

**Research Partnership Platform
8th meeting**

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Competition Law and the State - Part II

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UNCTAD Research Partnership Platform 2017

Competition Law and the State Part II

Interim Report

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Summary of the research: what will be examined?

- Part I considered coverage of competition laws to proscribe state-related acts and made some suggestions about what these laws should include
- Part II looks at how much and how well the existing prohibitions are enforced against state and local actors and administrative bodies: in short, how does it all work in practice?
- Assumption: The state is often a very significant competition problem but is also an instrument for the public interest
- How should nations draw the line between legitimate and illegitimate acts?

Methodology /process

Three basic issues:

1. Are the provisions which exist systematically applied in practice?
2. Why are they not applied? Hypothesis
3. Consider examples of good enforcement

Questionnaires were sent through UNCTAD along with an appendix of sample statutory excerpts to assist respondents with answering

27 Participants: Stage II

Chile

Cyprus

Egypt

EU

Finland

Hungary

India

Indonesia

Ireland

Japan

Kenya

Latvia

Mauritius

Montenegro

The Netherlands

New Zealand

Oman

Peru

Russia

Serbia

Slovenia

South Africa

Sweden

Switzerland

Turkey

Ukraine

Zambia



Scheme of the Questionnaire

- Does your competition law cover SOEs?
- Does your competition law cover entities to which the state has granted special or exclusive rights or privileges (such as the EU)?
- Does your competition law cover anticompetitive state and local measures and law against provincial restraints of trade?

Six recommended principles set out in our article based on earlier research

- Competition law should cover SOEs
- Competition law should cover complicit state officials
- Competition law should cover enterprises with exclusive privileges and special obligations, with public mandate defence (EU)
- State action defences should be narrow
- For common markets: law should integrate free movement, state restraints and competition principles (EU)
- For federal systems with principles of federal supremacy: robust preemption of excessively anticompetitive state measures

Consideration of effectiveness of enforcement and review of jurisdictions against these recommendations, recognising that they will not be appropriate to all jurisdictions



Research Highlights: interim comments

Background

Most competition laws potentially cover SOEs

- Business activities is the most common test for application of the competition law and almost all are covered (not Oman)
- Many jurisdictions make no distinctions between state and non- state actors, covering “undertakings”, although this implies business activity
- A number have exemptions around activities of public interest, sometimes to the extent that the competition law would obstruct performance of them

In answering how frequently the authority has opened investigations or brought proceedings against SOES the results:

One said “frequently” (Ukraine and see below)

19 said “occasionally”

3 said “almost never”

Russia notes that public authorities at all level are caught and that investigating them is part of the day to day activity of the FAS

Research highlights

- When asked “Is enforcement a priority?”

9 said yes

15 said no

- When asked about enforcement actions (2013-2015) the total number of actions were:

2013
35

2014
27

2015
32

- The highest numbers were in Cyprus (4 in 2013) and Sweden (9 in 2014,9 in 2015)
- Russia had no specific statistics for actions against state bodies but detailed a large number of important cases against them, and noted a variety of different remedies in its law and the possibility of criminal prosecutions under other state bodies
- A number of jurisdictions only took one enforcement action over the three year period
- In terms of actual injunctions, Netherlands had the highest reported number – 4 in 2015
- In almost half the cases fines were not paid for reasons including that the case went on appeal
- Other actions included informing the State Audit Office, and behavioural undertakings

Undertakings granted special and exclusive rights

- How often are proceedings brought against such undertakings or enterprises?

12 said “occasionally”

2 said “almost never”

5 said “not at all”

(again some had no separate statistics for the category- as to Russia see later)

- Is enforcement a priority?

Yes 6

No 12

- Enforcement actions

Totals	2013	2014	2015
	22	24	16

- Most in the EU

- Much smaller number of injunctions and fines- in single figures overall- India notable numbers in all three years but still relatively low; no other remedies mentioned

Public procurement

Questions related to two particular categories:

- Unnecessary bundling of related goods/other restrictions favouring a preferred tenderer
- Some countries treated this within competition law/ others in other laws
- Only Indonesia and Chile stated that investigations were “frequent”- many said “never”
- Enforcement was a priority in Indonesia, Zambia and Kenya (but Kenya had no actions)
- Indonesia was by far the most active regulator in relation to bid rigging conduct
- Only 4 countries stated that government officials complicit in bid rigging were caught by the competition law
- Others said non-specific competition law provisions could catch them in certain circumstances

Countries will generally need to make a decision on the relationship between competition law and procurement

Abuse of government power

(Example clauses such as tying water supply to acquisition of pipes; electricity company given and exclusive right to mine a mineral which was the best and cheapest input into production of electricity)

- Does your law have a similar provision?

Yes 8 No 16

- Some had no similar provision but the general abuse provision would catch conduct

- Investigations

5 “Occasionally” 1 “Almost never” Rest N/A

- Prioritisation Yes 3 No 5 Rest N/A

- Enforced mainly in the EU

- Very little evidence of fines, injunctions or other action

Support for or resistance to enforcement

- Did a government body or official ever disagree with or attempt to override your assessment of a state activity on the grounds of national interest or sovereignty?

Yes 4 , but no express evidence of overriding decisions

- Does enforcement in this area have popular support?

Yes 8 No 3 Not answered 13

- Some said great public support when issues involved interference with their rights

Useful examples

Russia is very active in this area – large number of investigations/ actions

Federal Law on Protection of Competition Arts 15 and 16

- FAS issues binding determinations to federal executive authorities, public authorities, local bodies, and their officials
- Administrative liability for violation- fines or disqualification for up to three years

Following “4th Antimonopoly Package” 2015 FAS can:

- Issue warnings to public officials where activity could lead to breaches of Arts 15 and 16
- Admonish officials
- Apply non- alternative penalty of disqualification in case of repeated violation by officials of antimonopoly law

FAS has stated that violations of public authorities have declined significantly between 2010 and 2016

Peru

- Says that the Commission initiated investigation of every local government in strategic sectors in Lima from 2013
- Actions were not “command and control” but coordination and education and “friendly deterrence”- letters followed by sanctions for those which did not show commitment
- Estimates 45 public authorities in Lima eliminated 978 unnecessary regulations affecting different economic sectors
- ICN and World Bank award for this program

Comments on research to date

- While competition laws generally cover the activities of SOEs, in most jurisdictions relatively few investigations involve them. It appears that SOEs are not generally a priority area for investigation or enforcement
- Range of possible reasons for this: small volume of anticompetitive conduct by government in the jurisdiction, lack of focus on the area, more pressing enforcement needs, lack of effective enforcement tools, fear of political repercussions or removal of officials
- Where bodies owned or controlled by the state are investigated, only a very small number result in any action against them
- This could be because they change their conduct once the issue is raised with them
- It could also be because there is no appetite in courts or tribunals to impose fines or other measures against them

Comments on research to date

- Competition laws of many jurisdictions did not expressly deal with public procurement
- Only in 4 jurisdictions were officials caught in bid rigging etc. expressly dealt with under competition law, although others said that less specific provisions of the competition law would apply
- Specific provisions on abuse of government power were limited; but in some cases the general abuse provision in the competition law would catch this
- Investigations on abuse of government power were relatively limited and few jurisdictions prioritised it, mainly the EU.
- There was little evidence of express disagreement or attempts to override decisions of the regulator by government or government bodies on grounds of national interest or sovereignty, although a large number of jurisdictions did not complete this answer
- Popular support for enforcement against government in jurisdictions was variable, although it was stronger when the activity interfered with affected rights

Next steps

- Further examination of the data to ascertain efficacy of law enforcement
- How do agencies determine when a measure crosses the line from governance with anti-competitive by-products to illegality under the law?