COMPETITION POLICY

Competition policy refers to measures intended to promote and protect competition, to prevent collusion between firms and to make it difficult for business to exercise excessive market power. Increasingly, Merger and Acquisition (M&A) activity is coming under more scrutiny and questions have been posed if regulation of such activity should come be controlled by an international body like the World Trade Organisation (WTO). Whilst most industrialised nations have created their own set of competition laws, on a multilateral level, it has been impossible to agree on a coherent framework for competition rules.

M&A Activity and Competition Policy

In its broadest terms, competition policy refers to the set of rules designed to promote and protect competition and restrict monopolistic practices. It has been suggested that competitive process should be not to maintain and promote competition for competition's sake but to achieve other objectives. The competitive regulatory process includes the oversight of M&A activity; price fixing and agreements that seek to promote market sharing or other behaviour that might restrain competition. M&As often raise concerns about their potential impact on markets and national regulatory bodies such as the Australian Competition and Consumer Commission (ACCC), the European Commission (EC) , the US Department of Justice and the US Federal Trade Commission (FTC) have the power to investigate takeovers and even to block mergers. A recent example of the FTC invoking its power was when it moved to block the takeover of US biotherapeutics company Talecris by the Australian firm CSL.

The advent of competition policy is relatively recent as laws in this area had been confined mainly to Organisation for Economic Cooperation and Development (OECD) countries. There is also significant variation amongst various countries in areas such as the objectives of competition laws, the conduct covered, and enforcement, sanctions and legal remedies. More recently there has been a rise in bilateral and even multilateral cooperation between competition authorities in order to cross border issues. This is particularly important in the area of M&A activity and means that action can be taken on a government to government basis to curb cross border anticompetitive behaviour. Competition has been specifically addressed in most recent Free Trade Agreements (FTA) and multilateral organisations have also been prominent in this area. For example, the OECD has promoted bilateral cooperation,

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the United Nations (UN) has developed non-binding rules on restrictive business practices and the World Trade Organisation (WTO) has convened a working group to look at the interaction between trade and competition. Additionally, the advent of the International Competition Network (ICN) has been important in the development of a global framework for the enforcement of competition law.

Is there a need for a Multilateral Approach?

It has been proposed that competition policy be enforced multilaterally through the WTO or some new purpose built organisation. Indeed, there has been considerable debate amongst WTO members as to whether or not competition law should form part of multilateral trade agreements. As part of the ongoing Doha round of WTO trade talks, discussions have included whether or not competition law enforcement should move up to the global level. Whilst this proposal has its advocates (like the EU) many countries, including the US, are opposed to such an approach, due mainly to issues about the loss of sovereignty.

To be successful, such a multilateral approach would need widespread consensus as to what would be overseen. It has been suggested that, in order to be effective, any multilateral competition framework would need: a 'supra-national' competition enforcement agency; harmonised national competition laws; to ban state-run cartels, like Organisation of Oil Producing and Exporting Countries (OPEC); a new enforcement agency; to enact any competition law other than a cartel law; to abandon pro-development objectives of competition law; to abandon existing exemptions, exclusions, etc from national law, and institute measures to prevent the creation of national champions.

Conclusion

The advent of a multilateral organisation to oversee competition policy is "unlikely to prevent governments from pursuing other policy goals or even from implementing policies that may sometimes limit competition in ways that they have traditionally done so." It is more likely that further changes to legislative instruments, like competition and regulatory authorities, will be undertaken at a national level. If a multilateral body to regulate competition policy did eventuate, it is likely to be of more benefit to companies more so than governments, as the latter would be unlikely to cede sovereignty on such a key policy platform.

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