

# APPLICATION OF COMPETITION LAW TO STATE RESTRAINTS – building an UNCTAD data base

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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 Findings
- ▣ 4 Data highlights
- ▣ 5 Conclusion and recommendation
  - A data platform for developing countries

# I. The Problem

- ▣ Imagine a world in which there **is** antitrust law
  - ▣ **BUT** all state acts and state-facilitated acts are exempt
- ▣ The State can shrink the space for the market
  - ▣ catering to officials and vested interests
  - This is the plight of (especially) many developing countries
    - ▣ The State is often the BIGGEST competition problem
  - But the State is an instrument for the public interest
  - How nations draw the line between legitimate and illegitimate acts

# II The Project

## QUESTIONNAIRES, answered by

- Australia
- Barbados
- Brazil
- China
- European Union
- Greece
- Guyana
- Hong Kong
- Hungary
- India
- Italy
- Jamaica
- Japan
- Kazakhstan
- Kenya
- Korea
- Lithuania
- Malaysia
- Mauritius
- Mexico
- Pakistan
- Poland
- Russia
- Serbia
- Seychelles
- Singapore
- Spain
- Sweden
- Switzerland
- Trinidad & Tobago
- Tunisia
- Turkey
- United States

# Scheme of the Questionnaire: 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)?
- Does your competition law cover anticompetitive state and local *measures* and laws against provincial restraints of trade (such as China, eastern Europe)?
- May private parties invoke a state action defense
  - shielding conduct ordered or encouraged by the state?

# III Findings

## 1. Coverage of SOEs

- ▣ 1a. Does your country's competition law cover SOE's?
  - All 33, yes 1
- ▣ 1b. With what exceptions?
  - E.g., when acting in exercise of government authority
  - When entrusted with services of general economic interest
- ▣ 1c. A number of SOEs and even ministries have been sanctioned
  - ▣ E.g. India – coal; Spain – post office, ministry of agriculture led dairy cartel

## 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**?
  - 23 yes, 10 no
    - ▣ sometimes as in EU – except to the extent necessary to carry out mandatory obligations



### 3. Acts of administrative authorities

- ▣ 6. Does your country's law prohibit certain anticompetitive acts of state bodies such as administrative authorities?
  - 20 yes, 13 no
  - China prohibits abuse of administrative monopoly
  - Tunisia:
    - ▣ The Competition Council may sue administrative authorities when the economic activity goes beyond the public service mission for which they are vested
  - Sweden
    - ▣ Municipalities, county councils and state authorities, like SOEs, may be barred from conducting commercial activities in a manner that distorts competition for private companies



## 4. State as conspirator in rigged procurement

- ▣ 7. Does your competition law apply against the state (or its officials) complicit in bidding rings and preferences ... in awarding state contracts?
  - ▣ 14 yes, 19 no
  
- ▣ **Poland**
  - The President of the Office of Competition and Consumer Protection may institute antimonopoly proceedings if procurement requests to bid are discriminatory or have an anticompetitive effect. The President of the Office can issue a decision imposing a fine up to 10% of past year's revenue

## 5. (Other) State measures: antitrust as a commerce/free movement clause

- ▣ 9a. Does your competition law proscribe state or local government measures that
  - 1. limit entry of goods from other localities
    - 11 yes, 21 no
  - 2. discriminate against outsiders or block markets
    - 12 yes, 19 no

# Administrative abuse; state measures

## ▣ Lithuania

▣ Art. 4): “ ... *Entities of public administration shall be prohibited from adopting .. acts or .. 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 ...*”

- Competition Council may order the state body to abolish the measure
- Most infringements: unlawful public procurement by municipalities' awarding contracts to undertakings (mostly SOEs) without any competitive process

■ Italy Art. 35 (1) 21 bis : Antitrust Authority may attack “any government measures that violate the rules protecting competition”

■ China

## 6. State action/involvement defense or immunity

- ▣ 12. May private parties assert a state action/involvement defense? 14 yes 17 no
  - What limits to the defense?
    - **Korea** Art. 58: Administrative guidance does not shield private acts
    - **EU**: Private parties may escape antitrust liability when the member state eliminates all scope for autonomous action
    - **US**: defense available when the state clearly articulates what the firm must do and actively supervises the conduct
  - ▣ **Malaysia**: when the state orders the conduct or requests and supervises it
  - ▣ **Serbia** and **Turkey**:
    - The defense is available when the state merely encourages the conduct

## IV. Data Highlights

- ▣ All 33 cover, or do not exclude, SOEs
  - ▣ although a number have exceptions
- ▣ Entities granted special or exclusive rights covered
  - ▣ 23 yes, 10 no
- ▣ **Coverage of state bodies**, e.g. administrative authorities
  - ▣ 20 yes, 13 no
- ▣ **Rigged procurement**: applies against state or officials
  - ▣ 14 yes, 19 no
- ▣ **A little commerce clause (free movement)**
  - ▣ 11 yes, 21 no
- ▣ State action defense: 14 yes, 17 no

# Special issue of state measures: EU, Eastern Europe as models of expansive competition law

- ▣ EU TFEU 106 (1)
- ▣ Re public undertakings and those with exclusive rights
  - ▣ Member states may not enact any measure contrary to the competition rules
- ▣ TEU 4(3)- duty of sincere cooperation not to undermine Treaty
- ▣ \*Thus, Post Office with exclusive franchise cannot prevent private delivery even if the State gives it exclusive rights; PO cannot extend its monopoly to adjacent market; State cannot give preferential supply of scarce raw material if beneficiary is bound to harm the market; State cannot organize a cartel and order private firms to carry it out



## V. Conclusion and Recommendation

- ▣ In our related article (ATLJ 2014 forthcoming) we propose a copious use of competition law to combat undue state restraints
- ▣ We propose discussion of 6 proposed principles with a view to identifying aspirational global norms



# Proposed principles in article

1. Competition law should cover SOEs
2. Competition law should cover complicit state officials
3. Competition law should cover enterprises with exclusive privileges and special obligations, with public mandate defense (EU)
4. State action defenses should be narrow
5. For common markets: law should integrate free movement, state restraints and competition principles (EU)
6. For federal systems with principles of federal supremacy: robust preemption of excessively anticompetitive state measures (as in facts of *Parker v. Brown*)

# Proposed step forward for RPP: Data Platform – What nations do

- ▣ We have assembled a data base. This may be useful to the UNCTAD competition family.
- ▣ Could be the basis for periodic contributions by the competition authorities
  - ▣ along lines of UNCTAD Model Code's running annotations of what nations do