Preface

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 Drexl 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 Drexl 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.

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