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# STATE-INITIATED RESTRAINTS OF COMPETITION

*Edited by*  
**JOSEF DREXL**  
**VICENTE BAGNOLI**



**ascola**

Academic Society for Competition Law

# State-Initiated Restraints of Competition

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ASCOLA COMPETITION LAW

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## Preface

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This book assembles various contributions that are based on talks given to the Seventh Conference of the Academic Society of Competition Law (ASCOLA), which was held at the Mackenzie Presbyterian University of São Paulo (Brazil) on 12–14 April 2012. Some other contributions are made by ASCOLA members who were not able to attend the conference.

In recent years the market economy has gained ground all around the world. Privatization and trade liberalization have not only characterized the economic policy of the more advanced economies, these policies also characterize economic reform in the many emerging and developing economies. In short, the state seems to get out of the economy almost everywhere and, thereby, seems to leave more room for private economic actors. Therefore, there is a temptation to assume that the state as the source of the restraints of competition is fading away, while competition law enforcers will have to concentrate on controlling restraints of competition by private parties.

Yet this book shows a much more complex picture. Of course the topic of the book – which was also the topic of the conference – was chosen with a purpose. Especially as countries in Latin America have a legacy of state-run economies. State-owned enterprises still exist in many of these countries, and regulators may have a hard time to switch from interventionism to pro-competitive regulation. Yet the kind of state interventions that take place in the market economy may be very multifaceted. In more advanced jurisdictions, competition law has been complemented by pro-competitive public procurement regimes and subsidy (state aid) control. Also, privatization and trade liberalization have not reduced the need for state intervention. Quite on the contrary, such policies have increased the need for a different kind of regulation. Historically, there were often good reasons, such as the public service argument, why certain sectors of the economy were exempted from competition in favour of state-owned monopolists. Such reasons have not disappeared with liberalization. Rather, diverse policy goals and public interest grounds also need to be taken account of today in the framework of sector-specific regulation. At the same time, this raises the question as to how such regulation interfaces with general competition law and policy.

In sum, the book was conceived on the assumption that ‘state-related restraints’ can take very diverse forms and that it is very timely to discuss those restraints and how they are handled in different jurisdictions.

The book addresses the topic in four parts. Part 1 deals with state-owned enterprises, as the classical form of state-initiated restraints. Part 2 presents examples of ‘pro-competitive regulation’ in a broader sense, that is, beyond the topic of state-owned enterprises, namely, in the context of sector-specific regulation or where specific forms of regulation and even competition law are used as a means to enhance competition with the state as an addressee. Part 3 assembles contributions on ‘anti-competitive’ state intervention and regulation where the authors criticize the state or the regulator for distorting competition and failing to achieve the goals of competitive markets. Part 4 finally contains two contributions that provide snapshots of the law on public procurement and subsidy control from the perspective of two individual jurisdictions.

Part 1 opens with a contribution on the Australian ‘competitive neutrality’ policy by Deborah Healey. This policy is designed to combat distortions of competition arising from privileges granted to state-owned enterprises. Many other jurisdictions could learn from such a more principled approach to controlling state-owned enterprises. In the next contribution, Gilberto Bercovici analyses the role Petrobrás, as the state monopolist in the oil sector, still today plays in Brazil’s economic energy and innovation policy and how competition issues, including pricing and purchaser power exercised by Petrobrás are handled. In another contribution Tania Zúñiga-Fernández illustrates that Latin American jurisdictions can also adopt more principled approaches – namely, based on the constitutional principle of subsidiarity in Peru – to deciding whether the state must or must not entertain state-owned enterprises. In the last contribution of Part 1, Josef Drexler addresses the regulation of so-called public sector information (PSI) in the European Union at the interface with competition law. The contribution highlights how difficult, but important, it is to distinguish between economic activity by a state – in the sense of a ‘public undertaking’ – and original state function. By evaluating this form of regulation through the lenses of competition policy, Josef Drexler simultaneously introduces Part 2 of the book.

Part 2 starts with two contributions that analyse broader policy instruments by which jurisdictions address state administrative actions that distort competition. In the first one, Maria Manuel Leitão Marques and Leonor Bettencourt Nunes demonstrate how the European legislature enhanced cross-border competition among EU Member States in the framework of the Services Directive. Similarly, Thomas Cheng analyses

the rules of the Chinese Anti-Monopoly Law on ‘administrative monopolies’ after some years of experience. These competition rules are designed to prevent Chinese provinces and lower territorial entities from restricting imports from other parts of China through regional trade regulation. The question of this analysis is above all how effective these rules can be. The remaining two contributions of Part 2 deal with more sector-specific issues. Gesner Oliveira looks at the regulation of the water and sanitation services market in Brazil in order to find out which pro-competitive policy measures can deliver the fastest universal coverage of these services in the country. In the last contribution of Part 2, Simonetta Vezzoso addresses a more recent and very important challenge of competition law, namely the interface of competition policy and data protection regulation. The latter has quite some tradition in the European Union in particular. It was initially inspired by concerns about data collection and processing activities of state entities. More recently, however, the focus moved to large private entities, such as Google, that build their business model and even market power on the control of personal data of individuals.

In the first contribution to Part 3, Claudia Curiel Leidenz shows through a thorough analysis of the economic policy development in Venezuela that countries can also completely turn around market liberalization by increasing state intervention in the economy, thereby also destroying the first impressive steps in the direction of building up a workable competition system. Then, Arthur Barrionuevo and Pedro Dutra criticize how the Brazilian sector-regulator went beyond its statutory powers by aiming to impose investment targets on providers of pay-TV. In contrast, the authors sketch an alternative model of regulation that not only respects the limitation of the regulatory powers but, more importantly, also achieves the goals of innovation and broader coverage of the country by relying on competitive pressure. In the last contribution to Part 3, Rudolph Peritz strikes an almost provocative tone by describing intellectual property law as anti-competitive regulation and by claiming that the far-reaching rejection of a duty to license under US antitrust law should be reconsidered in the light of the recent *eBay* case-law of US courts according to which public interest reasons can justify a denial of injunctive relief in intellectual property infringement cases.

Public procurement decisions and subsidies are other forms by which states can distort competition among firms. In Part 4, S. Chakravarthy recommends that India seriously consider joining the WTO Agreement on Government Procurement. He thereby argues that this Agreement would not prevent India from taking into account development needs, including privileged treatment of micro and smaller enterprises from



India. In the second contribution, Thomas Jaeger turns to state aid control in the European Union. In comparison with the anti-subsidies regime of the WTO, he also criticizes the European approach. Due to an inappropriate delineation between public and private subsidies many state-initiated restraints escape control despite their nevertheless equally distortive effect on competition.

Neither the conference nor the book was meant to present a full analysis of the very diverse forms of 'state-initiated restraints of competition'. The contributions of the book present analyses of various sub-topics and examples from several jurisdictions, offering numerous insights that will hopefully attract the interest of the reader. Yet, also across the various contributions, there are a number of common threads of learning.

First of all, the variety of different forms of state-initiated restraints is quite astonishing. They cannot be captured by the three areas of the control of state-owned enterprises, public procurement and state subsidies. Most importantly, trade liberalization requires policymakers and regulators to use competition policy analysis as a means to enhance pro-competitive regulation and avoid the fallacy of anti-competitive regulation.

Secondly, the international perspective shows that the topic cannot be dealt with uniformly across different jurisdictions. By definition, state-initiated restraints of competition can only be understood and appropriately addressed in the historical and socio-political context of an individual country. Yet this does not mean that countries cannot learn from the experience of other countries. Quite the contrary, countries typically share the same policy goals and the same economic features of markets that are in need of regulation.

Thirdly, some of the contributions (Drexl, Jaeger) show how important it is to identify the scope of legal instruments correctly to achieve maximum positive effects in terms of competition, whether this concerns if certain state activity fulfills the requirements for an 'economic activity' of an undertaking and, consequently, makes the state an addressee of competition law, or whether it is about certain forms of regulation that can be considered a subsidy.

Fourthly, some authors (Oliveira, Chakravarthy) also contribute to the growing research on competition law in developing countries. In emerging and developing countries, public services are still in need of extending distribution networks in order to attain a degree of universal provision of all consumers, while developed countries liberalized public service markets after having attained universal coverage often through a state monopolist. Oliveira's contribution demonstrates that competition policy is also the

right approach in the field for developing countries. Chakravarthy explains how important government procurement rules are for developing countries despite justified development concerns against fully opening up national procurement markets to international competition.

Moreover, many contributions highlight the relevance of state-initiated restraints in multi-level (federal) jurisdictions, whether this is about China or the European Union. The upper level cannot accept that lower level state entities distort competition in the larger market. Of course, in a globalized world such concerns have long attained the level of international law with the WTO law and many bilateral agreements that nowadays address public procurement and state subsidies.

And finally, several of the contributions explore the interface of competition law and sector-specific regulation. None of them favoured exclusive competence of the sector regulators. They all supported pro-competitive regulation as well as parallel application of the sector-specific rules and general competition law. This makes state-initiated restraints of competition and anti-competitive regulation also an issue for competition agencies and courts.

This book would not have been possible without the conference held at Mackenzie Presbyterian University in São Paulo. Therefore, the editors would like to thank Mackenzie Presbyterian University, Mackenzie Presbyterian Institute and Mackenzie Law School, which recognized the potential of the Conference and provided a unique opportunity to bring together academics from different nations and universities. As regards the burden of organizing the conference, the editors would also like to thank, from the Mackenzie Competition Law Studying Group, Tatiana Coutinho, Amanda Navas, Patrícia Calderon, Mariana Cavichioli Almeida, Ana Cláudia Stein, Maria Fernanda Madi, Paulo André Nogueira Lima, Murilo Sampaio Ferraz and Israel Sayão.

Some other people were involved in the preparation of this book to whom the editors are greatly indebted. The editing of the book took place at the Max Planck Institute in Munich, where Delia Zirilli collected the contributions and brought them into a uniform style. Most important and time consuming was the work done by Allison Felmy. She reviewed all the contributions by the non-native speakers from a linguistic point of view. Last but not least, the editors are very grateful to the staff of Edward Elgar, especially to John Paul McDonald, who strongly supported the book throughout the time of its coming into existence.

June 2014  
Vicente Bagnoli  
Josef Drexl

# Abbreviations

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ABA	American Bar Association
ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
ACTA	Anti-Counterfeiting Trade Agreement
AGCNCO	Australian Government Competitive Neutrality Complaints Office
AIC	Administration for Industry and Commerce (China)
AIS	Australian Institute of Sport
Am. Econ. Rev.	American Economics Review
Am. J. Sociology	American Journal of Sociology
ANATEL	Agência Nacional de Telecomunicações (National Telecommunication Agency of Brazil)
ANP	Agência Nacional de Petróleo (National Oil Agency of Brazil)
Antitrust Bull.	Antitrust Bulletin
Antitrust L.J.	Antitrust Law Journal
AQSIQ	Administration of Quality Supervision, Inspection and Quarantine (China)
ASC	Australian Sports Commission
ASEAN	Association of South-East Asian Nations
BEUC	Bureau Européen des Unions de Consommateurs (The European Consumer Organisation)
CAC Act	Commonwealth Authorities and Companies Act (Australia)
CAPEX	capital expenditure
CCNCO	Commonwealth Competitive Neutrality Complaints Office (Australia)
CCTV	China Central Television
CHP	combined heat and power

Cir.	U.S. Circuit Court of Appeals
CJEU	Court of Justice of the European Union
C.M.L. Rev.	Common Market Law Review
CNP	Conselho Nacional do Petróleo (National Oil Council of Brazil)
CNU	Competitive Neutrality Unit (Victoria)
COAG	Council of Australian Governments
Colum. L. Rev.	Columbia Law Review
Comp. Eur. Pol.	Comparative European Politics
CSO	community service obligation
DBCDE	Department of Broadband, Communications and the Digital Economy (Australia)
DTH	direct-to-home
EC	(former) European Community; European Community Treaty
ECJ	(former) European Court of Justice (now CJEU)
ECLR	European Competition Law Review
ECR	European Court Reports
EDIPE	Escritório de Distribuição de Produtos de Petróleo (Office of Distribution of Oil By-Products of Brazil)
E. L. Rev.	European Law Review
EStAL	European State Aid Law Quarterly
Eur. Const. L. Rev.	European Constitutional Law Review
Fed. Cir.	US Court of Appeals for the Federal Circuit
FRAND	fair, reasonable and non-discriminatory
FTC	Federal Trade Commission (United States)
F.3rd	Federal Reporter, Third Series
GBE	Government Business Enterprise (Australia)
GDP	gross domestic product
Geo. Mason L. Rev.	George Mason Law Review
GFR	general financial rules (India)
GPA	Agreement on Government Procurement
GPS	Global Positioning System
HCA	High Court of Australia
Harv. Int'l Rev.	Harvard International Review

IIC	International Review of Intellectual Property and Competition Law
INDECOPI	Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (National Institute for the Protection of Competition and Intellectual Property of Peru)
Int'l Data Priv. L.	International Data Privacy Law
IPART	Independent Pricing and Review Tribunal (Australia)
IPRs	intellectual property rights
IRA	internal rate of return
IWA	International Water Association
J. Am. Stat. Ass.	Journal of the American Statistical Association
J. Comp. L. & Econ.	Journal of Competition Law and Economics
J. Development Stud.	Journal of Development Studies
J. Pol. Econ.	Journal of Political Economy
LAPSI	Legal Aspects of Public Sector Information
LGT	Lei Geral de Telecomunicações (General Telecommunication Law of Brazil)
lit.	littera (letter)
Md. L. Rev.	Maryland Law Review
MEQR	measure of equivalent effect as quantitative restrictions
Mich. L. Rev.	Michigan Law Review
MINCI	Ministero para la Comunicación y la Información de la República Bolivariana de Venezuela (Ministry for Communication and Information of the Bolivarian Republic of Venezuela)
MMDS	Multichannel Multipoint Distribution Service
NAFTA	North American Free Trade Agreement
NBN	national broadband network
NCC	National Competition Council (Australia)
N.C. L. Rev.	North Carolina Law Review
NCP	National Competition Policy (Australia)
NDRC	National Development and Reform Commission (China)

NPV	net present value
NSW	New South Wales
Nw. J. Tech. & Intell. Prop.	Northwestern Journal of Technology and Intellectual Property
Nw. U. L. Rev.	Northwestern University Law Review
OECD	Organisation for Economic Cooperation and Development
OJ C	Official Journal Part C (European Union)
OJ L	Official Journal Part L (European Union)
PNAD	Pesquisa Nacional por Amostra de Comincílios (National Housing Sample Survey of Brazil)
PNSB	Pesquisa Nacional de Saneamento Básico (National Basic Sanitation Survey of Brazil)
POSC	point of single contact
PPP	public-private partnership
PSI	public sector information
PSU	public sector undertaking
Pub. Contr. L.J.	Public Contract Law Journal
QCA	Queensland Competition Authority
RAND J. Econ.	RAND Journal of Economics
Rev. Eur. Adm. L.	Review of European Administrative Law
SAIC	State Administration for Industry and Commerce (China)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
S. Ct.	US Supreme Court Reporter
SeAC	serviço de acesso condicionado (conditional access service)
SEP	standard-essential patent
SNIS	Sistema Nacional de Informações sobre Saneamento (National Information System on Sanitation of Brazil)
Stan. L. Rev.	Stanford Law Review
SVO	State Valuation Office (Australia)
TEC	(former) Treaty on the European Community
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Trade Practices L.J.	Trade Practices Law Journal
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TVC	cable television
UNCITRAL	United Nations Commission on International Trade Law
USC	United States Code
Utilities Pol'y	Utilities Policy
WACC	weighted average cost of capital
West Eur. Pol.	West European Politics
WTO	World Trade Organization

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