

WHEN THE STATE HARMS COMPETITION CAN ANTITRUST CATCH IT?

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DRAFT RESULTS OF PROJECT

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Outline

- ▣ 1 The problem
- ▣ 2 The UNCTAD research platform project
 - ▣ To what extent do national competition laws proscribe undue restraints by the state?
 - As market actor, as sovereign
- ▣ 3 Preliminary findings
- ▣ 4 Stories and Experiences
- ▣ 5 How to solve the problem?
 - ▣ National
 - ▣ Trans-national norms

I. The Problem

- ▣ State acts and practices that unduly block competition are a matter of concern
 - Financial crisis period: an increasing state presence heightens concern
 - See Ian Bremmer, *The End of the Free Market*
- ▣ Why?
 - 1. Imagine a world in which there is antitrust law
 - ▣ **BUT** all state acts, state-facilitated acts, mergers of firms owned or partly owned by states are exempt or untouchable
 - 2. The state has power and those who run it have incentives to monopolize and distort competition
...portending a shrunken scope for markets and antitrust

Trying to stop the water flow by blocking one channel

- ▣ “Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel.”
- ▣ Moreover, “regulatory success in attacking private restraints increases the efforts that firms will devote to seeking public restraints. Indeed rational firms are likely to prefer public restraints. Public restraints can be far more effective at restraining competition.”

▪ Tim Muris, U. Chi. Law School 2005

The problem is world-wide but more serious in developing countries

- ▣ Anticompetitive state acts are especially serious in developing countries, and especially in countries with a tradition of statism, cronyism, corruption and discrimination, and in general where blockage of markets by states themselves or in complicity with private business “friends” has been rampant.
 - For the depth of the problem of pervasive corruption, see Michaela Wrong, *It’s Our Turn to Eat*

But designing antitrust to reach anticompetitive state action is daunting

- ▣ State and local governments need room to regulate in the public interest
 - ▣ The state needs breathing space
- ▣ Big challenges
 - ▣ **Drawing the line** between state acts that are unduly anticompetitive and should be proscribed and those that are appropriate sovereign acts
 - ▣ The state must agree that the state is constrained
- ▣ But the challenges have been met, at least on the books
 - ▣ Mexico, Chile, Pakistan, Russia, Spain, Lithuania, etc.

II. The UNCTAD RESEARCH PARTNERSHIP PLATFORM PROJECT

- ▣ The UNCTAD Research Partnership Platform
- ▣ Eleanor Fox (New York University) and Deborah Healey (U. of New South Wales), with
 - ▣ Michal Gal (Haifa), Kusha Haraksingh (West Indies), Mor Bakhoum (Dakar and Munich) and Ebru Gökçe (UNCTAD)
- Have assembled data from some 25 nations to determine how far their **competition laws** reach to catch anticompetitive state restraints
 - This is not about advocacy except as it is intertwined with the law
 - This project does not analyze state aids or competitive neutrality, which are the subjects of two related research platform projects

RESEARCH PLATFORM PROJECT

Goals – to consider:

- ▣ Is anticompetitive behavior of the state
 - through 1) SOE business conduct, 2) hybrid state/private acts, and/or 3) measures
 - an important, feasible target for antitrust **law**?
- ▣ If yes
 - ▣ What formulation might serve as a model?
 - ▣ What are the problems in applying such law?
 - ▣ What success in applying such law has already been achieved, and thus might be expected?
 - ▣ What solutions to the problems - national, transnational?

QUESTIONNAIRES, ANSWERED re LAWS OF:

- ▣ Barbados
- ▣ China
- ▣ European Union (by student)
- ▣ Guyana
- ▣ Hungary
- ▣ Jamaica
- ▣ Japan
- ▣ Kazakhstan
- ▣ Kenya
- ▣ Korea
- ▣ Lithuania
- ▣ Malaysia
- ▣ Mexico
- ▣ Pakistan
- ▣ Poland
- ▣ Russia (by student)
- ▣ Serbia
- ▣ Seychelles
- ▣ Singapore
- ▣ Spain
- ▣ Sweden
- ▣ Switzerland
- ▣ Trinidad
- ▣ Tunisia
- ▣ Turkey

In addition, we have data from the United States, Australia and other nations we have studied.

Scheme of the Questionnaire: The most central questions

- Does your competition law cover SOEs?
- Does your competition law cover entities to which the state has granted special or exclusive rights or privileges, and with what exceptions (such as EU TFEU Section 106)?
- Does your competition law cover anticompetitive state and local *measures* (such as China's AML against abuse of administrative monopoly, e.g. parochial provincial restraints of trade)?
- Does your competition law allow for a state action defense
 - shielding public and private anticompetitive conduct ordered or encouraged by the state?
- What remedies are available against the state
 - and are they actually applied ?
- Examples; stories of success and of frustration

III Some preliminary findings

- ▣ 1a. Does your country's competition law cover SOE's?
 - 24 yes
 - China's law is ambiguous but it seems: yes
 - Tunisia seems to be the exception
- ▣ 1b. With what exceptions?
 - E.g., when conducting activities in exercise of governmental authority
 - When SOE is entrusted with services of general economic interest
 - Malaysia: when conducting activities based on principle of solidarity
 - A number of nations have no exceptions, make no distinction: Seychelles, Kenya, Hungary

1b. Covering SOEs, but with exceptions ... examples

▣ **Kazakhstan**

- ▣ *According to Art.31, para 2, and setup of state enterprises, where the government holds over 50% of shares (interests) and affiliated legal entities, which had been directly foreseen by the laws of the Republic of Kazakhstan is not subject to the preliminary consent of the antimonopoly body*

▣ **Switzerland**

- ▣ Art. 3 ACart entails the general principle to distinguish which state-owned activities are covered by competition law or not... “Statutory provisions that do not allow for competition in a market for certain goods or services take precedence over the provisions of this Act. Such statutory provisions include ..: a. provisions that establish an official market or price system; and b. provisions that grant special rights to specific undertakings to enable them to fulfil public duties. “
- ▣ Example: The Swiss Post Office has a legal monopoly for letters up to 50 grams.

2. Exclusive rights and privileges

- ▣ 5a. Does your statute cover public entities and entities to which the state has granted **special or exclusive rights or privileges**?
 - 16 yes, 8 no
 - ▣ sometimes subject to the “EU” exception – exception to the extent necessary to carry out mandatory obligations

Findings .. example

- ▣ Greece gave Greek state-owned electricity incumbent Public Power Corporation privileged access to lignite, the cheapest source of electricity generation
 - This “created inequality of opportunity between economic operators and enables PPC to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering market entry by newcomers.”
- ▣ Greece infringed TFEU 102 and 106
 - ▣ European Commission 5 March 2008, IP/08/386

3. Acts of administrative authorities

- ▣ 6. Does your country's law prohibit certain **anticompetitive acts of state bodies such as administrative authorities?**
 - 16 yes, 8 no
 - Cf. China prohibits abuse of administrative monopoly; see State measures below
 - **Tunisia:**
 - The Competition Council has competence to sue administrative authorities when the economic activity goes beyond the public service mission for which they are vested

Acts of government .. Example

▣ Sweden

▣ The supplementary rule on anti-competitive sales activities by public entities came into force on 1 January 2010. If petitioned by the Competition Authority, individual companies or an industry organisation, the Stockholm City Court may under penalty of a fine prohibit the state, a municipality or a county council from conducting certain practices in its sales activities. A municipality or county council may also be banned from conducting activities that are incompatible with the law. This means that municipalities, county councils and state authorities – just like public sector controlled legal entities – may be banned from conducting commercial activities in a certain manner if they distort competition for private companies.

▣ It is still early to evaluate whether the new rule is enough to solve the competition problems identified, but so far clear positive results have been seen.

4. State as conspirator in rigged procurement: Procurement, Bidding, Corruption

- ▣ 7. Does your competition law apply against the state (or its officials) complicit in bidding rings and preferences ... in awarding state contracts?
 - ▣ 10 yes, 11 no

- ▣ **Poland**
 - The President of the Office of Competition and Consumer Protection can institute antimonopoly proceedings if procurement requests to bid are discriminatory or have an anticompetitive effect. As a result of the proceedings, the President of the Office can issue a decision imposing a maximum fine of 10% of revenue earned in the accounting year preceding

5. (Other) State measures: antitrust as commerce clause; as a check on anticompetitive procurement

- ▣ 9a. Does your competition law proscribe state or local government measures that
 - 1. limit entry of goods from other localities
 - 9 yes, 13 no
 - 2. discriminate against outsiders or block markets
 - 10 yes, 12 no
 - 3. procurement requests-to-bid that contain anticompetitive specifications
 - 10 yes, 11 no

Administrative abuse; state measures

- ▣ Lithuania
- ▣ The Law on Competition (Article 4): “ ... *Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings .. which .. may give rise to differences in the conditions of competition for undertakings competing in the relevant market, except where the difference in the conditions of competition cannot be avoided [because of] the requirements of the laws ...*” ... The Competition Council has power to oblige the state body to abolish or amend the measure concerned in order to conform with the competition rules... *In case of failure to comply ... the Council shall have the right to appeal against the decisions of entities of state administration ...*
- ▣ Most infringements concern unlawful public procurement by municipalities' awarding contracts to certain undertakings (mostly to SOEs) without any competitive process

More state measures

▣ Mexico. The constitution of Mexico establishes that state and municipal authorities shall not perform acts or issue rules with the aim or effect of:

▣ *a) Charging fees on the transit of people or things across their territory*

▣ *b) Prohibiting or imposing fees on entry or exit to the territory of national or foreign merchandising, directly or indirectly. ****

▣ *d) Issuing fiscal laws .. that impose differences of taxes or requirements due to the origin of national or foreign merchandise ...*

The FCC may initiate a procedure to determine if there is a violation and refer matters to the general attorney.

State measures, Mexico, cont'd

- ▣ The FCC is authorized to ensure that free competition principles are observed by administrative authorities at the three levels of government (Fraction XVII, Art. 24 FLEC). ***
- ▣ Fraction VIII
- ▣ “[May] issue ... binding opinion in matters of economic competition, to dependencies and organizations of the federal public administration, with respect to drafts of dispositions, rules, agreements, circulars and other administrative acts of general character that they intend to issue, when they can have opposite effects to the competition process and free concurrence. ... The opinion and [any objection by the executive] shall be published”

Italy: new law to help deal with crisis

- ▣ Article 35 of the Decree Law of December 6, 2011 containing urgent measures for the growth, fairness and consolidation of the public accounts ('**Disposizioni urgenti** per la crescita, l'equità e il consolidamento dei conti pubblici'):

- ▣

- ▣ Art 35. Strengthening of the Competition and Market Authority

- ▣

- ▣ 1. 21bis - Powers of the Competition and Market Authority in relation to administrative measures which cause distortion of competition. - **1. The Competition and Market Authority is hereby granted standing to take judicial action against general administrative acts, regulations and any government measures that violates the rules protecting competition and the market.** 2. The Competition and Market Authority, if it considers that the government has enacted an act in violation of the rules protecting competition and the market shall, within sixty days, issue a reasoned opinion indicating the specific types of violations found. If the government fails to comply within sixty days following the notification of the opinion, the Authority can file an appeal ... within thirty days.

6. State action/involvement defense or immunity

- 12. May private parties assert a state action/involvement defense? 11 yes 12 no
 - What limits to the defense?
 - May be limited to state *orders*—**Jamaica, Lithuania, Spain**
 - **Korea**, Article 58: “This Act shall not apply to acts of an entrepreneur or trade association committed in accordance with any Acts or decree”
 - Administrative guidance does not shield private acts
 - **EU**: Private parties may escape antitrust liability for conduct only when the member state orders the conduct or eliminates all scope for competition
 - **US**: defense available only when the state clearly articulates what the private firm must do and actively supervises anticompetitive conduct
 - **Malaysia**: only when the state orders the conduct or requests and supervises it
 - **Serbia and Turkey**: ...
 - The defense is also available when the state merely encourages the conduct

State acts that encourage anticompetitive activity

Lithuania: Mitigating circumstances when imposing fine

- Where agreement was induced by state body
 - Competition Council reduced fines by 20% where public authority was not only aware but encouraged. 20 Jan. 2011 nr. 25-2

Spain

- The prohibitions do not apply where the concerned conduct is harboured by a legal Act emanating from Parliament unless such legal Act is itself in breach of the European Treaty.
- Nevertheless, the possibility that the offenders acted in the belief that their conduct was legal is taken into account within the principle of *legitimate expectations*, which prevents the Public Administrations from, surprisingly and unreasonably, betraying an expectation of legality generated by their actions. This principle is closely linked to the general principle of *good faith*, as well as to that of *legal certainty*, which enlightens the entire legal system.

EU: no defense if private actors act “autonomously”

- ▣ **EU** antitrust rules apply to any conduct engaged in by undertakings on their own initiative. If e.g. prices set by an undertaking have been approved by a regulator, this does not absolve the undertaking from responsibility under EU competition rules (Case 123/83 BNIC (1985) ECR 391, para 21 to 23; Court of First Instance, Case T-271/03, judgment of 10.4.2008, Deutsche Telekom v Commission, para 107). If national law merely encourages or makes it easier for undertakings to engage in autonomous anticompetitive conduct, EU competition rules remain applicable Deutsche Telekom para 87. [contributed by Spain]

US Supreme Court to Revisit Scope of State Action Defense or Immunity

- ▣ **FTC v. Phoebe Putney Health System**, cert. granted June 25, 2012
- ▣ US law – state action defense available:
 - If local gov't action is involved – The state must anticipate the anticompetitive effects and implicitly authorize the anticompetitive action
- ▣ Georgia law creates system of hospital authorities to manage health care providers
 - Vests regional authority with powers to acquire property including hospitals
- ▣ The local hospital authority purchased Palmyra Park Hospital and leased it to competitor Phoebe for 40 years, creating a monopoly
 - Circuit court: this was immune
 - ▣ Georgia's lawmakers must have appreciated that Georgia's rural markets could not support many hospitals

IV. STORIES and EXPERIENCES

▣ 1. SUCCESS STORIES

- For organizing cartels (Spanish milk), for monopolizing adjacent markets (telecoms, post), for tipping the game to cronies in procurement (Lithuania), for intimidating agents trucking beer across provincial lines in Kenya
 - So many stories supplied by those answering questionnaire

▣ 2. FRUSTRATIONS

- ▣ i. Actual limits of power to constrain state acts
- ▣ ii. Practical limits of power to bite “the hand that feeds”
 - Not happy stories of authorities who did the right thing against an interested state
 - Understanding the limits of practical power
 - the need to choose targets wisely

Frustrations

- ▣ **Serbia**: Opinions given by the Commission that reflect the application of Article 21 of the Law are not binding.... The Ministry of Agriculture issued a tender for the procurement of regressed mineral fertilizers and as a condition **for participation in the tender stated that the company must have production and sales on the territory of the Republic of Serbia**. .. The Commission gave its opinion, but without any reaction of mentioned Ministry.
- ▣ The CPC is competent to submit opinions to competent authorities on draft regulations, as well on existing regulations that effect the competition on the market. However, the government is not obliged, according to its rules of procedure, to submit draft Laws to the CPC. We are trying to find a solution for this situation with the aim to change the respective government rules of procedure and to enable the CPC to give opinions on all legislation that affects competition on the market and mechanism to assure that our opinion will be fully respected.

But – help may come:
Speech of Prime Minister of a major
economy, April 3, 2012

- ▣ “Frankly, our banks make profits far too easily. Why? Because a small number of major [state-run] banks occupy a monopoly position, meaning one can [go only] to them for loans and capital.”
- ▣ “That’s why right now, as we’re dealing with the issue of getting private capital into the finance sector, essentially, that means we have to break up their monopoly.”

Statement of China's Prime Minister Wen Jiabao



• Quoted in NY Times April 4, 2012

V. Solutions?

- ▣ We need solutions so we no longer try to stop the water flow by blocking only one channel
- ▣ Solutions at what level?
 - Best solutions may be supra national, including regional
 - EU as paradigm; states pool power in common interest
 - Within a nation under national law:
 - ▣ It may be harder to muster agreement to control vested interests, cronyism, privileges of state

Solutions, cont'd

- ▣ 1. Start local (National)
 - Identify best national laws (texts) that reprehend the overreaching state that harms the people by unjustified anticompetitive acts
 - Identify the institutional arrangement and possible remedies that work
 - Identify the political environment or governance model in which laws catching anticompetitive state action are most likely to be accepted as legitimate
 - And least likely to snap back at and disable the competition authority and its leader
 - Start with advocacy, e.g.
 - Laws should cover SOEs
 - Transparency: publicize harmful anticompetitive state-related acts beyond reasonable bounds of public interest
 - Acts of a sort that have been caught by comp. law enforcement

Solutions, cont'd

- ▣ **2. Regional/Global**
 - **Consider hypothetically** as guide to good law in interest of community where competition-harming state acts are more likely to be identified and constrained
 - ▣ See EU style constraints in common markets
 - WTO: if next steps were to be taken, what would they be?
- ▣ **3. Trans-National but National**
 - **Develop NORMS**
 - ▣ Research in **OECD** and **UNCTAD**
 - **Feeding into ICN development of recommended practices**

CONCLUSIONS

- ▣ The state may sometimes be a solution, but the state is often the problem
 - ▣ particularly in this era of increasing state capitalism
- ▣ Solutions
 - 1 Transparency
 - 2 National
 - ▣ Identify better laws that reprehend the overreaching state; publicize their success stories
 - 3 Regional
 - 4 **Develop Transnational NORMS**
 - Build on OECD research
 - UNCTAD – formulate options that could serve as models
 - Suggest ICN recommended practices