

The Internationalisation of Competition Rules

Brendan J. Sweeney



Routledge Research in Competition Law

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First published 2010

by Routledge

2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada

by Routledge

270 Madison Avenue, New York, NY 10016

Routledge is an imprint of the Taylor & Francis Group, an informa business

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Typeset in Garamond by Keyword Group Ltd.

Printed and bound in Great Britain by

CPI Antony Rowe, Chippenham, Wiltshire

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British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data

Sweeney, Brendan J.

The internationalisation of competition rules / Brendan J. Sweeney.

p. cm.

1. Competition, Unfair. 2. Antitrust law. 3. Restraint of trade.

I. Title.

K3850.S94 2009

343'.0721—dc22

2009007000

ISBN10: 0-415-46079-4 (hbk)

ISBN10: 0-203-87233-9 (ebk)

ISBN13: 978-0-415-46079-8 (hbk)

ISBN13: 978-0-203-87233-8 (ebk)

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1 Introduction and overview

Introduction

Business is becoming increasingly globalised.¹ The causes are undoubtedly manifold but important drivers include liberalisation of the international trading system,² creation of the World Trade Organization (WTO) in 1994 and its various agreements,³ advances in communications and information technology and substantial reductions in the costs of transportation.⁴ Law and policy, by way of contrast, remain predominantly domestic or state based. This creates tensions between the practice of business and its regulation. The rapid growth of commercial globalisation has emphasised the tension between conflicting national economic policies.

1 There are many views on globalisation, both descriptive and normative. It is sufficient for present purposes to describe the notion of globalisation as being concerned with the processes which strengthen or 'thicken' interstate interdependence. See R. Keohane & R. Nye, Jr., 'Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy' (Working Paper, Kennedy School of Government, February 2001).

2 Multilaterally, trade liberalisation has progressed from the creation of the General Agreement on Tariffs and Trade (GATT) in the late 1940s through various rounds of trade talks. See General Agreement on Tariffs and Trade, Opened for signature 30 October 1947, 55 UNTS 187 (entered into force provisionally 1 January 1948). A number of important regional trade agreements have also been forged. More recently, there has been a significant growth in bilateral free trade agreements.

3 The WTO was established by the Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('Marrakesh Agreement'). A number of other agreements were successfully completed including the General Agreement on Trade in Services, opened for signature 15 April 1994, 1869 UNTS 183, 33 ILM 1168 (entered into force 1 January 1995) (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights, opened for signature 15 April 1994, 1869 UNTS 299, 33 ILM 1197 (entered into force 1 January 1995).

4 See European Commission (EC), *Responses to the Challenges of Globalisation: A Study on the International Monetary and Financial System and on Financing for Development* EC Doc SEC(2002) 185 final, 21–22.

Competition policy is important to this debate because of the explosive growth in the number of states shifting towards more market driven forms of economic regulation. This trend is noticeable not only in eastern Europe and the former Soviet republics, but also in socialist states such as China and Vietnam, in developing democracies such as India and in the industrialised democracies where there has been a move away from the welfare state to a greater reliance on market-driven solutions. In this new world, promoting competition and efficiency has become a central economic principle and competition law has become a core regulatory mechanism. In the early 1980s only 20 jurisdictions had a competition law. By 2000 the number had grown to 98 and continues to grow.

The problem created by the intersection of these forces – commercial globalisation, domestic rules and the shift to more market-based regulation – is captured in a communication by two former commissioners for the Competition Directorate at the European Commission to the European Council. They commented:

[Liberalisation and globalisation] call into question the domestic nature of competition rules and the absence of binding rules at the international level. Many countries or regions have implemented comprehensive policies, but lack appropriate instruments to apply domestic competition rules to anticompetitive practices with an international dimension, as well as to obtain relevant information outside the jurisdiction. A framework is then necessary to enhance the effective enforcement of competition rules.⁵

The search for a suitable framework with which to handle the problem has led to a series of proposals for global competition rules. To date these proposals have been hotly contested. Proposals range from the realist approach – which stresses vigorous and unilateral application of domestic law to foreign conduct – to the internationalist approach – which stresses binding multilateral rules enforced by some supranational institution. In between these two extremes lie an infinite number of possibilities. How do we determine which possibility is most suitable? This book proposes a possible way forward.

Structure used in the book

From among the plethora of possible solutions to the global competition problem, how do we determine which possibility is most suitable? This question

5 Sir Leon Brittan & Karel Van Miert, 'Towards an International Framework of Competition Rules — Communication to the Council', Doc No COM (96) 284 (1996).