive competition rules, the functioning of the institutional structure and enforcement mechanism or building a suitable platform for coherent and sensible policy formulation. It is indeed remarkable that the real beneficiaries as a result of this 'knowledge transfer' exercise have not always been developing countries themselves but rather some 'specialists' and 'consultants' in the field. It seems not explained nor justified why some countries should take a model competition law regime of another country without careful 'local' assessment being conducted first simply because personal contacts between officials and specialists in the two – often facilitated by officials of some international bodies – make this convenient to do so. It remains to be explained why certain countries would be 'faxed over' (or perhaps in today's more common context 'emailed') a few provisions representing a slightly altered version of the competition rules of certain competition law regimes so they could incorporate them into a domestic competition law of their own.

In fairness, this trend of *copy* and *paste* (albeit objectionable in most cases) has in some way helped in turning competition law into an international phenomenon. And there is no particular desire here to be overly critical of

this particular trend. In the case of many if not most countries which have come to adopt competition law in recent years however, this has been a dangerous trend, which has contributed[4] to the enormous difficulties preventing these countries from converting their competition rules into effective enforcement tools in practice in order to deal with anticompetitive situations in their domestic economies, let alone educate their public (including local businesses) on the benefits of competition and the role of competition law. A successful competition law regime in the USA or the EU for example does not necessarily mean there is going to be a successful competition law regime in countries adopting or following these model regimes. Consulting the experience of successful competition law regimes is helpful and in many cases is absolutely crucial and this must be recognised with no doubt; indeed the usual practice of many competition officials in these countries is to consult the experience of advanced regimes – such as the EU and US regimes – on a daily basis. There is nothing wrong with this. However, when it comes to adopting competition law domestically and designing a regime for enforcing this law, there is no substitute for a competition law growing from domestic roots. Competition law revolves around the idea of needing to protect the process of competition, consumers and other appropriate interests in *domestic* markets; sometimes, perhaps, this needs to include the idea of needing to facilitate this process in the marketplace. Given its concern with the process of competition, it is vital to appreciate that this process sits at the heart of the culture prevailing in the country or region concerned.[5] Determining what form and scope the local competition law should have requires an understanding of the culture prevailing in the country concerned, as well as an understanding of the particular economic, social and political circumstances of that country. Without such understanding, there is bound to be a gap – if not in the actual substantive provisions of the local competition law – certainly in the enforcement of the law; this gap will only widen through a blind copying of the competition rules of certain regimes.

3. The competition law 'chain'

The cross-border influence of competition law as described in the comments made in the previous part is not necessarily 'bilateral', i.e. one that

[4] It is important to note that this situation has been *one* of many factors causing difficulties. See chapter 6 below for a list and a discussion of the different factors.

[5] See pp. 62–64 below on the importance and relevance of culture in the field of competition law.

links between only two competition law regimes. In some cases one may be able to identify a cross-border influence extending beyond being merely bilateral. The competition rules of jurisdiction or country B may be modelled on those of jurisdiction or country A and the former may be the model on the basis of which the competition rules of jurisdiction or country C were enacted.[6]

4. The lack of competition law

It is true that a large number of countries around the world have come to introduce some form of competition law domestically and in some cases also regionally.[7] The fact however remains that most countries around the world have not adopted a competition law. Some of these countries have embraced the principles of a free market without opting to legislate for protecting competition specifically in the marketplace. Some countries for many years relied on the market itself – not a body of officials enforcing a set of competition rules – to provide the forces of competition, choosing thus free trade as the appropriate competition policy and the promotion of free trade as a way to bring about desired economic benefits for their firms and citizens.[8] Other countries have somehow relied on their unfair competition law to deal with all types of market problems, whether those of anticompetitive behaviour or conduct, or those within the specific scope of unfair competition law itself;[9] and there are those countries which have laws against restrictive business or trade practices which do not necessarily seek to promote the process of competition but rather to continuously 'regulate' the behaviour of powerful firms;[10] a number of these countries for many years maintained some reservations regarding capitalism,[11] though this number has come to dwindle in recent years as can be

[6] For example, see how major parts of the UK competition law regime (most notably the Chapter I and Chapter II prohibitions of the Competition Act 1998) are modelled on EU competition law and major parts of the Singaporean competition law regimes are modelled on UK competition law.

[7] See chapter 7 below for a discussion on regional competition law and policy; chapter 4 below also contains a discussion on the EU competition law regime.

[8] Singapore was an example here until it adopted a specific competition law in 2005.

[9] See pp. 320–323 below.

[10] See p. 17 below.

[11] Arguably, the collapse of many Asian economies in 1998 seems to have increased the fear of these countries about capitalism. See W. E. Kovacic, 'Capitalism, Socialism and Competition Policy in Vietnam' (1999) *Antitrust* 57; 'Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies' (1998) *University of Cincinnati Law Review* 1075; 'Getting Started: Creating New Competition Policy Institutions in

seen in the case of countries like China, which has now adopted a specific competition law, the Antimonopoly Law 2007.[12]

The absence of a specific competition law from most countries may be looked at in different ways. On the one hand stands the view that competition law has come to be adopted in most if not all of the world's 'important' economies and that a sufficient number of these economies have subscribed to it, to give competition law and policy a global significance and status;[13] taking into account as well the fact that the competition rules of many of these economies have a wide extraterritorial scope making them capable of catching anticompetitive situations occurring on foreign soil.[14] On the other hand, it is arguable that the fact that many countries do not have competition laws – whilst not disputing the global significance of competition law – may produce some negative effect; for example, it may affect the chances of achieving full or meaningful 'internationalisation' of competition law through, for example, the pursuit of a multilateral agreement within the framework of an international body, such as the World Trade Organisation.[15] It would be correct to say that the exclusion of such countries might in any case (and regardless of any push towards internationalising competition law or the type of internationalisation sought)[16] affect the *role* competition law can play in a globalised economy as an effective means to address anticompetitive behaviour, conduct or transactions that impede and distort the flows of trade and investment worldwide. Even these countries themselves may be at a disadvantage here, especially in combating harmful situations. This highlights the importance of competition law and more generally international cooperation in the field for such countries. Obviously such disadvantages are not solely caused by the lack of

Transition Economies' (1997) *Brooklyn Journal of International Law* 403; N. S. Pakaphan, 'Indonesia: Enactment of Competition Law' (1999) *International Business Lawyer* 491; S. Supanit, 'Thailand: Implementation of Competition Law' (1999) *International Business Lawyer* 491.

[12] China adopted its long-awaited Anti-Monopoly Law in August 2007. This law entered into force in August 2008.

[13] Such a view seems to receive some strength from the fact that those economies in which competition law has not been introduced tend to – usually – follow whatever global trends emerge. However this remains highly debatable and not fully supported in practice.

[14] The extraterritorial application of competition law is examined in chapter 8 below.

[15] See chapter 10 below for a discussion on multilateral cooperation in the field of competition law.

[16] For a discussion of the process and the different types of internationalisation, see the following chapter.

competition law: in cases where a competition law regime may exist, the competition authority(ies) in this regime may be constrained due to lack of resources, whether financial or human and lack of necessary expertise or independence to take action, i.e. to be able to enforce the rules effectively.[17] Nonetheless, it is sensible to suggest that most of these 'disadvantages' should disappear if these countries are encouraged, or actually seek, to adopt competition law in their national legal orders (where they do not have such law) with the necessary institutional and enforcement mechanism, and if they are encouraged to seek international cooperation with other countries in the field.

5. Is competition law really global?

Referring to competition law as 'global' or 'international' is not unheard of; this book obviously does this. Whether in the literature, competition conferences and events, the work of international organisations or statements by competition authorities, the term *global* competition law has been used quite frequently. The point was made in the previous part that competition law can be said to have global significance. The question may be asked, however, whether competition law itself is really global? This is a highly important question and it is worth giving some thought to.

Probably almost everyone in the field would agree that this question may be answered in two ways: 'yes' and 'no'. Obviously, it is possible to say that competition law is global because, as the discussion in the previous part made clear, many nations – developing and developed, American and European, Australasian and African – have adopted some form of competition law; in addition to the fact that competition law enforcement has become increasingly international through extraterritorial assertion of jurisdiction and bilateral cooperation. On the other hand, it is arguable that competition law is not global because – apart from the fact that not all countries have adopted competition law in their domestic systems – the majority of people around the world are not familiar with competition law at all. In many parts of the world competition law is simply unknown; in others it is misunderstood and confused with laws such those on unfair competition and sport (because of the use of the word 'competition'); and there are even those world communities in which competition law – due to its association with capitalism

[17] See World Trade Organisation (WTO), *Annual Report* (1997).

and specifically the market mechanism – is looked at with discomfort and suspicion. There is therefore a noticeable lack of sufficient public awareness of competition law in different parts of the world; though in recent years, this awareness has been gradually increasing. There are several reasons for this increase in awareness which will be explored at different stages of the discussion in later chapters. But one important reason has been the interest of the media in the field and the almost daily reporting on competition law developments in different parts of the world. Some of these developments have an enormous global impact. Perhaps the most high-profile example here is the decision of the European Commission and the judgment of the General Court of the EU in the *Microsoft* case.[18] The case has been widely reported around the world and raised considerable interest even in some of the world's smallest communities. Astonishingly, whilst some of these communities are not at all familiar with the existence of their national competition authority – which may be located some 120 miles away – they are able to discuss the specific issues of Windows and Media Player in the case, which was decided some 2,000 miles away!

6. The desirability of competition

Posing the question of whether competition is desirable is not a mere academic exercise. Especially in a book offering an international-comparative perspective, it would be important to ask this question. Across the world, there are variable degrees in relation to the desirability of competition. In certain parts of the world, most notably in the EU and USA the desirability of competition in the marketplace is held *almost* like an item of faith by competition officials, judges and politicians in particular. In other parts of the world however, this attitude to competition does not appear to be shared, not to mention the almost absent (free market) competition culture in some countries. In some parts of the world the idea of having competition is taken to mean a reduction in the power and influence of those few individuals or families controlling specific sectors of the local economy; it is therefore a highly undesirable and disliked idea.

[18] Case T-201/04, *Microsoft* v. *Commission* [2007] ECR II-3601. A more recent example of a decision that has come to attract global attention is that of the European Commission in COMP/C-3/37.990 *Intel* (2009) *Official Journal* C-227/13. The firm was fined by the Commission in May 2009 an extremely high fine totalling almost €1.06 billion.

But even if one were to eliminate the geographical reference or comparison, the question over the desirability of competition can be said to be a difficult one to answer and it is a highly debatable one. For example, looking at the almost universally acknowledged economic goals of competition law, economic efficiency and maximisation of consumer welfare,[19] it seems not everyone would agree that these goals are *impossible* to achieve without a process of competition in the marketplace. The consumer benefits of lower prices, better quality and more choice may still be realised with the existence of a single firm in the market, provided that this firm would have an interest in innovating and achieving efficiency and translating this into direct consumer benefits.[20] Certain views and theories which came to develop during the twentieth century were highly sceptical about the desirability of competition. These argued that competition considerations are not the only coordinating force within free and liberal markets, and that their dominance of the intellectual discourse of competition law *is over developed*. They also contended that coordination of private economic behaviour is also possible via other terminals such as social collusion, the creation of collectivist norms, decisions and hierarchy and the virtues of social responsibility. Furthermore, the collective intellectual influence of approaches such as those advocated by the theory of 'contestable markets'[21] and the Chicago School[22] of thought has, to a certain extent, undermined the conventional view on the desirability of competition.

Admittedly however, the chances for key consumer benefits emerging when only one firm operates in the market appear slimmer than in the

[19] See pp. 36–44 below for a discussion of the goals of competition law.

[20] It is worth noting the concepts of 'productive' and 'allocative' efficiency here. Productive efficiency is achieved where products are produced at the lowest cost possible. On the other hand, allocative efficiency is realised where a product is sold at the lowest price possible; the price consumers are willing to pay. See further pp. 23–25 below.

[21] The theory of contestable markets is one which has been advocated by some economists in recent years. What this theory says is that an optimal allocation of resources will be ensured provided that the market in question is contestable. Contestable in this sense means that a firm will be able to enter the market without incurring sunk costs (which the firm will not be able to recover at a future date when it exits from the market). In other words, for a market to be contestable there must be a realistic likelihood that potential competitors can easily enter the market and begin to compete when market conditions, including imperfections (caused mainly by the behaviour of firms in the market or changes in the patterns of consumer demand), provide the opportunity to do so. See W. Baumol, J. Panzar and R. Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace Jovanovich, 1988); E. E. Bailey, 'Contestability and the Design of Regulatory and Antitrust Policy' (1981) *American Economic Review* 178.

[22] See further pp. 61–62 below.

situation where more than one firm exists and with some form of competition between these firms. This particular philosophy seems to have been one of the driving forces behind the dramatic change in the attitude of many countries towards the market mechanism in the last quarter of the twentieth century as can be seen from the noticeable shift on the part of those countries from monopolisation to de-monopolisation and from state control and planning to liberalisation and privatisation. This contrasts with the prevailing tendency for most of that century in many parts of the world to favour a tradition of exerting strict control over the planning and management of domestic economies. One of the major consequences resulting from this change – other than the apparent, though in light of the recent global economic crisis 'controversial', victory of capitalism over communism – has been the enhancing of the desirability of competition. This has meant that a belief came to grow that, on the whole, competition can be regarded as an effective tool for achieving important benefits for countries and their citizens, among which encouraging innovation, furthering growth and safeguarding the welfare and social development of countries came to rank high. This significant development – which has unfolded in parallel with a relentless process of globalisation and a sharp increase in the removal of hindrances to the flows of trade and investment worldwide[23] – has demonstrated a strong belief in and reliance, particularly in the developed world, on the market mechanism.[24]

7. The 'need' for competition law

The enhancement of the desirability of competition, among other things, meant that a framework was required to afford it adequate protection. This obviously pushed competition law to the fore and contributed to the impressive increase in significance and geographical scope of the competition law as described above.[25]

Although the question over the desirability of competition can be considered to remain in contention, the question of whether competition law is needed has *very interestingly* developed into a subject of little debate and *on the*

[23] See A. Fiebig, 'A Role for the WTO in International Merger Control' (2000) *Northwestern Journal of International Law and Business* 233. See also pp. 92–97 below for a discussion on globalisation and its implications for competition law and policy.

[24] See further below at pp. 26–27 on the belief in and reliance on the market to achieve economic progress.

[25] See M. R. A. Palim, 'The World Wide Growth of Competition Law: an Empirical Analysis' (1998) *Antitrust Bulletin* 105.