



# UNCTAD RESEARCH PARTNERSHIP PLATFORM

## COMPETITION LAW AND THE STATE

**Volume 1:** Summary of answers to questionnaire



**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT**

UNCTAD Research Partnership Platform Publication Series

## **COMPETITION LAW AND THE STATE**

**Competition laws' prohibitions of anti-competitive State acts  
and measures**

**Volume 1: Summary of answers to questionnaire**

Project Coordinators  
Eleanor Fox and Deborah Healey



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## **Foreword on the Research Partnership Platform**

Considering the important role of research and policy analysis in the development of appropriate policies and legislation responding to the challenges faced in the area of competition and consumer protection, UNCTAD created the **Research Partnership Platform (RPP)** in 2010. The UNCTAD RPP is an initiative that aims at contributing to the development of best practices in the formulation and effective enforcement of competition and consumer protection laws and policies so as to promote development.

The RPP brings together research institutions, universities, competition authorities, business and civil society, and provides a platform where they can undertake joint research and other activities with UNCTAD, exchange ideas on the issues and challenges in the area of competition and consumer protection faced particularly by developing countries and economies in transition. Currently, the Platform hosts over sixty institutions consisting of research institutes, universities, non-governmental organizations, corporate affiliates and competition agencies.

The role of UNCTAD is to facilitate and provide guidance on the research and analysis, as well as other activities, to be undertaken by members of RPP. UNCTAD benefits from the research findings in responding to the challenges faced by developing countries through its technical assistance and capacity-building activities.

This publication is the third in the UNCTAD RPP Publication Series.

## Table of Contents

|   | Page      |
|---|-----------|
| <b>I. Introduction</b>  | <b>1</b>  |
| <b>II. Summary of the Data from Questionnaire Answers</b>                                       | <b>4</b>  |
| <b>2.1. Anti-competitive acts by State or State-privileged entities operating on the market</b> | <b>5</b>  |
| <b>2.2. Anti-competitive acts by State administrative authorities</b>                           | <b>26</b> |
| <b>2.3. Procurement, bidding and corruption</b>   | <b>33</b> |
| <b>2.4. State measures</b>  | <b>48</b> |
| <b>2.4a. State aids</b>   | <b>62</b> |
| <b>2.5. Shielding private Anti-competitive acts or conspiracies</b>                             | <b>64</b> |
| <b>2.6. Country experience</b>  | <b>74</b> |

## I. Introduction

The role of the State in the market has a significant impact upon the way competition functions within a jurisdiction. This UNCTAD RPP Project set out to study and map the extent to which competition laws apply to anti-competitive acts and measures by States. The background to the study and its history are set out below. Thereafter we present a summary of the data derived from the questionnaire answers.

The study is elaborated in the article, Eleanor M. Fox and Deborah Healey (2014): *When the State Harms Competition—The Role for Competition Law*, 79(3) Antitrust Law Journal, p. 769.

### The State in the Market

The role that the State plays, both formally and informally, within a jurisdiction is dictated by factors that are political, cultural, and historical, and may relate to the stage of a nation's economic development. In a market-friendly environment with a strong commitment to competition law and policy the State can contribute to enhancing markets. State intervention can also have the opposite impact. There are a number of ways that the State may act to impede or hinder market competition, some of which can be addressed by competition law and some of which must be addressed, if at all, by broader competition policy.

In jurisdictions with deficient governance and corrupt leaders, the scope of competition law is limited by ineffective law and enforcement. Where most of the significant actors in a jurisdiction are State bodies, competition law is a very small part of the picture. The State itself may be the problem directly or as the facilitator of cartels. In many developing countries with traditions of statism and cronyism, corruption and discrimination may accompany weak institutions, a lack of funding, high barriers to entry and weak capital markets. The blockage of markets by the State or in complicity with private business is common.

Even in market-friendly environments, State acts may be a matter of concern. They are likely to be more permanent and harder to overcome than private restraints. Attacking private restraints may in itself lead to pressure by business on government to implement public restraints, thus rounding the circle.

The most obvious example of State market impact is seen in Anti-competitive conduct by State-owned businesses, which are a historical legacy even in some of the most developed jurisdictions and a substantial part of economic life in developing countries. States or State entities might conduct business in competition with the private sector. If these State businesses are not covered by competition laws or sector specific competition provisions, they may harm competition and consumers with impunity.

A further category of State impact on the market is distortive regulation. States need the ability to regulate in the public interest, but they often make laws and regulations without considering their impact on competition. These laws or regulations may be by way of sectoral regulation, authorizing or approving particular conduct (and sometimes conferring on the authorized private actor a "State action defense"). In some cases they may be adopted with specific anti-competitive purposes. The State and its entities can also be co-conspirators in distortive tendering or bid rigging.

Even in jurisdictions in which competition laws apply squarely to the State and its businesses, the relevant enforcement agencies may not have the will, independence, resources or capacity to enforce the laws against them. Thus, there may be law on the books without proper implementation.

Each of the outlined categories demands a legal or policy response to ensure that privilege is constrained and markets work efficiently and fairly. Appropriate responses vary according to the political economy of the particular jurisdiction and its stage of development.

### **The RPP Project**

The Competition and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD) established the Research Partnership Platform (RPP) in 2010. The RPP was devised to bring together researchers from academia, research institutions, competition authorities, business and civil society to exchange ideas and undertake joint research projects with UNCTAD on the issues of competition law and enforcement, and consumer protection.

In 2011 the authors, along with Michal Gal of University of Haifa Faculty of Law, Kusha Haraksingh of the University of the West Indies, and Mor Bakhom of the Max Planck Institute, formed a research group to study the extent to which competition laws reach anti-competitive acts and measures by States. Ulla Schwager and Ebru Gökçe participated on behalf of UNCTAD. The team drafted a questionnaire, which was distributed by the UNCTAD Competition and Consumer Policies Branch to competition authorities and their members. The competition agencies of 35 jurisdictions, or in some cases a researcher, answered the questionnaire. Most questionnaires were ultimately completed or reviewed by a competition agency.

The results span six continents. Seven participants are members of the European Union. Twelve are developed countries, three are transitional countries and 19 are developing countries. Classified by income, one country is low income, 16 are middle income and 17 are high income.

The data show a surprisingly wide breadth of competition laws, including coverage of SOEs in general, coverage of entities (often SOEs) to which the State has granted special and exclusive privileges, and in some cases coverage of corrupt procurement practices, which are often biased in favour of SOEs.

Our study reveals the wide extent to which SOEs are covered by competition laws and confirms the shift across the world to a more copious pro-competition policy including growing appreciation of the market harm caused by unjustified State restraints.

The authors thank all of the respondents to the questionnaire and others who assisted with answers and translation. Also, we thank our collaborators at UNCTAD, Ulla Schwager and Ebru Gökçe, for their assistance with conducting the information gathering. We also thank Graham Mott of UNCTAD for his assistance in compiling this volume. We list below the jurisdictions covered by the questionnaire and the many individuals in the various countries who answered the questionnaire, reviewed answers, or assisted in answering.

Thereafter, we present a summary of the data culled from the questionnaire answers. An appendix of sample excerpts from competition statutes that prohibit or control anti-competitive State acts is provided in Volume 2 of this study.

Eleanor Fox, Professor, New York University School of Law

Deborah Healey, Associate Professor, Law Faculty, University of New South Wales

## Jurisdictions that responded to the questionnaire

Australia, Barbados, Brazil, China, European Union, France, Greece, Guyana, Hong Kong (China), Hungary, India, Italy, Jamaica, Japan, Kazakhstan, Kenya, Republic of Korea, Lithuania, Malaysia, Mauritius, Mexico, Pakistan, Peru, Poland, Russian Federation, Serbia, Seychelles, Singapore, Spain, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

## Individuals who responded to the questionnaire, reviewed answers, or otherwise assigned

Dhaniah Ahmad, Stefanie Alder, Mor Bakhoun, Oxana Bassalaeva, José Antonio Batista de Moura Ziebarth, Hector Alarii Robles Bucio, Paulo Burnier da Silveira, Thomas Cheng, Evangelia Chrysanthopoulou, Gonçalo Coelho, Russell Damtoft, Sophie-Ann Descoubes, Holger Dieckmann, Sean F. Ennis, Jesus Espinoza, Daniel Gappy, Seema Gaur, Ridha Hajkacem, Mohamed Faouzi Ben Hammed, Kusha Haraksingh, Graeme Jarvie, Jin Jing, Vladimir Kachalin, Dmitry Kaysin, Markus Langenegger, Sang Hyup Lee, Toh Han Li, Andrés Calderón Lopez, Karin Lunning, Kiran Meetarbhan, Lilian Mukoronia, Matteo Negrinotti, Eiichiro Omata, Burton Ong, Stephanie Panayi, Mark Pearson, Dragan Penezic, Heidi Claudia Sada Correa, Paola González Sanz, József Sárai, Marta Skrobisz, Lina Strikauskaitė, Georges Tirant, Lerzan Kayihan Ünal, Mark Williams, Joseph Wilson

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