Should competition law punish rogue officials that facilitate anti-competitive practices?

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Abstract: State restraints to competition are en vogue. In recent times, both the competition authorities worldwide have discussed diverse types of public interventions in the markets that raise concerns from the perspective of competition law. However, the enforcement of competition prohibitions against the state bodies and public officials somehow involved in the anticompetitive behavior has proved a complex task. Of course, anticompetitive behavior of public bodies when they act as regular market participants, buying goods or services, is subject to competition law. It is true also that public procurement rules strongly condition competition conditions in many cases. Aside from that, other public restraints to competition have legitimate grounds as they pursue some general interests and have been introduced by the Parliament. In that case, they remain out of the scope of competition law enforcement, and authorities can only use their advocacy tools against them. The same occurs when public bodies act exercising their public functions and powers and that has some incidence in the marketplace. However, a puzzle remains on how to deal with those actions by the public bodies and their staff that promote or facilitate an anticompetitive action and which cannot be justified in their exercise of their public functions. The most radical case would involve rogue or corrupt public officials that blatantly provoke or facilitate an anticompetitive action (and even profits from it). Although the legal system may have other rules (administrative or criminal) to deal with such conduct, the doubt has been posed on whether the competition prohibitions should apply in this case.

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A puzzle remains on what should be done when public bodies or their staff illegitimately promote or facilitate anti-competitive actions. Focused primarily on fighting private business anti-competitive behavior, antitrust law neglected the treatment of anti-competitive actions realized, promoted or favored by public powers. Varying degrees of State involvement in economic activities on different countries have soon lead to antitrust law being challenged with the dilemma of State anti-competitive action. In some countries it even lead to the adoption specific of rules to address State anti-competitive actions. This article will draw a general framework that examines how State anti-competitive actions are assessed and ultimately will look at whether antitrust law could directly reach dishonest public officials that promote anti-competitive actions.

Naturally, the level of State involvement and participation in markets vary from country to country, with some countries showing a strong level of Statism and powerful state owned enterprises (SOEs) capable of restraining competition in the markets strongly conditions the background in which the assessment is made. Moreover, different levels of State organization and decentralization, multiplying the number of public bodies that potentially may intervene in markets, further makes the assessment more complex as there may be constitutional rules governing what type of market interventions are admissible by each level of the public administration.

After defining what can be considered public restraints to competition (infra 1), this article will look at when those restraints can be considered legitimate (infra 2). Then it will move to analyze public bodies actions that might be relevant in the market and which may run afoul competition law rules (infra 3). In particular, we will consider when the State acts as a mere market participant (infra 3.1), including public procurement (infra 3.2) and those cases in which the public powers intervene in the markets (infra 3.3). Given the difficulties to adequately address the later cases, we will finally look at if competition law might be a tool to be used to fight them or alternatively it will me more plausible to combat them other instruments provided by the legal system (infra 4).