Avoidance Techniques: State Related Defences in International Antitrust Cases

An ESRC Research Centre
CCP CENTRE FOR COMPETITION POLICY

March 2011

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CCP Policy Briefing

BACKGROUND

- Competition law is fragmented and lacks an international framework that allows for dispute settlement.
- The extraterritorial application of national competition laws, with all its shortcomings and limitations, has the potential to substantially address the problem of international anticompetitive arrangements, at least for the most important and powerful states and regions.
- However, this tool is significantly impaired in cases involving or implicating foreign states.

METHODOLOGY

- The author considers the defences available in litigation that concern transnational anticompetitive agreements involving or implicating foreign states.
- Analysis is conducted of four legal doctrines which may bar litigation of an antitrust case involving or implicating a foreign state:
    - non-justiciability (political question doctrine)
    - state immunity
    - act of state doctrine, and
    - foreign state compulsion.
- The author also addresses the general problem of the applicability of competition laws to a foreign state.

KEY FINDINGS

- The analysis provides evidence that the present legal framework is ill-suited to handling antitrust cases involving or implicating a foreign state. This is found to be to the detriment of global welfare and the global system itself.
- The analysis reveals fundamental inconsistencies:
    - Competition laws and competition regimes are built on the plinth of the neo-liberal school of economic thought and focus on the economic analysis of the effects of particular forms of economic arrangements on total welfare. But the doctrines barring litigation of cases involving or implicating foreign states have no connection with these economic principles.
    - International interdependence is a characteristic of modern trading. But more interdependence necessitates more co-responsibility if the system is to be sustainable in the long run. The present situation where particular states can *de facto* free ride on the global system through anticompetitive conduct, targeting and exploiting some or all players while sheltering behind the bulwark of the institution of the state, is unacceptable *de lege ferenda*.
- Further clarification of the law on these matters is required together with a more systematic, global approach towards competition in which states are recognised as participants in the competitive process.

W: www.uea.ac.uk/ccp
T: +44 (0)1603 593715
A: UEA, Norwich, NR4 7TJ

University of East Anglia
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THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

The full working paper (11-2) and more information about CCP and its research is available from our website: www.uea.ac.uk/ccp

ABOUT THE AUTHORS

- Marek Martyniszyn is a PhD candidate, Ad Astra Scholar at University College Dublin

W: www.uea.ac.uk/ccp
T: +44 (0)1603 593715
A: UEA, Norwich, NR4 7TJ

University of East Anglia

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