Kluwer Competition Law Blog

State action as one of "The Global Limits of Competition Law"

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Stanford University Press has just released the first volume of a series on Global Competition Law and Economics, entitled "The Global Limits of Competition Law" (I. Lianos & D. Sokol, eds). This first volume contains a wealth of ideas on how law, economics and institutions respond to an increasingly global and interconnected antitrust community. It is divided in five parts:

(i) "*The Competition Law Process*" deals with the process rules that constitute the backbone of the competition law system and ultimately define its reach;
(ii) "*The Economic Limits of Competition Law*" explores the extent to which economics is a limit to antitrust and probes whether and how the competition law doctrine has internalized advances in economics;
(iii) "*Competition Law and Its Synergies with Other Areas of Law*" aims to test whether and how other areas of law may limit or expand the scope of competition law and/or may act as a substitute or a complement to competition law;
(iv) "*Competition Law and Institutional Design*" examines the design of appropriate institutions for an effective implementation of competition law; and
(v) "*Competition Law and Culture*" questions whether and to what extent competition law doctrines are culture-specific.

In Part (iii), Chapter 7 reflects more specifically on the appropriate means to discipline government-erected barriers to competition, *i.e.*, public restraints or "state action". To that effect, it raises a number of fundamental questions: while those restraints carry the potential of harming allocative efficiency as much as private anticompetitive practices do, should public restraints be considered through the same efficiency lenses as private practices? In contrast, should government be allowed to interfere with competition for reasons of public policy? Consequently, should state action be subject to the discipline of competition law — *i.e.*, antitrust — or to another system of analysis and, in the latter case, which one?

The reasoning developed in the chapter is rooted in three basic premises. First and foremost, while public restraints that protect "*special interests at the expense of society*" must be disciplined, they should also be distinguished from those restraints whereby governments pursue legitimate redistributive objectives, notably to "*reduce the societal strains that increased efficiency and globalization may cause*" (Sokol, 2009). Hence, the search for the relevant criteria on which to draw that distinction constitutes the central inquiry of the chapter. Second, disciplining state action requires some form of hierarchical relation between the public authority that is at the source of the distorting measure and the one endowed with the power to assess the validity thereof, *i.e.*, a

central, federal or supranational authority empowered to review regional, state, or national choices. A variety of factors, such as the degree of proximity between the relevant authorities, can of course affect the legitimacy of that hierarchical assessment. Third, competition law, like any discipline, embodies a particular rationality that focuses on the protection of the process of competition. Its reach is therefore constrained to ensure a level playing field between market actors conducive to efficient outcomes. Likewise, its effectiveness depends on a pre-commitment to the free market, rooted in a willingness to allow private initiatives to flourish and the contestability of markets to prevail.

In turn, the chapter argues that the discipline of competition law does not accommodate well the variety of redistributive objectives pursued by public authorities. As a result, it does not appear particularly well suited for distinguishing between legitimate and other public restraints. Conversely, when competition law attempts to do so, it often finds itself constrained to stretch the boundaries of its own rationality, which entails a risk of inconsistencies and double standards. This is notably because the assessment of public restraints requires consideration for a broad range of public interest justifications, which competition law does not allow.

Subsequently, the chapter explores the opportunity of submitting public restraints to an alternative ubiquitous discipline, that of trade law as applicable either within or between sovereign states, and it endeavors to determine the conditions necessary to ensure the sustainability of such an approach. The underlying rationale lies in the fact that both competition and trade disciplines pursue the same overarching allocative efficiency objective. Because competition and trade law address different actors, namely private economic entities on the one hand and public authorities on the other hand, their respective system of analysis factors in different variables. Provided that the scope of the notion of obstacle to trade is defined sufficiently broadly, trade law appears more promising to achieve the right balance between the pursuance of allocative efficiency and the necessary deference for governments' sovereign choices and, hence, to address public restraints. In other words, its system of analysis appears better suited to distinguish between the protection of parochial interests and genuine concerns to achieve redistributive objectives.

Intrigued? Want to know more and discover other challenging thoughts? Get the book – 250 pages of original views on a broad range of questions central to the study of competition law from a global perspective – a must read this summer!

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