

A Comparative Analysis of the Perception Differences between Competition Law and Anti-corruption Law

Gönenç Gürkaynak, Ç. Olgu Kama,
Ceren Özkanlı, & Burcu Ergün*

ABSTRACT

Both anti-corruption law and anti-trust law aim to create a level playing field and they are complementary to each other in support of this aim. Given the indispensable nature of both fields in terms of reaching social welfare, it is striking how differently society reacts to the breaching behaviour of each field. On the one hand, if a company engages in corrupt behaviour, the perpetrator will be shunned from society, its behaviour generating strong moral reactions. Civil society organizations, both global and local, will publicize this corruption. The private and public sector, along with civil society organizations, will come together to find ways to eradicate it. The mood of such collaboration will dictate that the good are fighting the bad when fighting corruption.

On the other hand, the fight against anti-competitive behaviour may not always be as outrageous as fighting corruption. As for technocrats, when they encounter anti-competitive behaviour, they will fight such acts, enforce fines on the perpetrators and order them to stop violations. Corporations would attempt to do their best to be careful not to engage in anti-competitive behaviour the next time and the story would generally end there. Because preventing or stopping anti-competitive behaviour may not always demonstrate a direct, immediate and visible effect in the consumers' eyes in most of the cases, the cries from society, if any, are not as loud as the cries against corruption.

Thus these two regulatory areas, convergent in their aims, are perceived in divergent fashions by society. This essay delves into the reasons behind such divergence and suggests that among the reasons for this differentiation are the premises that these fields also differ in their consequences, in their enforcement styles, leading to different moral perceptions, and in the visibility of their consequences.

I INTRODUCTION

Corruption and anti-competitive behaviour have different consequences. Competition is praised from a liberal economic perspective. Accordingly, competition law policies were mainly developed in the second half of the twentieth century in countries pursuing market-based economic policies. It is difficult to argue that the protection of competition has been a common universal value akin to the condemnation of corrupt activities; on the contrary, competition was even discouraged as a Hobbesian value that reinforces distrust among people. The first modern competition law was enacted in 1889 in Canada,

* **Gönenç Gürkaynak** (Gonenc.gurkaynak@elig.com) is the Managing Partner, Ç. Olgu Kama (olgu.kama@elig.com) is a Partner and Ceren Özkanlı (ceren.ozkanli@elig.com) is a Senior Associate at the Turkish firm ELIG, Attorneys-at-Law, where Burcu Ergün (Burcu.ergun@elig.com) is an Associate.

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and was followed by the Sherman Act of the USA in 1890. The UK's first competition law statute, namely the Monopolies and Restrictive Practices (Inquiry and Control) Act dates back to 1948, built on the basis of the common law doctrine.¹ India enacted the Monopolies and Restrictive Trade Practices Act in 1969. Cartel agreements were not outlawed in early German judicial opinions, but prohibited only to the extent their effects were abusive. It was only after the Second World War that the US influence was felt in the German competition law regulations.² From this perspective, it is not surprising that most of the South American and post-USSR countries developed their competition law policies in the 1990s, and China's first comprehensive competition law went into effect in 2008.

Aside from the divergent views on the necessity of competition, there are debates on the aims of competition law. A sound competition law policy should aim to maintain social welfare through economic efficiency. Competition law is a tool in achieving efficiency, enabling consumers to have access to a wider range of products at lower prices and better quality. Among the actors that it does not aim to protect are small enterprises, competitors.

As protection of competition for enhancing social welfare can be considered as a vague objective, there are usually no clear-cut conclusions and directions in competition law. Competition authorities examine undertakings' behaviour in detail from an economic perspective, and may consider the benefits of restrictive behaviour and grant an exemption, or send notices instead of levying fines on the undertakings.

In contrast the consequences for corrupt behaviour are not just economic. There are also governance, democracy, poverty and inequality consequences. The economic consequences of corruption are blunt. Many studies demonstrate the negative effects of corruption on economic growth. Corruption also diverts the allocation of state resources to less productive areas for rent-seeking purposes, thereby blocking sustainable projects that could lead to economic growth. Such misallocation of resources from health and education projects causes a decrease in the quality of life of citizens. Corrupt governments can cover up such misallocation through blurring the budget items of public institutions.

Another area where corruption impedes economic growth is foreign direct investment. Since corruption decreases transparency and therefore foreseeability, foreign investors might not wish to invest in places where they might just as well be gambling with their money. An empirical study shows that investors from countries with strong anti-corruption backgrounds reduce their investments in countries which are perceived to be corrupt.³ Corruption may also discourage entrepreneurs because it introduces artificial costs in entering the market and creates the lack of a playing field. Access to

¹ J. Lever, *The Development of British Competition Law: A Complete Overhaul and Harmonization*, WZB Discussion Paper, No. FS IV 99-4, 1999, 4, available at <http://www.econstor.eu/bitstream/10419/51159/1/301152780.pdf>. Last accessed on May 2, 2016.

² H. L. Buxbaum, *German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement*, 23(2), Art. 10 Berkeley J. Intl. L. 4 (2005), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1296&context=bjil>. Last accessed on May 2, 2016.

³ A. Cuervo-Cazurra, *The Effectiveness of Laws against Bribery Abroad*, J. Intl. Bus. Stud., Vol. 39, Issue 4, pp. 634-651 (2008), available at SSRN:<http://ssrn.com/abstract=1811591> or <http://dx.doi.org/10.1057/palgrave.jibs.8400372> Last accessed on May 6, 2016..

public officials and not innovation and creativity determine market success. As such corrupt markets may lack these two important elements that create economic growth.

Since corruption tends to foster secretive environments, corrupt activities undermine two of the most basic tenets of democracy, namely transparency and accountability. In order to create opaque environments, corrupt regimes may exert pressure on the media, eventually curbing the freedom of speech in their jurisdictions. This may deter the media from exercising its watchdog function over state officials, preventing society from exercising supervision over the legislative and executive functions of the state. As corruption requires an anti-democratic climate to burgeon, the said opaque environment nurtures corruption, triggering a vicious circle that leads to less democracy and more corruption. Political corruption, where the electors cannot be sure whether the election results are fair or whether the representatives are under the influence of state capture or not, undermines public confidence in representative democracy. The data provided by the Democracy Index⁴ when read in conjunction with the rankings of the Transparency International Corruption Perception Index 2014⁵ suggest that there is a negative correlation between democracy and corruption. Similarly, the Human Development Index's findings add to this correlation, since countries with a lower level of corruption and a higher level of democracy have a higher ranking in overall human development.

Corruption is also correlated with poverty, both directly and indirectly. Poverty correlates with corruption indirectly because it leads to lower levels of growth, which in turn hurt the poor.⁶ However, corruption has more direct poverty-related consequences on areas such as service delivery. Since the poor are less likely to find replacement for basic public services such as transportation and health, the effects of such corruption on the poor are harsher. It is also harder for the poor to seek remedy for the corruption related damages they suffer. This, of course, leads to unequal allocation of states' resources and such inequality does not only have poverty-related consequences. For example, political parties have been known to misappropriate states' resources. Another example could be companies winning public tenders, not because of their merits, but due to their political affiliations. Corruption also can have consequences on income equality, as the rich may divert the tax system in their favour, through their connections.⁷

When we analyse the issue from an economical perspective, both fields seem to share the same purpose, namely to maximize market efficiency and economic growth. However, while both fields share the goal of maximizing social welfare,⁸

anti-corruption law has more blunt social and political consequences. Competition law, on the other hand, is a relatively new field of enforcement that is particular to market economy. The cross-cutting issue of corruption on the other hand, not only feeds poverty and inequality, it also disrupts the mechanisms and reliability of the democratic system. Social and political consequences of competition law breaches would be less visible and less likely to be calculable compared to the effects of corruption.

2 MORAL PERCEPTIONS

As corruption is subject to criminal enforcement while anti-competitive behaviour is generally subject to administrative enforcement, this leads to differing moral perceptions.

Currently, competition law violations are not considered as criminal offences in most jurisdictions, but are usually sanctioned with administrative tools. The public's perception of competition law is usually shaped around the idea that competition law falls merely under 'apathetic' administrative law, and only exceptionally concerns individuals (end customers). The United States is currently the best example to illustrate a system in which competition law violations have criminal sanctions attached. From 1890 on, when the Sherman Act was enacted in the US, criminal fines and sanctions for both enterprises and individuals have been in place. Since then, the amount of fines and the possible jail time to be imposed have gradually increased. Starting from 1959, businesspeople face prison sentences for price fixing, and since then, laws have been enforced very strictly, extending as far as extradition cases of foreign nationals committing offences in the US. In contrast, the EU countries only now seem to put criminalization on their agendas as a tool to fight anti-competitive conduct, such as cartels. However, this same drive is not mirrored at the EU level. In most jurisdictions, administrative monetary fines are applicable for employees and/or managers of the violator undertaking that had a determining effect on the creation of the competition law violation. Nevertheless, these administrative consequences may not frequently be enforced, loosening the connection between competition-law violations and individual responsibility.

Unlike competition law, corruption is almost always regarded as a matter of criminal law. The legal community in fact values the fight against corruption so highly in their agendas that even the traditional territoriality principles can be pushed aside in favour of the extraterritorial application of anti-bribery laws. The US Foreign Corrupt Practices Act and the UK Bribery Act are examples of such extraterritorial legislation. International conventions such as the OECD Anti-Bribery Convention and the United Nations Convention against Corruption encourage the application of extraterritorial laws. The perpetrators face high imprisonment and fines. All in all, there is a global consensus that corruption offences should be punished under criminal law.

In terms of public perception and reaction in both fields, imprisonment carries a strong moral message. As anti-competitive behaviour is addressed within the administrative processes in most countries, the criminal categorization of corrupt behaviour emphasizes the more evil nature of corruption. Even in jurisdictions where both anti-competitive and corrupt behaviour are dealt with under criminal law,

⁴ <http://democracyranking.org/wordpress/rank/democracy-ranking-2013/>
http://democracyranking.org/wordpress/ranking/2013/data/Scores_of_the_Democracy_Ranking_2013_a4.pdf.

⁵ <http://www.transparency.org/cpi2013/results#myAnchor1>.

⁶ <http://siteresources.worldbank.org/ECAEXT/Resources/Anticorruption/chapter2.pdf>.

⁷ S. Gupta, H. R. Davoodi & R. Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty?*, Econ. Governance, Vol. 3, Issue 1, pp.23-45 (2002).

⁸ G. Gürkaynak, *Türk Rekabet Hukuku Uygulaması için 'Hukuk ve İktisat' Perspektifinden 'Amaç' Tartışması* (A Discussion on the Prime Objective of the Turkish Competition Law from a Law & Economics Perspective), 3 (The Turkish Competition Authority Press, Sept. 2003).

the classification of such crimes may hint at the different approaches employed toward these two violations. In the US participation in cartels is seen as a property crime, similar to burglary.⁹ In contrast, in the US bribery is categorized under crimes against the government. In the same vein, in Turkey bribery is classified under crimes against the reliability of public administration and operation. Although crimes like burglary (or anti-competitive behaviour) violates the right to private property, corruption undermines the effectiveness of the very processes that protect the right to property – the credibility of the public administration and more broadly, the state. Accordingly, this categorization could be one of the reasons that reinforce the divergent societal perceptions for competition law and anti-corruption law.

3 IMPACT

The impact of corruption is dramatic, while the impact of anti-competitive behaviour may not be visible to the individuals.

The consequences of corruption are right under our noses. Every day, individuals anywhere might encounter corruption when their cars are being stopped by police officers or when one needs to obtain licences in order to operate a legitimate business. Still, corruption can be more dramatic than that. According to the Global Corruption Barometer 2013, published by the TI, in Zimbabwe, women who have screamed while giving birth in a local hospital have been charged USD 5 for each time they screamed.¹⁰ Examples such as this occur in a multitude of regions every day, demonstrating the devastating effects corruption may have over individuals' lives at the micro level.

The impact of anti-competitive behaviour on individuals' lives can be less distinguishable and less dramatic, given that the largest consequences will occur at the macro level, intangible to the individuals. In addition, parties to the illegal activity are merely companies operating in various markets, separate from the state as a legal entity. Since the impact of anti-competitive behaviour is also less visible to the individuals, anti-competitive behaviour can be maintained under

secrecy for longer periods without being spotted and its effect on individuals may be indirect and immeasurable. For instance, in 2009, the European Commission and other competition authorities around the world worked together in investigating a high voltage power cable cartel, which was revealed only after a leniency application.¹¹ It turned out that the members of the said cartel had shared markets and allocated customers between themselves for almost a decade. The effect of this kind of cartel is eventually passed on to the consumers as higher prices for lower quality. However, as it is difficult to quantify the damages to social welfare, it is also difficult to motivate the dispersed end customers to litigate for invisible and unquantifiable claims due to competition law violations.

4 CONCLUSION

Even though competition law and anti-corruption law share the same aim, there are several factors explaining the different reactions society generates to such offences.

There is no doubt that both competition law and anti-corruption law are indispensable and complementary in reaching this common goal. Both fields also do not attest to the value of each in attaining social welfare. The underlying reason leading to this difference is the societal reactions to both fields.

Such differences may be attributed firstly to the different consequences of both fields. While the consequences of anti-competitive behaviour are mostly economic, corrupt behaviour results in consequences with wider scope from undermining the credibility of the state to exacerbating poverty. Secondly, corruption is seen as a criminal offence in most jurisdictions while anti-competitive behaviour is dealt with as an administrative issue in many jurisdictions. The criminalization of certain behaviour carries with it strong moral judgments. Finally, corruption results in more engagement by the public because its consequences might be more dramatic, every day and can be experienced by anyone. The effects of anti-competitive behaviour, on the other hand, could be less salient in the eyes of the individuals.

⁹ <http://www.justice.gov/atr/public/speeches/283738.pdf>. Last accessed on May 2, 2016.

¹⁰ <http://www.transparency.org/gcb2013/report>.

¹¹ European Commission, *Antitrust: Commission Fines Producers of High Voltage Power Cables € 302 Million for Operating a Cartel* (Press Release, Brussels, 2 Apr. 2014), available at http://europa.eu/rapid/press-release_IP-14-358_en.htm. Last accessed on May 2, 2016..