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Introduction

General

The twentieth century witnessed a heated debate between capitalism and communism over the desirability of competition in the marketplace. Until the last quarter of that century there was a tendency in many parts of the world to favour a tradition of exerting strict control over the planning and management of domestic economies. As the end of the century approached, however, the scene began to change dramatically with a move on the part of many countries from monopolisation to demonopolisation and from state control and planning to liberalisation and privatisation. This important development has enormously contributed to the growing recognition that, on the whole, competition can be regarded as an effective tool for enhancing innovation, furthering economic growth and safeguarding the welfare and social development of countries. Remarkably, the debate seems to have settled in favour of the market mechanism, and this has enhanced the desirability of competition.

The growing recognition of the value of competition has been accompanied by a relentless process of globalisation and a sharp increase in the removal of hindrances to the flows of trade and investment worldwide.[1] It has also been accompanied by a considerable increase in the number of countries, which – particularly over the last two decades – have come to recognise not only the desirability of competition but also the need to protect it.[2] The law used to protect competition is commonly referred to as 'antitrust law', or 'competition law'.[3] Today, nearly 100 jurisdictions have

[1] See A. Fiebig, 'A Role for the WTO in International Merger Control' (2000) 20 *Northwestern Journal of International Law and Business* 233, 235. See also pp. 12–15 below for a discussion on globalisation and its implications for antitrust policy.

[2] See M. Palim, 'The World Wide Growth of Competition Law: an Empirical Analysis' (1998) 43 *Antitrust Bulletin* 105.

[3] 'Antitrust law' is the term used in the United States (USA). The term 'Competition law' is a synonym used more commonly outside the USA. The term 'antitrust law', unlike the concept

adopted some form of antitrust law and at least thirty others are in the process of developing antitrust legislation.[4] This impressive geographical expansion of the law has not been confined to certain countries or economies; it will, if anything, increase in the years ahead.

Similarities and differences

Most of the world's systems of antitrust share many common features. These include prohibitions on certain horizontal agreements between firms (such as cartels aiming at market-sharing, price-fixing and limiting production etc.), certain vertical restraints and abuses of market power by powerful firms. In more than half of those systems, there is a mechanism for the control of mergers.

In addition to these similarities, there are also many differences. These differences will be examined in detail in later chapters of the book; however, it would be useful at this stage to give an account of some of these differences. The first difference to be mentioned concerns the lack of consensus with respect to the meaning that should be given to terms such as 'competition' and 'anti-competitive'. As will become apparent during the course of the discussion, it is not clear whether countries agree on how these concepts should be defined and understood. Secondly, there is a debate regarding whether competition particularly needs antitrust law at all and whether it can be protected using other types of law and policy. In some countries the laws are referred to as laws against 'restrictive trade practices'. These laws may be more concerned with regulating how large firms use their market muscle than with removing hindrances to free market competition.[5] In other countries the laws are called the laws against unfair competition; and there is a third, but not a final, category of countries where the law is

of 'competition', encounters hardly any previous usage in the English language. See D. Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, Oxford, 1998), p. 4, analysing the translation of the term into other languages.

[4] See D. Valentine, 'Antitrust in a Global High Tech-Economy', paper delivered before the American Bar Association of the District of Columbia at the 8th National Forum for Women Corporate Counsel 30 April 1999, available at http://www.ftc.gov/speeches/other/dvatspeech.htm. Also, see W. Rowley and N. Campbell, 'Multi-Jurisdictional Merger Review – Is It Time for a Common Form Filing Treaty?' in *Policy Directions for Global Merger Review*, a special report by the Global Forum for Competition and Trade Policy (1999).

[5] Report of the American Bar Association Sections of Antitrust Law and International Law and Practice on *The Internationalization of Competition Law Rules: Coordination and Convergence*, ABA, December 1999.

called the antitrust or competition and fair trading law. A highly interesting and important question, which will be considered at some stage in the discussion, is whether these laws actually mean and aim to address the same thing. Thirdly, there are differences regarding the antitrust law traditions of countries and the degree of seriousness with which they enforce their antitrust laws. Certain countries may not be keen on enforcing their antitrust laws, whether seriously or at all, if or when foreign firms may be the beneficiaries of enforcement actions. On the other hand, lax antitrust enforcement by countries causes uncertainty and creates incentives for firms to treat these countries as 'antitrust havens', a situation that is likely to lead to distortions of competition in the countries concerned and may even extend beyond domestic boundaries.[6] At the moment, not all countries where antitrust law has been adopted, enjoy a tradition of vigorous enforcement of the law. Some countries have a tradition of separation of antitrust law enforcement and decision-making from politics, but others do not. Some countries have a tradition of state control and planning, which in some cases has been disintegrating, and others have a strong tradition of liberalisation and privatisation. Fourthly, there is no agreement on the proper goals of antitrust law. The possibilities range from economic to social to political goals.[7] Fifthly, there is lack of agreement regarding the right institutional approach to protect competition. In some jurisdictions it is done administratively, whilst in others it is done judicially.[8] Finally, countries differ with regard to the way transnational antitrust issues should be handled. At one end of the spectrum, some countries are 'unilateralist' in their approach and thinking. What this means is that, quite frequently, they are willing to export their domestic antitrust laws into other jurisdictions, a factor which, as will be seen, can be problematic.[9] At the other end of the spectrum, other countries seem to believe that there is scope for creating some common order within antitrust law and policy by adopting a 'bilateral',[10] a 'regional',

[6] D. Gerber, 'Afterword: Antitrust and American Business Abroad Revisited' (2000) 20 *Northwestern Journal of International Law and Business* 307, 312. See further chs. 7 and 8.

[7] See pp. 49–57 below.

[8] See J. Griffin, 'What Business People Want from a World Antitrust Code' (1999) 34 *New England Law Review* 39, 44; C. Bellamy, 'Some Reflections on Competition Law in the Global Market' (1999) 34 *New England Law Review* 15, 18–19.

[9] See chs. 7 and 9.

[10] 'Bilateral' is used in this context to refer to the conclusion of bilateral agreements between countries, in particular between their domestic antitrust authorities. See for example the agreement entered into between the European Community (EC) and the USA on 23 September 1991, OJ 1995 No. L95/45 as corrected by OJ 1995 No. L131/38, discussed at pp. 112–16 below.

a 'pluralist' or even proposing a 'global' approach when addressing such issues. Between these two ends, some countries have opted for a mixture of these approaches.

These differences, as well as those which will become apparent in the discussion, are important and therefore cannot be ignored. The differences have been widened by the fact that in some jurisdictions, notably the USA and the EC, antitrust law is well developed and the policies underlying it are in a constant state of change and evolution, whilst in other jurisdictions antitrust law is just seeing the light of the day.[11]

The scope of the book

Generally, a position of difference is not particularly healthy. In antitrust policy there is strong evidence that would support this.[12] In this regard a move from a position of difference to a position of similarity is indeed desirable, but surely one that gives rise to a challenge. This is a challenge which is currently facing antitrust communities in many jurisdictions; and those who have realised the existence of this challenge and the need to move closer to a position of similarity have been seeking ways to 'internationalise' antitrust policy. However, even here differences have surfaced regarding how the 'internationalisation' should be viewed.[13] As a result, different examples of internationalisation seem to have emerged. These examples will be considered in the fifth part of the chapter.

The aim of the present book is to give a serious and fresh consideration of the process of internationalisation of antitrust policy. It inquires into the nature of this process, whether it is a matter of law or politics (or both), and the direction in which this process should be focused. The need for examining the internationalisation of antitrust policy arises not only because of the differences alluded to above but also in the light of several problems that seem to require attention. These problems can be summarised as follows. Domestic antitrust laws have their bounds and limits and because of this they are unable to address international restraints effectively. In light of the relentless process of globalisation, antitrust authorities seem to lack vision when the antitrust issues facing them transcend their domestic

[11] See W. Hannay, 'Transnational Competition Law Aspects of Mergers and Acquisitions' (2000) 20 *Northwestern Journal of International Law and Business* 287.
[12] See ch. 7. [13] See above.

boundaries. It seems that countries are becoming less representative of firms that have their business offices registered within their boundaries but that manufacture, distribute and sell their products in global markets. This factor is all the more important to consider given that gradually norms and expectations have developed around antitrust policy and have increased in importance and in geographical scope.[14] On the other hand, the antitrust laws of some countries have a wide reach and this means that these laws may end up being used to regulate individuals, firms and transactions in other countries. There is solid evidence to support the view that antitrust policy enforcement by a score of domestic antitrust authorities in the world has become extraterritorial over the years.[15] Although there is merit in the claim that international restraints should not go unpunished, it is doubtful that this development should be regarded as acceptable when such enforcement would interfere with the prerogatives and orders of other countries. Furthermore, the application of the antitrust laws of different countries in the same situation can trigger conflicts between those countries. Apart from the damage that may be caused to the relationship between the countries themselves, conflicting results are damaging to firms, who are normally anxious about the application of more than one domestic antitrust law to their transactions. Firms, quite legitimately so, are concerned about the costs in time and money incurred when their operations and transactions are subjected to review by several domestic antitrust authorities. In addition to such costs, conflicting results can drag firms into diplomatic disputes between countries. The present book will seek to argue that in practical terms all of the points just made show that antitrust authorities in the world have to seek effective ways to overcome jurisdictional hurdles inherent in the territorial nature of antitrust enforcement jurisdiction.

The strategy adopted in this book has three different aims. The first aim, the basic aim on which all else depends, is to expand the way into the jungle of internationalisation of antitrust policy. The second is to open up issues in the discourse between law, economics and politics in this highly important

[14] Other reasons include the shortcomings of both bilateral agreements between antitrust authorities and the convergence of antitrust laws of different countries in addressing international antitrust issues. See chs. 7 and 8. See also E. Fox, 'Global Problems in a World of National Law' (1999) 34 *New England Law Review* 11, 11–12, Fiebig, 'International', 233; P. Muchlinski, *Multinational Enterprises and the Law* (Blackwell, Oxford, 1995), p. 384.

[15] See ch. 7 for an examination of the doctrine of extraterritoriality.

and topical area that seem susceptible to further research and thinking. Finally, the third is to formulate an approach and to try to lay down some foundations on which the present book, as well as future study in this area, whether academic or otherwise, can be constructed.

The nature of the book

In examining the process of internationalisation, first the limits of antitrust law have to be defined. It seems sensible to start with some basic concepts and to examine the point and goals of the law. It would be a fruitless exercise to discuss the internationalisation of antitrust policy without having first enquired into the *raison d'être* and aims of the law. This, in turn, entails a further inquiry into how its doctrines have evolved and the nature of its ultimate impact upon public and private power, the structure and function of institutions and markets and the economic freedom of the individual.[16] This in itself is an inquiry into another thread of antitrust (in addition to law and economics): the role and influence of politics and the relevance of the principles of liberal democracy.[17] The significance of this thread can be illustrated in the following manner. Generally, political ideology and initiative serve as the basis for enacting different antitrust laws in different countries.[18] This is based on the view that underlying the concept of antitrust is a serious concern about excessive economic power, and a general awareness that the principles of liberal democracy may be undermined if market *economic democracy* is not afforded adequate protection.[19] As

[16] R. Bork, *The Antitrust Paradox* (Basic Books, New York, 1978), p. 3.

[17] Political influence and the principles of liberal democracy, as referred to in the present work, are not identical. Although the principles of liberal democracy bear strong links to several issues with respect to the internationalisation of antitrust policy, there remain other important issues that should be examined within a different framework. The question of sovereignty is an example in point. As chapter 6 shows, several threads related to that question seem to have a wider implication that need to be evaluated within a wider framework than that of the principles of liberal democracy.

[18] Some commentators have argued that the enactment of antitrust law is a political act, and, as such, political factors should be given paramount consideration. See C. Ehlermann and L. Laudati (eds.), *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing, Oxford, 1998), p. 58.

[19] It is important to emphasise that the present discussion is more concerned with economic democracy than political democracy. For some interesting discussion of the latter concept, see G. Amato, *Antitrust and the Bounds of Power* (Hart Publishing, Oxford, 1997), p. 96; H. Thorelli, *The Federal Antitrust Policy*: *Origination of an Antitrust Tradition* (Johns Hopkin Press, Baltimore, 1954); E. Fox, 'The Modernization of Antitrust: a New Equilibrium' (1981) 66

political ideology is crucial in the adoption of antitrust law in different jurisdictions, it is essential when examining the internationalisation of antitrust policy to consider issues inherent in such ideology. In particular, it is necessary to be aware that the regulation of competition and enforcement of antitrust law by administrative institutions can involve bureaucratic politics and bureaucratic decision-making. To an extent, the merits of antitrust law enforcement, whether national or regional (such as the case with the European Community),[20] carry implications of political directions ordered by administrative and political institutions. The present book will aim to develop this proposition by demonstrating that the internationalisation of antitrust policy is subject to political influence. So far, there has been little exposition in the literature of the actual or potential importance of politics in this area. As the following chapter will seek to show, one of the contributing factors towards this seems to be that economists chose first to determine to what extent economics, not politics, was a systematic force in antitrust law enforcement. As the discussion in that chapter shows, there is no doubt that one must appreciate the importance of economic analysis in antitrust law and policy. Equally, however, one ought to be aware of the importance of politics and the need to understand its influence on antitrust policy in general and the internationalisation thereof in particular.

The nature of this inquiry opens up the need for new insights from various disciplines, including political science. These insights are valuable in order to understand the internationalisation of antitrust policy and complement its rules, normative principles and guiding policies. It seems that lawyers and political scientists have a great deal of mutual interest in the internationalisation of antitrust policy, which could be realised by constructing an adequate dialogue between the two disciplines.[21] For this reason, the author encourages the adoption of an interdisciplinary approach to any study on the internationalisation of antitrust policy. What one must remain aware of is that institutions have an important role to play in antitrust

Cornell Law Review 1140; E. Sullivan (ed.), *The Political Economy of the Sherman Act* (Oxford University Press, Oxford, 1991); D. Millon 'The Sherman Act and the Balance of Power' (1988) 61 *Southern California Law Review* 1219.

[20] See ch. 5.

[21] On constructing dialogues between different disciplines, see generally J. Weiler, 'Community, Member States and European Integration: Is the Law Relevant?' (1982) 21 *Journal of Common Market Studies* 39; R. Pryce, *The Politics of the European Community* (Butterworths, London, 1973).

policy and that the internationalisation of antitrust policy makes the case for considering institutional dimensions particularly pressing. It is advisable to adopt an interdisciplinary approach because of the particular emphasis that should be placed on the importance of institutional dimensions and politics, including the way in which policy processes complement the law in this area. Thus, it is important for any study on this topic to be receptive to insights regarding the choice of methodology within political science and political regulation. This emphasis reflects the need to develop an interdisciplinary approach to the topic and the sense of importance of institutional endowments and their relevance to the internationalisation of antitrust policy.[22]

Generally, it seems that political scientists themselves have been very slow to undertake systematic work on antitrust policy, leaving this area to lawyers and economists.[23] There may be more than one explanation for this. One explanation may be that as antitrust law and policy and their analysis have been dominated by economists, this seems to have made it virtually impossible for political scientists to enter the area. Another, perhaps less convincing, explanation may be that there has been little interest on the part of political scientists to undertake any work in this important area of law and policy. Whichever of these two explanations one may find plausible, it seems very likely that lawyers and economists will eventually need to concede the importance of politics and of institutions; although it is very possible that in the short term, at least, their focus will remain on analysing legal principles, economic models and individual cases in the abstract and without any reference to, or recognition of, political acceptability or political bargaining.[24] Despite such timidity on the part of lawyers, economists and political scientists to give sufficient attention and recognition to the situation just described, it is almost beyond doubt that

[22] See M. Staniland, *What Is Political Economy?: a Study of Social Theory and Underdevelopment* (Yale University Press, New Haven, 1985); D. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, Cambridge, 1990); M. Granovetter, 'Economic Action and Social Structure: the Problem of Embeddedness' in M. Granovetter and R. Swedberg (eds.), *The Sociology of Economic Life* (Westview Press, Boulder, 1992).

[23] C. Doern and S. Wilks (eds.), *Comparative Competition Policy* (Oxford University Press, Oxford, 1996), p. 4.

[24] *Ibid*., at pp. 4–5. The authors argue that their assertion is not intended to be dismissive of law and economics disciplines, or to imply that academic lawyers or economists invariably overlook political factors. They merely (and it seems rightly) emphasise 'a systematic bias and an understandable, if regrettable, narrowness of viewpoint' on the part of either discipline.

awareness of institutional and political dimensions can vastly contribute to understanding the internationalisation of antitrust policy.

The examples of internationalisation

The point was made above that in seeking to internationalise antitrust policy, differences have surfaced with regard to the way 'internationalisation' in the present context should be viewed. The result is that several examples of internationalisation have emerged which may conveniently be split into four categories. First, there is the idea of bilateral co-operation between different antitrust authorities around the world. Bilateral co-operation revolves around the enforcement of the domestic antitrust laws of the countries concerned. It generally takes the form of formal agreements between the domestic antitrust authorities of those countries which normally include, *inter alia*, provisions on information-sharing and comity.[25] Secondly, there is the idea that domestic antitrust laws can converge towards some common points and standards.[26] The basic idea here is to harmonise the different antitrust laws of different countries. The third example involves creating a detailed international antitrust code to be adopted by countries.[27] A fourth example of internationalisation focuses on establishing an international system of antitrust within a framework of autonomous international institutions.[28] Entrenched in this example is the idea that countries would apply the principles emerging from the system under the auspices of an independent antitrust authority. The system would also provide for a minimalist procedure with a mechanism to resolve disputes among participating countries. Arguably, this example is the most central, but certainly the most ambitious, of all four. It may be appropriate to note in passing that this list of examples is not exhaustive; it is very possible that more examples will come to light. However, these are the four main, principal and important examples which have emerged over the years.

[25] See for example the EC–US agreement (23 September 1991) OJ 1995 No. L95/45 as corrected by OJ 1995 No. L131/38, discussed at pp. 112–16 below. Other bilateral agreements also have been entered into by different countries, including Canada, Australia and New Zealand. See chs. 7 and 8 for a discussion on these agreements.

[26] See ch. 5.

[27] See pp. 283–4 below.

[28] See the proposal put by the 'Wise Men Group', a group of experts commissioned by K. van Miert, former Commissioner for antitrust policy in the EC, 'Competition Policy in the New Trade Order: Strengthening International Co-operation and Rules' COM (95) No. 359. The proposal is discussed in ch. 5.

Some reflection on terminology

At this stage, a comment on the employment of terminology in the book would be appropriate. There are three important terms which merit specific mention. These are 'system of antitrust', an 'international system of antitrust' and 'the internationalisation of antitrust policy'. Other important terms and concepts will be mentioned and examined as and when they crop up in the discussion.

System of antitrust

Quite frequently reference will be made to a 'system of antitrust'. It is essential to explain this concept, which it is submitted, includes at least three different components.[29] The concept is suitable to accommodate the three components concerned. The 'system', in this sense, functions as an operative whole, combining the interaction of its ideas and the factors influencing its operation. It is believed that a special relationship exists between the three components concerned, which will be explored at different levels in the book. The book will draw on the knowledge and insights of the disciplines to which these components belong in order to build an analytical framework in which they could be interwoven and therefore complement and enrich one another.

The first component to be mentioned is the concept of competition itself, which is entrenched in economics. The following chapter will demonstrate how the economic philosophy of competition has become its dominant intellectual discourse.[30] Antitrust policy has developed as such that no study of antitrust law and policy which lacks appreciation for the role that competition plays within the market economy can be justifiable, indeed possible. As Dewey, in a characteristically trenchant style, remarked: before deciding what antitrust law ought to be, it is necessary to understand what the process of competition is really like.[31] Secondly, there is antitrust law which

[29] See M. Dabbah, 'Measuring the Success of a System of Competition Law: a Preliminary View' (2000) 21 *European Competition Law Review* 369, 370–1.

Note the employment of the concept by other writers. For example, Gerber uses the concept system to analyse how institutions interact with norms in relation to the protection of competition. According to Gerber, the concept thus becomes more specific and functional, and more analytically valuable, because it focuses on the characteristics and consequences of those interactions. Gerber, *Competition*.

[30] See Amato, *Power*.

[31] D. Dewey, 'The Economic Theory of Antitrust: Science or Religion?' (1964) 50 *Virginia Law Review* 413, 414.