



Competition Law and the State

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Competition Law and the State

- Project conducted by Professor Eleanor Fox of New York University Law School and Deborah Healey of University of New South Wales Law School

- About building an UNCTAD data base on the application of competition law to State restraints, and drawing some conclusions



Outline

1. The problem
2. The UNCTAD RPP project itself
 - to what extent do national competition laws address or proscribe undue restraints by the State?
 - as a market actor, as a sovereign
3. Findings
4. Data highlights - a data platform for developing countries
5. Conclusion and recommendations



The problem

- Competition law aims to create a level playing field to deliver efficient products and services to consumers
- Antitrust law in the US was traditionally focussed on private corporations
- The potential impact of the State and its corporations and other entities in markets is great so it cannot be exempt from competition/antitrust laws
- Particularly in many developing countries the State is often a big market player having a significant impact on markets
- The issue: how do nations draw the line between legitimate and illegitimate acts of government in the market or which affect the market?



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



The big picture questions

- To what extent do competition laws proscribe or override laws, rules or regulations?
- Special importance in jurisdictions with deep histories of significant government control, corruption, cronyism
- Often these had more recently adopted or modernised a competition law to open markets



Central questions

- Does your competition law cover SOEs?
- Does your competition law cover entities which the stated has granted special or exclusive rights or privileges?
 - are there exceptions?
- Does your competition law cover anticompetitive State and local measures (laws, local laws, regulations) and laws against provincial restraints on trade?
- May private parties invoke a State action defense?
 - shielding conduct which is ordered or encouraged by the State?



Findings on coverage of SOEs

1a Does your country's competition law cover SOEs?

- All 33 said Yes
- Mainly when carrying on business or engaged in trade; some in any circumstances

1b What are the exceptions?

- when acting in the exercise of government authority
- when entrusted with services of general economic interest

1c A number of SOEs and even ministries have been sanctioned

- eg India- coal , rail; Spain- post office, ministry of agriculture led dairy cartel; Australia- power authority breached competition law in refusing access to potential competitor



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 EU - except to the extent necessary to carry out mandatory obligations - this assist to draw a line between “the role of government “ and “the role of government in the market”



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

- 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



State as a 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 can issue a decision imposing a fine up to 10% of the past year's revenue.



Other State measures: antitrust as a commerce/ free movement clause

9a Does your competition law proscribe State or local government measures that

- limit entry of goods from other localities
-11 yes, 21 no
- discriminate against outsiders or block markets
- 12 yes, 19 no



Administrative abuse: other 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 protection competition”
- China



State action/involvement defense or immunity

12 May private parties assert a State action/involvement defense?

14 yes 17 no

- What are the 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 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



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 the Treaty
- Thus, Post Office with exclusive franchise cannot prevent private delivery even if the State gives 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 organise a cartel and order private firms to carry it out



Conclusions and recommendation

- In our related article (79 *Antitrust Law Journal* 769 (2014)) we propose a copious use of competition law to combat undue State restraints
- We propose further discussion of 6 proposed principles with a view to identifying aspirational global norms



The article in summary

- It assesses the problem in historical, evolutionary and intellectual contexts
- It constructs a template of categories of State restraints and summarises the answers to the questionnaire
- It offers a normative analysis on the difficult question of the balance between State sovereignty and consumer and market rights and freedoms
- It offers recommendations for a good competition law, and a modality for convergence on consensus principles.



Proposed principles in our 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 a 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 the facts of *Parker v Brown*)



Proposed step forward for RPP: Data Platform on 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 the lines of UNCTAD Model Law's running annotations of what nations do)



Further questions

- Can the law successfully distinguish between legitimate and illegitimate sovereign interests?
- How robustly can competition authorities enforce the law when it touches the raw nerve of a State vested interest?
- How much of the area under consideration touches the raw nerve?



Continuing research

- Exploration of the competition laws in our study that reprehend anticompetitive restraints

