ISSN: 2450-8160

Herald pedagogiki. Nauka i Praktyka

wydanie specjalne

Warszawa
2021

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(wydanie specjalne) Volume-2, № 1 January 2022

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INTRODUCTION TO COMPETITION LAW OF SOME FOREIGN COUNTRIES (CANADA AND AUSTRALIA): OVERVIEW

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Abstract: Any business - whatever its legal status, size and sector - therefore needs to be aware of competition law, firstly so that it can meet its obligations, and in doing so, avoid heavy penalties, but also so that it can assert its own rights and protect its position in the marketplace.

This article discusses the general principles of competition law, the importance of legal regulation and the specifics of each country. In doing so, the competition law of foreign countries such as Canada and Australia was studied and the existing concepts were discussed in detail.

Keywords: businesses, competition, deceptive marketing, customers, consumers.

There is no doubt that "competition law" is a popular term. A Google search on the term in Hong Kong on 2 November 2017 produced 15.8 million hits. It has its own Wikipedia page.

Textbook titles include Competition Law, European Competition Law and Economics, EC Competition Law, and Competition Law in Canada. [1] It is perhaps surprising therefore that there is no consensus on the meaning of the term. To begin with, what is called competition law in some jurisdictions is called something else in others. For example, what is usually called competition law in Europe is called "antitrust law" in the US, "anti-monopoly law" in China and Japan, and (until recently at least) "trade practices law" in Australia. Somewhat bizarrely, the term "antitrust" has been adopted relatively recently by the EU to describe subset of competition law which deals with agreements between businesses, other than mergers and abuse of market dominance, i.e. most of the conduct subject to competition law - even although the term was originally adopted in the US in the late nineteenth century to denote the large US corporations or "trusts" at which the law was directed.[2] The range of conduct which falls within competition law, antitrust law, anti-monopoly law or trade practices law also varies from one jurisdiction to another. In the EU, for example, competition law is not just directed at business conduct, but also at conduct by EU Member State governments in

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the form of "state aids" to businesses which distort competition.[3]

Somewhat illogically, however, it does not include the EU laws on public procurement, which require EU Member State governments to put contracts with private sector companies out to open tender, even although the main purpose of these rules is to ensure that there is competition between businesses for public sector contracts.

In Australia, trade practices Law covers not just rules on competition, but also, for example, rules against misleading or deceiving consumers, [4] as well as sector specific rules on access to networks in the energy and telecommunications sectors both of which would normally be regarded as falling outside competition law in the EU. The Canada Competition Act also has rules against deceptive marketing practices.

These disparities have not prevented efforts being made to define the term "competition law", efforts which have not been entirely, if at all, successful. For example, Whish and Bailey state that: "As a general proposition, competition law consists of rules that are intended to protect the process of competition in order to maximize consumer welfare". [5]

However, there are at least three problems with this definition. The first is that, as will be seen later in this Chapter, competition law in some jurisdictions (such as the EU) was not primarily intended to protect the process of competition (or rivalry between businesses), but to protect the economic freedom of individual operators. Some competition laws, including those of the EU and South Africa, are also intended to prevent dominant operators from exploiting their position vis-?-vis customers and consumers.

This objective also has little to do with protecting the process of competition. The second problem is that the goal of protecting competition may be to enhance consumer welfare in some jurisdictions, whereas in other jurisdictions - as will also be seen later in this Chapter - competition is protected for other reasons. The third problem is that, although competition law may take protection of competition as a starting point, there are many situations in which these laws expressly permit competition to be harmed, in order to achieve objectives which are considered more important than competition itself. [6]

Rather than trying to find a satisfactory definition of competition law at this stage, it is therefore more fruitful to examine first what the common elements of competition laws are (using the subject jurisdictions as the sample) before going on to look at what competition and harm to competition mean, why competition is valued, and what the objectives of competition laws are.

Australia

In Australia, the competition provisions are contained in Part IV of the Competition and Consumer Act 2010 ("CCA"). Unlike EU law, where all arrangements are subject to a competition test ("preventing, restricting or distorting competition") there are certain types of arrangement in the CCA that are prohibited in themselves i.e. per se (unless a specific authorization is obtained), irrespective of their intended, likely or

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actual effects on competition. [7] These arrangements are regarded as the more serious violations of the CCA, and are as follows:

"Exclusionary" provisions. This prohibition is aimed at so-called "primary boycotts", i.e. an agreement between competitors not to deal with one or more suppliers or customers. Hardcore arrangements between actual or potential competitors, i.e. bid-rigging, market-sharing, output- restriction and price-fixing. These arrangements are subject not just to a civil law prohibition, but also a criminal law prohibition if the requisite mens rea (knowledge or belief) is present.

"Third line forcing": an arrangement whereby a business sells goods or services or gives a discount, but only on condition that the purchaser acquires other goods or services from a third person, resale price maintenance. Other arrangements are prohibited only if they have the purpose, or the actual or likely effect of "substantially lessening competition" ("the SLC test"). [8] As with EU law, all types of anti-competitive arrangements may in principle be allowed on certain public interest grounds, although the grounds for authorization under Australian law appear to be considerably wider than under EU law. In Australia, the CCA uses the concept "substantial degree of market power" as the benchmark for triggering the rules on abuse (or "misuse", to use the Australian term that has at least until recently been used), as opposed to the EU concept of dominant position. Australian law also adopted a different approach from EU law to the question of unilateral anti-competitive conduct. There were two main differences:

- it was the purpose of the conduct that triggered the prohibition, not the effect;
- and the market power had to be used for the purpose in question, whereas this is not necessary in the EU. [9]

In order to establish a breach, it was necessary to show that the business has "taken advantage" of its substantial degree of market power for one of the purposes specific in the section, namely:

- eliminating or substantially damaging a competitor;
- preventing the entry of a person into a market;
- or deterring or preventing a person from engaging in competitive conduct in a market.

However, Australia has recently adopted fundamental reforms to the misuse of market power provisions. These reforms remove the "take advantage" requirement, and replace the three purposes in the current law with a new test. The new test, which entered into force on 6 November 2017, is as follows:

- A corporation that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market". [10]

This new test will considerably widen the scope of the conduct that will be caught.

Canada

In Canada, the Competition Act, like the Australian CCA, distinguishes between hardcore arrangements, which are prohibited in principle irrespective of their effects

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on competition, and other agreements that "substantially lessen competition". As in Australia, the former category covers price-fixing, market-sharing, output-restriction and bid-rigging, albeit the prohibitions are framed in different terms in Canada. [11]

Unlike Australian law, hardcore arrangements are subject only to criminal penalties: there is no parallel civil offence. And unlike in Australia and the EU, there is no possibility (even theoretically) of an exemption for such arrangements. (There are also specific offences related to anti-competitive agreements in professional sport and between financial institutions).

Until 12 March 2010, other arrangements outside the hardcore category also constituted offences if they substantially lessened competition. However, as part of a series of major reforms to the Competition Act which took effect on that date, non-hardcore arrangements were removed from the criminal provisions, and became covered by a new provision, section 90.1, which applies to any arrangement between at least two competitors that "prevents or lessens, or is likely to prevent or lessen, competition substantially in a market" (given its similarity to the Australia test, we shall also refer to this test as the SLC test). [12]

As a result of Section 90.1, and in contrast to the laws of the other subject jurisdictions, agreements that harm competition are no longer prohibited automatically by law. If the agreement causes SLC, the Tribunal may (subject to an efficiency exception which is discussed below) issue an order prohibiting any person from doing anything under the arrangement (i.e. a "cease-and-desist" order). [13] Alternatively, the Competition Bureau may enter into a consent agreement with the businesses in question whereby they agree to take certain steps to terminate the SLC instead of the Bureau taking the case to the Tribunal: the consent agreement must be endorsed by the Tribunal. [14] Entering into and operating the arrangement is perfectly legal until such time as a cease-and-desist order is issued or a consent agreement is signed. Illegality only arises if a Tribunal order or Tribunal-endorsed consent agreement is breached.

Like arrangements outside the hardcore category, abuse of dominant position is not prohibited in itself: The Commission can enter into a consent agreement, or it can refer such conduct to the Tribunal and the Tribunal can issue a cease-and-desist order for the future. [15] In addition, and rather unusually as there is no express prohibition of abuse, the Tribunal may impose an administrative monetary penalty if an abuse takes place. The Competition Act lists (non-exhaustively) a series of "anti-competitive" acts that will be regarded as an abuse, if they cause SLC.

In conclusion, although there are differences in form and substance between the competition laws of the five jurisdictions examined in this thesis, they share the following common elements: a prohibition of, or provisions entitling the authorities to intervene against, arrangements between businesses which have negative effects on competition, subject to exceptions; a prohibition of, or provisions entitling the authorities to intervene against, businesses which have substantial market power (or market dominance) abusing that position. [16] In Canada and South Africa there are express exceptions to these

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provisions, on grounds of superior performance and economic efficiency respectively, but not in the EU, Australia or Hong Kong.

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