Introduction

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Governments intervene widely in markets to achieve various policy goals. Sometimes these policy goals align with one another and sometimes they conflict and require various trade-offs in policy responses, such as to pursue efficiency, to correct market failures, or to ensure equity and distributive justice.

In recent years, the interaction of competition law and policy with state (government) activity has attracted considerable interest from the global competition community, both among scholars and within policy circles.[1] Developments around the world have created the need to reconsider the roles of competition and the state. This reconsideration forces competition law to interact, sometimes uneasily, with a broader and somewhat distinct competition policy. The broader competition policy (which includes not only competition law but also other measures to address issues of competition in the economy) interfaces with state activity across many different levels of how government organizes economic behavior.

Government organizes economic activity in part through the shape and nature of regulation and overall state involvement. Understanding the distinction between competition law and policy clarifies competition authorities' capabilities and limitations when it comes to promoting competition in situations of a broader regulatory overlay. Competition law focuses on enforcement, whereas competition authorities also must address issues of nonenforcement such as advocacy and institutional design. When considering the question of

institutional design, how countries design optimal competition policy involves three choices: what to leave to the jurisdiction of competition law (and competition agencies and judges), what to assign to noncompetition authorities (such as sector regulators) exclusively as part of their jurisdiction, and how to establish concurrent jurisdiction among the competition authority and two or more regulatory authorities.

The role of competition advocacy on the part of competition authorities is significant in both developed and developing economies. The state sets the rules by shaping how market forces work. A focus on country competitiveness often highlights regulatory barriers to business creation and economic growth. These include rules and regulations that may impact how the market operates. For example, licensing requirements may serve certain important noncompetition purposes, such as ensuring quality of service. However, overly stringent requirements may create significant barriers to entry and reduce competition. Addressing these barriers has been a significant part of competition policy in both young and old competition authorities and has fed into efforts at reform.

Efforts at competition advocacy shape the economic activity that competition law enforces. Depending on the legal system, competition law may directly (or only indirectly) address public restraints, private restraints, and mixed public-private restraints on competition.

A number of factors, some long term and some more immediate, have made the role of the state as it relates to competition an issue of primary importance. Most immediately, the impact of the worldwide financial crisis has led to a fundamental reexamination of the state's role in economic development. Countries that had liberalized various parts of the economy reacted to the financial crisis via direct government intervention through increased government ownership interest in strategically important firms (such as in the financial sector or for firms that had significant employment).

Many countries passed new laws and regulations that fundamentally reorganized the role of the market in a given country. Even though many of the debates surrounding policy decisions centered on "competition" and "competitiveness," competition authorities for the most part played only a minor role in the formulation of these policies.[2] As countries face continued economic crises, the need for effective competition law and policy will only grow. Yet, the various permutations of both the state's and competition law's roles remain vague.

The state's role in the economy is both pervasive and unclear. This is due to problems in measuring state-related activity. There is no definitive measure for state involvement in economic life. One way to measure the degree of

government intervention in an economy is usually in terms of public expenditure as a percentage of GDP. In the Organisation for Economic Co-operation and Development (OECD) countries, the degree of government intervention, measured in terms of public expenditure as a percentage of GDP, has on the average increased, although there are marked differences among its members. In 2011, this ranged from around 31.5 percent (Korea) to 56 percent (Denmark), with the OECD countries averaging 43.3 percent.[3]

Another way to measure the impact of the state's role on competition is to measure regulation's role, as the OECD does,[4] across countries based upon competition in the nonmanufacturing economy. This portion of the economy represents two-thirds of economic activity in OECD countries and those parts of the economy that are the most growth oriented. These studies find variation in domestic and foreign direct investment patterns,[5] the labor market,[6] productivity,[7] and their impact on structural reforms.

One can also calculate the number of international trade barriers to determine how much control the state has over how the market operates. Although tariff barriers have declined over time, in developed world countries these have been replaced by nontariff barriers. In short, barriers to trade in goods and services remain significant.[8]

What does the role of the state mean as it relates to competition? This government intervention may take different forms, depending on the policy area and the dimension of government action with the preservation of some form of market competition. For example, governments may intervene as market makers: they might decide to use competitive tendering to introduce competition for goods and services that were previously supplied solely by the public sector; they might introduce more choice in the provision of public services by opening access to private or voluntary sector providers; or they might make tradable permits accessible in such a way as to most efficiently allocate among private providers the costs of engaging in an activity that is harmful to society.

The state may operate to create or facilitate markets, or in some cases to act as a market participant. Governments can affect markets through direct participation as a supplier to provide public goods and services that free markets are unlikely to supply at an adequate level. Governments also act as significant buyers of goods and services from the private sector to deliver public services and perform their normal functions. In dispensing public services the government may establish a state-owned enterprise (SOE) or a public-private partnership (a relatively recent phenomenon, as Chapter 3 discusses), or it may decide to procure services through a competitive tendering process.[9] Alternatively, the

state may act as a deregulator in which it removes regulation to unleash market forces within various parts of the economy.

Starting in the late 1970s and early 1980s in the United States and the United Kingdom, the deregulatory/economic liberalization movement spread across the world. This trend became more pronounced in the 1990s. In more recent years, the liberalization road map to economic development has come under fire from both liberal economies and countries that have organized their economies along a more managed path. Countries that managed their economies less, such as the United States and the United Kingdom, suddenly found themselves owners of significant firms and regulators of industries that had been left more to market forces in the past.

The emergence of new global economic powers, where state intervention in the economy remains the norm rather than the exception, particularly China, is another significant factor that forces a reconsideration of the relationship between competition and the state. Because of the export-oriented nature of the Chinese economy, other countries must confront the Chinese competitiveness in ways that the legal system has not been able to do. An important part of the structure of China's managed economy (and to a certain extent of other countries in specific sectors) is its reliance on SOEs.[10] SOEs are present in various economic sectors, from gambling and alcohol sales to utilities, transport, oil, universities, and health care. SOEs have been instrumental in the economic success of some jurisdictions and are important players in global markets. In some cases, SOEs behave much the same way private firms do, with similar capital structures and a profit-maximizing incentive. In other circumstances, profit maximization is less important than revenue maximization, and managerial structures and controls resemble those of government ministries. As the lines separating private and public in the context of SOE incentives become blurred (see Chapters 1 and 13 for further discussion), the way competition law should address potential anticompetitive conduct by SOEs becomes an issue.

Likewise, governments may intervene indirectly by influencing private markets when they create either negative or positive impacts on consumer or total welfare. In this case, command and control regulation or more market-based incentive forms of regulation might be other venues for taxes and subsidies to influence the incentives and behaviors of private firms. Sometimes, governments deliberately try to influence consumer behaviors in a variety of ways—for example, by providing information on hidden costs associated with certain types of consumption (e.g., advertising campaigns against tobacco or alcohol)

or by nudging consumers to adopt a behavior that will protect their self-interest. They might also attempt to indirectly influence businesses by coordinating private-sector activities to generate the appropriate amount of information for the adoption of public policies or by promoting self-regulation by business, as this generally saves implementation costs.

In some situations, government intervention may be the by-product of corruption, may be captured by special interests, or it may be following the right objectives but be badly designed—what is called "government failure."[11] In this case it will be, in general, welfare reducing. In other instances, however, government intervention is justified by legitimate public interest objectives. Of course, it is not the aim of competition law to correct any form of government failure if that failure does not impact the competitive process. Competition law may supplement other areas of law in an effort to improve government action and increase efficiency. Yet, the role of competition law is also relevant in the context of legitimate state action, depending on the forms that the latter may take, some of which may affect the competitive process more than others.

This book analyzes the multifaceted role of the state and its impact on competition law and policy. The chapters address various aspects of the tensions and complexities involved in competition and the state's role. Although the book offers different normative approaches, economic analysis remains a unifying theme. The way economic analysis is used in competition law and policy can create problems in other parts of regulation.

Several chapters provide examples of how these factors might impact competition across a number of different areas. For example, airline regulation, covered in Chapter 1, must ensure customer safety, and in some countries, airports are required to provide flights to smaller airports for reasons of fairness. Yet, liberalization that promotes competition by allowing additional domestic carriers to compete, reducing entry and fare restrictions, and reducing barriers to foreign carriers creates significant price deflation. Chapter 2 discusses the various goals regarding the provision of health services. Allowing consumers to choose their own health coverage, physicians, and health care facilities opens the door to intense competition. This competition had to be managed in such a way as to create incentives for hospitals while maintaining the principle of competitive neutrality. Therefore, government intervention in the economy may indeed affect the competitive process and thus be subject to the scope of competition law. This raises the questions of how competition law can apply to government activity and if specific competition rules and principles for public actors must be established. It also questions the scope of competition law as

opposed to the role of advocacy to identify and correct anticompetitive legislation and regulation.

The starting point of each competition law regime is obviously different because its evolution largely depends on the role and place of government intervention in the economy. For example, in the United States, the Sherman Act does not have any specific provisions on state restrictions on competition and has mainly targeted privately owned corporations, in view of the few state-owned enterprises in the United States. It has also declared regulations adopted by the federal state or the states to be immune, under certain conditions, from antitrust enforcement.

In Europe, state action was soon subjected to the strict scrutiny of European Union competition law, in view of the important role of state-owned undertakings in the European economy,[12] the need to preserve market integration, and the *effet utile* of EU competition law against the attempt of national governments to protect their national champions or incumbent firms by adopting anticompetitive regulations.[13] Competition law thus operated as a complement to the internal market project. As a result of these broader aims of EU competition law, the legal framework put in place by the constitutive treaties include, in addition to provisions on collusive and unilateral conduct, provisions on the control of state aids and the conduct of state monopolies and undertakings entrusted with special or exclusive rights.

The EU courts have also developed a body of case law on different forms of public restrictions on competition, ranging from SOEs' dominance, to the regulation of state privileges and licenses conferring exclusivity, to state measures that restrict competition or that facilitate private restrictions.[14] The EU is not the only jurisdiction possessing specific competition rules applying to state action. Among other jurisdictions, Russia, Mexico, and China (see Chapter 10) prohibit state and local measures that unduly restrict the free flow of goods in their internal trade. There is also binding international governance of state action across a number of areas within the trade setting, such as telecoms,[15] financial services,[16] and state trading enterprises.[17]

More recently, competition advocacy has risen in importance as one of the major tasks of competition agencies, with a special Advocacy Working Group created in the International Competition Network (ICN).[18] According to the ICN standard definition, competition advocacy "refer[s] to those activities conducted by the competition agency related to the promotion of a competitive environment by means of nonenforcement mechanisms, mainly through its

relationships with other governmental entities and by increasing public awareness of the benefits of competition."[19] In performing their competition advocacy functions, competition authorities are interacting increasingly with other parts of government and utilizing an important tool to make their voice for competition heard.

Even if one assumes that competition law (in the broad sense) should apply to various forms of state action, it is still important to ascertain if competition rules applying to government activities should take into account that, contrary to the action of private economic actors who are motivated by the pursuit of their own interests, state actors are presumably motivated by the promotion of the public interest. Certainly, the calls for competitive neutrality are strong,[20] but while SOEs may have some inherent advantages, they can also suffer from certain disabilities due to the variety of tasks and missions of general interest they assume. Hence, one might argue that SOEs should be subject to competition rules, albeit with some adjustments.[21]

This book seeks to fill a void by providing a collection of works that address various aspects of the role of the state across a number of dimensions as it relates to competition law and policy. Part I reconceptualizes the interaction between competition law and government activities, in view of the profound transformation of the conception of state action in recent years, by looking to the challenges of privatization, new public management, and public-private partnerships.

Chapter 1, by Alexander Volokh, focuses on a core issue of the role of the state in competition law. SOEs have been set up in many jurisdictions for a market replacement function. When economies become liberalized, there is the potential for market-based competition. It is in this context that privatization might both raise funds for the government coffers in the near term and create greater efficiencies for the long term. However, in many instances, there have been concerns that privatization's positive effects may have been mitigated as public monopolies were replaced by private ones. Chapter 1 links two themes of privatization to competition law: corporate governance and competition policy. The chapter discusses the impact of privatizations on natural monopolies and explores why competition law may serve as an entry-promoting policy. Using standard public choice methods, the chapter then discusses the limitations on public monopolies (including organs of the government) that create exemptions from competition law. Ultimately Volokh is agnostic on which form of ownership is optimal, as so much of successful economic organization of society is context specific.

In Chapter 2, Ioannis Lianos recasts the law and economics of competition using a socio-legal approach. He argues that the traditional dichotomy of market versus state in competition policy is a false one because it ignores the multifaceted nature of the concept of "state," the evolution of the composition and role of public bureaucracies, and the interaction between politics and scientific (here economic) expertise in policy making. One should take into account that a neoliberal state will require a different approach in the interaction of competition law with government activity from a patrimonial or a neocorporatist one. In a neoliberal state, the value of competition may already be integrated in all forms of state action. The "technology" of professional public bureaucracy has also evolved in parallel toward a more proactive technocracy, assuming tasks of forecast, knowledge gathering, and sharing. Regulators compete with competition authorities in the market for expertise and may sometimes be better placed than the latter in reconciling the different objectives pursued by government action with the principle of competition. Lianos illustrates this new dynamic by focusing on two examples: the competition screening of regulation, including the interaction between the regulatory impact assessment tool and competition assessment, and the way competition and other regulatory values have been balanced in the UK managed-competition health care services sector.

In Chapter 3, R. Richard Geddes analyzes competition issues, where the roles of the private and public sectors have been blurred. He discusses public-private partnerships (PPPs). These are agreements between public and private sectors to design, construct, operate, and finance infrastructure projects. PPPs have a number of potential competitive concerns. The differences in the public's versus the private sector's cost of capital affect their competitive position and call for action. His starting point is that antitrust law may be poorly positioned to address public-private competition issues created by the developing use of public-private partnerships. For example, the private partner in a public-private partnership is typically granted an exclusive concession to operate the transportation facility for a fixed period. These are usually long-term contracts, in view of the sunk costs incurred to develop the infrastructure, and include a noncompete clause insulating the private partner from public-sector competition. Yet, despite their potential to restrict competition, they may benefit from competition law immunity because they result from a concession contract between a public and a private actor and the concession is overseen by the state. Principles borrowed from utility regulation and franchise bidding may provide a better framework for addressing competitive issues posed by PPPs.

Indeed, competitive neutrality principles may be embedded in the public-sector comparator (PSC) test, which is considered one way to increase competition between public and private provision for the benefit of the public. Another mechanism for addressing competitive concerns that is not typically utilized in public utilities is the rebidding of the concession and the adjustment of concession length to increase the frequency of rebidding

The chapters in Part II debate whether a substantive legal framework that addresses competition issues as they relate to the role of the state can be put into place. In Chapter 4, Wentong Zheng examines how competition law might address SOEs' anticompetitive practices, given some of the lessons from trade law. As he notes, unlike private firms, the state may simultaneously be both regulator and market participant via SOEs. While this issue has become increasingly important in antitrust, there is a longer history of addressing such concerns under international trade law. Zheng offers examples from both antidumping and subsidies law to aid competition law in its inquiry into competition concerns regarding SOEs.

Merger control is another area in which both the setup and the function of the legal regime impact how much the state leaves to market forces, and indeed the extent to which the state chooses antitrust over, or concurrent with, other forms of regulation. In Chapter 5, D. Daniel Sokol explores the complexity of these sets of trade-offs. In a sense, the question of whether to have antitrust merger control and the factors that such an analysis considers are, in part, political issues. Sokol explores via theoretical discussion and case studies the extent to which political factors are (and should be) recognized within competition law and policy in merger control. According to Sokol, the first level of politicization occurs in the decision of whether or not to utilize an antitrust merger analysis that exclusively applies an economic welfare standard (total or consumer welfare) or that includes noneconomic factors such as "fairness." The debate over the politicization of antitrust also plays out in the mechanisms by which antitrust merger law interacts with other forms of merger review—for example, in the case of sector regulation when a regulator must consider other noncompetition economics factors as part of the merger analysis, such as "public interest."

What exactly public interest means and how consumer welfare analysis interacts with it is the focus of Chapter 6, by Alberto Heimler. Heimler notes that governments play a significant role in promoting competition and use a variety of policies for this purpose, including, most prominently, property rights rules, regulatory reform, trade liberalization, and antitrust law enforcement. All these

policies share the objectives to be achieved (greater competition), but they differ in terms of the instruments they use and the intensity with which they are able to promote market mechanisms. Contrary to the general understanding, regulation is pervasive. Price control of public utilities; concession for the use of public property, including the radio spectrum; pollution control; information requirements of all sorts; accreditation of suppliers of credence goods; and delimitation of exclusivities are all areas where governments intervene directly in our economies, although often disregarding the effects of the imposed regulatory structure on incentives. While antitrust enforcement in the last few decades has thoroughly emphasized the role of incentives in achieving optimal economic outcomes (making sure that the law is interpreted so as not to block welfare-enhancing firm strategies), such an understanding does not seem to have played a similar role in regulation, trade policies, or even in the protection of intellectual property rights. Heimler compares the ideology that inspires antitrust enforcement with that behind other areas of government intervention, concluding that the antitrust approach is the most market friendly and the one that, in consideration of the relevance it provides to innovation and growth, should be widely adopted. A possible strategy in this respect is to have the different communities that inspire competition policies—trade, regulatory reform, intellectual property, and antitrust communities—develop common approaches and strategies, possibly under the auspices of international organizations, such as the OECD or the United Nations Conference on Trade and Development (UNCTAD).

Although Chapters 4, 5, and 6 focus on the domestic implications of various mechanisms to address competition concerns, a number of international law doctrines offer some doctrinal mechanisms to address issues involving competition and the state. Several international law doctrines apply to conflicts that implicate competition among states.

In Chapter 7, Paul Stephan addresses how to achieve optimal international competition policy through an analysis of the concepts of territoriality, sovereign immunity, and act of state under international law as interpreted by U.S. courts. Stephan notes that should optimal global consumer welfare dominate all policy objectives pursued by governments, competition authorities probably would not distinguish between private and governmental restrictions of competition. Yet, in a world where states pursue other objectives and embrace strategic trade objectives, the unilateral pursuit of aggressive pro-consumer competition objectives might lead to trade wars instead of cooperation. This

creates interesting institutional questions as to which—the government or the courts—should intervene to mitigate the risks of conflict.

In Chapter 8, Joseph Bauer also examines U.S. courts' focus on international law issues. Bauer confronts how the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) has created barriers to creating a successful legal claim under U.S. antitrust law through both its enacting legislation and subsequent case law. He argues that as a consequence of case law developments, the FTAIA has reduced consumer welfare by harming U.S. plaintiffs.

In Part III, case studies of national experiences are presented. In Chapter 9, Dae-Sik Hong provides the first English-language analytical description of the Korean competition advocacy system. This system is important because of the scope of the Korean Fair Trade Commission's power (cabinet level and the ability ex post and ex ante to review all new legislation and regulation). This level of competition review of legislation and regulation has evolved over time and reflects issues in Korea's political economy and institutional design. Yet, this form of competition advocacy has particular salience globally as competition authorities try to create more effective mechanisms to limit anticompetitive government economic intervention.

In Chapter 10, Thomas Cheng analyzes administrative monopolies under the Chinese Anti-Monopoly Law (AML). Tied to Volokh's question in Chapter 1, but specifically in the Chinese context, Cheng asks if Chinese SOEs are to be used when there is market failure, when the provision of public goods is at issue, or for some other purposes. These other purposes include situations in which SOEs may serve as an extension of the state to control the political and economic organization of China, as SOEs implicate employment and federalism issues. Cheng notes that abuses of administrative monopolies under the AML emanate from systemic issues in Chinese political and economic organization. Consequently, as long as China promotes SOE national champions and values such champions over competition, the potentially ameliorative effects of the AML for abuses will not be attained.

In addition to ex ante work regarding advocacy, competition law can act ex post to correct for distortions in the market. One mechanism to do so is the EU state aid system. State aid is a form of subsidy in which the state may influence national economic policy through targeted interventions. However, the EU has instituted limits on the types of state aid a country in the EU may offer. Chapter 11, by Leigh Hancher and Francesco Salerno, examines the evolution toward an effects-based approach under state aid law. Their analysis

leads to a common framework (and reference to economics and the theory of market failure). At the same time, they examine how the form of state aid and the different priorities of the Commission in certain sectors might challenge this uniform effects-based approach to state aid control. Because there is no real effects-based approach and because other forms of state intervention are not subject to the same stringent requirements, Hancher and Salerno ask whether member states would behave strategically. This in turn raises the need to devise an overall framework that subjects all types of state action to some analysis of the competition distortions they might impose.

Questions of centralization are not relevant merely at the supranational level. In Chapter 12, Deborah Healey describes how state and competition interact within the Australian context. Healey examines how government has acted as a market actor and how Australian competition law has been used in such a context. While there is some immunity under competition law for government action, until relatively recently this provided competitive advantages for immune government bodies. The Australian experience also includes competition-based regulatory reform, which has had tangible benefits for Australian consumers. However, Healey questions whether these reforms have been sufficient.

Chapter 13 examines in a country-specific context the role of the state in sectors that are heavily regulated. Philippe Gagnepain, Marc Ivaldi, and Chantal Latgé-Roucolle discuss the issue of public concessions in the transport sector. They explore how to provide sufficient managerial incentives in a way that improves competition. The particular dynamics of competition in urban transport are related to the form of regulation that shapes the industry via the public service tenders and their regulation. The authors test the implications of their model with data on the French transport sector. The chapter concludes that the regulatory framework of the sector has an impact on costs, regulation creates network effects among operators within the same group through incentive schemes, and the regulatory framework is itself a reflection of the regulator's objectives rather than simply the welfare of urban transport services users.