THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY

ANESTIS S. PAPADOPOULOS

CAMBRIDGE UNIVERSITY PRESS
CONTENTS

List of Tables    page xiv
Acknowledgements  xv
Abbreviations     xvii
Table of Cases    xix
Table of Legislation xxix
Table of Treaties and Agreements xxiv

1  Introduction, Structure of the Book and Method    1
   1.1  Introduction  1
   1.2  Structure of the book and method  4

2  The National and International Dimensions of
   Competition Law and Policy    7
   2.1  Origins of competition law    7
       2.1.1  Canada and the United States: first modern
              competition statutes to be enacted  9
       2.1.2  Competition in the twentieth century in Europe  12
       2.1.3  The Treaty of Rome  14
   2.2  Expansion of competition law and policy worldwide,
       and factors that lead to varied application of competition
       law at the national level  15
       2.2.1  Influence of economics in the application of
              national competition rules  18
       2.2.2  Legal aspect of competition law: competition law
              versus sectoral regulation  26
       2.2.3  Political aspect of competition law: competition
              policy versus other national policies  30
       2.2.4  Cultural factors that may have an effect on the
              adoption and/or application of competition rules  32
       2.2.5  Competition law in developing and small countries  33
   2.3  International aspects of competition law and policy  36
       2.3.1  Economic globalisation and the appearance
              of anticompetitive business practices with
              an international effect  36
### Contents

2.3.2 Anticompetitive practices that have an international effect 39  
   (i) International cartels 40  
   (ii) Vertical restraints 42  
   (iii) Multijurisdictional mergers 43  
2.3.3 Governmental and hybrid practices 45  
2.3.4 Need for international cooperation on competition 47  
   (i) Sovereignty and its implications for the internationalisation of competition law 47  
   (ii) Types of formal international cooperation: classification of international agreements and introduction of the working question 48  
2.4 Conclusion 50

3 Bilateral Enforcement Cooperation Agreements 52  
3.1 Common characteristics of enforcement cooperation agreements 52  
   3.1.1 Enforcement cooperation as a substitute for harmonisation of competition laws 52  
   3.1.2 Basic structure of the agreements 54  
   3.1.3 Bilateral agreements as a way to contextualise international cooperation in other fields of commercial law 55  
   3.1.4 Enforcement cooperation where there are trade flows 55  
   3.1.5 Enforcement cooperation agreements (first generation) in the form of soft law 58  
   3.1.6 Bilateral enforcement cooperation as a strategy of strong states 60  
   3.1.7 Policy of the EU towards the adoption of first generation bilateral enforcement cooperation agreements 62  
3.2 Content of first generation agreements 63  
   3.2.1 Early first generation agreements: reactive rather than proactive 63  
   3.2.2 Agreement between the United States and the EU 64  
   3.2.3 Negative comity (avoidance of conflicts) 64  
   3.2.4 Extraterritorial application of competition rules 67  
   3.2.5 Procedures of positive cooperation provided for by first generation agreements 70  
      (i) Notification, cooperation and coordination 70  
      (ii) Exchange of information: meetings between officials 72  
      (iii) Positive comity 73  
3.3 Limitations of first generation bilateral enforcement cooperation agreements 77  
   3.3.1 The confidentiality clause 78  
   3.3.2 Inability of first generation agreements to address some important cases 81
3.4 So what's next? Wider soft law cooperation and closer bilateral cooperation 83
3.4.1 Second generation agreements: The United States–Australia Agreement on Mutual Antitrust Enforcement Assistance and the Denmark–Norway–Ireland Agreement 85
3.4.2 Use of MLATs and extradition treaties in competition cases 87
3.5 Conclusion 89

4 Bilateral Trade Agreements which Include Competition Provisions 93
4.1 Historical review of trade agreements 93
4.1.1 Bilateral agreements of the EU 95
   (i) Agreements with candidate countries 97
   (ii) The European Neighbourhood Policy 100
   (iii) Agreements with selected trade partners 102
4.1.2 Role of competition in trade agreements and the way that the EU has used such provisions 103
4.2 Substantive competition provisions in the EU bilateral agreements 105
4.2.1 Provisions relating to private undertakings 106
   (i) Agreements with candidate and potential candidate countries 106
   (ii) Euro-Mediterranean agreements 109
   (iii) Agreements with Eastern European and Central Asian countries 112
   (iv) Agreements with selected trade partners 114
4.2.2 Rules relating to state actions and public undertakings 115
   (i) Agreements with candidate and potential candidate countries 115
   (ii) Euro-Mediterranean agreements and agreements with former Soviet Union states 122
   (iii) Agreements with selected trade partners 126
4.3 Provisions on cooperation in competition 127
4.3.1 Notification of cases 130
   (i) Agreements with candidate and potential candidate countries 130
   (ii) Euro-Mediterranean agreements and agreements with former Soviet Union states 131
   (iii) Agreements with selected trade partners 132
4.3.2 Exchange of information 132
4.3.3 Consultations 133
4.3.4 Positive comity 134
4.3.5 Technical assistance 134
CONTENTS

(i) Agreements with candidate and potential candidate countries 135
(ii) Euro-Mediterranean agreements and agreements with former Soviet Union states 135
(iii) Agreements with selected trade partners 136
(iv) Application of technical assistance provisions 136

4.4 Dispute settlement and the extent to which EU bilateral agreements are considered hard law 138

4.5 Conclusion 141

5 Plurilateral Regional Agreements which Include Competition Provisions 145

5.1 History of plurilateral regional agreements, reasons that led to their adoption and the role of competition law and policy 145
5.1.1 Historical development of plurilateral regional agreements 145
   (i) Europe 145
   (ii) Latin America 146
   (iii) Africa 147
   (iv) North America and the Caribbean 149
   (v) Asia 149
5.1.2 Factors that lead to the creation of plurilateral regional agreements 152
5.1.3 Role of competition law and policy in plurilateral regional agreements, and the role of plurilateral regional agreements in the development of international competition norms 153
5.1.4 EU strategy regarding the formation and operation of plurilateral regional agreements 155

5.2 Competition law and policy in the EU 159
5.2.1 Substantive provisions 160
   (i) Articles 101 and 102 TFEU (ex Articles 81 and 82 EC) 160
   (ii) State aid and public undertakings 161
   (iii) Control of mergers 163
5.2.2 Institutional set-up: role of the European courts and the European Commission 164
   (i) Role of the ECJ 165
   (ii) Role of the European Commission and the modernisation of enforcement 167
5.2.3 Some points on the EU competition regime 173

5.3 Competition provisions in other plurilateral regional agreements 174
5.3.1 Andean Community 175
5.3.2 MERCOSUR 177
5.3.3 NAFTA 180
5.3.4 CAFTA-DR 180
5.3.5 FTAA 180
5.3.6 CARICOM 181
5.3.7 WAEMU 183
5.3.8 ECOWAS 185
5.3.9 EAC 186
5.3.10 COMESA 187
5.3.11 SACU 188
5.3.12 SADC 189
5.3.13 ASEAN 189
5.3.14 APEC 190

5.4 Competition provisions in plurilateral agreements: a comparative reading 191
5.4.1 Substantive competition provisions in plurilateral regional agreements 192
5.4.2 Institutional set-up and implementation of the rules 194
5.4.3 Some final thoughts on the comparative reading of competition provisions in regional blocs 197

5.5 Role of the EU in the formation and application of competition rules in regional blocs 199

5.6 Conclusion 202

6 The Role of Competition Law and Policy of the EU in Multilateral Negotiations on Competition 205

6.1 Historical development of the negotiations on the adoption of a multilateral agreement on competition 205
6.1.1 Attempts under the aegis of the League of Nations and the proposed International Trade Organization 205
6.1.2 UNCTAD: the Restrictive Business Practices Code 206
6.1.3 Re-opening of the debate on a multilateral agreement on competition in the 1990s 208

6.2 Factors that led to the EU proposal for inclusion of competition within the WTO framework 211
6.2.1 Leadership of Lord Brittan and creation of a network of academics and politicians who supported the adoption of a multilateral agreement at the WTO 211
6.2.2 Expansion of the EU model on a global scale 215
6.2.3 EU pursued inclusion of competition agreement within the WTO in order to secure market access for its firms to other national markets 216
6.2.4 Multilateral agreement in order to avoid conflicts in the enforcement of competition law and weaken the effect of extraterritorial application of US laws 217
6.2.5 Proposal for an agreement on competition as a way of avoiding reforms on agriculture 218
6.2.6 Development of the EU proposal in the context of the work of the working group on trade and competition 219
6.2.7 From Doha to Cancun 223
CONTENTS

6.3 Reasons that led to the failure of the EU proposal 225
6.3.1 Resistance by the United States 225
   (i) Establishment of ICPAC and the introduction of a ‘new global initiative’ 227
   (ii) Paradox in Doha 229
6.3.2 Coordinated resistance by developing countries 232
   (i) Developing countries, competition law and industrial policy 235
   (ii) Implementation issues: lack of institutional capacity and need for technical assistance 237
   (iii) Export cartels 238
   (iv) Developing countries and concerns relating to agriculture 241
6.3.3 Back to the European Commission: did everybody in the Commission really want an agreement at the WTO? 242
6.4 Future of competition at the WTO and alternative options 245
6.4.1 Genesis and operation of the ICN 248
6.5 Conclusion and evaluation of the role of the EU 253

7 Conclusions: Main Findings of the Study 258
7.1 General observations 258
7.2 Main findings of the study with regard to the operation of international agreements which are devoted to or include competition provisions 260
7.3 International dimension of EU competition law and policy 264
7.4 Final remarks 267

Appendix 1 Economic Theories Applied to Competition Law 268
A1.1 Classical theory 268
A1.2 Neoclassical economics 269
A1.3 Alternatives to the perfect competition model 270
   Monopolistic competition 270
   Oligopoly 271
A1.4 Workable competition and the Harvard School 271
A1.5 The Chicago School 273
A1.6 Game theory model 273
A1.7 Contestable markets 274
A1.8 Dynamic competition, innovation and technological efficiency 274
A1.9 The Austrian School 275
A1.10 Ordoliberalism 276