Public Companies and Competition Law: The Launching of an ICN Project

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Public (or state-owned) companies present a conundrum. On the one hand, they were established by the state presumably to carry out special responsibilities[1] and they may be burdened by extra duties. On the other hand, public enterprises are market participants. They may be favored market players, recipients of special privileges such as subsidies, rights to scarce inputs, and exclusive rights to markets. Many are dominant firms. They often have incentives to harm market competition and they often do so, using the levers of privilege to preempt rivals and raise price. Recent evidence shows that, especially in developing countries, state-related acts and measures including acts of SOEs are principal culprits in strangling opportunities for meritorious competition by people and firms without power or privilege.

How, then, should public enterprises be treated under competition laws? How distinguish the bad without chilling the incentives for the good? Should public enterprises be exempt from competition law? Should they be included but with broad derogations? Should they be included but with narrow derogations? Where public enterprises exist in regulated sectors, should policing be left to the sector regulator? Should rules be tailored specially for enterprises entrusted with services of general public interest? How should "public enterprise" be defined?

The Competition Council of Morocco will host the next annual conference of the International Competition Network, which will be held in Marrakech in April 2014. Felicitously, it has selected this set of issues as the special project for the meeting. Thus far, in its many substantive convergence projects, the ICN has focused on private firm conduct.[2] With the Marrakech special project, the ICN will expand its horizons to an oft-neglected subject that is at the very core of competitive economies.

These questions also lie at the heart of a research project that Deborah Healey of the University of New South Wales and I have conducted under the auspices of the UNCTAD Competition Research Partnership Platform on the extent to which competition law reprehends state anticompetitive acts.[3] I shall report here briefly on four points revealed by our study, all of which might suggest principles for debate for the ICN agenda.

First, the competition law of every one of the 33 responding jurisdictions covered SOEs, albeit many with exceptions. This is not the universal pattern, but competition laws that fully exempt SOEs are a distinct minority today.

Second, even where the competition law covers all persons or enterprises, it may remain for the courts to define what is a person or enterprise and thus whether and how broadly the category includes state and local enterprises and their emanations. We are attracted to

[1] Alternatively, the governance structure may favor public ownership. State ownership as the rule, where it exists, may be a vestige of a prior era, before the nearly global appreciation of the benefit of markets.
[2] It has, however, suggested recommended practices on unilateral conduct of state-created or recently privatized monopolies.
[3] Our findings are summarized and our analysis and recommendations are presented in E. Fox and D. Healey, *When the State Harms Competition – The Role for Competition Law*, forthcoming in Antitrust Law Journal.

a holding of the Delhi High Court, ruling on an abuse-of-dominance investigation of the Indian Ministry of Railroads in its capacity as operator of the Indian railroads. The Ministry sought dismissal of the investigation order on grounds that running the railroad was a sovereign function and therefore not subject to the Competition Act. Rejecting the plea, the Delhi Court noted that in a welfare state many activities are operated by the state, and many may be monopolies, but that does not make them sovereign. "[B]arring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the State cannot claim any immunity." "The fact that the Government runs the railways for providing quick and cheap transport for the people and goods and for strategic reasons will not convert what amounts to carrying on of a business into an activity of the State as a sovereign body."[4]

Third, a number of jurisdictions, while providing coverage generally, grant a full or partial exemption when an enterprise – public or not – is entrusted with services of general economic interest. The most mature model is that of the European Union in Article 106 of the Treaty on the Functioning of the European Union. The EU competition laws apply to such enterprises unless application of the law would obstruct the performance of the special duties. Article 106 has sharp teeth; grantees of unjustifiably broad exclusive rights cannot invoke those rights to bar the competition.[5] Competition laws of many jurisdictions echo the language of Article 106. In their early stages of transition from command-and-control economies, Eastern European nations appreciated the critical importance of anchoring the market and were among the first nations to do so by competition law prohibitions against certain state restraints.[6]

Fourth, one of the scourges of competition, especially in developing countries, is buying and marketing boards. Sometimes the boards are composed of a mix of state officials and private industry members. While boards can serve public interests, they often play a principal role in distorting the buying side and monopolizing the selling side, as with the Pyrethrum Marketing Board in Kenya, which displaced tens of thousands of poor small-scale farmers and devastated the export performance of the country.[7] When and to what extent these boards do and should fall within the competition laws is a worthy subject for the agenda.

In sum, the Marrakech special project is of high importance. A discrete set of issues can usefully be teed up for debate and consideration by the participants in the ICN, with a view towards formulating aspirational principles. One would expect healthy debate and some

[4] Union of India v. Competition Comm'n of India, W.P.(C) No. 993/2011 (23 Feb. 2012), quoting from prior cases.
[5] See, e.g., Case C-320/91, Régie des Postes v. Corbeau, 1993 E.C.R. I-2533.
[6] See Roger Boner, *Antitrust and State Action in Transition Economies*, 43 Antitrust Bull. 71 (Spring 1998), with poignant examples from Ukraine.
[7] See slides, Francis W. Kariuki, Director General, Competition Authority of Kenya, World Bank pre-ICN Forum Warsaw 2013, http://icnwarsaw2013.org/pre-icn/pre-icn-3c_Kariuki-Competition_in_Agribusiness.pdf.

divergence, given the significant political economy aspects. Some nations will surely prefer more breathing room for the state and others will prefer more breathing room for competition; some will prefer to leave more issues to competition advocacy while others might choose a more robust reach of the competition law. The expected diversity is not an argument against the project; quite the contrary. Greater understanding of the room for convergence and the bases for divergence is one of the tasks that the ICN does best.

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