

THE
INTERNATIONALISATION OF
ANTITRUST POLICY

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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 Hopkins 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.

concerns applying a body of legal rules and standards to deal with market imperfections and restoring desirable competitive conditions in the market. The third component is antitrust policy,³² which is anchored in politics. This deals with public authorities' intervention beyond certain market imperfections, such as market failures.³³ Market failure, in this context, connotes the existence of circumstances in which private forces in the market fail to sustain 'desirable activities' or to estop 'undesirable activities'. The corollary of this provides that sovereign countries are responsible for the formulation of different public policies, and public institutions possess *discretion* to ensure their implementation in practice. In Bork's view, antitrust policy exemplifies one of the most elaborate deployments of governmental force in areas of life still thought primarily committed to private choice and initiative.³⁴ These thoughts to one side, it is essential to realise that the term 'antitrust policy', like the term 'antitrust law' and the concept of 'competition', has been given different interpretations in different jurisdictions and in different contexts, and that this may present a difficulty in the internationalisation of antitrust policy.

International system of antitrust

In the present book, a distinction is made between a 'system of antitrust' and an 'international system of antitrust'. The latter will – if and when established – inevitably be hybrid in nature. What this means is that the system is to be constructed not only on the basis of ideas originating at the national level, but also on the basis of understanding international politics and international economic issues. Constructing the system will also involve some appropriate recourse to principles of public international law. Finally, to avoid any likely confusion of terminology between this system and other systems (national/regional) of antitrust, the former will be referred to uniformly throughout this book as an international system of antitrust.

The internationalisation of antitrust policy

In addition to highlighting the dividing line between a 'system of antitrust' and an 'international system of antitrust', another distinction needs to be

³² See WTO Annual Report 1997, p. 34.

³³ See F. Bator, 'The Autonomy of Market Failure' (1958) 72 *Quarterly Journal of Economics* 351.

³⁴ Bork, *Paradox*, p. 3.

made between the latter and ‘the internationalisation of antitrust policy’. It is argued that an international system of antitrust can ultimately be constructed through the process of ‘internationalisation’. It is important to understand this sequence as the process of internationalisation seeks to deal with issues which seem to be vital in order to construct this system. The term ‘internationalisation’ is employed in this book, not only to highlight the need to accommodate the various national interests and decision processes into how international institutions are designed and politically justified, but also to refer to the actual penetration of international pressures into the concrete functioning of domestic institutions. These thoughts show that the process of internationalisation functions as a ‘double-edge sword’. More importantly, they also result in legal, as well as political, implications for the internationalisation of antitrust policy. These implications will be explained and analysed in the different chapters of the book.

Globalisation and its implications for antitrust policy

In the preceding discussion, reference was made more than once to the concept of ‘globalisation’. It may be helpful at this point to explain the use of the concept in the present book and more importantly demonstrate its implications for the place of antitrust policy in a global economy. It is beyond the scope of the book to engage in a detailed discussion on whether globalisation in itself is a good or bad thing; this is a highly debatable issue. There is certainly an argument that globalisation would be considered a good thing in so far as it leads to improvement in economic conditions and standards within different countries, especially developing ones. There would be little sense in attacking or opposing globalisation if consumers worldwide (in both developed and developing countries) were able to enjoy better quality of products and services, more choice and lower prices. In this way, globalisation can have positive effects, which must be welcomed, encouraged and supported. Having said that, there is also a counter argument that globalisation is not a virtue. There is a certain degree of scepticism over globalisation in many quarters. Different groups, including some consumer groups, anti-capitalist groups and developing countries have come to regard globalisation as a process used by developed countries and their firms to impose their standards on these groups and to suppress and constrain their freedom. In this case, and if indeed there is truth behind this, there is hardly any legitimacy in pursuing or supporting globalisation. This

important issue raises an extremely interesting and relevant question as far as antitrust policy is concerned, namely how antitrust authorities can ensure that the global integration of markets leads to and maintains competitive outcomes, thus making globalisation both economically more efficient and socially more acceptable. It is believed that antitrust policy – and specifically international co-operation on antitrust policy – has an important role to play if resentment against globalisation and a protectionist backlash are to be avoided.

The important debate on the pros and cons of globalisation to one side, there is a need to be aware that globalisation, like free trade and open competition, is not irresistibly a natural phenomenon. It is a process that follows from political choices. The amount and level, as in fact the actual existence, of globalisation is the product of political decisions and policy formulations adopted by governments which have come to reflect a newer, late 1990s, approach to markets and state regulation. This approach stands in complete contrast to the approach largely witnessed in the years preceding the last two decades or so of the twentieth century. The opening paragraph of the present chapter demonstrated quite succinctly how the global economy witnessed dramatic changes in a remarkably short period of time, including the reduction and elimination of state control and monopolisation; favouring the market mechanism; and opening domestic markets to foreign trade and investment.

Whether one agrees or disagrees with globalisation, it is of significant importance to realise that the concept is susceptible to different meanings, depending on the context in which it is used and the way in which it is understood. For this reason, the concept may not be easy to define. In fact, there is not a single universal definition of globalisation; and probably one should not attempt to argue the case for such a definition. It may be more sensible to identify or describe the concept according to the situation at hand. In the present context, the concept is employed to refer to market globalisation, which has been particularly fostered by advances in technology and the elimination of barriers hindering the flows of trade and investment worldwide.³⁵

As a result of globalisation, the number of antitrust policy matters that transcend national boundaries has been increasing. The sequence in this

³⁵ See generally M. Walters, *Globalization* (Routledge, New York, 1995); J. Dunning, *The Globalization of Business: the Challenges of the 1990s* (Routledge, New York, 1993).

regard is an easy one to follow. As markets and competition become increasingly international, so do restrictive and anti-competitive practices by firms. These practices may occur in different fields, including air or sea transport, software products, drugs and telecommunications; and they may be in a variety of forms such as export cartels, international cartels and conspiracies, abuse of market dominance and mergers. The economic effects of these practices can easily pierce national boundaries; and are not constrained by the latter. For example, a number of firms may collude on a product market that extends beyond national boundaries. The collusive behaviour in this case will have an effect throughout that market. Similarly, a single firm which enjoys dominance in the manufacture and distribution of its products or the provision of its services throughout the world may be able to achieve the same result unilaterally. The same is also true with regard to international mergers which produce effects in more than one country and which normally require the approval of several domestic antitrust authorities before they can be implemented. The antitrust law practice and literature are full of examples covering such, or similar, scenarios.

In all of the above scenarios, anti-competitive and restrictive practices affect the interests of consumers on the relevant market and,³⁶ as a consequence, the country and communities of which they are part. It should therefore be clear why domestic antitrust authorities would want to regulate such practices; though it is clear that legal and political hurdles affecting their endeavour may arise along the way. Practices of this nature lead to transfer of wealth from consumers to producers; and in an international context the transfer of wealth will be from consumers in one country to producers in another. Regardless whether one or more domestic antitrust authorities are able to intervene in this situation; whether they will intervene; and how they will do so, it is beyond doubt that such situations give rise to fundamental legal, economic and political problems with which the internationalisation of antitrust is concerned.

It can be seen therefore that globalisation has very significant implications for antitrust policy in the global economy. Globalisation has made it almost inevitable to change antitrust law and policy. In this regard, the internationalisation of antitrust policy is a response to market globalisation. It is necessary therefore to examine antitrust policy and its place in the

³⁶ See ch. 2 for discussion on the meaning of the relevant market.

global economy and to enquire into what steps, if any, should be followed and in what direction.

The structure of the book

The book is structured as follows. Chapter 2 refines some concepts and ideas that are important to understand, including the concept of competition. Chapter 3 examines the goals of antitrust law and its political perception. Chapter 4 considers the use of discretion by antitrust authorities and how this affects the internationalisation of antitrust policy. It will be argued that this use of discretion can lead to similar antitrust laws in different jurisdictions being radically different in their enforcement – a situation that often leads to divergence in the legal standards between those jurisdictions. Chapter 5 examines the antitrust experience of the EC – focusing on both the internal and external developments of the experience. Chapters 6 and 7 examine the doctrine of sovereignty and extraterritoriality respectively. Chapter 8 deals with the relationship between antitrust and trade policies. Chapter 9 gives an account of the past, present and future of the internationalisation of antitrust policy from a comparative perspective. It examines, *inter alia*, the perspectives of countries, international organisations, the business community and the consumer on the internationalisation of antitrust policy. Finally, chapter 10 concludes.

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This book is essentially an examination of the internationalisation of antitrust policy, with a special reference to the law, economics and politics thereof, as evidenced in the actions and statements of antitrust authorities, political bodies and decisions of law courts. To a great extent, the book can be seen as an original and empirical inquiry. The theory presented in the book is general, in the sense that it is not tied to any particular jurisdiction, but seeks to give an explanatory and a clarifying account of the internationalisation of antitrust policy.

The book begins with refining some central concepts and ideas, including the concept of competition and antitrust law as well as an examination of the goals of the latter. This is a central theme in the discussion, which illustrates the need to build bridges between different disciplines with respect to the internationalisation of antitrust policy. This theme also contributes to understanding the process of internationalisation and complements its underlying rules, principles and guiding policies.

The book concludes by reviewing the landscape of the internationalisation of antitrust policy and asking what further developments can be expected to appear on the horizon. The recommended approach in the book has much to commend it in a world of relentless globalisation, where conflicts between different countries and between countries and multinational firms may make legal and political decisions regarding the process of internationalisation more central.