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NEW DEVELOPMENTS IN COMPETITION POLICY: AN AUSTRALIAN PERSPECTIVE

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I will provide an Australian perspective on the international dimension to competition policy.

Globalisation

As we all know, the international factor in the economic activities of countries has been increasing greatly in recent decades. Trade has grown even faster than economic growth in the last 50 years - so also have foreign investment and international capital flows. The causes of this include:

- Economic growth itself which both creates ever increasing demand for imports and also increases the capacity of economies to produce exports; it also generates greater amounts of savings which may be invested domestically and internationally to meet the greater investment demands associated with economic growth.
- Technological innovation. This pervades most fields of economic activity but is especially great in the areas of information and communication technology. A sector particularly affected by technological growth in these areas is the financial services sector, which, in turn, facilitates higher degrees of financial and economic interaction between economies in different countries.
- Falling transport costs.
- International, as well as domestic, liberalisation of trade, investment and economic activity generally.

Generally speaking, globalisation has positive effects on promoting competition and in widening consumer choice. However, it can be associated, in some cases, with anti

competitive behaviour on an international scale and this can pose problems for national governments which have difficulties in dealing with behaviour taking place in other countries that can affect their own economies.

I will particularly focus on the areas of international cartels and global mergers, although I shall also mention some other areas where the global dimension to anti competitive behaviour is relevant. I would also like to refer, in passing, to the related debate about the interaction of trade policy and competition policy and to some of the policy choices being discussed. Given the growing importance of cooperation from offenders in the detection of global cartels, I would also like to discuss leniency policy. Finally, I will look at some of the policy implications of globalisation and how the lack of an international anti-trust regime can be addressed.

Global Cartels

Global cartels, that is, cartels organised on an international scale, have long existed ever since the beginnings of international trade. There is a long history of cartels, in particular, during the nineteenth and early parts of the twentieth century. Indeed, in 1907 an important US Antitrust case sought to end the tobacco cartel which had divided up world markets between British producers who controlled the UK, US producers who controlled the US and the rest of the world which was divided up and allocated to either British or American producers who agreed not to compete in one another's markets.

However, there appears to have been a sharp increase in the extent of global cartel activity, or at least in its detection, in the past few years. If there has been an increase in the amount of international cartel activity, rather than just an increase in the amount that has been detected, this is probably due to the impact of trade liberalisation. Liberalisation is generally good for competition, but it tends to put pressure on firms that have dominated particular local markets without much international competition. Facing competition for the first time, some of them tend to get together with producers in other countries to divide up world markets and to agree on prices and output.

The vitamins case is the most spectacular example. Vitamins is an important product supplied to the food processing industry and the animal feed industry. There is also a small amount supplied to consumers directly. Food companies blend raw vitamins into things like bread, rice and juice. The animal feed industry buys huge amounts of bulk vitamins to produce healthier and faster growing livestock. An example would be huge chicken farms. The vitamins cartel affected $5-6 billion of US commerce. The worldwide effect would be much greater – over $20 billion.

There is evidence that the cartel increased prices by around 70 percent during the 1990's.

The conspiracy appears to have begun in 1989 when executives at Roche AG, and BASF began holding talks about price fixing. They decided to carve up the vitamin market and to recruit other major vitamin makers to come in on the arrangement, like Rhone-Poulenc of France and Takeda Chemical Industries from Japan. Later, yet further vitamin producers joined the cartel. Nearly all world vitamin producers now

face massive fines. Already Roche has paid fines of $US500 million and the total fines already collected exceed $US1 billion in the US alone. Fines in other countries and damages cases lie ahead.

The cartel appears to have operated in a fairly stable manner for over 10 years. There were frequent high level executive meetings. There were very detailed arrangements involved in the administration of the cartel, including careful budgeting, market allocation, price fixing and so on.

I think it is worth noting that vitamins are not produced very much in the United States. They are mainly produced in Europe and Asia. The American business culture is far more wary about entering into price fixing arrangements, although as I shall show in a moment, the Archer Daniels Midland's conspiracy shows that one must be wary about this kind of generalisation.

Another important cartel concerned Archer Daniels Midland which in 1996 paid $100 million to settle US charges about price fixing conspiracies that occurred with European and Japanese to fix the prices of feed additives. Some top executives are now in jail. The Archer case was revealed by Mr Mark E Whitacre an Archer executive who secretly tape recorded company executives discussing price fixing with rivals. In fact, he very conveniently was able to arrange for the videoing, as well as recording, of these meetings for a couple of years.

The Archer Daniels Midland's case involved international cooperation between American, Japanese and European firms to fix prices in the worldwide food and feed additives industries.

Another important case concerned UCAR International Inc which pleaded guilty in participating in an international cartel which agreed to fix prices and allocate market shares in the US $500 million graphite electrodes industry.

The US is currently investigating a number of other international cartels. There are over 25 Grand Jury investigations. We are told that there are some major cartels still to be disclosed.

The above conspiracies involved secret meetings of high level executives in a number of countries around the world. Typically the meetings were held outside the United States where fear of imprisonment, high penalties and detection is greatest. A significant number of meetings were held in the Asian region.

I believe that the existence of international cartels on a rather large scale is an important reason why steps need to be taken to enhance the extent of international cooperation in competition law and perhaps why every country needs to consider having a competition law and policy of its own.

Global mergers

In recent times there has been a spectacular increase in the extent of international merger activity, in one sector after another – finance, communications, oil, airlines, pharmaceuticals, automotive professional services and so on.

For the most part, these mergers are not anti competitive and pose no major challenge to the global economy's major competitiveness. Indeed, in many cases, they enhance competitiveness and improve economic efficiency by creating more efficient arrangements for international business transactions.

However, it is very important that we be vigilant about these matters.

I am often asked whether in Australia or indeed in other smaller countries global mergers pose an economic threat and are we powerless to deal with them.

My answer is, that for the most part, the global mergers that we read about every day are not anti competitive. Most of them are logical commercial developments occurring in response to the forces of globalisation, technological change and liberalisation. For example, many of the financial sector mergers in Europe are a response to the advent of the Euro which is leading to the emergence of a single European financial market. In the United States many of the financial mergers are a response to deregulation of financial markets which had previously prohibited operations on a truly national scale within the United States.

Likewise, telecommunications mergers have a great deal to do with the emergence of a liberalised approach to telecommunications and the breaking down of barriers to international transactions. This is similarly the case with airlines.

Another reason why these mergers do not deeply concern me is that these days in particular, major anti competitive mergers are likely to be stopped by overseas authorities. In this respect, it is worth noting that the United States after a rather quiet period in the 1980s has become far more active in the public enforcement of anti trust law. The European Union is also becoming far more active than in the past. Japan and Korea are also stepping up some of its anti trust activities and I have no doubt that there are other examples. Indeed in some respects the real issue is that some global mergers have to be approved by so many regulators in so many countries that greater cooperation between regulators is required, as I will discuss further.

However, it still remains the case that some mergers that occur internationally can damage competition and will force consumers to pay more in certain countries with particular market structures. Are these countries powerless to act?

My own view is that they are not. I shall take Australia as an example. When Gillette tried to take over Wilkinson Sword in the wet shaving market, the ACCC opposed the merger successfully in the Federal Court of Australia, even though the transaction occurred offshore. As a result of the Federal Court action divestiture was imposed upon the companies with the selling off of the Wilkinson Sword brands to an independent buyer for ten years.

This case established the jurisdiction of the *Trade Practices Act* with respect to off shore mergers and showed that strong remedies are possible.

Moreover, when a merger occurs that is anti competitive, it is often possible to resolve it in a manner that does not damage competition. A recent example was the attempt by the British American tobacco company (trading in Australia as WD & HO Wills) to

take over Rothmans. In some countries this would not have damaged competition. However, in Australia it was clear that it would. There are only three companies – WD & HO Wills, Rothmans and Philip Morris – and imports are fewer than 1%. The Commission considered that a merger of two of three big players would reduce competition. It opposed the merger. Following this, British American Tobacco and Rothmans decided to release 17% of the total brands of cigarettes on the market and they were acquired by Imperial Tobacco, a major international tobacco organisation which has now entered, aided by an initial 17% market share and the introduction of its own well established brands into Australia. Some coincidental changes in tax law will also boost imports. As a result, there remains three strong credible players in the Australian market and the original merger between British American tobacco and Rothmans has been able to go ahead in Australia as well as in other parts of the world.

The point is that very often practical solutions can be found to seemingly difficult problems.

Another case we have dealt with has been the Coca-Cola acquisition of Schweppes. This is an interesting merger because it has never been proposed that it should occur in the US where there are clear anti trust problems. At this stage, the merger has not proceeded in France where there have been anti trust problems which were made clear in the Orangina case. Moreover, there have been problems with the merger in the European Union. Australia opposed the merger. It noted strong opposition by many outlets that sell Coke. Following that, Coke put two proposals to try and meet our concerns but, in each case, the Commission believes that they could not overcome its concerns. The essential concern of the Commission is with the merging of the two sets of brands, ie, Coca-Cola brands and the powerful international brands of Schweppes. The undertakings to which I have referred and which have been rejected by the ACCC, have all failed to address this fundamental concern. They involve concessions about other minor brands and some other arrangements.

Another interesting solution has occurred in a couple of cases where the Commission had initial concerns. When BHP, Australia's major steel company, wanted to take over New Zealand Steel, the Commission believed that there could be some anti competitive effects in certain parts of the steel market, even though international trade would take care of many problems. However, when the Commission objected a practical solution was found. The Government agreed to reduce tariffs on an accelerated basis in relation to those parts of the market where there could have been an anti competitive effect. Accordingly, it is my provisional view that many of the problems for competition created by global mergers can be met by appropriate action in domestic markets.

Market Power

It is not my intention to discuss issues of market power occurring on a global basis other than to make one point about the Microsoft case in the United States.

In November 1999 the United States District Court found that Microsoft possesses monopoly power in the markets for Intel-compatible PC operating systems and browsers, and that it has used this power to thwart competition in contravention of US

anti-trust law, and resulting in substantial consumer detriment. On 6 June 2000 the Court ruled that Microsoft should be split into two distinct entities.

The point I wanted to make about this case is that it is essentially about anti competitive arrangements in the United States which have a global effect. It is part of the global competition picture. Moreover, the Microsoft case illustrates the importance of applying anti trust law to areas of the economy, which are characterised by high rates of technological innovation.

Trade and Competition.

I would now like to deal with one sub set of the problems concerning the international dimension of competition policy. This concerns the interaction between trade policy and competition policy. I emphasise in passing that this is only one aspect of the global competition scenario but this fact is not always recognised.

The essence of the debate about the interaction between trade and competition policy can be summarised as follows.

First, trade policy liberalisation can be frustrated by failures in the enforcement of competition policy. For example, supposing a country liberalises trade, allowing a potential flow of imports following the reduction or elimination of trade barriers.

The benefits to consumers of this liberalisation can be defeated by restrictive practices in the liberalising market. For example, retailers in the liberalising market may reach agreement with manufacturers in the home market not to accept imports. Entry into that distribution sector may be difficult. Trade policy liberalisation in such cases can clearly be frustrated by failures to enforce competition policy properly, eg, if the regulator does not exist or fails to take action to stop anti competitive practices.

Second, it is important to note the reverse relationship. Trade policy can be highly anti competitive. For example, nearly all forms of import protection whether they be quotas, tariffs, anti dumping laws and so on can reduce competition and damage consumer interests. It is important that the debate about the damaging effect on trade of failures in competition law enforcement be balanced by recognition of the damaging effects on competition and consumers of trade restrictions.

Third, it is important to note that there is another extremely important variable which may be at work – regulation. Very often it is Government regulation rather than failures in the enforcement of competition law that are the true obstacle to imports, to trade liberalisation working and to competition working. What is needed is a three-way debate about the relationship between trade, competition policy and regulation, rather than a debate that is focussed too narrowly on trade protection and failures in competition law and enforcement.

Intellectual property laws are an interesting example. An interesting aspect of the Microsoft case that I discussed earlier is that the outcome reinforces the defeasibility of Intellectual Property rights in the event that they are used as a façade for blatant anti-competitive behaviour.

Intellectual property law has been captured by the interests of producers in countries which are net exporters of intellectual property. In particular, the statutory restrictions on parallel imports under copyright law have enabled massive unjustified price discrimination between countries, have hindered and distorted competition and imposed draconian restrictions on international trade. In this part of the world we are losers from these laws. I am heartened that some change is occurring in some parts of the world – New Zealand has abolished parallel import restrictions, Australia has removed restrictions in some areas and Japan's Supreme Court has relaxed them in patents.

Leniency Policy

Internationally, most competition authorities are recognising the growing importance of cooperation from offenders in mounting a successful prosecution in respect of violations of the antitrust laws. This is based on the realisation of the increasing difficulty of detecting and proving the existence of anti-competitive conduct, which is further compounded by the fact that such conduct is very commonly global in its scope and effect.

Certain enterprises participating in anti-competitive agreements might wish to terminate their involvement and inform the Commission of the existence of the agreements, but are deterred from doing so by the risk of incurring large fines.

Perhaps the best "carrot" to encourage persons to blow the whistle on themselves and their co-conspirators is to offer them favourable treatment. Favourable treatment means any penalty or obligation that is less severe than one which would be sought in the absence of disclosure and cooperation by the party who may have contravened the provisions of the *Act*.

It is generally felt that the interests of customers and consumers in ensuring that such practices are detected and prohibited outweigh the policy objectives of imposing financial penalties on those entities which engage in anti-competitive practices and which cooperate with the law enforcement agency.

The Vitamins case I discussed earlier first came to the attention of the anti-trust authorities when one of the participants to the cartel came forward in exchange for immunity.

Most competition authorities have developed guidelines regarding when they will grant leniency in exchange for cooperation.

The European Union and the US have developed prescriptive factors to determine when leniency will be granted. In comparison, the ACCC has adopted an overtly flexible cooperation policy. The Commission developed guidelines which are intended only as an indication of the factors the Commission will consider relevant when considering a request for leniency.

The Commission distinguishes between corporate and individual leniency. The ACCC further enunciates two levels of amnesty, being:

a) immunity from prosecution; and

b) Leniency in the imposition of a civil penalty.

Leniency, including immunity, may be considered appropriate for directors, managers, officers or employees of a corporation who come to the ACCC as individuals where they:

(a) have important evidence of a contravention of which the ACCC is either otherwise unaware or has insufficient evidence to initiate proceedings;

(b) provide the ACCC with full and frank disclosure of the activity and relevant documentary and other evidence available to them;

(c) undertake to cooperate throughout the ACCC's investigation, and comply with that undertaking;

(d) agree not to use the same legal representation as the firm by which they are employed; and

(e) have not compelled or induced any other person/corporation to take part in the conduct and were not a ringleader or originator of the activity.