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Competition Law and State-Owned Enterprises

- Contribution from the United States -

1. This paper focuses on recent developments in the antitrust treatment of state-owned enterprises (SOEs) and related entities, both domestic and foreign, under the federal antitrust laws of the United States.¹ Because slightly different doctrines apply to such entities depending on whether they are owned by domestic or foreign governments, this paper treats those categories of entities separately. Part I focuses on the antitrust treatment of domestic SOEs; Part II focuses on the same for foreign SOEs.

1. Domestic SOEs

2. In the United States, “[t]he heart of our national economic policy long has been faith in the value of competition.”² Most U.S. industries have private actors competing in markets. On the other hand, government enterprises play a more limited role in the U.S. economy. The term “state-owned enterprise” is not defined in United States law, although entities owned by federal, state, or local governments do offer goods and services, sometimes in competition with private entities. There are exemptions from federal antitrust laws for government entities in certain situations, but those exemptions have relatively limited applications because of the general principle in federal antitrust law that “exemptions from the antitrust laws are to be narrowly construed.”³

1.1. Antitrust Exemptions for Federal Government Enterprises

3. Some federal government entities may qualify for a status-based exemption from the antitrust laws where the exemption applies regardless of the underlying conduct. In *U.S. Postal Service v. Flamingo Industries (USA), Ltd.* (“*Flamingo*”), the U.S. Supreme Court ruled that the federal antitrust laws did not apply to the U.S. Postal Service.⁴ The Court held that, by statute, the U.S. Postal Service was “an independent establishment of the executive branch” of the federal government that exercised “significant governmental

¹ Prior submissions of the United States to the OECD included fuller discussions of the legal and factual landscape of SOEs and related entities in the United States. See Note by the United States of 9 June 2015, “*Roundtable on Competitive Neutrality in Competition Enforcement*,” available at https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/cn_united_states.pdf; Submission of the United States of 20 October 2009 to Working Party No. 3 of the Competition Committee, “*Discussion on Corporate Governance and the Principle of Competitive Neutrality for State-Owned Enterprises*,” available at <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/antitrustlawroundtable.pdf>.

² *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951).

³ *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

⁴ 540 U.S. 736 (2004).

powers” but lacked certain powers and responsibilities that characterized most private market participants, such as the power to set prices unilaterally and the responsibility to maximize profits.⁵ The Court thus held that the U.S. Postal Service, like the United States government itself, was not subject to federal antitrust laws.⁶ Congress later passed legislation allowing private entities to compete against the U.S. Postal Service in offering many postal services—essentially all services other than carriage of first class mail.⁷ The legislation also established that the U.S. Postal Service is subject to federal antitrust law with regard to the provision of the competitive postal services.⁸

4. Entities that are owned by the federal government but are not instrumentalities of the federal government cannot avail themselves of the broad, entity-based exemption described in *Flamingo*. Nonetheless, such entities may, under certain circumstances, enjoy conduct-specific exemptions from federal antitrust laws due to the work they perform on behalf of the federal government. For example, the Court of Appeals for the Sixth Circuit held that because the Tennessee Valley Authority (“TVA”) was a federal corporation rather than “an independent establishment of the executive branch,” it could not claim its “public characteristics” as a basis for receiving a status-based antitrust exemption.⁹ The Court nevertheless held that the TVA was shielded from the antitrust claim at issue in that case. A federal statute expressly authorized the TVA “to enter into contracts for the purpose of ‘promot[ing] the wider and better use of electric power for agricultural and domestic use, or for small or local industries.’”¹⁰ The Court found that “concerns about competition would conflict with the fulfillment of TVA’s purpose,”¹¹ and that the antitrust laws had been implicitly repealed with respect to conduct performed pursuant to those statutorily authorized contracts.¹²

1.2. Antitrust Exemptions for State and Local Government Enterprises

5. State or local government enterprises do not enjoy automatic exemptions from the federal antitrust laws. However, depending on the circumstances, they still may enjoy an exemption by virtue of the state action doctrine first announced by the Supreme Court in *Parker v. Brown*.¹³ Application of the state action doctrine to subordinate instrumentalities of the state—municipalities, for example—requires that the challenged conduct be undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition.¹⁴ That rule ensures that the policy underlying the challenged conduct

⁵ *Id.* at 746-48 (citing 39 U.S.C. § 201).

⁶ *Id.*

⁷ Pub. L. 109-435, 120 Stat. 3189 (Dec. 20, 2006), *codified* at 39 U.S.C. §§ 101 *et seq.*

⁸ *Id.*

⁹ *McCarthy v. Middle Tennessee Electric Membership Corp.*, 466 F.3d 399, 414 (6th Cir. 2006).

¹⁰ *Id.* at 414 (quoting 16 U.S.C. § 831i).

¹¹ *Id.* at 414.

¹² *Id.* (citing 422 U.S. 659, 689 (1975)).

¹³ 317 U.S. 341 (1943).

¹⁴ *California Retail Liquor Dealers Ass’n v. Midcal Aluminum Co.*, 445 U.S. 97, 105 (1980).

really is that of the state, even without a showing of active supervision, because “[w]here the actor is a municipality there is little or no danger that it is involved” in private anticompetitive conduct, incentives of the kind animating private actors are lacking, and there is electoral accountability.¹⁵

6. To avoid undue extension of the state’s exemption to private actors, private parties seeking the exemption must show both that the challenged conduct is a foreseeable result of a “clearly articulated and affirmatively expressed . . . state policy,” and that the challenged conduct is “actively supervised” by the state.¹⁶ The “active supervision” element is warranted because of the danger that a private actor engaged in anticompetitive conduct (unlike a municipality, for example) may be pursuing its own private interests rather than the governmental interests of the state. Concern about the private incentives of active market participants is the basis for *Midcal*’s supervision mandate, which requires “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”¹⁷

7. In a pair of recent cases, the Supreme Court has reaffirmed that exemptions from the federal antitrust laws under the state action doctrine must be interpreted narrowly so as to preserve competition in the U.S. economy to the greatest extent possible. In *FTC v. Phoebe Putney Health System, Inc.*, the Supreme Court warned that, although the “clear articulation” test is met when state statutes foreseeably displace competition, the lower court had applied that test “too loosely.”¹⁸ In this case, the Court held that just because the statute gave hospital authorities the power to engage in acquisitions of hospitals, it did not necessarily clearly authorize such authorities to engage in *anticompetitive* acquisitions.¹⁹ The Court in *Phoebe Putney* also mentioned a trend in lower court state action jurisprudence that holds the view that the doctrine does not apply when the state entity acts as a market participant, but the Court did not reach that question.²⁰ In *North Carolina State Board of Dental Examiners v. FTC*, the Court relatedly stressed the importance of the active supervision element in preventing anticompetitive conduct. In that case, the Court held that, even where state law designates a body as an agency of the state, it must meet the active supervision element from *Midcal* to enjoy state action protection if it is controlled by active market participants.²¹

¹⁵ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

¹⁶ *Midcal*, *supra* note 12.

¹⁷ *N.C. State Bd. Of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1112 (2015) (quoting *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988)).

¹⁸ 568 U.S. 216, 229 (2013).

¹⁹ *Id.* at 231-232.

²⁰ *Id.* at 226 n.4 (“Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it.”).

²¹ 135 S. Ct. at 1113.

2. Foreign SOEs

8. A foreign government-owned entity may be involved in anticompetitive conduct in or affecting U.S. commerce. In determining whether antitrust actions may be pursued against these entities, a court will consider various legal doctrines that lie at the intersection of foreign relations and the antitrust laws, particularly the act of state doctrine, foreign sovereign immunity, and foreign sovereign compulsion.²² There have been several developments with respect to the treatment of foreign SOEs in the context of American legal jurisprudence.

2.1. Act of State Doctrine

9. The act of state doctrine bars a lawsuit when “the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.”²³ Applying this doctrine, courts decline to adjudicate claims or issues that would require the court to judge the validity of the sovereign act of a foreign state in its own territory. However, the doctrine does not apply to every act taken by an individual or entity affiliated with a sovereign state. The doctrine protects a sovereign’s acts only when “performed within its own territory.”²⁴ The doctrine also does not apply to the acts of individual government officials acting outside their official capacity, nor to private actors, even when those acts are approved or condoned by the foreign government in question.²⁵ Following a plurality decision of the Supreme Court,²⁶ moreover, several lower courts have recognized that the doctrine does not apply to commercial activities of a foreign government.²⁷ Further, several cases have suggested that the act of state doctrine does not apply when the United States brings a case; where the federal government brings the lawsuit, “th[e] case does not present the possibility of interference with the Executive branch” that the doctrine was designed to avoid.²⁸

10. In a recent application of the act of state doctrine in the antitrust context, the U.S. Court of Appeals for the Ninth Circuit ruled on the circumstances under which an SOE can benefit from the protections of the act of state doctrine. In *Sea Breeze Salt v. Mitsubishi Corp.*, 899 F.3d 1064 (9th Cir. 2018), the Ninth Circuit held that the doctrine precluded liability for a Mexican corporation in an antitrust case where the corporation was majority

²² See U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for International Enforcement and Cooperation*, § 4.2 (2017).

²³ *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l*, 493 U.S. 400, 405 (1990).

²⁴ *Kirkpatrick*, 493 U.S. at 405.

²⁵ See U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for International Enforcement and Cooperation*, § 4.2.3 (2017).

²⁶ See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976) (plurality opinion).

²⁷ *Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108, 1121 (N.D. Ill. 1997), *aff’d*, 250 F.3d 1145 (7th Cir. 2001); *Am. Int’l Grp., Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980).

²⁸ *United States v. Noriega*, 746 F. Supp. 1506, 1523 (S.D. Fla. 1990), *aff’d*, 117 F.3d 1206 (11th Cir. 1997); *see also United States v. Giffen*, 326 F. Supp. 2d 497, 502 (S.D.N.Y. 2004).

owned and partially controlled by the Mexican government. In concluding that the corporation in question was an agent of the sovereign, the Ninth Circuit relied only on the fact that the Mexican government owns 51 percent of the corporation and appoints a majority of its board of directors and its Director General. By contrast, other cases have inquired into whether a foreign government was actually involved in the challenged acts before affording the entity act of state protection, rather than simply attributing the entity's actions to that government based on ownership and control alone.²⁹

2.2. Foreign Sovereign Immunity Act

11. The Foreign Sovereign immunity Act (“FSIA”)³⁰ shields foreign states from the civil jurisdiction of the courts of the United States, subject to certain enumerated exceptions and to treaties in place at the time of the FSIA’s enactments.³¹ The “commercial activity” exception is the most relevant exception for antitrust purposes, and as a practical matter, most activities of foreign state-owned enterprises operating in the commercial marketplace are “commercial.” Under the FSIA, such enterprises are not immune from the jurisdiction of the U.S. courts in actions to enforce the antitrust laws for commercial activity “carried on in the United States,” for “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere,” or for “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”³² The commercial activities of these enterprises, in those situations, are subject to the U.S. antitrust laws to the same extent as the activities of privately owned firms.

12. The extent to which the FSIA’s protections apply to SOEs in antitrust cases may soon be addressed by a U.S. District Court in the Northern District of California in the *In re Cathode Ray Tube Antitrust Litigation* case.³³ In that case, a wholly state-owned Chinese SOE and its partially state-owned subsidiary have moved to be dismissed from a case claiming that the two SOEs participated in a conspiracy to fix prices for cathode ray tubes in violation of the antitrust laws. Because the SOEs are controlled by the Chinese government, they contend that they have sovereign immunity under the FSIA. In addition, the SOEs have claimed that no statutory exception to the FSIA deprives them of sovereign immunity. In particular, the SOEs argue that because they have no direct sales into the United States, the commercial activity exception to the FSIA does not apply to their behaviour.

13. In 2014, the U.S. District Court for the Southern District of New York addressed the related issues of when a private, for-profit entity can nevertheless be considered an organ of the state for purposes of the FSIA, as well as the circumstances under which such an entity falls within the commercial activity exception in the *In re Aluminum Warehousing*

²⁹ See, e.g., *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011).

³⁰ 28 U.S.C. § 1602 *et seq.*

³¹ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for International Enforcement and Cooperation*, § 4.2.1 (2017).

³² 28 U.S.C. § 1605(a)(2).

³³ 2018 WL 659084 (N.D. Cal. Feb. 1, 2018).

Antitrust Litigation matter.³⁴ In that private antitrust lawsuit, the London Metal Exchange (LME) moved to be dismissed on the basis of the FSIA. The court concluded that the LME was an organ of the United Kingdom. The court based this finding on LME satisfying three of the five “Filler factors,” which are used to determine an entity’s status for purposes of the FSIA. Specifically, the court found that: (i) the LME performs the public function of market regulation; (ii) the LME is actively supervised by a conceded agency of the U.K. government; and (iii) U.K. law treats the LME’s activities as part of its immunized public functions. On balance, the court held that these factors weighed in favour of treating the LME as an organ of the U.K. It did so even though the U.K. government does not require the LME to hire public employees or pay their salaries, the LME is a privately owned for-profit entity that was previously owned by various investment banks and trading companies, and the LME is not the only entity that enjoys the right to act as a recognized investment exchange in the commodities trade. The court went on to determine that the LME’s alleged conduct—entering into a conspiracy to manipulate its own rules in order to restrain aluminum output and increase the price of aluminum—falls outside of the commercial exception of the FSIA because the alleged manipulation was a form of market regulation. Accordingly, because the actions were regulatory rather than commercial in nature, LME was entitled to sovereign immunity and dismissed from the case.

2.3. Foreign Sovereign Compulsion

14. Courts also have recognized a limited defense against application of the U.S. antitrust laws when a foreign sovereign compels the very conduct that the U.S. antitrust law would prohibit.³⁵ If it is possible, however, for a party to comply with both the foreign law and the U.S. antitrust laws, the existence of the foreign law does not provide a legal excuse for actions that do not comply with U.S. law.³⁶ Similarly, that the conduct may be lawful, approved, or encouraged in a foreign jurisdiction does not, in and of itself, bar application of the U.S. antitrust laws. Foreign sovereign compulsion exemplifies another legal defense that may shield SOEs from the application of the U.S. antitrust laws.³⁷

³⁴ 2014 WL 4211353 (S.D.N.Y. Aug. 25, 2014).

³⁵ See, e.g., *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979); *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1304 (D. Del. 1970).

³⁶ *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993).

³⁷ *Id.* The foreign sovereign compulsion doctrine recently surfaced in *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011), a case in which sellers of Vitamin C in China argued that Chinese law compelled them to conspire to fix the quantity and prices of the vitamin exported to the United States that ultimately went to the Supreme Court. Although the Supreme Court addressed only the narrow question of whether a federal court determining foreign law is required to treat as conclusive a submission from the foreign government describing its own law, as relevant to a distinct but related comity defense, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865, 1872 (2018), the Chinese sellers had argued in district court (among other defenses) that they should be shielded from liability under U.S. antitrust law on the basis of the foreign sovereign compulsion doctrine, *id.* at 1870.

2.4. Possible Statutory Developments

15. Both the House of Representatives and the Senate are currently considering legislation entitled the No Oil Producing and Exporting Cartels Act (“NOPEC”)—H.R. 5904 and S. 3214—which would amend the Sherman Act to explicitly provide that oil cartels among foreign states or their agents or instrumentalities are illegal. The draft legislation further articulates that the U.S. Attorney General has the sole right to enforce this provision, making inapplicable the act of state doctrine, and removing a foreign state’s immunity from the jurisdiction of U.S. courts in enforcement actions brought by the Attorney General. Prior administrations have emphasized that private parties should not be able to bring lawsuits challenging OPEC because such litigation would inappropriately interfere with executive branch control over foreign policy, but these bills would not provide any right of action to private parties.³⁸

³⁸ Courts have blocked efforts by private parties to sue OPEC based on various legal defenses. *See, e.g., Int’l Ass’n of Machinists & Aerospace Workers, (IAM) v. Org. of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354 (act of state doctrine).