



# COMPETITION LAW APPLIED TO LOCAL GOVERNMENT

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# Unofficial translation!

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## SECTION IVa

### **SUPERVISION OF PUBLIC AUTHORITIES**

#### Article 19a

- (1) Distortion of competition by providing aid favoring particular undertaking, or by other means, shall be prohibited to public authorities.**
- (2) If the Office finds, within the framework of proceedings concerning the matters pursuant to Paragraph 1, that the distortion of competition has been committed, it shall declare such fact in a decision.**
- (3) Should the local government authority commit the distortion of competition in the exercise of self-governance or the transferred state administration, the Office shall send to the body relevant to perform supervision pursuant to special regulation<sup>19a)</sup> the decision in force pursuant to the Paragraph 2 and shall assign the administrative file if requested thereto.**



# Dilemma

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- Government is big business – usually the biggest – so can distort many markets
- Incentives may be somewhat different...but not always



“The best of all  
**monopoly profits** is a  
quiet life”

John Hicks

- BUT clearly, Government by its nature prevents, restricts and distorts competition all the time - legitimately



# Prevents





# Restricts





# Distorts





## So... needs some form of balancing test

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- Is the restriction *justified* in some sense?
- Difference between US and EU approaches:
  - US approach assesses whether State action is properly politically accountable – steers away from the “merits” of the case
  - EU approach assesses merits, requiring some kind of assessment of proportionality



# Analogies with EU approaches

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- General incompatibility of national laws with EU law (including Arts 101 and 102)
- Article 107 (State Aid)
- Article 106





## Art. 107 - State Aid

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- General prohibition on aid “which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods ”
- Four characteristics:
  - Granted by the State
  - Favours certain undertakings or goods
  - Distorts or threatens to distort competition
  - Affects trade between Member States



# Assessing State Aid

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- Market Economy Investor Principle effectively assesses ‘distortion’ – but quite a low threshold
- Affecting trade between Member States - also low threshold
- ‘Exemptions’ in Article 107(3) allow very significant assessment exercise and sophisticated conditional approvals by Commission



## Art. 106 (2)

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(2)

“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the applications of such rules does not obstruct the performance, in law or in fact, of the particular task assigned to them.”

- Essentially rests upon a test of proportionality



## Other examples: Italy

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- Italy “Salva Italia” decree Dec 2011:
  - AGCM delivers binding opinion “on the principle of proportionality” on government bills and regulations introducing access restrictions to economic activities
  - AGCM can challenge acts before Administrative Courts
  - NO cases yet



## Other examples: Sweden (2010)

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The Stockholm District Court (the “District Court”) may prohibit:

- certain *conduct*, in the context of *offering goods or services*, by a municipality, county council, state or companies controlled by either of these bodies; or
- an *activity*, consisting of *offering goods or services*, from being carried out by municipalities, county councils or companies controlled by either of these bodies;
- ...if that conduct or activity
  - *distorts*, by object or effect, the conditions for effective competition on the market; or
  - *impedes*, by object or effect, such competition from occurring or developing.

Conduct that is found to be justifiable on public interest grounds; and activities which are compatible with law, may *not* be prohibited:

- Consider whether public objective can be attained through less restrictive means;
- Consider principle of proportionality.



# Administrative penalties: China

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- Antimonopoly Law, Chapter V:
  - Article 32: prohibits use of administrative powers to limit trading “by requiring them to deal, purchase or use commodities provided by designated undertakings”
  - Article 33: non-discrimination, against trading of goods from other regions
  - Article 34: prohibits discrimination in procurement
  - Article 35: prohibits discrimination in investment
  - Article 36: prohibits “compelling undertakings to engage in monopolistic activities that are prohibited under this law”
  - Article 37: “Administrative agencies shall not abuse their administrative power to make regulations that eliminate or restrict competition”

An offending agency “shall be ordered by the superior authorities to correct the abusive act, the individuals who are directly responsible shall be given a black mark in accordance with the law”



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