

## WHEN THE STATE HARMS COMPETITION— THE ROLE FOR COMPETITION LAW

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This article is about the actual and potential use of antitrust (or competition) laws<sup>1</sup> to proscribe or override acts or measures of the state<sup>2</sup> that significantly and unnecessarily harm market competition.<sup>3</sup> Anticompetitive impact that is a by-product of otherwise legitimate state acts, such as rent control, are not our focus or concern. At the other extreme, state laws organizing private cartels and state-granted monopoly rights blocking entry to essentially competitive markets are at the core of our concerns.

We begin by describing the evolution of competition law from a world of distinct boundaries between the market and the state to a world that recog-

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<sup>1</sup> “Antitrust law” and “competition law” are used interchangeably herein.

<sup>2</sup> We use “state” to include bodies of federal, state, provincial, or local government unless the context indicates otherwise.

<sup>3</sup> By “unnecessary” we mean the following: not necessary or important to carry out the usual sovereignty functions of the state. We are using the phrase “significantly and unnecessarily harm” as a place-holder as we begin our analysis. We do not purport to define these words for any state or its legislature, but we do believe that the state acts and measures that would be proscribed by the principles we ultimately propose are unlikely to be justified as important to carry out a public interest, generously defined, unless economic protectionism is regarded as a public interest.

nizes the harms from state and hybrid (mixed public and private) restraints and subjects some of these acts and measures to antitrust challenge. We report on results of a research project investigating the scope of this coverage, and we assess what principles emerge that might usefully be adopted into nations' laws and incorporated into suggested international practices.

### I. THE BACKGROUND AND THE PROBLEM

Antitrust law was conceived in the United States as a discipline designed to control anticompetitive acts of business firms.<sup>4</sup> The principal targets of the law were aggressive industrialists who were building business empires at the perceived expense of farmers, buyers, and other small players and were undermining a vision of the social good.

The United States was not a statist economy; state and local ownership of business was the exception, not the rule. The state and the market stayed largely in separate spheres. Anticompetitive state abuses raised constitutional or political questions; business abuses raised antitrust questions. If individual states took measures that by some account excessively harmed the market, this could be dealt with by the Commerce Clause of the Constitution,<sup>5</sup> which prohibits undue burdens on interstate commerce, and by legislative preemption: Congress could, if it chose, pass laws to condemn anticompetitive state restraints that affected interstate commerce.<sup>6</sup> Otherwise, any problem of state action that unduly harmed competition was left to political processes.<sup>7</sup> If the U.S. federal government itself took measures that restrained competition within the United States, this would be a legislative and political matter, not vulnerable to antitrust scrutiny.<sup>8</sup> If the government took measures that restrained world trade, the measures could be prohibited by GATT/WTO<sup>9</sup> agreements, depending on trade bargains the United States made. As Ameri-

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<sup>4</sup> The first federal antitrust statute of the modern era was adopted in Canada in 1889, the year before the U.S. Congress adopted the Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1890).

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>6</sup> *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712–13 (1985).

<sup>7</sup> See Daniel A. Crane, *Judicial Review of Anticompetitive State Action: Two Models in Comparative Perspective*, 1 OXFORD J. ANTITRUST ENFORCEMENT 418, 420–22 (2013). *Parker v. Brown*, 317 U.S. 341 (1943), laid the cornerstone for the U.S. state action doctrine: a private party has a state-action defense only if the state has clearly and affirmatively expressed a state policy to replace competition with regulation and the state supervises any private anticompetitive conduct taken to carry out that policy. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 105 (1980).

<sup>8</sup> See *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 746 (2004) (rejecting application of the antitrust laws to the U.S. Post Office, which was an independent establishment of the executive branch of the government and was regarded as no different from the United States); note 36, *infra*.

<sup>9</sup> General Agreement on Tariffs & Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Marrakech Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

can antitrust matured, federal antitrust agencies and occasionally private parties challenged seriously anticompetitive state and local government acts as incompatible with the antitrust laws.<sup>10</sup> These challenges generally failed except when a local body was a direct participant in the market.<sup>11</sup>

Meanwhile, the world changed and perceptions changed. Antitrust principles spread around the world in a form more elastic than in the United States, called “competition law and policy.” In some nations, competition law and policy now takes a holistic approach to the anticompetitive impact of conduct in the marketplace.<sup>12</sup> Five key historical and intellectual developments in particular helped redefine boundaries between the market and the state.

First, six European nations adopted the Treaty of Rome establishing the European Economic Community in 1957 to create a single market as a prescription for peace in Europe.<sup>13</sup> (Now 28 nations comprise the European Union.) For basic effectiveness, the single market required prohibition of trade and competition restraints by Member States and businesses in the internal European market.<sup>14</sup> In several of the member nation/states, the state owned most of the nation’s major businesses and gave preferences to “its own” domestic firms, in public procurement and otherwise.

The European Treaty of Rome explicitly brought within the purview of the Treaty’s competition rules the conduct of firms owned by or granted exclusive privileges by the state.<sup>15</sup> Many restraints were hybrid (state and private), and accordingly the drafters wrote the antitrust rules and the free movement (commerce) rules so that trade and competition in the internal market were two sides of the same coin. Knowing that a line must be drawn between inappropriate nationalistic state action, on the one hand, and appropriate state action to protect public interests, on the other, the European Court developed a jurisprudence delineating such a line.<sup>16</sup> The jurisprudence is constantly evolving. Thus, from the start, the European Community (now the European Union) integrated rules of trade, which traditionally had been confined to constraining

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<sup>10</sup> For an example of a private action, see *Exxon Corporation v. Governor of Maryland*, 437 U.S. 117 (1978). For FTC initiatives, see Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 ANTITRUST L.J. 911 (2005).

<sup>11</sup> See *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389 (1978).

<sup>12</sup> See, e.g., COMM. OF INQUIRY (AUSTRALIA), NATIONAL COMPETITION POLICY (1993) [hereinafter THE HILMER REPORT], available at [ncc.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf](http://ncc.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf).

<sup>13</sup> See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

<sup>14</sup> *Id.* art. 3.

<sup>15</sup> *Id.* art. 92.

<sup>16</sup> See *infra* Parts II.C, II.G.

states, and rules of competition, which were first conceived as constraining firms.

Second, beginning in the late 1980s and continuing throughout the 1990s, conversations under the aegis of the GATT and later the WTO highlighted the synergies between control of state restraints and control of private restraints. In the General Agreement on Trade in Services (GATS) Agreement on Telecoms, the trade and competition threads converged.<sup>17</sup> Thus, Mexico ran afoul of its undertakings when the Mexican telecoms regulator ordered the telecoms firms in Mexico to set their rates for calls entering Mexico at the rate set by the largest firm (i.e., Telmex). Public action organized a private cartel and protected the high profits of Telmex.<sup>18</sup>

An effort was launched to adopt a stand-alone competition agreement in the WTO.<sup>19</sup> Proponents noted that trade liberalization—which meant ratcheting down state trade restraints such as tariffs and non-tariff regulatory barriers—could be defeated by competitors' agreements to re-erect national border barriers, just as was predicted and in fact occurred in the European Community upon its condemning quotas and tariffs in the internal market.<sup>20</sup> Although the project for a world competition agreement ultimately lost (or never gained) traction,<sup>21</sup> it left a legacy of important conceptualization and documentation<sup>22</sup> of the symbiotic relationship between state restraints and business restraints.<sup>23</sup>

Third, beginning in late 1989 with the fall of the Berlin Wall, scores of nations adopted market systems and competition laws to govern them, and the world community began to recognize competition as the usual, albeit not absolute, rule of trade. Many of these new members of the antitrust family were

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<sup>17</sup> See World Trade Organization: Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services), Feb. 15, 1997, 36 I.L.M. 354.

<sup>18</sup> See Eleanor Fox, *The WTO's First Antitrust Case—Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT'L ECON. L. 271 (2006), regarding a WTO provision requiring signatory states to maintain and enforce competition laws in the telecoms sector).

<sup>19</sup> See DAVID GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION* 103–07 (2010); Eleanor Fox, *Competition Law and the Millennium Round*, 2 J. INT'L ECON. L. 665 (1999); Eleanor Fox, *Antitrust Without Borders: From Roots to Codes to Networks*, in COOPERATION, COMITY, AND COMPETITION POLICY 265 (Andrew T. Guzman ed., 2011); TWENTY-FIFTH REPORT ON COMPETITION POLICY, COM(1996)126 final (May 30, 1996).

<sup>20</sup> See, e.g., Joined Cases 40–48, 50, 54–56, 111, 113 & 114/74, *Suiker Unie v. Comm'n*, 1975 E.C.R. 1663 (sugar cartel); Case 48/69, *Imperial Chem. Indus. Ltd. v. Comm'n*, 1972 E.C.R. 619 (dyestuffs cartel); Case 41/69, *ACF Chemiefarma v. Comm'n*, 1970 E.C.R. 661 (quinine cartel).

<sup>21</sup> See Fox, *supra* note 18.

<sup>22</sup> The WTO's Working Group on the Interaction between Trade and Competition published seven reports between 1997 and 2003. See *Documents of the Working Group*, WORLD TRADE ORG., [www.wto.org/english/tratop\\_e/comp\\_e/wgtcp\\_docs\\_e.htm](http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm).

<sup>23</sup> The symbiosis can be observed especially in common markets as in the European Union, see *infra* Part II.G, and in other trading communities, notably the WTO. See *supra* note 17.

emerging from statist systems, and their major enterprises were state-owned. They undertook massive programs of law and economic reform. They privatized many enterprises leaving the monopoly intact to command the highest price for the state or to benefit cronies. The privatized firms commonly inherited privileges and advantages.

In most of the Central and Eastern European nations at the start of their transition to markets, local governments controlled the terms of trade. Local governments and their officials held financial interests in major businesses. They commonly protected their interests by blocking competition, thus threatening to defeat the economic and political reforms. The competition laws of these nations include broad clauses prohibiting certain government restraints, in defense of the emerging markets.<sup>24</sup>

By the new millennium, anticompetitive national, state, provincial, and local acts and measures that were market-blocking or cartel-facilitating came to be regarded as conceptually close to private firm restraints because of the similarity of the direct harms to competition. These behaviors fell more convincingly into the category of “the market” than the category of “sovereignty.”

Fourth, a literature developed on the particular harmfulness of state restraints that impair the market by blocking entry, laying the foundation for private exploitations even in the developed, market-reliant world. Tim Muris, former Chairman of the U.S. Federal Trade Commission, described the problem: “While antitrust law most often involves enforcement against private parties, competition agencies must also consider the effects of government actions. Protecting competition by focusing solely on private restraints is like trying to stop the water flow at a fork in a stream by blocking only one channel.”<sup>25</sup>

Anticompetitive state acts that block entry and expansion on the merits and facilitate cartels are a qualitatively more serious problem in transitional and developing countries than in developed countries, and especially in countries

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<sup>24</sup> Russia, Slovakia, Kazakhstan, and Ukraine, among others, fall into this category. For a brief overview of early enforcement of these antitrust provisions against state bodies in Ukraine and Kazakhstan, see Roger Alan Boner, *Antitrust and State Action in Transition Economies*, 43 ANTI-TRUST BULL. 71 (1998).

<sup>25</sup> Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 170 (2005); see also Alden F. Abbott & Singham A. Shanker, *Enhancing Welfare by Attacking Anticompetitive Market Distortions*, CONCURRENCES, No. 4-2011, available at [ssrn.com/abstract=1977517](http://ssrn.com/abstract=1977517); James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Laws and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1559–62 (2010); D. Daniel Sokol, *Anticompetitive Government Regulation*, in THE GLOBAL LIMITS OF COMPETITION LAW 83 (Ioannis Lianos & D. Daniel Sokol eds., 2012).

with a tradition of statism, cronyism, corruption, and heinous discrimination.<sup>26</sup> The blockages and other restraints can so dominate the landscape that they defeat the establishment and development of markets and, commensurately, squeeze out all significant economic opportunities for people without social or political connections or economic power.<sup>27</sup>

Fifth, a critical number of newer competition law jurisdictions, such as China and Russia, have designed their competition laws to move into the broader space of undue anticompetitive state acts.

These five developments bring us to the cusp of our challenge: rethinking the relationship between competition law and significant unjustified anticompetitive acts and measures of the state that might appropriately be brought under the wing of antitrust law.

“State action” is an old issue in the United States and some other jurisdictions, but only as a possible defense to be asserted by market actors (usually private firms) that perform anticompetitive acts and contend that the state has triggered or blessed their conduct.<sup>28</sup> Moreover, advocacy by competition authorities against unnecessarily anticompetitive regulatory measures has become a major part of competition policy.<sup>29</sup> The advocacy function is deepening, with the aid of both the Organization for Economic Co-operation and Development (OECD) and the International Competition Network (ICN). The OECD Competition Committee has prepared a toolkit for identifying anticompetitive regulations,<sup>30</sup> and the ICN has recently launched a project to develop modalities for competition agencies to assess the anticompetitive aspects of regulatory law.<sup>31</sup>

This article paints on a much different canvas. It explores: (1) descriptively, what anticompetitive state conduct is covered by the various nations’ antitrust

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<sup>26</sup> For the depth of the problem of pervasive corruption orchestrated and facilitated by the state, see MICHELA WRONG, *IT’S OUR TURN TO EAT* (2010).

<sup>27</sup> See generally HERNANDO DE SOTO, *THE OTHER PATH* (2002) (detailing the state restraints in Peru, such as unreasonable, burdensome, and time-consuming licensing rules, that keep masses of the poorer people out of the formal economy and could lead them to join a group like The Shining Path, a violent terrorist organization).

<sup>28</sup> See *supra* note 7. In many jurisdictions, as in the European Union, the relevant defense is: no room for autonomous private action in view of the command of the state. See *infra* Part II.I.

<sup>29</sup> See, e.g., Trudi Makhaya, *Towards a Competition Culture—Advocacy and Outreach in the South African Competition Regime*, *CPI ANTITRUST CHRON.*, Summer 2012, Vol. 8, No. 2; MAUREEN K. OHLHAUSEN, *COMPETITION ADVOCACY: THE IMPACT OF FTC STAFF REPORTS ON BARRIERS TO E-COMMERCE IN CONTACT LENSES AND WINE* (2004), available at [www.ftc.gov/ftc/history/docs/ohlhausen.pdf](http://www.ftc.gov/ftc/history/docs/ohlhausen.pdf).

<sup>30</sup> See *Competition Assessment Toolkit*, OECD, [www.oecd.org/competition/toolkit](http://www.oecd.org/competition/toolkit). The OECD toolkit is modeled on the Australian *Hilmer Report*. See *supra* note 12.

<sup>31</sup> See Eduardo Pérez Motta, *New Year, New Project: Turning the Focus to Competition Policy for 2013*, *COMPETITION POL’Y INT’L: ICN COLUMN* (Jan. 29, 2013), [www.competitionpolicyinternational.com/new-year-new-project-turning-the-focus-to-competition-policy-for-2013](http://www.competitionpolicyinternational.com/new-year-new-project-turning-the-focus-to-competition-policy-for-2013).

or competition laws; (2) whether there are areas in which nations' competition laws can usefully proscribe certain anticompetitive state acts while not interfering with the state's prerogative to govern; and (3) what are the normative implications of (more) antitrust coverage of state acts.

The research project is addressed to the first question. We describe the project and its results. We then use the data in three ways: (1) to tease out possible recommended principles that nations might consider adopting; (2) as a confirmation of political feasibility, at least in a critical mass of nations; and (3) as inspiration for wise principles, in view of the implicit mandate of competition law to challenge the restraints that hurt the market the most. This article does not address state aids or subsidies, or policy to achieve competitive neutrality. It does not focus on competition advocacy, while recognizing its close relationship and occasionally making reference to it.

## II. SURVEY OF COMPETITION LAW COVERAGE OF STATE ACTS

### A. INTRODUCTION

The Competition and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD) established a Research Partnership Platform (RPP) in 2010. The RPP was devised to bring together researchers from academia, research institutions, competition authorities, business, and civil society to exchange ideas and undertake joint research projects with UNCTAD on issues of competition law and enforcement. In 2011, the authors, along with Michal Gal of the University of Haifa Faculty of Law, Kusha Haraksingh of the University of the West Indies, and Mor Bakhoum of Max Planck Institute, Munich, formed a research group to study the extent to which competition laws reach anticompetitive acts and measures by states. Ulla Schwager and Ebru Gökçe participated on behalf of UNCTAD.

The team drafted a questionnaire, which the UNCTAD Competition and Consumer Policies Branch (CCPB) distributed to the competition authorities of its members. The competition agencies of 35 jurisdictions, or in some cases a researcher,<sup>32</sup> answered the questionnaire. The responding jurisdictions are listed in Appendix A. The questionnaire is provided as Appendix B. Key questions or categories of the questionnaire and the responses are discussed below.

The responding jurisdictions span six continents, with clusters from Asia, Africa, Western Europe, Central and Eastern Europe, and the Americas, in-

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<sup>32</sup> In most cases the answers to the questionnaire were supplied by the competition authority. Researchers supplied an answer—in most cases reviewed by an official in the competition authority—in Australia, Brazil, China, the European Union, Hong Kong, India, Japan, Peru, Singapore, and the United States. All questionnaire answers are on file with the authors.

cluding Latin America. Seven are members of the European Union. Twelve are developed countries, three are transitional countries, and 19 are developing countries. One jurisdiction, the European Union, is a common market. Four of the developing countries are rapidly emerging economies. Six countries are small island economies. Classified by income, one country is low income, 16 are middle income, and 17 are high income.

State or state-related acts may be conceptualized as lying along a continuum from those closest to traditional antitrust concerns (purely business) to those more commonly associated with the sovereign functions of the state. The business activities of state-owned enterprises (SOEs) lie near the heart of traditional business firm-focused antitrust. Liability of state officials who are complicit in procurement bidding rings lies further along the continuum. State laws that facilitate prohibited private anticompetitive conduct lie near the outer end. State laws that are anticompetitive and price-raising as a by-product of law that credibly addresses a public interest (e.g., law banning sale of tuna caught with purse seine nets that also catch dolphins; antidumping laws) we place beyond the outer bounds, for practical and political policy reasons, including separation of powers.

This section describes what the antitrust laws of the responding jurisdictions cover, supplemented by selected case law and analysis.

#### B. STATE-OWNED ENTERPRISES (SOEs)

The questionnaire asks if the nation's antitrust laws cover SOEs. All jurisdictions in our sample answered yes. This is the predominant but not universal practice. For example, the competition law of the United Arab Emirates, a country not included in our survey, expressly excludes state-owned entities.

According to the responses, the major determinant of coverage is whether the body is engaged in trade or is carrying on business. A number of the statutes, including those of Kenya, Hungary, Pakistan, and Seychelles, and the EU Treaty, make no distinction between state and private ownership. The competition laws of Brazil and Peru specifically state that they are applicable to all persons or entities, public or private.<sup>33</sup>

The Indian Competition Act covers all enterprises. It expressly excludes the sovereign functions of government. The scope of the exclusion has been tested. In India, the Ministry of Railroads runs the railroads. The Competition Commission of India (CCI) charged the Ministry of Railroads with abusing its

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<sup>33</sup> Legislative Decree No. 1034, art. 2, Junio 25, 2008 (Peru), available at [www.apeccp.org.tw/doc/Peru/Competition/Legislative%20Decree%201034.pdf](http://www.apeccp.org.tw/doc/Peru/Competition/Legislative%20Decree%201034.pdf); Article 31 of Lei No. 12,529, art. 31, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.12.2011 (Braz.); Brazil, Questionnaire Response, questions 1b, 5a.

dominant position by increasing charges for various railroad services, not providing access to rail terminals, and imposing restrictions on carrying certain goods. The Ministry argued that running the railroad was a sovereign function and not subject to the Competition Act. Rejecting this argument, the Delhi High Court noted that in a welfare state many activities are operated by the state, and many may be monopolies. That, it said, does not make the function sovereign: “[B]arring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the State cannot claim any immunity.”<sup>34</sup> “The fact that the Government runs the railways for providing quick and cheap transport for the people and goods and for strategic reasons will not convert what amounts to carrying on of a business into an activity of the State as a sovereign body.”<sup>35</sup>

The United States follows the general rule of antitrust coverage for firms owned by its states. However, a federal establishment with public service responsibilities was held not to be “a person” who can violate the Sherman Act. The Supreme Court dismissed a Sherman Act case by a maker of mail sacks alleging that the U.S. Postal Service sought to suppress its competition and monopolize the market for mail sacks.<sup>36</sup>

In the European Union, the law applies to all entities engaged in economic activity, which are designated as “undertakings.”<sup>37</sup> Essential prerogatives of the state, such as defense and air traffic control, are excluded.<sup>38</sup> SOEs gener-

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<sup>34</sup> Union of India v. Competition Comm’n of India, W.P.(C) No. 993/2011, ¶ 27 (Feb. 23, 2012), *available at* [indiankanoon.org/doc/99613527/](http://indiankanoon.org/doc/99613527/) (quoting from prior cases).

<sup>35</sup> *Id.* ¶ 21. India has continued enforcement against state entities. The CCI held Coal India Ltd. (CIL) liable for abuse of dominance by imposing oppressive, discriminatory and opportunist clauses in its fuel supply agreement with power companies. *See In re Maharashtra State Power Generation Co. Ltd.*, Case Nos. 03, 11 & 59 of 2012 (Dec. 12, 2013), *available at* [www.cci.gov.in/May2011/OrderOfCommission/27/592012.pdf](http://www.cci.gov.in/May2011/OrderOfCommission/27/592012.pdf). CIL argued unsuccessfully that it could not have market power because it was constrained by the Ministry of Coal, the Ministry of Power, the Central Electric Authority, the Planning Commission, and directives of the Supreme Court, which set the norms on whom to supply and how much to supply; and that its market position could not be condemned because it was the result of nationalization. *Id.* ¶¶ 35–36, 40. The CCI held that the regulatory environment did not detract from CIL’s “operating independently of market forces.” *Id.* ¶ 260. In quantifying the penalty, however, it took into account CIL’s obligations and constraints. *Id.* ¶ 261.

<sup>36</sup> *See* U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736, 746 (2004). The U.S. Postal Service (USPS) had nationwide public responsibility, including national security responsibilities; it lacked the power to set prices; and it was not seeking profits. A limited waiver was subsequently enacted. The USPS is not a corporation and was deemed not “a person” under the U.S. Sherman Act. In a later antitrust case against the Tennessee Valley Authority, the defendant was a federal corporation and was held to be a “person.” However, the court found an implied repeal of the antitrust laws because the challenged conduct was undertaken pursuant to federal law. *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399 (6th Cir. 2006).

<sup>37</sup> European Union, Questionnaire Response, question 1b.

<sup>38</sup> *Id.* question 2.

ally qualify as undertakings. However, a state entity that purchased goods not intended for resale (in the particular case, medical equipment that the state bought and distributed to hospitals) was held not engaged in economic activity and therefore was not an “undertaking” that could abuse dominance.<sup>39</sup> The European Union’s further limited exception is described below.<sup>40</sup>

In Hong Kong and Singapore, two newer and smaller jurisdictions, there are numerous government entities known as statutory boards or bodies that are incorporated under their own special laws, which govern their operation. In both countries SOEs incorporated under general incorporation law are subject to competition law. The law of both nations assumes that statutory boards or bodies are not engaged in business and therefore are exempt. This means that some 66 bodies in Singapore and some 575 bodies in Hong Kong are, in the first instance, not subject to the competition law. However, in both jurisdictions the bodies can be “opted-in” by regulation. In Singapore, many of the statutory boards have commercial subsidiaries incorporated under general incorporation law that are subject to the competition law. In contrast, in Hong Kong, the list of exempt statutory bodies contains numerous bodies that are not subject to competition law, and would not be in other jurisdictions as well, because they do not carry on business of any kind.

In China, the definition of “undertaking” in the Anti-Monopoly Law (AML), Article 12, implicitly includes state-owned enterprises, which are, famously, among the politically and economically most powerful entities in the country.<sup>41</sup> Article 7 assures certain protections to SOEs and other firms in strategic sectors, while still mandating that these firms “not impair the interests of consumers by exploitation of their controlling or exclusive and monopoly positions.”<sup>42</sup> The language of the act may be intentionally ambiguous so as to assure flexibility in its application and enforcement.<sup>43</sup>

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<sup>39</sup> Case T-319/99, *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental v. Comm’n*, 2003 E.C.R. II-237, ¶ 37 (holding that a purchase for a non-economic activity or one purely social in nature fell outside of the protections of the competition law).

<sup>40</sup> See *infra* Part II.C. The exception is contained in Article 106 of the Treaty on the Functioning of the European Union (successor to the Treaty of Rome) for entities “entrusted with the operation of services of general economic interest” where application of the antitrust rules would “obstruct the performance” of these duties. Treaty on the Functioning of the European Union art. 106, Sept. 5, 2008, 2008 O.J. (C 115) 47 (effective Dec. 1, 2009) [hereinafter TFEU].

<sup>41</sup> See H. STEPHEN HARRIS ET AL., *ANTI-MONOPOLY LAW AND PRACTICE IN CHINA* 376 (2011).

<sup>42</sup> *Id.* at 374–75.

<sup>43</sup> *Id.* at 196–97. In some few cases, the Chinese authorities have enforced the competition law against SOEs, but they appear to have been beneficiaries of lax enforcement. See *China Telecom, China Unicom Pledge to Mend Errors After Anti-Monopoly Probe*, XINHUA (Dec. 2, 2011), available at [news.xinhuanet.com/english2010/china/2011-12/02/c\\_131285141.htm](http://news.xinhuanet.com/english2010/china/2011-12/02/c_131285141.htm). The Ministry of Commerce (MOFCOM) has decreed that SOEs must notify it of mergers in accordance with the AML and has developed guidelines on punishment for failure to notify. See Susan Ning, Ji Kailun & Hazel Yin, *MOFCOM Getting Tough on Failure to Notify a Concentration*, CHINA L.

A number of countries have regulatory laws that replace competition law in whole or part.<sup>44</sup> Commonly, the regulatory authority is charged with applying the public interest including competition.

Examples of SOE violations include both traditional offenses (participating in a cartel) and restraints made possible by the power of the state. The Spanish Competition Authority held an SOE liable for leading a cartel of industrial dairy firms that agreed on the basic prices, quality, bonuses and discounts for raw milk.<sup>45</sup> The Spanish Competition Authority also held the post office liable for taking advantage of its dominant position in postal services to prevent new entrants from entering a connected liberalized market.<sup>46</sup> The Lithuanian Supreme Court held that the state-owned AB Lietuvos paštas, which held the exclusive right for reserved mail services, abused its dominant position by trying to oust two competitors from the closely related invoice printing, binding, and enveloping market.<sup>47</sup> In Mexico, the Federal Competition Commission (now reconstituted as the Mexican Federal Economic Competition Commission) prohibited the state-owned petroleum monopoly, Pemex, from requiring the gasoline stations it served to carry only Pemex lubricants, blocking a principal outlet for rival lubricant makers.<sup>48</sup> And in Australia, a statutory power authority misused its market power in violation of the competition law

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INSIGHTS (Jan. 16, 2012), [www.chinalawinsight.com/2012/01/articles/corporate/antitrust-competition/mofcom-getting-tough-on-failure-to-notify-a-concentration/](http://www.chinalawinsight.com/2012/01/articles/corporate/antitrust-competition/mofcom-getting-tough-on-failure-to-notify-a-concentration/).

<sup>44</sup> These countries include Hungary, China, Switzerland, Turkey, Korea, Lithuania, Malaysia and Singapore. The Swiss competition law provides that specific provisions superseding competition in specified markets, such as those establishing an official market or price system or granting exclusive rights to fulfill public duties, take precedence over the competition law. Federal Act on Cartels and Other Restraints of Competition, art. 3, Oct. 6, 1995, as amended (Switzerland), available at [www.admin.ch/ch/e/rs/2/251.en.pdf](http://www.admin.ch/ch/e/rs/2/251.en.pdf). Lithuania's competition law excludes economic activities when an exemption is clearly stated in another law. Law on Competition No. VIII-1099, art. 2(1), Mar. 23, 1999, as amended (Lithuania), available at [kt.gov.lt/en/index.php?show=antitrust&antitrust\\_doc=law\\_competition](http://kt.gov.lt/en/index.php?show=antitrust&antitrust_doc=law_competition). Most such exemptions are meant to ensure that particular services are being provided for society.

<sup>45</sup> Fines of €6.61 million were imposed. See Resolución, Industrias Lácteas, Expte. 352/94, 3 de junio de 1997 (Spain), available at [www.unizar.es/departamentos/derecho\\_empresa/primer\\_segundo\\_ciclo/titulaciones/documents/18\\_1.pdf](http://www.unizar.es/departamentos/derecho_empresa/primer_segundo_ciclo/titulaciones/documents/18_1.pdf); see also Spain, Questionnaire Response, question 5b.

<sup>46</sup> Fines for successive violations were €5.4 million and €15 million. Spain, Questionnaire Response, question 5b.

<sup>47</sup> Lithuania, Questionnaire Response, question 17.

<sup>48</sup> See OECD, COMPETITION LAW AND POLICY IN MEXICO: AN OECD PEER REVIEW 21 (2004), available at [www.oecd.org/daf/competition/prosecutionandlawenforcement/31430869.pdf](http://www.oecd.org/daf/competition/prosecutionandlawenforcement/31430869.pdf); see also Leon Ricardo Elizondo Castro, *Landmark Cases Related to Proceedings Commenced by the CFC for Monopolistic Practices*, 9 U.S.-MEX. L.J. 85, 90-92 (2001). Similarly, see the Mexican Federal Competition Commission's imposition of a fine on Pemex for requiring gasoline stations to use Pemex's tank trucks and unionized personnel to transport the gas they had already bought. Resolución, Pemex-Refinación, Expte. DE-024-2010, 20 de agosto de 2013 (Mexico), available at [www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V75/9/1761112.pdf](http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V75/9/1761112.pdf).

when it refused to grant access to its power lines to a licensed potential competitor.<sup>49</sup>

In 2013–2014, the International Competition Network (ICN) conducted a Special Project on State-Owned Enterprises and Competition. The Report of the Moroccan Competition Council, summarizing questionnaire responses of 38 jurisdictions, is a useful source of additional information on the application of national competition laws to SOEs.<sup>50</sup>

### C. ENTERPRISES GRANTED SPECIAL OR EXCLUSIVE RIGHTS OR PRIVILEGES

The questionnaire asked: Does your competition statute cover, as possible violators, entities to which the state has granted special or exclusive rights or privileges? Twenty-six answered yes; nine answered no. A large number of entities that hold special or exclusive rights or privileges are owned by state or local government.

The model for antitrust coverage of entities holding special or exclusive rights and privileges is EU law, the Treaty on the Functioning of European Law (TFEU) Article 106. Article 106 specifies antitrust coverage for public enterprises and enterprises granted special or exclusive rights or privileges, and imposes a broad obligation on states to refrain from adopting anticompetitive measures with respect to these enterprises. Article 106 is read in conjunction with Article 101 (anticompetitive agreements), and Article 102 (abuse of a dominant position). Under Article 106(1), as to public undertakings and undertakings to which Member States have granted special or exclusive rights, “*Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular [the anti-discrimination and competition rules].*”<sup>51</sup> Article 106(2) provides that undertakings “entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly” are subject to the competition rules of the Treaty “in so far as the application of such rules does not obstruct the performance . . . of the particular tasks assigned to them.”<sup>52</sup> Under this framework, “a Member State is in breach of the prohibitions contained in [TFEU Articles 102 and 106(1)] if the undertaking in question, merely by exercising the exclusive rights granted to it, is led to abuse its dominant posi-

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<sup>49</sup> *NT Power Generation Pty Ltd. v. Power and Water Auth.*, [2004] 219 CLR 90 (Austl.).

<sup>50</sup> INTERNATIONAL COMPETITION NETWORK ANNUAL CONFERENCE, SPECIAL PROJECT OF THE MOROCCAN CONSEIL DE LA CONCURRENCE, STATE-OWNED ENTERPRISES AND COMPETITION (Apr. 23–15, 2014), [www.icnmarrakech2014.ma/images/SOE\\_under\\_competition\\_law\\_Morocco.pdf](http://www.icnmarrakech2014.ma/images/SOE_under_competition_law_Morocco.pdf).

<sup>51</sup> TFEU, *supra* note 40, art. 106(1) (emphasis added).

<sup>52</sup> *Id.* art. 106(2). Undertakings designated to provide services of general economic interest or having the character of a revenue producing monopoly are generally undertakings granted special or exclusive rights.

tion or when such rights are liable to create a situation in which that undertaking is led to commit such abuses.”<sup>53</sup> These provisions have stunningly broad implications and may, along with Article 4(3) of the Treaty on European Union (TEU) (Member States’ commitment not to undermine Treaty law), constitute a long reach of competition law to control anticompetitive state measures.

A number of cases illustrate the EU law. Postal services are prominent among them. In *Corbeau*, the European Court of Justice held that a state-owned or city-owned mail delivery service or one with an exclusive license could not legally prevent the entry of a private express delivery service except to the extent that exclusivity was necessary to achieve a public mission.<sup>54</sup> In *Slovenska posta*, the Slovakian post office had a monopoly over traditional mail delivery. Private enterprises developed an adjacent new market—hybrid mail services—that involved businesses sending invoices by Internet to local mail delivery offices, which would print and deliver the invoices locally.<sup>55</sup> To take advantage of this new lucrative market, the Slovakian post office adopted a measure to extend its monopoly to the adjacent market, thus displacing the entrepreneurs who had developed hybrid mail delivery. The adoption of this measure without justification (the market worked; there was no need for monopoly) was an abuse of dominance.

A German public agency with the exclusive license to provide executive recruitment services infringed the competition law by mere exercise of its right to keep out competition because the agency was clearly not in a position to satisfy the demand for such services.<sup>56</sup> In another example, *Port of Genoa*, Italy was held to have infringed the law by adopting national legislation providing for the grant of exclusive rights to organize dock work and requiring that dock work be performed by workers of Italian nationality. *Merci*, which held the exclusive right in the Port of Genoa (and apparently provided inferior unloading services) could not help but abuse its dominant position.<sup>57</sup>

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<sup>53</sup> Case C-163/96, *Silvano Raso*, 1998 E.C.R. I-533, ¶ 27; *see also* European Union, Questionnaire Response, question 5a.

<sup>54</sup> *See* Case C-320/91, *Régie des Postes v. Corbeau*, 1993 E.C.R. I-2533, ¶¶ 12–13.

<sup>55</sup> *See* Case COMP/39.562—*Slovenská Pošta*, Comm’n Decision, 2008 O.J. (C 322) 10, *on appeal*, Case T-556/08, *Slovenská Pošta v. Comm’n* [2008].

<sup>56</sup> *See* Case C-41/90, *Höfner & Elser v. Macrotron GmbH*, 1991 E.C.R. I-1979, § 34.

<sup>57</sup> Case C-179/90, *Merci Convenzionali Porto di Genova SpA v. Siderurgica Gabrielli SpA*, 1991 E.C.R. I-5889, ¶ 19. Many cases are in accord. *See, e.g.*, Case C-18/88, *Régie des Télégraphes et des Téléphones v. GB-Inno-BM SA*, 1991 E.C.R. I-5941; Case C-462/99, *Connect Austria*, 2003 E.C.R. I-5197. The language of the Court in *Connect Austria* may cut broadly by condemning state measures that “distort[ ] competition . . . which create[ ] a situation where equality of opportunity . . . cannot be ensured” by conferring special privileges on a dominant firm. *Id.* ¶ 87. Most recently, a case came to the Court of Justice in which Greece had given its state-owned electricity company DEI quasi-exclusive rights to lignite, a scarce mineral and an important ingredient in the supply of electricity. The competitors complained, the Commission

Transitional economies of central and eastern Europe were perhaps the first to adopt provisions tracking or echoing TFEU Article 106. These provisions were enacted in an urgent defense of the newly created markets, for local monopoly privileges and power threatened to unravel the economic reforms.<sup>58</sup> The provisions were enforced. In 1995, during the early stages of transition, the Yasinovataya Town Council passed a regulation granting to the Donetskytortsvetmet Production Association, a group of metal scrap processors that together accounted for 40.5 percent of the market, the exclusive right to collect metal scrap for industrial purposes in Yasinovataya. The regulation meant that the enterprises previously in the market but not part of the producers' group were excluded. The Anti-Monopoly Commission held that the regulation violated Article 6 of the Ukraine law, and the Town Council revoked the regulation.<sup>59</sup>

Enforcement of Article 6 has been a high priority in Ukraine. In the early years of the law, most competition violations involved regulations adopted by oblasts (or regions), municipalities, and smaller governmental units of regional or local markets.<sup>60</sup> These cases commonly involved significant harm to competition, often by exclusion of a specific class of enterprises from the market.<sup>61</sup>

A number of countries adopt or adapt the language of the European Union. Sweden, a Member State of the EU, has similar language: SOEs "may be exempted only to the extent that their activities are a direct outflow of the special tasks that they are entrusted with."<sup>62</sup>

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brought proceedings, and the Commission held that Greece had infringed TFEU Article 106(1) in conjunction with TFEU Article 102. The General Court set the decision aside, holding that the Commission was required to show and did not show how, as a result of the grant, DEI abused or was bound to abuse its dominance. The Court of Justice overturned the judgment of the General Court, finding that it was not necessary for the Commission to assess the effects of the privileged grant or its impact on consumers. Confirming the line of cases, the Court of Justice said, "[I]f inequality of opportunity between economic operators, and thus distorted competition, is the result of a State measure, such a measure, be it legislative, regulatory or administrative, constitutes an infringement of Article 86(1) EC [now TFEU Article 106(1)] read in combination with Article 82 EC [now TFEU Article 102]." Case C-553/12P, *Comm'n v. Dimosia Epicheirisi Ilektrismou (DEI)*, 2014 E.C.R. \_\_, § 57 (July 17, 2014 judgment, not yet published), available at [curia.europa.eu/juris/document/document.jsf?text=&docid=1551j09&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=226483](http://curia.europa.eu/juris/document/document.jsf?text=&docid=1551j09&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=226483).

<sup>58</sup> Boner, *supra* note 24, at 98–99.

<sup>59</sup> *Id.* at 91–93. Following Ukraine's amendments to its competition law in 2009, the provisions applicable to SOEs were moved from Article 6 to Articles 15–17. See *Ukraine Law on the Protection of Economic Competition*, WORLD INTELL. PROP. ORG., [www.wipo.int/wipolex/en/text.jsp?file\\_id=187954](http://www.wipo.int/wipolex/en/text.jsp?file_id=187954).

<sup>60</sup> Boner, *supra* note 24, at 97–98.

<sup>61</sup> *Id.*

<sup>62</sup> Sweden, Questionnaire Response, questions 1–2.

Nations outside of the European Union may also follow its model. The language of the Malaysian law is ambiguous but provides an exemption either similar to or wider than the European Union. Malaysia specifies coverage except when the enterprise conducts activities “based on the principle of solidarity” or “any activities in the exercise of governmental authority.”<sup>63</sup> Singapore generally follows the EU paradigm except that a complete exemption from the law against anticompetitive agreements and abuses of dominance is provided for conduct that relates to specified activities—namely, postal services, piped potable water, wastewater management, scheduled and licensed bus services, and licensed cargo terminal operations.<sup>64</sup>

Table 1 below summarizes and illustrates the application of the national competition laws to state-owned enterprises and entities granted special or exclusive rights in the jurisdictions of the respondents to the questionnaire.

#### D. PUBLIC PROCUREMENT—THE STATE AS BUYER OR CONSPIRATOR

Public procurement is an area of enormous significance for competition and consumers, and for governance in general. In a number of nations, the amount spent on public procurement represents a third or more of GDP. Procurement is a target area for corruption. Corrupt anticompetitive procurement practices normally involve complicity of government officials, either in tailoring specifications to the unique capabilities of cronies or in selecting them as winners.<sup>65</sup> Bidding rings may buy the “right” to win the bid from government officials. Projects typically involve core areas of the economy that hold keys to the well-being of masses of people, such as housing, schools, road construction, and other infrastructure. Enforcement against corrupt procurement is virtually always entrusted to state attorneys general under criminal law. Private bidding rings typically also violate the competition law. Might corrupt government officials and the state be held accountable under competition law as well? The subject is not typically regarded as an antitrust issue in developed nations, but in fact, it holds a larger place in antitrust laws than the authors anticipated.

The questionnaire asked: Does your competition law apply against the state or its officials complicit in bidding rings and [in] preferences . . . in awarding state contracts? There were 13 who answered “yes” and 22 “no.”

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<sup>63</sup> Malaysia, Questionnaire Response, questions 1–2.

<sup>64</sup> See Competition Act, No. 46 of 2004, Third Schedule, ¶ 6 (Singapore); see also Singapore, Questionnaire Response, question 2. Singapore has granted substantial rights to government-linked corporations, albeit in a more transparent fashion than in some other jurisdictions. See generally Deborah Healey, *Application of Competition laws to Government in Asia: the Singapore Story*, 2 KLRI J.L. & LEGIS. 59 (2012) (discussing competition law in Singapore particularly as related to government).

<sup>65</sup> See WRONG, *supra* note 26 (discussing the startling example of Kenya).

TABLE 1  
APPLICATION OF COMPETITION LAW TO SOEs/GOVERNMENT

Responses to question 1a established that competition laws of all respondent jurisdictions cover SOEs. This table illustrates common qualifications or exemptions from application of the competition laws.

("Law" means "Competition Law")

Country or Jurisdiction	Law requires SOE or state-interested entity to be engaged in business or trade	Law covers entities granted special or exclusive rights and privileges (state and non-state)	Law fully or partially exempts services of general economic interest or similar	Sector specific or other law overrides application to SOEs or administrative authorities	The law is enforced against SOE or state-interested entity
Australia	Yes	Yes			Yes
Barbados	Yes	Yes		Yes	Yes
Brazil		Yes			Yes
China	Yes	Yes*	Yes*	Yes	Yes
EU	Yes	Yes*	Yes		Yes*
France	Yes	Yes	Yes		Yes
Greece	Yes	Yes*			Yes
Guyana				Yes	
Hong Kong	Yes*	Yes*	Yes*	Yes	**
Hungary	Yes	Yes*		Yes	Yes
India		Yes*	Yes		Yes
Italy	Yes	Yes*	Yes		Yes
Jamaica				Yes	
Japan	Yes	Yes			Yes
Kazakhstan	Yes	Yes	Yes*	Yes	Yes
Kenya	Yes	Yes*			Yes
Korea			Yes*	Yes	Yes
Lithuania	Yes	Yes		Yes	Yes
Malaysia	Yes		Yes	Yes	**
Mauritius	Yes	Yes*	Yes*		Yes
Mexico	Yes	Yes		Yes	Yes
Pakistan	Yes				Yes
Peru	Yes	Yes			Yes
Poland	Yes		Yes	Yes	Yes
Russia	Yes	Yes		Yes	Yes
Serbia	Yes	Yes*			Yes
Seychelles	Yes	Yes*	Yes*		Yes
Singapore	Yes*	Yes*	Yes	Yes	Yes
Spain	Yes	Yes	Yes	Yes	Yes
Sweden	Yes	Yes	Yes	Yes	Yes
Switzerland	Yes			Yes	Yes
Trinidad & Tobago	Yes	Yes		Yes	Yes
Tunisia	Yes				Yes
Turkey		Yes		Yes	Yes
United States	Yes*	Yes			Yes

\* Less than full coverage. For example, competition law applies insofar as it does not obstruct the performance of the tasks assigned and/or the law expressly exempts conduct relating to specified services, such as postal, bus, water, and waste management.

\*\* Recent law; too early to report on enforcement record.

In Japan, a special statute<sup>66</sup> specifies types of bid-rigging conduct involving central or local government and empowers the Japan Fair Trade Commission to demand reforms to prevent bid rigging and to demand that the heads of the ministry or agency discipline the responsible employee.<sup>67</sup> In Greece the competition commission is obliged to notify the public prosecutor of corruption in procurement in the case of proven anticompetitive agreements, notably cartels.<sup>68</sup>

A number of responses reported that corruption in procurement is covered by other laws and, in many cases, only by other laws. In Hong Kong, the Bribery Ordinance rather than the competition law covers this conduct.<sup>69</sup> In Singapore, contract law, anti-corruption law, and specific procurement legislation cover procurement and bidding.<sup>70</sup> In Japan, in addition to the statute referenced above, the corrupt government officials are subject to criminal prosecution.<sup>71</sup>

The questionnaire also asked: Does your competition law proscribe procurement requests to bid that contain anticompetitive specifications? Does other law do so? Regarding competition law coverage, 12 answered “yes” and 19 “no.” Regarding law other than competition law, 18 answered “yes” and 13 “no.”

Russia reports that in 2012 its Federal Antimonopoly Service investigated more than 4000 petitions regarding acts and actions of the state and local authorities. Of these more than 2400 petitions alleged failure to comply with antimonopoly requirements for competitive bidding. A “[m]ajority of the petitions (594) related to unreasonably restricting participation in bidding and to violating the procedures for determining the winner (365) and creating advantageous conditions for participating in bidding (322).”<sup>72</sup>

In Poland, the competition law empowers the President of the Office of Competition and Consumer Protection to institute antimonopoly proceedings

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<sup>66</sup> Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding, etc., Act No. 101 of 2002 (Japan), *available at* [www.jftc.go.jp/en/legislation\\_gls/aepibr.files/aepibr.pdf](http://www.jftc.go.jp/en/legislation_gls/aepibr.files/aepibr.pdf).

<sup>67</sup> Japan, Questionnaire Response, question 17.

<sup>68</sup> Greece, Questionnaire Response, question 7.

<sup>69</sup> Hong Kong, Questionnaire Response, question 7.

<sup>70</sup> Singapore, Questionnaire Response, question 7.

<sup>71</sup> The officials may be criminally prosecuted under The Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishments for Acts by Employees that Harm Fairness of Bidding. However, the procedure triggering discipline and reforms is the preferred route. Japan, Questionnaire Response, question 7.

<sup>72</sup> FED. ANTIMONOPOLY SERV. OF THE RUSSIAN FED’N, REPORT OF THE FEDERAL ANTIMONOPOLY SERVICE ON COMPETITION POLICY IN 2012 at § 2.3.1 (2013), *available at* [en.fas.gov.ru/reports-and-analytics/reports-and-analytics\\_30982.html](http://en.fas.gov.ru/reports-and-analytics/reports-and-analytics_30982.html).

if procurement requests-to-bid are discriminatory or have an anticompetitive effect.<sup>73</sup> In Lithuania, Article 4 of the competition law prohibits entities of public administration from adopting acts that grant privileges or that discriminate,<sup>74</sup> and the Competition Council has the power to oblige the body to abolish or amend the measure.<sup>75</sup> The article is regularly enforced. Most infringements of Article 4 concern violations by municipalities awarding procurement contracts without any competitive process. Most of these illegal awards have gone to SOEs.<sup>76</sup>

In Spain, when the National Competition Commission suspects bid rigging involving an administrative body, it may file a request asking the administrative body to adjust its behavior to conform with competition criteria. If a satisfactory response is not forthcoming, the Competition Commission may bring judicial action.<sup>77</sup>

Europe's TFEU Article 37 contains a special provision on procurement. This not an antitrust provision but is akin both to the antitrust and non-discrimination provisions of the Treaty. It provides that "Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States."<sup>78</sup> Discrimination by a state monopoly of a commercial character against goods imported from another state for procurement or marketing is illegal under this section.<sup>79</sup>

#### E. A FREE MOVEMENT CLAUSE FOR THE INTERNAL MARKET

The questionnaire asked the following questions:

Does your competition law proscribe state or local government measures that

- (1) limit entry of goods from other localities: 11 answered "yes" and 23 "no;"
- (2) discriminate against outsiders or block markets: 14 answered "yes" and 19 "no."

As the responses show, a number of nations incorporate a free movement function into their competition laws, although most do not. In general the

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<sup>73</sup> Poland, Questionnaire Response, question 9a.

<sup>74</sup> Lithuania, Questionnaire Response, question 9a.

<sup>75</sup> *Id.* question 6.

<sup>76</sup> *Id.*

<sup>77</sup> Spain, Questionnaire Response, question 9a.

<sup>78</sup> TFEU art. 37(1).

<sup>79</sup> *Id.*

nations with this coverage either do not have a commerce clause such as in the United States Constitution or a free movement mandate such as in the EU Treaty, or they are transitional economies fearful that local, parochial restraints handicapping trade from other parts of the nation would undermine reforms. The developed countries deal with the problem through constitutional provisions or other laws.

China's AML includes a distinctive "little commerce clause" directed against discriminatory burdens on commerce imposed by the provinces. Chapter V prohibits "Abuse of Administrative Powers to Restrict Competition."<sup>80</sup> Article 33 thereof prohibits administrative (government) agencies from using their administrative powers to block regional trade by setting discriminatory charges or prices on products originating from other regions or imposing discriminatory technical requirements or standards.<sup>81</sup> Adjoining articles prohibit administrative agencies from imposing discriminatory qualifications on firms from other regions and withholding material information from cross-border traders, and from discriminatorily rejecting investment or local branches from other regions.<sup>82</sup>

These free movement provisions of the AML are a response to a recurring problem of local protectionism: provincial governments have a history of erecting border barriers to keep goods and services from other provinces from entering their territory. The provinces have incentives to do so; they depend upon their local businesses for tax revenues and jobs.

The Federal Economic Competition Commission of Mexico also plays a role in policing restraints on free movement, albeit a more modest one than suggested by the competition laws of China, Russia, and Eastern Europe. Under the Constitution of Mexico, state and municipal authorities may not perform acts or issue rules with the aim or effect of taxing people or goods crossing internal borders.<sup>83</sup> The Competition Commission is empowered to initiate a procedure to determine if a violation has occurred, and it is required to refer potential violations to the general attorney.<sup>84</sup>

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<sup>80</sup> HARRIS ET AL., *supra* note 41, at 385.

<sup>81</sup> *Id.* at 385–86.

<sup>82</sup> *Id.* at 386–87.

<sup>83</sup> See Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, arts. 105, 117, Diario Oficial de la Federación [DO], 5 de febrero de 1917 (Mex.).

<sup>84</sup> See Ley Federal de Competencia Económica [LFCE] [Antitrust Law], as amended, arts. 14–15, Diario Oficial de la Federación [DO], 24 de diciembre de 1992 (Mex.). As in the procurement area, the offense here is the discriminatory blockage of the market, which falls into the larger category of "distortion of competition." Distortion of competition is a trade concept that has been imported into the competition law of the European Union and many other jurisdictions. The discriminatory blockage often causes prices to rise, but proof of a probable price rise is not an element of the violation.

Table 2 below shows the respondent nations' coverage, in their competition laws and in other laws, of free movement and market blockage restraints (i.e., barriers to entry), including blockage by discriminatory procurement requests. "Yes" indicates coverage in the competition law.

#### F. OTHER ABUSE OF ADMINISTRATIVE POWER

The question here overlaps with the preceding one, but is broader.

The questionnaire asked: Does your country's competition law prohibit certain anticompetitive acts of state bodies such as administrative authorities?—21 answered "yes" and 14 "no." Affirmative answers identified a diverse group of competition law systems, from those, like India, allowing suits against state ministries that perform some market functions (e.g. operating railroads) to those, like China, that prohibit administrative authorities from adopting certain legal acts that impair the conditions of competition.

In China there was much debate about inclusion of a provision in the AML prohibiting anticompetitive abuses of administrative powers. The legislation as it was first introduced contained significant enforcement powers against abuse of "administrative monopoly," but it was successively weakened before its passage in 2007. One of the leading experts, Professor Huang Yong, presented the following observations and conclusions, which apparently were widely enough shared to result in the AML's nominally broad coverage of state acts.

In today's China, people have agreed upon two conclusions with respect to the corrosive effects caused by intrusive State power upon economic development and even upon the political system. First, ever-expanding abusive State power is the biggest threat to a functioning competitive market system; second, the problem of administrative monopoly stems from the social structure, which is beyond any single statute to resolve. The ultimate solution relies on both economic and political reform. However, for China, the process of reform can take a long time, longer than competition could afford. Therefore, a second best option would be to adopt some technical restraints against certain State powers within the AML framework, which might be an unsatisfactory but realistic approach. This is a reflection of the "doctrine of the golden mean" in the Confucian school, an equivalent to pragmatism.<sup>85</sup>

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<sup>85</sup> Yong Huang, *Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 ANTITRUST L.J. 117, 122 (2008). As finally adopted, the lines of command for enforcement of Chapter V were shifted away from the competition authorities, and remedies were watered down. For abuses of administrative power, Article 51 provides that the offending agencies "shall be admonished by their superior agencies or departments . . . and the individuals who are directly responsible shall be disciplined according to law." HARRIS ET AL., *supra* note 41, at 392. The antitrust authority may make a proposal for handling the matter "to the relevant superior authority." *Id.*

TABLE 2  
DOES THE COMPETITION LAW COVER FREE MOVEMENT AND  
MARKET BLOCKAGE?

Country or Jurisdiction	Limiting entry of goods	Discriminating against outsiders or blocking markets	Discriminatory procurement requests to bid	Enforced regularly
Australia	*	*	*	*
Barbados				
Brazil	*	*	*	*
China	Yes	Yes	Yes	
EU	Yes*	Yes*	Yes*	Yes*
France	*	Yes*		Yes*
Greece				
Guyana		Yes*	Yes	
Hong Kong				
Hungary	Yes*		Yes	
India				
Italy	*	*	*	Yes*
Jamaica		Yes*	Yes*	
Japan				
Kazakhstan	Yes	Yes	Yes*	Yes*
Kenya	Yes	*	*	
Korea	Yes*	Yes*	Yes*	Yes*
Lithuania	Yes	Yes	*	Yes
Malaysia	*	*	*	
Mauritius				
Mexico	Yes*	Yes*	Yes	Yes
Pakistan	Yes	Yes	Yes*	
Peru	*	*	*	*
Poland	*	*	Yes*	Yes*
Russia	Yes	Yes	Yes	Yes
Serbia				
Seychelles				
Singapore		*	*	*
Spain	Yes	Yes	Yes	Yes*
Sweden			*	Yes*
Switzerland	*	*	*	*
Trinidad & Tobago				
Tunisia				
Turkey				
United States	*	*	*	

\* Covered by other laws.

China's AML states, in Article 32:

Administrative agencies and organizations authorized with administrative powers of public affairs by laws and regulations shall not abuse their administrative powers by limiting, or limiting in disguised form, organizations or

individuals by requiring them to deal, purchase, or use commodities provided by designated undertakings.<sup>86</sup>

Article 36 of the AML prohibits “compel[ling] undertakings to engage in monopolistic activities that are prohibited under this Law.”<sup>87</sup> Article 37 prohibits abusing administrative power to make regulations that eliminate or restrict competition.<sup>88</sup>

While examples of abuses of administrative monopoly are not abundant, we are offered the following example in Guangdong. The Municipal Government of Heyuan City had designated one company as the only supplier of GPS tracking and monitoring platform/systems for vehicles in the municipality. Other GPS operators were required to upload their monitoring data onto the designated firm’s platform for a monthly fee, and the traffic management bureau was required to refuse clearance to any automobile whose monitoring information did not conform. At the suggestion of the Guangdong Administration for Industry and Commerce (Guandong AIC), the Guangdong Government issued an administrative decision that the Heyuan Government had violated the AML. In response, the Heyuan Government withdrew its mandate.<sup>89</sup>

The Lithuanian competition law is a good example of the laws of Central and Eastern Europe. It provides:

When carrying out the assigned tasks related to the regulation of economic activity within the Republic of Lithuania, entities of public administration must ensure freedom of fair competition. Entities of public administration shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which give rise to or may give rise to differences in the conditions of competition for undertakings competing in the relevant market, ex-

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<sup>86</sup> For an example of an offense, see *infra* text at note 89.

<sup>87</sup> An example of such an offense in international commerce is the WTO *Telmex* case. The Mexican regulator, COFETEL, ordered the Mexican concessionaires that terminated telephone calls coming into Mexico to adjust their prices (upwards) to those of the largest operator, which was Telmex. This order was held to offend Mexico’s WTO obligations to maintain and enforce its competition laws. See Fox, *supra* note 18.

<sup>88</sup> Presumably, this offense would include protectionist regulation by provinces to stem cross-border trade, and procurement regulations tailored to fit a favored supplier.

<sup>89</sup> Susan Ning et al., *First Enforcement Action Under Anti-Monopoly Law Against Administrative Monopoly*, CHINA L. INSIGHT (Aug. 12, 2011), [www.chinalawinsight.com/2011/08/articles/corporate/antitrust-competition/first-enforcement-action-under-antimonopoly-law-against-administrative-monopoly/](http://www.chinalawinsight.com/2011/08/articles/corporate/antitrust-competition/first-enforcement-action-under-antimonopoly-law-against-administrative-monopoly/); see also UNIRULE INST. OF ECON., THE CAUSES, BEHAVIORS, AND TERMINATION OF ADMINISTRATIVE MONOPOLY IN CHINA (2012) [hereinafter UNIRULE REPORT], available in Chinese at [www.unirule.org.cn/xiazai/2012/20120803.pdf](http://www.unirule.org.cn/xiazai/2012/20120803.pdf); English summary available at [english.unirule.org.cn/html/UniruleIdeas/index.html](http://english.unirule.org.cn/html/UniruleIdeas/index.html) (select The Causes, Behaviors, and Termination of Administrative Monopoly in China) (providing examples and analyses of abuses). Under AML Article 51 (administrative monopoly provisions), the competition authorities are not authorized to enforce the law against offending government bodies but they may make recommendations to the supervising body, which may accept the recommendations.

cept where the difference in the conditions of competition cannot be avoided [by compliance with other laws].<sup>90</sup>

The Competition Council has the power to require the state body to abolish or amend offending measures to conform with the competition rules.

In Russia, the Federal Antimonopoly Service has the power to prosecute and enjoin any action by federal, regional, or local government bodies that is in breach of competition law and restricts competition. The Federal Antimonopoly Service Competition Report for 2010 states: “In 2010 as well as in 2009 the biggest number of violations of competition law was committed by the state and local authorities.”<sup>91</sup> Similarly, in Tunisia, the Competition Council has competence to sue administrative authorities in cases in which an economic activity goes beyond the public service mission for which they are vested.<sup>92</sup>

Table 3 below shows competition law coverage of anticompetitive acts of state bodies, including acts of ministries, legal acts of administrative authorities, and acts of corruption in procurement.

#### G. OTHER ANTICOMPETITIVE STATE MEASURES

The EU Treaties target state anticompetitive measures under two headings. TFEU Article 106, discussed earlier, which is part of the competition law, prohibits Member States from adopting measures that (in effect) confer or entrench dominance and facilitate abuse by public enterprises or those granted special or exclusive privileges.<sup>93</sup> TEU Article 4(3) provides, in addition, that the Member States have a duty of “sincere co-operation.”<sup>94</sup> The States must “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives.”<sup>95</sup> TEU Article 4(3) is read in conjunction with the antitrust articles of the TFEU, which prohibit anticompetitive agreements and abuses of dominance. This combination results in the obligation of Member States not to adopt or apply laws that would render the competition rules ineffective. This phrase is not self-explanatory and its meaning is developed in a body of case law.

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<sup>90</sup> Press Release, Competition Council of the Republic of Lithuania, Vilnius Municipality Fails to Ensure the Freedom of Fair Competition When Providing Public Passenger Transport Services (June 21, 2013), *available at* [kt.gov.lt/en/index.php?show=news\\_view&pr\\_id=1171](http://kt.gov.lt/en/index.php?show=news_view&pr_id=1171).

<sup>91</sup> FED. ANTIMONOPOLY SERV. OF THE RUSSIAN FED’N, REPORT OF THE FEDERAL ANTIMONOPOLY SERVICE ON COMPETITION POLICY IN 2010 at § 2.3.1 (2011), *available at* [en.fas.gov.ru/reports-and-analytics/reports-and-analytics\\_30662.html](http://en.fas.gov.ru/reports-and-analytics/reports-and-analytics_30662.html).

<sup>92</sup> Tunisia, Questionnaire Response, question 6.

<sup>93</sup> *See supra* Part II.C.

<sup>94</sup> Consolidated Version of the Treaty on European Union art. 4(3), Oct. 26, 2012, 2012 O.J. (C 326) 18.

<sup>95</sup> *Id.*

TABLE 3  
COMPETITION LAW COVERAGE OF ANTICOMPETITIVE  
ACTS OF STATE BODIES

Country or Jurisdiction	Acts of state bodies including administrative abuses	Corrupt procurement: state and/or officials
Australia	Yes	Yes
Barbados		
Brazil		
China	Yes	Yes
EU	Yes	Yes
France	Yes	
Greece		
Guyana		Yes
Hong Kong		
Hungary	Yes	
India	Yes	
Italy	Yes	
Jamaica		Yes
Japan	Yes	Yes
Kazakhstan	Yes	Yes
Kenya	Yes	
Korea	Yes	
Lithuania	Yes	
Malaysia	Yes	
Mauritius		
Mexico	Yes	Yes
Pakistan	Yes	Yes*
Peru		
Poland		Yes*
Russia	Yes	Yes
Serbia	Yes	
Seychelles	Yes	Yes
Singapore		
Spain	Yes	Yes
Sweden	Yes	
Switzerland	Yes	
Trinidad & Tobago		
Tunisia	Yes	Yes*
Turkey		
United States		

\* Some ambiguity or less than full coverage.

Perhaps the best example is the *Italian matches* case, *Consorzio Industrie Fiammiferi*.<sup>96</sup> Italy had a law organizing a match cartel. It required all producers of matches in Italy to join a consortium. A minister was required to set the price for matches, and the consortium of Italian producers was required to allocate quotas to all sellers in Italy. The process was to be overseen by government officials. The consortium allocated quotas so as to substantially exclude German and Swedish producers. The Italian Antitrust Authority brought proceedings and found antitrust violations by both Italy and the Italian producers. The Court of Justice of the European Union agreed. Italy had a duty to disapply its law. The Court said:

- 45 [A]lthough Articles [101 (anticompetitive agreements) and 102 (abuse of dominance) of TFEU] are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article [4, Treaty on European Union], which lays down a duty to cooperate, none the less *require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.*
- 46 The Court has held in particular that Articles [4 TEU and 101 TFEU] are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU] or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere . . . .
- 47 Moreover . . . the [ ] Treaty has expressly provided that in the context of their economic policy the activities of the *Member States must observe the principle of an open market economy with free competition* . . . .
- 49 *The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities, which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied.*<sup>97</sup>

*Italian matches* has limits.<sup>98</sup> The measure to be disapplied must be one that “may render ineffective” TFEU Article 101 or 102. In *Italian matches* the

<sup>96</sup> Case C-198/01, *Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato*, 2003 E.C.R. I-8055 (*Italian matches*).

<sup>97</sup> *Id.* at I-8093-94 (emphases added) (citations omitted). The Court continued:

50 [The competition] rules would be rendered less effective if, in the course of an investigation under Article [101 TFEU] into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles [4 TEU] and [101 TFEU] and if, consequently, it failed to disapply it.

<sup>98</sup> See Joined Cases C-94/04 & C-202/04, *Cipolla v. Fazari*, 2006 E.C.R. I-11421. Italy had adopted lawyer fee schedules based on a draft submitted by the lawyers’ association. The Court declined to find a violation of TEU Article 4(3) and TFEU Article 101 on the grounds that the fee schedule had to be approved by the Minister of Justice before it could enter into effect;

measure did so by commanding the members of the industry to fix quotas for the sale of matches in Italy.

Quite clearly, the ECJ judgment in *Italian matches* implies a rule different from the one applied by the U.S. Supreme Court in the celebrated case of *Parker v. Brown*,<sup>99</sup> in which the U.S. Supreme Court refused to enjoin the operation of a California statute organizing a state/private raisin cartel. If *Parker v. Brown* had been situated in Italy, the court would have been obliged to “disapply” the Member State’s cartel-directing law.<sup>100</sup>

Where no private or market-player action is involved, EU analysis moves seamlessly from competition law to internal market trade (free movement) law.<sup>101</sup> For example, if Italy had a law requiring retailers of burial caskets to be funeral directors licensed by Italy,<sup>102</sup> Italy would have violated the Treaty articles on free movement of goods, free movement of workers, and freedom of establishment, but not competition law.

#### H. SPECIFIC AUTHORIZATION TO CHALLENGE ANTICOMPETITIVE MEASURES

The competition laws of Tunisia, Lithuania, and Mexico authorize the competition authority to challenge anticompetitive measures.<sup>103</sup> The Mexican law gives its Competition Commission authority to challenge state measures at federal, state, and municipal government levels.<sup>104</sup> The Commission may challenge such measures in two ways: (1) by actively promoting competition and free market principles through legally binding opinions, and (2) by advocating for a favorable regulatory framework through non-binding opinions to the federal public administration entities. The Commission was empowered to issue

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therefore the fee schedule was not deprived of its character as legislation by delegation to private operators. The Court observed, however, that the Italian rules (high fees) could make it harder for out-of-state lawyers to contest the Italian market, and accordingly it held that the Italian court was obliged to consider whether the state-sanctioned fee schedule violated EU free movement rules.

<sup>99</sup> 317 U.S. 341 (1943).

<sup>100</sup> See Eleanor Fox, *State Action in Comparative Context: What If Parker v. Brown Were Italian?*, in 2003 FORDHAM COMPETITION L. INST., INTERNATIONAL ANTITRUST LAW & POLICY 463 (B. Hawk ed., 2004). In *Parker v. Brown*, the state won; under EU law, the state would have lost. In *Italian matches*, the Italian statute was “disapplied” rather than preempted because the European Court has no power to void a Member State law.

<sup>101</sup> See Joined Cases C-94/04 & C-202/04, *Cipolla v. Fazari*, 2006 E.C.R. I-11421.

<sup>102</sup> In the United States there is a conflict of circuits on the constitutionality of just such regulation of the sale of caskets. Compare *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (unconstitutional; no rational basis), with *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (constitutional).

<sup>103</sup> Tunisia, Questionnaire Response, question 1a; Lithuania, Questionnaire Response, question 5; Mexico, Questionnaire Response, questions 7b, 11.

<sup>104</sup> See Ley Federal de Competencia Económica [LFCE] [Antitrust Law], as amended, art. 24, Diario Oficial de la Federación [DO], 24 de diciembre de 1992 (Mex.). However, under the new law only non-binding opinions are authorized.

binding and non-binding opinions at the federal level, and non-binding opinions at state and municipal levels.<sup>105</sup>

Italy, in an effort to achieve a more competitive society and restore growth in the face of its deep financial crisis, adopted legislation in 2011 empowering the Italian Antitrust Authority to challenge administrative measures that distort competition.<sup>106</sup> The law, entitled Strengthening of the Competition and Market Authority, grants the Authority standing to take judicial action against “general administrative provisions, regulations or measures of any public administration that infringe on the laws protecting competition and the market.”<sup>107</sup> The Authority must issue a reasoned opinion outlining the violations, and if the government fails to comply, the Authority may file an appeal through the State Attorney.<sup>108</sup>

In 2012, the Italian Antitrust Authority issued approximately 20 opinions and filed three appeals involving resolutions of municipalities, local tenders, ministerial decrees, executive determinations, and denials of authorizations and concessions. In one case the Authority recommended that the Italian Transport Ministry revoke determinations setting minimum charges for freight forwarding services by land. When the Ministry failed to comply, the Authority filed an appeal challenging the determinations on grounds that the Ministry had fostered a price-fixing cartel among freight forwarders. The administrative court confirmed the Authority’s powers to challenge the Ministry. It emphasized the Authority’s primary and leading role in guaranteeing the effectiveness of the competition rules.<sup>109</sup>

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<sup>105</sup> Mexico, Questionnaire Response, question 11. In Mexico, a 2013 Constitutional amendment has conferred additional powers on the newly constituted, autonomous Commission. These include the power to publish guidelines for public administration entities that the entities must take into account when issuing concessions and during public procurement procedures. Ley Federal de Competencia Económica [LFCE] [Antitrust Law], as amended, art. 24, Diario Oficial de la Federación [DO], 24 de diciembre de 1992 (Mex.). However, under the new law only non-binding opinions are authorized.

In Hungary, drafts of all legislative acts that have a bearing on the responsibilities of the competition authority must be sent to the competition authority for comments. Moreover, the Hungarian competition authority may make regulatory-type recommendations in its annual report to parliament. 1996 évi LVII. Versenytorvény (The Competition Act), art. 36 (Hung.).

<sup>106</sup> See Decreto Legge 6 dicembre 2011, n. 201, art. 35 (amending Legge 10 ottobre 1990, n. 287 (It.) to add 21 bis.).

<sup>107</sup> Legge 10 ottobre 1990, n. 287 (It.), as amended, art. 21 bis.

<sup>108</sup> *Id.*

<sup>109</sup> Tribunale amministrativo regionale del Lazio, 15 marzo 2013, n.2720 (referred to the European Court of Justice a question on the compatibility of the Italian measure with, among others, TEU Article 4(3) and TFEU Article 101).

### I. A STATE ACTION DEFENSE TO PRIVATE ANTICOMPETITIVE CONDUCT

The questionnaire asked: May private parties assert a state action/involvement defense to justify anticompetitive conduct?—16 answered “yes” and 17 “no.”

States may carry out their policies by requiring or encouraging private players to act in ways that are anticompetitive. Or, private firms may desire certain restraints (railroads may want to limit truckers’ access to superhighways) and may procure state action by lobbying and political contributions. If those who suffer the anticompetitive impact were to sue the procurers of the law for their anticompetitive behavior (e.g., the conspiracy of the railroads against the truckers), the railroads may defend by asserting: The state did it.<sup>110</sup> Or, as in *Italian matches*: The state made me do it; or, the state wanted me to do it.<sup>111</sup> Or, the state gave me no choice but to do it. The state left no room for autonomous action.<sup>112</sup>

The laws of nations vary widely in the extent to which private parties may successfully defend their anticompetitive conduct by invoking state involvement. In jurisdictions such as Spain, the defense is limited to conduct that the state has ordered.<sup>113</sup> In jurisdictions including Malaysia, Italy, Lithuania, and Mauritius, the defense may apply when the state orders the conduct or requests and supervises it.<sup>114</sup> In Serbia and Turkey, the defense applies also when the state merely encourages the conduct.<sup>115</sup>

In Lithuania, the fact that an anticompetitive agreement has been induced by a state body is a mitigating circumstance. In general, the Competition

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<sup>110</sup> They may also assert their right to petition the state, which is protected by the *Noerr-Pennington* defense in the United States. See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965). Some other jurisdictions similarly allow a lobbying defense. Others allow a parallel defense: the state, not the private party, caused the harm.

<sup>111</sup> *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In an international context, see *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011). The defendant Chinese vitamin C producers admitted that they fixed prices into the United States. They asserted a foreign sovereign compulsion defense: that China required them to do it. The case went to trial on the question of China’s alleged compulsion. The jury found that the companies had not been compelled to fix prices. See Judgment, *In re Vitamin C Antitrust Litig.*, No. 06–MD–1738 (E.D.N.Y. Mar. 14, 2013); Special Verdict Form, *In re Vitamin C Antitrust Litig.*, No. 06–MD–1738 (E.D.N.Y. Mar. 14, 2013) (declining to dismiss for insufficiency of evidence) (appeal pending).

<sup>112</sup> *E.g.*, Case C-198/01, *Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato*, 2003 E.C.R. I-8055 (*Italian matches*).

<sup>113</sup> Spain, Questionnaire Response, questions 12–13.

<sup>114</sup> Malaysia, Questionnaire Response, questions 12–13; Italy, Questionnaire Response, questions 12–13; Lithuania, Questionnaire Response, questions 12–13; Mauritius, Questionnaire Response, questions 12–13.

<sup>115</sup> Serbia, Questionnaire Response, questions 12–13; Turkey, Questionnaire Response, questions 12–13.

Council exercises authority to reduce fines, which it considers case by case. Where a public authority encouraged an anticompetitive agreement, the Competition Council reduced the fine by 20 percent.<sup>116</sup> In Pakistan, the Competition Commission invoked U.S. and EU law, finding that the “tacit approval” of the securities regulator was insufficient for the Lahore and Karachi stock exchanges to avail themselves of a state compulsion defense.<sup>117</sup>

The European Union provides a narrow gateway for exoneration of private actors by reason of state action or policy. If the conduct is required by national law, it is not considered an act of the private parties. But state facilitation or encouragement of anticompetitive acts is no defense. The controlling concept is autonomy: to the extent that national law leaves room for the exercise of autonomy by the private entity, no defense applies.<sup>118</sup> Thus, where Italy fixed the price of matches and required the Italian producers to allocate quotas—which they did with bias against the outsiders—the European Court of Justice held that the producers had sufficient autonomy to merit responsibility.<sup>119</sup>

In the United States, a state action defense is available if the U.S. state has clearly articulated a policy that would replace competition with regulation and actively supervises the resulting conduct that has anticompetitive effects.<sup>120</sup> If the state has not actively supervised the conduct the private actors are not protected from liability.<sup>121</sup> Thus, even if a state *orders* anticompetitive conduct, such as “fix your rates” (where it does not actively supervise the conduct), the state cannot insulate the parties from the federal law against price fixing.

Under U.S. law immunity is accorded if the state “has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects.”<sup>122</sup> The state must “affirmatively contemplate” that the

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<sup>116</sup> Lithuania, Questionnaire Response, question 13.

<sup>117</sup> Pakistan, Questionnaire Response, question 13.

<sup>118</sup> See Case T-513/93, Consiglio Nazionale degli Spedizionieri Doganali v Comm’n, 2000 E.C.R. II-01807.

<sup>119</sup> The Italian producers had allocated the quotas so as to virtually exclude the Germans and Swedes from the Italian market. The discrimination against fellow Europeans from another Member State was not required by Italy and is a cardinal sin of EU law and policy. Case C-198/01, Consorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato, 2003 E.C.R. I-8055 (Italian matches); see also *supra* note 96 and accompanying text.

<sup>120</sup> Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum Inc., 445 U.S. 97, 105 (1980); see also Cooper & Kovacic, *supra* note 25, at 1575.

<sup>121</sup> *Midcal*, 445 U.S. at 105; Schwegmann Bros. v. Calvert Distillers, 341 U.S. 384, 388 (1951). In *North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359 (4th Cir. 2013), where a dental board intimidated non-dentists from providing teeth-whitening services, the court determined that the board could be liable as a private actor where the board was composed largely of private dentists. The Supreme Court has granted certiorari. 134 S. Ct. 1491 (Mar. 3, 2014).

<sup>122</sup> *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985).

local authority will displace competition by the delegated acts. Thus, a regional hospital authority that was granted power to acquire hospitals was not thereby granted power to undertake anticompetitive mergers. The Court said: “[S]tate-action immunity is disfavored.”<sup>123</sup> Further, the Local Government Antitrust Act of 1984<sup>124</sup> insulates local officials from damage liability for acts in the course of their official duties.

#### J. STORIES OF SUCCESS AND FRUSTRATION

The responders to the questionnaires contributed stories of success, such as SOE liability for organizing cartels (e.g., Spanish milk) and for monopolizing adjacent markets (e.g., telecoms and post); state body liability for tipping procurement bids to cronies (e.g., Lithuania); and the calling to account of provincial authorities for blocking markets and discriminating against outsiders (e.g., China and Kenya).<sup>125</sup>

Answers to the questionnaire also expressed frustrations. The authorities in both Serbia and Mexico have authority to give an opinion regarding certain measures, but with no binding effect; nor does the law require the minister to take the opinion into account.<sup>126</sup> Both Serbia and Mexico expressed regret that they did not have stronger powers.<sup>127</sup>

A second category of frustration is the *practical* limits of power. The state may be subject to the competition law in specified ways. But what happens when a competition authority challenges an act of an SOE or an entity in which the state or its “friends” are interested? The competition law careers of more than a few competition authorities have been sacrificed for their courage in challenging anticompetitive transactions against the wishes of their heads of state. Going beyond the research results of our project, we cite the story of Emilio Archila of Colombia, who as head of the Colombian Competition Commission stood fast in his opposition to the merger to monopoly of Avianca (state-owned) and ACES airlines.<sup>128</sup> The President of Colombia bypassed him as decision maker on the merger, and Archila resigned.

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<sup>123</sup> *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013).

<sup>124</sup> 15 U.S.C. §§ 34–36.

<sup>125</sup> More stories may be found in the consolidation of questionnaire responses, on file with the authors.

<sup>126</sup> Serbia, Questionnaire Response, question 18.

<sup>127</sup> Note that the Mexican Commission has received stronger powers as a result of a Constitutional amendment since the date of its answers to the questionnaire, but not with respect to opinions addressed to sister authorities. *See supra* note 105.

<sup>128</sup> ICN Curriculum Project, *Developing Countries & Competition*, YouTube (Feb. 26, 2014), [www.youtube.com/watch?v=ZBBFNty2hsk](http://www.youtube.com/watch?v=ZBBFNty2hsk).

## K. THE DATA AND THEIR SIGNIFICANCE

We summarize certain key responses in Table 4 below.

TABLE 4  
SUMMARY OF COMPETITION LAW PROVISIONS

The competition law:	Yes	No
1. covers SOEs	35	0
2. covers entities granted special or exclusive rights	25	10
3. covers public procurement: state and/or officials	13	21
4. covers state/local burdens on commerce/free movement	11	23
5. covers anticompetitive acts of state bodies*	21	14
6. provides a state action defense to private anticompetitive conduct	16	17

\* Ranging from suits against ministries performing commercial functions to abuse of administrative powers

In addition, we note that at least four responding competition authorities have been granted specific authority to challenge anticompetitive state measures or to write opinions advising government departments.<sup>129</sup> Also, we call attention to the law of the European Union (now a model for other common markets) imposing a duty on its Member States not to enact measures that make the competition law ineffective; and the law of many federal nations that preempts incompatible state and local measures.<sup>130</sup>

The data show that all of the responding jurisdictions cover some state acts, and all are sensitive to the problem of excessive state restraints and to some extent provide a home in competition law to contest them. A majority of responding jurisdictions fall within categories 1, 2, and 5 in the table above. Some fewer responding jurisdictions went further, and some quite far, in trying to tackle state abuses that block competition on the merits, especially by corrupt acts or protectionist measures (categories 3 and 4). The most far-reaching provisions are contained in the laws of developing and transitional countries, such as China, Russia, Lithuania, and Mexico, and, predictably, in the law of the common market, the European Union.

How do we make use of these observations? We undertook our study against a background of much technical assistance, cross-fertilization, and efforts at soft convergence of competition law, and the realization that the treatment of state acts and measures has been a neglected subject even though excessive state restraints can be the most significant competition problem

<sup>129</sup> See *supra* Part II.H.

<sup>130</sup> See *supra* Parts II.C. and II.G.

faced and, for developing countries, one of the most significant impediments to development.

Obtaining the data about what nations' laws provide is a first step in any project contemplating harmonization or convergence as well as agendas for technical assistance or model laws. The second step is attempting to abstract common principles, and to theorize as to what nations might regard as good or better law for themselves.

In moving forward, we take a lead from the European Union. In the European Union, the Court of Justice is frequently called upon to adopt a rule of law for the Union in an area previously occupied only by national law, e.g., the scope of legal privilege.<sup>131</sup> The Court canvasses the laws of the Member States and then uses the data as a major input into crafting an appropriate principle at EU level. It does not "count heads" to arrive at the average of what the Member States do, but, in view of what states do, the Court decides what seems fitting and wise for the Union.

In the pages that follow, the EU modality for harmonization is our *modus operandi*—not of course to decree rules for the world but to suggest possible recommended principles for nations. We proceed to contemplate formulations in view of what (we have learned from our sample) a critical mass of nations do. Our suggested formulations might be appropriate or not for any given nation, in view of its own system of governance and divisions of powers affecting the relationship between the state and the market.

The data are helpful not only in considering the reach of laws to proscribe anticompetitive state conduct but also in considering their limits, which presumably are crafted to preserve political processes and the public interest functions of the state.

### III. ANALYSIS: WHAT IS GOOD FOR NATIONS?

#### A. SETTING THE STAGE FOR NORMATIVE ANALYSIS

As we noted at the outset, the Treaty establishing the European Economic Communities (predecessor to the TFEU) called attention to the state as a major obstructor of trade and competition. It highlighted the fact that most major state obstructions were not required or even indicated by the normal sovereign functions of the state, and that permissiveness towards these obstructions threatened to defeat the entire project of a single, peaceful Europe.

As the world opened to globalization, the symbiosis between trade law (constraining state acts) and competition law (constraining business acts)

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<sup>131</sup> See Case 155/79, *AM&S Europe Ltd. v. Comm'n*, 1982 E.C.R. 1575.

emerged clearly. The confluence of the five key historical and intellectual developments discussed in Part I brought “The State” into the crosshairs of antitrust.

Yet, traditional reasons for separating private firm acts and state acts remain valid. The state by its nature is charged with acting in the public interest of its citizens. It is expected, at least in most democracies, to be politically accountable to the people. If the state acts out of bounds, the political process may constrain it; and political process defines what is “out of bounds.” Many state acts and measures, such as rent control and minimum wage laws, have anti-market by-product effects, and we have put such laws categorically beyond the bounds of this project. Can we sufficiently distinguish antitrust-relevant anticompetitive state measures from all others? The inquiry, daunting in the abstract, becomes manageable when we examine eight discrete categories of state acts and measures identified in the questionnaire answers that have already been treated as antitrust-relevant in a critical number of jurisdictions.

#### B. PRINCIPAL CATEGORIES

We examine the following eight categories as antitrust-relevant or possibly so:

- (1) Coverage of SOEs;
- (2) Enterprises granted special or exclusive rights and privileges;
- (3) Public procurement: The state as buyer; state officials as conspirators; antitrust provisions requiring due process in letting the bids;
- (4) A free movement clause for the internal market, reprehending state and local market blockage;
- (5) Abuse of administrative power;
- (6) Other anticompetitive state measures, particularly, those that facilitate anticompetitive private action,
- (7) Specific authorization of the competition authority to advocate against, submit opinions regarding, and challenge unduly anticompetitive state measures; and
- (8) Private parties’ use of state action or “no autonomous conduct” as a defense to their anticompetitive acts.

##### 1. *State-Owned Enterprises*

All antitrust laws surveyed cover SOEs. Most do so with few reservations. The question we raise here is not whether SOEs are a proper subject for anti-

trust enforcement but, rather, should they be exempted and if so to what extent?

We observe at the outset that the costs of not covering SOEs would be great, especially where many of the jurisdiction's major businesses are state-owned and where many of the SOEs are dominant firms, as in China. Immunizing these major players from antitrust scrutiny would create a gaping hole in any scheme to control anticompetitive behavior. It would also create a two-tiered marketplace that systematically disadvantages private competitors and creates barriers that new entrants may be unable to surmount. The theoretical literature supports the intuition that state-owned firms have heightened incentives to engage in anticompetitive conduct.<sup>132</sup> Dominant SOEs may barricade their principal markets and adjacent markets or at least use leverage derived from state-granted privileges to obtain significant competitive advantages such as exclusive privileges, blocking markets to competition on the merits and creating inefficiencies.<sup>133</sup>

Moreover, the economic costs (as opposed to possible political costs) of antitrust coverage are not great. They lie mainly in limiting the flexibility of the state in carrying out state policies through its SOEs. Breathing space of the state can be especially important in strategic or vital industries such as defense and finance. There is danger, however, in overstating the need for insulating SOEs from antitrust in order to enable them to carry out their duties to the state, and also in expanding the list of "strategic industries" that may be free of antitrust, as China may have done.<sup>134</sup> SOEs in dominant positions tend to use those positions to block competition and innovation, and experience has shown that antitrust enforcement against these firms does not harm legitimate sovereign efforts. European Union law offers the richest examples, in electricity, telecoms, and the post.<sup>135</sup> The political costs and political feasibility are contextual to the jurisdiction.

If there is any near consensus principle that emerges from our study, it is that competition law normally covers state enterprises to the extent that they are market actors. Exceptions may be handled under provisions akin to the

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<sup>132</sup> See David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479, 479–80 (2003).

<sup>133</sup> They also may be beneficiaries of cheap loans and free rents. See UNIRULE REPORT, *supra* note 89. These are state aids, and state aids may also distort competition, but they are not a subject of this paper.

<sup>134</sup> See China's AML Article 7, giving special regard to "industries controlled by the State-owned economy and concerning the lifeline of . . . national security or the industries implementing exclusive operation and sales according to law . . . ."

<sup>135</sup> See, e.g., Case C-280/08P, *Deutsche Telekom AG v. Comm'n*, 2010 E.C.R. I-09555; Joined Cases C-147/97 & 148/97, *Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH*, 2000 E.C.R. I-825; Case C-320/91, *Régie des Postes v. Corbeau*, 1993 E.C.R. I-2533.

European Union Treaty, TFEU Article 106, treated immediately below, exempting acts necessary or important to carry out special responsibilities and thus allowing justification, and special treatment in narrowly drawn areas such as defense.

## 2. *Enterprises Granted Special or Exclusive Rights or Privileges*

The European TFEU Article 106(2), which is taken as the model in many nations, subjects undertakings entrusted with services of general economic interest to the competition laws except to the extent that liability would obstruct performance of their duties. Most of the cases in this area involve state grants of unnecessarily broad privileges that cause blockage of markets in which competition is feasible. For example, an entity required to perform certain public services (often a state-owned entity) is granted exclusive rights to serve the market and it keeps would-be competitors from operating in “its” domain even while it does not satisfy demand; or it raises price and limits output by strategies that put costs on competitors.

Should firms with such state-granted exclusive rights be subject to competition law, and if so should a reservation be broad or narrow? The economic costs of a broad exclusion can be high. The privileged firm can block whole markets, as EU case examples show. Antitrust coverage is particularly important in states—including many developing countries—that freely grant special and exclusive rights and in states whose markets are so pervasively blocked by privilege and special favor that the scope for economic opportunity is narrow and the danger of overpricing is great.

The public interest cost of antitrust inclusion is the prospect that entities entrusted with general services will not carry out their functions effectively and efficiently. This possibility is limited by the solution built into the framework of Europe’s Article 106. The undertaking is free of antitrust where freedom is necessary or important to carry out the state-delegated functions.

The law can be tailored to the context and must be tailored to the scope of political possibility. A jurisdiction that fears impairing the performance of special public interest responsibilities more than impairing the market might define the space for the privileged entity more broadly and put the burden on the antitrust enforcer to show that antitrust duties in the particular case (e.g., not unreasonably to exclude competitors) will not impair the firm’s obligations to the state. A jurisdiction (such as the EU) that fears market impairment more than undermining special duties to the state can assign the burden of justification to the presumptive antitrust violator. Nuances can depend on the conduct challenged. For example, if the privileged firm blatantly uses leverage to monopolize a neighboring competitive market, the monopolist might be called upon to demonstrate how its freedom to engage in such conduct is

important to execution of state-assigned duties. But if the alleged offense is merely charging “discriminatory” (higher) prices for serving a sparsely populated area, the burden might and should remain on the prosecutor.

Also relevant is the scope of the nation’s abuse of dominance statute. The concern that antitrust exposure will chill the performance of the mandated public duties by the firm granted special rights and responsibilities will be greater in jurisdictions in which dominant firm duties and offenses are generously found—e.g., where the competition law imposes duties not to trample on smaller firms. This concern would all but disappear in jurisdictions such as the United States, in which affirmative antitrust duties even by dominant firms are rare and for the most part involve conduct that would not make sense as a way to serve the market—or a public interest.

Inclusion, not exclusion, tends to be the consensus standard today, with derogations tailored to the context.

### 3. *Public Procurement*

Public procurement entails two quite different competition problems: (1) State officials conspire with bidders to throw a bid, and (2) A state body or official writes the procurement rules without providing for a competitive bidding process or issues requests to tender whose specifications can be filled only by favored firms.

In the first case a state official, probably bribed, has joined a bidding conspiracy that violates the antitrust laws and inevitably drives up the cost of goods, which are usually critical goods such as cement for highways and housing. We consider below whether the official should be accountable under antitrust law as well as under applicable criminal laws. In the second case, we consider whether a state body, and possibly officials, should be accountable in antitrust for creating loopholes into which corruption predictably rushes (and drives up prices and suppresses incentives to innovate) and for more directly corrupt activity in designing specifications “to order” for a friend.<sup>136</sup>

Public procurement is typically the subject of special laws, as is bribery. Bid rigging to obtain procurement contracts quite naturally falls into both antitrust and general criminal prohibitions. Antitrust officials and public prosecutors often work hand-in-hand. Should competition law (also) provide: (1) liability for complicit state officials, and (2) accountability of state bodies for manipulated specifications?

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<sup>136</sup> The answers of Lithuania and Spain give examples of violations of their competition laws based on preferences or lack of competitive process in public procurement. *See* Lithuania, Questionnaire Response, question 17; Spain, Questionnaire Response, question 17.

The benefits of antitrust coverage of complicit state officers can be significant and coverage of the official natural. It can be natural because (and if) the officer is part of a unified conspiracy and is a necessary link to its success. The narrative of the conspiracy may importantly involve him or her. Discovery into and evidence concerning his or her acts and statements are integral to the case. Indeed, if the corrupt agreement is between only one market player and the official, proof of the official's complicity would be a necessary element for proof of agreement.

Moreover, the threat of antitrust liability may provide the decisive incentive to officials not to join illegal conspiracies and grease their wheels. The fact that a defendant is not a participant in the relevant market does not preclude liability.<sup>137</sup> The literature shows that deterrence is a complicated enterprise and incentives to comply with the law are generally insufficient. Individuals typically discount the chances of getting caught, and when they do get caught the penalties—in fines alone—are often less than their ill-gotten gains.<sup>138</sup>

In some jurisdictions such as the European Union, the competition law covers only undertakings; by definition undertakings must be engaged in business, and state officials are not engaged in business. While the EU Treaty limitation could be an obstacle in the European Union and some nations, the statutory wording is not an obstacle in many others. Moreover, nations' legislatures might decide to close the loophole in their law.

While the benefits of including corrupt state officials as possible antitrust violators are great, the economic costs of doing so are limited. The officer would be chilled only from perpetrating a crime. Damage awards and fines can be coordinated with procurement or bribery law enforcement to avoid double punishment. The biggest costs are those costs of overlapping jurisdiction with the office of the prosecutor and the possible difficulty of distinguish-

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<sup>137</sup> "Outsiders" not doing business in the market can violate competition laws by aiding and abetting illegal conspiracies. A management consulting firm in Switzerland did just that for its clients and was fined by the EU. See Case T-99/04, *AC-Treuhand AG v. Comm'n*, 2008 E.C.R. II-01501. The Spanish competition authority applied the *Treuhand* judgment against the Council of Agriculture of the Government of Andalusia (Department of Agriculture) for facilitating a price agreement by the associations of grape and wine producers, and fined the associations, although not the Council. See Resolución, *Productores de Uva y Mosto de Jerez*, S/0167/09 (Oct. 6, 2011), available at [www.cnmc.es/desktopmodules/buscadorexpedientes/mostrarfichero.aspx?dueno=1&codigoMetadato=86308](http://www.cnmc.es/desktopmodules/buscadorexpedientes/mostrarfichero.aspx?dueno=1&codigoMetadato=86308). The Spanish appellate court affirmed that the agreements were contrary to the Spanish Competition Act and TFEU Article 101, but annulled the fine on the basis of good faith and legitimate expectations. See Sentencia, *Productores de Uva y Mosto de Jerez*, S/0167/09 (Mar. 21, 2013), available at [www.cnmc.es/desktopmodules/buscadorexpedientes/mostrarfichero.aspx?dueno=1&codigoMetadato=381604](http://www.cnmc.es/desktopmodules/buscadorexpedientes/mostrarfichero.aspx?dueno=1&codigoMetadato=381604).

<sup>138</sup> See John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 *CARDOZO L. REV.* 427, 468 (2012); Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 *INDIANA L.J.* 1527, 1567–69 (2011).

ing between “innocent” and criminal facilitation.<sup>139</sup> The latter problem can be solved by clarity in the law, drawing the line between mere bad judgment in choosing the most qualified bidder (not a violation), and accepting payoffs to throw a bid. By this standard, ambiguous cases, such as having accepted campaign contributions from a credible bidder who wins the bid, would not warrant liability.

Should competition law be applicable to procurement *measures* that fail to provide a competitive process or that manipulate the requirements so that the most meritorious bidder does not win? Procurement laws of many if not most nations purport to safeguard fair process and to ban manipulation of standards for favoritism. In the case of procurement measures, antitrust may be a second string in the bow.

The main cost of antitrust coverage is that the antitrust authority gets another significant duty and one in a realm that is not necessarily the closest neighbor to antitrust. This cost—in money and focus—is not insubstantial. We speculate that the nations that have adopted antitrust provisions to cover public procurement practices have identified corruption in procurement as an overwhelming problem, not sufficiently handled by the prosecutor, that undermines the integrity of the market system and that causes significant consumer harm, and that they welcome this additional tool to help stem a poisonous tide.<sup>140</sup>

Antitrust coverage would be especially important where the offenses are rampant and the public prosecutor cannot be counted on to do the job, whether for reasons of integrity, competency, or overburden. But these jurisdictions might be exactly the jurisdictions with extremely scarce resources in which the competition authority would struggle to handle yet another task. The wisdom of inclusion must depend entirely on context.

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<sup>139</sup> See *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991). A new entrant in the billboard market was excluded when its monopolist rival procured city zoning ordinances excluding new entrants through lobbying and as a result of close relations with city officials. When sued, the defendants pleaded state action as a defense. The plaintiff argued that there is a conspiracy exception when the government actions are not in the public interest. The Court rejected this claim, reasoning that virtually all government actions could be classified as not in the public interest, and that inquiring whether an official believed his or her action to be in the public interest would involve the Court in “the sort of deconstruction of the governmental process and probing of the official ‘intent’ that we have consistently sought to avoid.” *Id.* at 377.

<sup>140</sup> The OECD’s 2014 Global Forum on Competition highlighted the links between fighting corruption and promoting competition. It was proposed that competition authorities are well placed to integrate corruption issues. For Global Forum documents, see *Fighting Corruption and Promoting Competition*, OECD, [www.oecd.org/daf/competition/fighting-corruption-and-promoting-competition.htm](http://www.oecd.org/daf/competition/fighting-corruption-and-promoting-competition.htm).

#### 4. *A Free Movement Clause*

As we have seen, several nations, including China, Mexico, and countries in Central and Eastern Europe, have a free movement clause within their competition laws.<sup>141</sup> The laws prohibit provinces from discriminating against or blockading goods coming from within the nation but outside of the province.

In the absence of a constitutional free movement clause, the benefits of such measures are potentially large. In some countries, competition law might be the best available home for this mandate. Indeed, competition law has seemed a natural fit in the transitional economies such as Russia and Central and Eastern Europe, where rampant local parochial measures threatened to undermine the fledging market reforms. We might worry about the competition authority's diversion from priorities. But if there is no constitutional commerce clause and no better home for the function, cleansing the market of border obstructions *is* a priority for competition policy.

#### 5. *Abuse of Administrative Power*

As discussed above, the competition laws of several jurisdictions cover abuse of administrative power. On its face, China's AML appears to do so most robustly. Russian and other Central and Eastern European competition laws typically prohibit abuse of administrative power.<sup>142</sup>

There are benefits to placing administrative body abuses that harm the market within the purview of competition law and under the eyes of the watchdog that cares the most about the virtues of competition.<sup>143</sup> The benefits may be suggested by the enormity of the problem. Administrative abuses by Chinese SOEs have been detailed in the *Unirule Report*,<sup>144</sup> which shows the extent to which administrative authorities grant monopoly powers to themselves and their friends, and the extent to which CEOs of SOEs have power at the level of ministers and commit economic offenses that harm the market. The provisions on administrative monopolies in China's AML, if applied robustly, could greatly enhance the competitive environment. But at this stage, enforcement of the AML is young and the provisions are complex, and there is little transparency as to whether and how these provisions are enforced.<sup>145</sup>

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<sup>141</sup> Many other jurisdictions have such a clause in their constitutions or constitutional treaties. These include the United States, the European Union, Brazil, and Australia.

<sup>142</sup> For the Russian statutory provisions, see Federal Law of the Russian Federation on Protection of Competition, July 16, 2004, No. 135, arts. 15–16, as amended.

<sup>143</sup> See Boner, *supra* note 24, 81–82 (stating that competition agencies—compared with all government agencies—are least subject to capture because they do not have a defined, repeat constituency (other than the antitrust bar)).

<sup>144</sup> UNIRULE REPORT, *supra* note 89.

<sup>145</sup> The “superior agencies or departments” are charged with enforcing the law. See AML art. 51.

There are five reasons against such coverage: (1) Enforcement may have little chance to succeed, and thus it may entail investment of resources in projects with a low chance of meaningful outcomes; (2) the agency (if it has enforcement powers) may be distracted from more central competition law priorities; (3) the state may retaliate by, for example, limiting the competition agency's jurisdiction, power, or budget; (4) there may be a danger that the competition authority will over-define the category of administrative abuse and thus chill normal governmental processes; and (5) there may be a better home in the law for checking abuses of administrative powers.

The net virtues of such a provision are entirely dependent on the context. One needs to know if there is a better placement for this provision of law and to examine the added value from competition law coverage, including the practical enforceability of the provision. Professor Huang Yong makes a convincing case for the pragmatic importance of such a provision in the Chinese AML.<sup>146</sup>

#### 6. *Other Anticompetitive State Measures*

For other anticompetitive state measures, we note the European Union law requiring the Member States to ensure fulfillment of the Union's tasks, including the competition mandate, and not to jeopardize the attainment of these tasks, and prohibiting the Member States from adopting measures that grant special privileges that empower the grantee to abuse dominance, unless justified. These provisions are especially fitting for a common market where the competitive harm stretches beyond the offending state of a common market. They are appropriate also for a federal system with supremacy of federal law. In the United States, the doctrine most akin to Europe's TEU Article 4(3)/TFEU Article 106(1) is preemption by federal law of inconsistent state law with interstate effects. Although the U.S. Supreme Court was reluctant to apply the doctrine for more than half a century, as reflected by the famous case of *Parker v. Brown*,<sup>147</sup> recent jurisprudence suggests a greater appetite for preemption.<sup>148</sup> The United States has no near counterpart to TFEU Article 106(1).

What are the benefits of a little TFEU Article 106(1) and TEU Article 4(3), or a robust preemption doctrine? We address this question particularly for

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<sup>146</sup> Huang, *supra* note 85, at 122.

<sup>147</sup> 317 U.S. 341 (1943); *see also* *Exxon Corp. v. Governor*, 437 U.S. 117, 128–29 (1978) (Maryland law that prohibited producers and refiners of gasoline from operating retail stores in the state held not unconstitutional).

<sup>148</sup> Recently, the Supreme Court has used the preemption doctrine aggressively. *See, e.g.*, *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075 (2011) (holding that state design defect claims against vaccine manufacturers are preempted by the National Childhood Vaccine Injury Act). The doctrine of preemption, when applicable, can go further than the concept of disapplication, for it does not depend on the statute's facilitating private anticompetitive behavior.

common markets and systems that feature federal law supremacy, for other systems have made political choices regarding state and local autonomy that may be in tension with doctrines that could override state and local laws.

The benefits lie in coherence of law in the direction of efficient markets, consumer welfare, and competitiveness. These benefits are potentially great. The ammunition provided by a strong preemption or disapplication doctrine can be powerful, especially when the anticompetitive conduct facilitated by the state measure raises the price of staples of life. The primary costs are the loss of state and local government autonomy to pursue a non-market public interest, and intrusion into the political process, and the difficulty of defining the category of measures condemned. The U.S. case of *Parker v. Brown* presents a useful fact situation for testing the scope and boundaries of preemption or disapplication (the EU concept). *Parker* involved a raisin cartel under the aegis of the California state government, which was worried about a crisis of oversupply of California raisins. Some 95 percent of the California raisins were sold in interstate or foreign commerce, meaning that California not only chose the most costly anticompetitive vehicle to address its problem (a cartel essentially run by competitors) but did not pay for it; it shifted the costs to consumers outside of California.<sup>149</sup> California thus commandeered private anticompetitive action (although probably more accurately, the raisin growers commandeered government action), thus deeply undermining the nation's competition law. In the similar *Italian matches* case in the European Union, Italy was required by EU law to disapply its law that ordered private action to set quotas for the sale of matches in Italy.<sup>150</sup>

The principal cost of this competition coverage can be minimized by adopting the following limitations to the law: (1) Limit the category of preempted and superseded anticompetitive measures to frontal assaults on competition by measures that impose significant anticompetitive externalities on the larger community; and (2) limit the law covering state grants of exclusive privileges to those ostensibly in excess of needs to counteract any market failure or serve any credible public interest.<sup>151</sup>

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<sup>149</sup> See Cooper & Kovacic, *supra* note 25, at 1570 (arguing that the Court's holding in *Parker* must be seen in historical context: "Once the federal judiciary got out of the business of second-guessing the wisdom of states' economic regulation under substantive due process analysis [during the *Lochner* era], it could hardly reopen this line of attack under the guise of antitrust.")

<sup>150</sup> Case C-198/01, *Conorzio Industrie Fiammiferi v. Autorità Garante della Concorrenza e del Mercato*, 2003 E.C.R. I-8055 (*Italian matches*).

<sup>151</sup> See Boner, *supra* note 24, at 80–82. For a discussion of anticompetitive spillovers, see, for example, Frank H. Easterbook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997).

7. *Specific Authorization of the Competition Authority to Advocate Against, Submit Opinions Regarding, and Challenge Unduly Anticompetitive Government Measures*

Specific authorization of advocacy and authorization to submit opinions to sister authorities seems to have virtually all benefit and virtually no cost, unless as a result the competition authority ignores more important priorities. Advocacy would expose unreasonably anticompetitive state acts, which could then be addressed through the political process. Opinions addressed to regulators may bring about less intrusive regulation. Powers to challenge or trigger challenge of anticompetitive measures that may be void under constitutions or other laws likewise have the benefit of exposing and possibly eliminating excessively anticompetitive state measures.

In the case of a *duty* to make such challenges, the resource burden would be greater. An important question is whether there is a better, more effective, and reliable source for such challenges to anticompetitive measures. If so, the extra burden on the competition authority may be greater than the benefits.

8. *A State Action or No-Autonomy Defense to Charges of Private Anticompetitive Conduct*

The antitrust laws of a number of nations include a state action defense, allowing space for a state to enlist private parties to carry out a state mission and providing a fairness shield for private parties caught between conflicting policies or commands. The aspect of this defense of interest in this article is: What space does the state need or should it have to carry out state policies through the instrument of private actors? After addressing this primary question, we turn to fairness to the private actor.<sup>152</sup>

In terms of the defense, which if allowed would validate the state action, we might frame the principal choice in broad terms: Should private parties, acting anticompetitively, be accorded a broad or a narrow state action defense? Under a broad defense, private parties could defend their anticompetitive behavior if a state policy merely encouraged it. Under a narrow defense

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<sup>152</sup> The U.S. *Midcal* case illustrates the point that the main and first question should involve the proper relationship of the state law to the federal system. See *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980). The State of California had ordered wine and liquor wholesalers to post resale prices, and ordered retailers to obey them. A deliberately offending discounter sued for an injunction against enforcement of the statute, arguing that the statute was void because resale price maintenance was (then) illegal. The Supreme Court affirmed the grant of an injunction against enforcement of the statute. It decreed that the statute did not grant the wholesalers antitrust immunity because they, the wholesalers, had set the price; the state neither set nor supervised it. *Id.* at 105–06. If the Court had first tackled the fairness question and declared that fairness to those who comply with state orders requires tolerating the anticompetitive law, a progressive rule would not have emerged.

private parties would be responsible for their behavior unless the state specifically ordered it or the state clearly expressed a policy that depended upon the anticompetitive behavior and closely supervised the private anticompetitive acts. (The latter conditions are akin to those required by U.S. law.) The European Union has a very narrow defense: the private party must have had no autonomy to act competitively.

A yet narrower defense could in theory require one more condition—transparency. Let us suppose that the offense was price fixing. Contemporaneously with its agreeing to fix prices the implicated firm could be required to make a public disclosure: “I have just agreed to fix the price of *x*. The state required me to do it.” This condition would not only provide transparency but would smoke out latter-day contrived contentions: “The state made me do it.”

A narrow defense favors more market, less state. A broad defense favors more state, less market. A broad defense has significant costs. It errs on the side of vested interests. It would give private firms generous leeway to act anticompetitively for their private benefit, which may be far beyond what the state contemplated and not remotely needed by the state for its public objectives, as the uranium firms attempted to do in carrying out their cartel in the late 1970s.<sup>153</sup> But what costs might a narrow defense impose upon state autonomy? Might it chill the adoption of programs that are (according to the state) good for the people and that the state cannot effectively execute by itself? China made such a claim in an international context in litigation in a U.S. court charging Chinese vitamin C makers with price fixing of vitamin C for sale into the United States. China argued that the pharmaceutical trade associations—which became the forum for the private price fixing—were infused with a governmental character, and that China ordered the price fixing of vitamin C in order to shield its firms from dumping claims and to ease them into a market economy.<sup>154</sup>

We prefer a narrow defense. The state can almost always carry out its desired state policy efficiently without enlisting private firms in otherwise illegal conduct, and the gains from a broad defense are almost always private.

We now turn to fairness. If a defendant firm followed the policy of its state and could not have known that it was doing wrong, there would be a fairness

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<sup>153</sup> See *United Nuclear Corp. v. Gen. Atomic Corp.*, 629 P.2d 231, 259 (N.M. 1980); see also EARLE GRAY, *THE GREAT URANIUM CARTEL* (1982).

<sup>154</sup> See Brief for Amicus Curiae Ministry of Commerce of the People’s Republic of China in Support of the Defendants-Appellants, *In re Vitamin C Antitrust Litigation*, No. 13-4791-cv (2d Cir. Apr. 14, 2014). The Chinese defendants lost their claim of sovereign compulsion in the district court; an appeal is pending to the Second Circuit. See *supra* note 111. Had China ordered the price fixing, as it claims to have done, it may have violated its obligations to the WTO. See Eleanor Fox & Merit Janow, *China, the WTO, and State Sponsored Export Cartels: Where Trade and Competition Ought to Meet*, *CONCURRENCES*, No. 4-2012, at 5.

concern. That situation will be rare. If unfairness would occur—e.g., treble damages liability for following an apparent command of the state—it could normally be addressed in the remedy. The court could issue an injunction against future price fixing, and perhaps (if allowed by law) could limit damages to the amount of the price fixers' windfall profits. The needs of the state, not the fairness claims of defendants, would lead the search for a wise rule.

### C. CONCLUSIONS: WHAT IS GOOD FOR NATIONS?

We have examined the importance of limiting exclusions from competition law and of endorsing or extending coverage of the law to certain state anticompetitive conduct and measures. Our least controversial conclusions relate to exclusions and immunities, namely:

1. Competition laws should apply to SOEs, in law and in fact; derogations should be narrow.
2. Competition laws should apply to state officials who join and facilitate illegal private conspiracies and bid-rigging rings.
3. Competition laws should apply to enterprises with exclusive privileges and special obligations, except as necessary to carry out a public mandate. EU law is a guide to the scope of the “public mandate” defense.
4. A state action or no-autonomy defense to charges of private anticompetitive conduct should be narrowly limited.

The next categories that we derive from the competition laws of the responding jurisdictions involve extensions beyond business-focused antitrust. These provisions can be important in completing the circle of good competition policy, although some might have a better home than competition law. There are two broad categories. The first is composed of provisions giving the competition authority tools to challenge state and local measures, and power to deliver opinions to other bodies of government on anticompetitive aspects of proposed or existing laws and regulations. Empowering provisions of this sort are useful options in a competition law. The second is composed of state measures that may violate the competition law itself. This second prong is a wide subject that touches four categories treated above: administrative monopoly, procurement processes, measures that impair free movement, and measures that empower market actors to harm competition.

For the last category—measures that empower market actors to harm competition—EU competition law is a useful guide. The relevant provisions are TFEU Articles 106(1)/102 for public enterprises and enterprises granted special or exclusive rights, and Articles TEU 4/TFEU 101 and 102 for laws that produce cartels or abuses of dominance. Requiring the state not to enact such laws, and bringing the offending measures by the state under the wing of antitrust (if only to void or disapply the measures) is a wise option. It is an

important option in a common market when the anticompetitive laws impose costs on the community beyond the borders of the offending state, and in a federal system that includes a principle of federal supremacy.<sup>155</sup>

The three other provisions are: a free movement clause, an administrative monopoly clause, and clauses requiring unbiased procurement procedures. The wisdom of incorporating any or all of these provisions into a competition law regime depends entirely on context. Such provisions have been included in competition laws where competition law is the best home and the offending measures critically undermine market reforms.

It is doubtful that these three provisions should be listed as options in a model law on competition, although they might be noted as important in their own right and certainly as important flanking provisions to protect the market system.

#### IV. RECOMMENDATION FOR CONVERGENCE ON CONSENSUS PRINCIPLES

In this world with more than 130 competition law jurisdictions, the nurturing of common norms is an essential step in the process of nudging the world toward greater economic coherence. Projects for convergence and for development of shared norms in competition law have thus far ignored the critical area of the state, the market, and the scope of competition law to reach anticompetitive acts of the state. This article addresses the category.

In that spirit, we propose six principles to be debated and possibly adopted as best practices or recommended principles, perhaps under the aegis of the ICN with the collaboration of the OECD and UNCTAD. The first four will be recognized as those we have just identified as least controversial, although they are not without controversy. We repeat them for convenience, and add two more. All recommendations are subject to compatibility with the political system of the nation and its state/market balance.

1. Competition laws should apply to SOEs, in law and in fact. Derogations should be narrow.
2. Competition laws should apply to state officials who join and facilitate illegal private conspiracies and bid-rigging rings.
3. Competition laws should apply to enterprises with exclusive privileges and special obligations, except as necessary to carry out a public mandate. EU law is a guide to the scope of the “public mandate” defense.
4. A state action or no-autonomy defense to charges of private anticompetitive conduct should be narrowly limited.

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<sup>155</sup> In many systems, doctrines of preemption and free movement (prohibiting significant burdens on internal market commerce) fill this need.

5. Federal systems with principles of federal supremacy should consider robust doctrines of preemption of excessively and unnecessarily anticompetitive state measures by federal competition law where the measure is incompatible with the competition law.
6. In common markets, the law should integrate free movement, state restraint and competition principles along lines drawn by the European Union.

#### V. CONCLUSION

Our study of the extent to which the competition laws of nations cover anticompetitive state and local acts reveals strong patterns across jurisdictions. The competition laws of all of the respondents covered state-owned enterprises. Most had few exceptions. Many competition laws condemn some anticompetitive state and local acts and measures to prevent state and local governments from undermining the competition systems for parochial or protectionist ends.

Our study of the various laws confirms the shift in the world from *anti-trust* to a more copious and affirmative pro-competition policy, and the growing consciousness in the world of the market harm imposed by unjustified state restraints. Indeed, particularly in developing and transitional countries, restraints in the public channel easily overwhelm restraints in the private channel.<sup>156</sup> To the extent that good competition law can be developed with a sharper eye on the public channel, this should be a priority project.

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<sup>156</sup> See Muris, *supra* note 25, at 170.

## APPENDIX A

LIST OF JURISDICTIONS RESPONDING TO THE QUESTIONNAIRE,  
AND YEAR OF ENACTMENT OF THE FIRST MODERN  
COMPETITION LAW

Australia (1974)	Malaysia (2010)
Barbados (2002)	Mauritius (2007)
Brazil (1994)	Mexico (1992)
China (2007)	Pakistan (2010)
European Union (1957)	Peru (1991)
France (2008)	Poland (1990)
Greece (1977)	Russia (1992)
Guyana (2006)	Serbia (2005)
Hong Kong (2012)	Seychelles (2009)
Hungary (1990)	Singapore (2004)
India (2002)	Spain (2007)
Italy (1990)	Sweden (1993)
Jamaica (1993)	Switzerland (1995)
Japan (1947/2005)	Trinidad and Tobago (2006)
Kazakhstan (2001)	Tunisia (1991)
Kenya (2010)	Turkey (1994)
Korea (1980)	United States (1890)
Lithuania (1999)	

## APPENDIX B

## QUESTIONNAIRE FOR THE RESEARCH PROJECT

UNCTAD PROJECT ON COMPETITION LAW AND THE STATE:  
ENFORCEMENT OF THE COMPETITION LAW AGAINST  
STATE AND HYBRID ACTS

This research project on competition law and the state is undertaken by independent researchers, namely, Eleanor Fox of New York University School of Law, Deborah Healey of the University of New South Wales Faculty of Law, Michal Gal of University of Haifa Faculty of Law, Kusha Haraksingh of the University of the West Indies, Mor Bakhoum of Max Planck Institute, Munich, and Ebru Gökçe of Competition and Consumer Policies Branch of UNCTAD. The objective of this project is to examine the extent to which competition laws cover anticompetitive acts and measures of and involving states and state-owned entities (SOEs) and to consider model language for competition law in that regard.

This research project will be carried out within the **Research Partnership Platform**<sup>157</sup> (**RPP**) created by UNCTAD in 2010 in consideration of the important role of research and policy analysis in the development of appropriate policies and legislation on competition. RPP is an UNCTAD initiative that brings together independent researchers from academia, research institutions, competition authorities, business and civil society where they can interact with each other, undertake joint research projects with UNCTAD, and exchange ideas on the issues and challenges faced in the area of competition law enforcement. The role of UNCTAD is to facilitate and contribute to these activities undertaken by researchers.

Below you will find a questionnaire prepared by this Research Group (named above), which seeks inputs from all competition authorities around the world. Please note that this questionnaire is independent from the preparation of documentation for the Intergovernmental Group of Experts (IGE) and is *not* intended for the collection of contributions for that purpose. The views expressed in the research paper or publication to be produced as a result of this project are those of the authors and do not necessarily reflect the views of the UNCTAD Secretariat.

The researchers and UNCTAD will be grateful for your answers to this questionnaire. Please provide your answers by email by **December 30, 2011** [later extended] to *eleanor.fox@nyu.edu*, *d.healey@unsw.edu.au*, and *ebru.gokce@unctad.org*.

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<sup>157</sup> [www.unctad.org/Templates/Page.asp?intItemID=5520&lang=1](http://www.unctad.org/Templates/Page.asp?intItemID=5520&lang=1).

**PRELIMINARY DEFINITION AND INSTRUCTIONS:**

“State”, when used herein, includes local government and state and local government officials.

“State-owned entities” (SOEs), when used herein, refers to state-owned entities and entities in which the state has a financial interest.

As for each category in which the state or a state agency or entity may be held liable or accountable for an offense, please state what remedies can be imposed.

If the provision inquired about (e.g., coverage of SOEs) is in your statute, please attach or cite the provision. If the provision is in case law, please cite a leading case or two and provide a very short description.

Should the space provided for the answers not suffice, feel free to add additional lines or add additional pages to your answers.

**I. Anticompetitive Acts by State or State-Privileged Entities  
Operating on the Market**

1a. Does your competition statute cover state-owned entities? For example, is the state a “person” or “undertaking” capable of violating the competition law?

yes     no

1b. If applicable, how does your competition statute distinguish between state-owned entities that are covered by your competition law, and those that are not covered?

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2. Are there exceptions from the statutory coverage of state-owned entities (see 1a); e.g., as in the EU, undertakings entrusted with services of general economic interest? Please specify scope of exceptions.

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3. If the coverage or qualifications are not in your statute but in your case law, please specify.

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4a. If you answered yes to 1a, in practice is the competition law enforced against the state or SOE?

yes     no

4b. If yes, is the law applied equally to state and non-state actors (subject to any specific exceptions or defenses)?

yes     no

If not, please explain. \_\_\_\_\_

5a. Does your statute cover, as possible violators, entities to which the state has granted special or exclusive rights or privileges?

yes     no

If yes, specify any qualification or defense in the statute. \_\_\_\_\_

5b. If the above is provided by case law instead of or in addition to the statute, please specify.

**II. Anticompetitive Acts by State Administrative Authorities**

6. Does your competition law prohibit certain anticompetitive acts of state bodies such as administrative authorities?

yes     no

If yes, please explain. \_\_\_\_\_

Is the prohibition regularly enforced?  yes  no

### III. Procurement, Bidding and Corruption

7. Does your competition law apply against the state and/or officials of the state who are complicit in bidding rings, preferences or other anticompetitive corruption in the awarding of state contracts?

yes  no

7a. If yes, is the competition law in fact so applied?  yes  no

7b. Can and does the competition authority work with the public prosecutor in cases of procurement fraud and corruption that result in overcharging the state for inputs or underpaying the state for goods or services, or keeping outsiders out?

yes  no Explain. \_\_\_\_\_

7c. Does your law governing procurement by the state require transparency to assure that requests for bids are written in an appropriately open way, that the best bid wins, and that the money paid goes to the project?

yes  no What are those requirements? \_\_\_\_\_

Are violations regularly prosecuted?  yes  no

8. Does your competition law cover corruption in any other way?

yes  no

If yes, please explain. \_\_\_\_\_

### IV. State Measures

9a. Does your competition law proscribe or limit any state or local government laws, ordinances or other measures; for example:

1. measures that limit the entry of goods from other localities  yes  no

2. measures that otherwise discriminate against outsiders or block markets

yes  no

3. procurement requests-to-bid with discriminatory or anticompetitive specifications

yes  no

4. measures nationalizing/monopolizing competitive markets?  yes  no

5. other \_\_\_\_\_

Are these prohibitions regularly enforced?  yes  no

If so, by what means? (e.g., by your competition authority or some other body? by injunction?)

9b. Does your country have laws other than competition law—such as internal trade or commerce laws—that proscribe or limit any state or local government laws, ordinances or other measures; for example:

1. measures that limit the entry of goods from other localities  yes  no

2. measures that otherwise discriminate against outsiders or block markets

yes  no

3. procurement requests-to-bid with discriminatory or anticompetitive specifications  
 yes  no

4. measures nationalizing/monopolizing competitive markets?  yes  no

5. other \_\_\_\_\_

Are these prohibitions regularly enforced?  yes  no

If so, by what means? (e.g., by your competition authority or some other body? by injunction?)

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10. If your country is a member of a customs union or other free trade area, does the law of the customs union or FTA proscribe state measures that are (undue) barriers to the free flow of goods or services from other states?  yes  no

Does it otherwise limit abuses or undue restraints by the states?  yes  no

Are these prohibitions regularly enforced?  yes  no

#### IVa. State Aids

11. Does your competition law control state aids?  yes  no

If yes, how? (E.g., does it prohibit state aids unless approved?) \_\_\_\_\_

#### V. Shielding Private Anticompetitive Acts or Conspiracies

12. Under your competition law, may private parties assert state involvement as a defense; e.g., that a government body or authority encouraged or ordered the action or agreement (sometimes called "a state action defense") in appropriate cases?

yes  no

13. If yes, when is that defense available? Is it available when the state has ordered , requested and supervised , merely encouraged  the conduct or agreement? Other. \_\_\_\_\_

Explain. \_\_\_\_\_

14. Is your state involved in decisions of trade and professional associations?

yes  no

If so, are the trade and/or professional associations and their members immune from your law for acts or decisions taken when the state is involved?

yes  no

If yes, what level of state involvement is required for immunity?

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15. Are boards (e.g., dairy, trucking, electronics) comprised of private industry members and charged by the state with (e.g.) setting standards and disciplining violators, immune from your competition law?

yes  no

If yes, explain requirements for immunity.

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16. Are activities lobbying the state immune from your competition law?

yes  no

If yes, explain requirements for immunity.

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### **VI. Your Experience**

17. Success stories: Do you have a success story in which your competition authority has applied the competition law to catch serious state or state-related restraints? If so, please share it with us.

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18. Frustrations: Do you have frustrations in not being able to catch certain state or state-related restraints by application of your competition law, whereas, with a change in the competition law, you could do so? If so, please identify the type of restraint and the change that could correct the situation.

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Thank you very much for replying to this questionnaire.

The Research Group on State Restraints

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Mor Bakhoun

Ebru Gökçe

28 November 2011