



St Martins Conference on Competition  
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*“Infringement of Competition Law by Public  
Bodies”*

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# Content

- **The State operations in the Business**
- **UNCTAD- RPP Project**
- **Individuals who responded to the questionnaire, reviewed answers, or otherwise assigned**
- **Concluding observations**

# Summary of the research

## Focus: Areas under examination.

- 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?

## The Standing points:

- The state can pose a significant competition enforcement challenge but is also an instrument for public interest.
- How should nations draw the line between legitimate and illegitimate acts?
- Is competition law enforcement peculiar vis-à-vis other laws?

# Scheme of the Survey

## Questionnaire

- Competition law coverage of SOEs?
- Competition law coverage of entities to which the state has granted special or exclusive rights or privileges (example of EU)
- Competition law coverage of anticompetitive state and local measures and law against restraints to trade

## **Six recommended principles based on earlier research\***

1. Competition law should cover SOEs
2. Competition law: sanction to complicit state officials
3. Competition law should cover enterprises with exclusive privileges and special obligations, with public mandate defence (EU)
4. State action defences should be narrow

## Six Principles Continued...

5. **Common markets:** law should integrate free movement, state restraints and competition principles (EU)

6. **Federal systems with supremacy status:** robust preemption of excessively anticompetitive state measures

Note: these recommendations, may not be appropriate or applicable to all jurisdictions

## Main issues covered

### A. Anti-competitive Acts by State or State-Privileged Entities Operating on the Market

- (i) Question of competition statute coverage to State-owned entities and other entities in which the State has an interest. For example, is the State a “person” or “undertaking” capable of violating the competition law?

27 jurisdictions were covered\*

Countries covered include; Chile, Serbia Cyprus, Slovenia, Egypt, South Africa, EU, Sweden, Finland, Switzerland, Hungary, Turkey, India, Ukraine, Indonesia, Zambia, Ireland, Japan, Kenya, Latvia, Mauritius, Montenegro, The Netherlands , New Zealand, Oman, Peru, Russia



## **Anticompetitive State Acts cont...**

*(ii)*. Competition statute and distinction between State entities that are covered by law, and those that are not covered.

## Research Highlights

- ❖ Most competition laws potentially cover SOEs
- ❖ Business activities is the most common test: unanimous except Oman)
- ❖ Many jurisdictions make no distinctions between state and non-state actors,
- ❖ “undertakings”, implies business activity
- ❖ Exemptions on public interest is common
- ❖ sometimes it becomes an obstruction to enforcement

## Highlights cont....

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

- ❖ One said “frequently” (Ukraine)
- ❖ 19 said “occasionally”
- ❖ 3 said “almost never”
- ❖ Russia notes that public authorities at all levels are covered and that investigating them is part of the day to day work of FAS.

# More 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)

## Highlights Cont...

- ❖ **Russia:** No specific statistics on actions against state bodies; but a large number of important cases, a variety of different remedies provided: a possibility of criminal prosecutions under other state bodies
- ❖ A number of jurisdictions only took one enforcement action over the three year period.

# More Highligts.

- ❖ 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”

(some had no separate statistics for the category)

## Exclusive rights cont..

Is enforcement a priority?

Yes 6, No 12

Enforcement actions

Totals 2013 (22), 2014 (24), 2015 (16)

Most in the EU

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



# Abuse of government power

(Example: tying water supply to acquisition of pipes; 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

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

# Abuse of Government Power cont..

## 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

## Some Examples

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

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

**Peru:** Estimates 45 public authorities in Lima eliminated 978 unnecessary regulations affecting different economic sectors

- ICN and World Bank award for this program

# Observations

- Investigations on abuse of government power were relatively limited and few jurisdictions prioritised it, mainly the EU.
- Express disagreement or attempts to override decisions of the regulator by government or government bodies on grounds of national interest or sovereignty, limited, but answers were few

# Concluding Observations:

- SOEs engaged in business activities are capable of breaking competition laws and therefore should be covered
- The degree of compliance or interference with competition law enforcement may change with the government of the day
- Does competition advocacy have a role?  
Question to ponder!

The United Nations logo, featuring a world map surrounded by olive branches, is positioned in the upper left corner of the slide.

# Thank you for your kind attention

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