UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD Research Partnership Platform Publication Series

COMPETITION LAW AND THE STATE

Competition laws' prohibitions of anti-competitive State acts and measures

Volume 1: Summary of answers to questionnaire

Project Coordinators
Eleanor Fox and Deborah Healey
UNCTAD/DITC/CLP/2015/3

Electronic copy available at: https://ssrn.com/abstract=3705247

Foreword on the Research Partnership Platform

Considering the important role of research and policy analysis in the development of appropriate policies and legislation responding to the challenges faced in the area of competition and consumer protection, UNCTAD created the **Research Partnership Platform (RPP)** in 2010. The UNCTAD RPP is an initiative that aims at contributing to the development of best practices in the formulation and effective enforcement of competition and consumer protection laws and policies so as to promote development.

The RPP brings together research institutions, universities, competition authorities, business and civil society, and provides a platform where they can undertake joint research and other activities with UNCTAD, exchange ideas on the issues and challenges in the area of competition and consumer protection faced particularly by developing countries and economies in transition. Currently, the Platform hosts over sixty institutions consisting of research institutes, universities, non-governmental organizations, corporate affiliates and competition agencies.

The role of UNCTAD is to facilitate and provide guidance on the research and analysis, as well as other activities, to be undertaken by members of RPP. UNCTAD benefits from the research findings in responding to the challenges faced by developing countries through its technical assistance and capacity-building activities.

This publication is the third in the UNCTAD RPP Publication Series.

Electronic copy available at: https://ssrn.com/abstract=3705247

Table of Contents

		Page
I.	**Introduction**	**1**
II.	**Summary of the Data from Questionnaire Answers**	**4**
2.1.	**Anti-competitive acts by State or State-privileged entities operating on the market**	**5**
2.2.	**Anti-competitive acts by State administrative authorities**	**26**
2.3.	**Procurement, bidding and corruption**	**33**
2.4.	**State measures**	**48**
2.4a.	**State aids**	**62**
2.5.	**Shielding private Anti-competitive acts or conspiracies**	**64**
2.6.	**Country experience**	**74**

Electronic copy available at: https://ssrn.com/abstract=3705247

I. Introduction

The role of the State in the market has a significant impact upon the way competition functions within a jurisdiction. This UNCTAD RPP Project set out to study and map the extent to which competition laws apply to anti-competitive acts and measures by States. The background to the study and its history are set out below. Thereafter we present a summary of the data derived from the questionnaire answers.

The study is elaborated in the article, Eleanor M. Fox and Deborah Healey (2014): *When the State Harms Competition—The Role for Competition Law*, 79(3) Antitrust Law Journal, p. 769.

The State in the Market

The role that the State plays, both formally and informally, within a jurisdiction is dictated by factors that are political, cultural, and historical, and may relate to the stage of a nation's economic development. In a market–friendly environment with a strong commitment to competition law and policy the State can contribute to enhancing markets. State intervention can also have the opposite impact. There are a number of ways that the State may act to impede or hinder market competition, some of which can be addressed by competition law and some of which must be addressed, if at all, by broader competition policy.

In jurisdictions with deficient governance and corrupt leaders, the scope of competition law is limited by ineffective law and enforcement. Where most of the significant actors in a jurisdiction are State bodies, competition law is a very small part of the picture. The State itself may be the problem directly or as the facilitator of cartels. In many developing countries with traditions of statism and cronyism, corruption and discrimination may accompany weak institutions, a lack of funding, high barriers to entry and weak capital markets. The blockage of markets by the State or in complicity with private business is common.

Even in market-friendly environments, State acts may be a matter of concern. They are likely to be more permanent and harder to overcome than private restraints. Attacking private restraints may in itself lead to pressure by business on government to implement public restraints, thus rounding the circle.

The most obvious example of State market impact is seen in Anti-competitive conduct by State-owned businesses, which are a historical legacy even in some of the most developed jurisdictions and a substantial part of economic life in developing countries. States or State entities might conduct business in competition with the private sector. If these State businesses are not covered by competition laws or sector specific competition provisions, they may harm competition and consumers with impunity.

A further category of State impact on the market is distortive regulation. States need the ability to regulate in the public interest, but they often make laws and regulations without considering their impact on competition. These laws or regulations may be by way of sectoral regulation, authorizing or approving particular conduct (and sometimes conferring on the authorized private actor a "State action defense"). In some cases they may be adopted with specific anti-competitive purposes. The State and its entities can also be co-conspirators in distortive tendering or bid rigging.

Even in jurisdictions in which competition laws apply squarely to the State and its businesses, the relevant enforcement agencies may not have the will, independence, resources or capacity to enforce the laws against them. Thus, there may be law on the books without proper implementation.

Electronic copy available at: https://ssrn.com/abstract=3705247

Each of the outlined categories demands a legal or policy response to ensure that privilege is constrained and markets work efficiently and fairly. Appropriate responses vary according to the political economy of the particular jurisdiction and its stage of development.

The RPP Project

The Competition and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD) established the 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 the issues of competition law and enforcement, and consumer protection.

In 2011 the authors, along with Michal Gal of University of Haifa Faculty of Law, Kusha Haraksingh of the University of the West Indies, and Mor Bakhoum of the Max Planck Institute, formed a research group to study the extent to which competition laws reach anti-competitive acts and measures by States. Ulla Schwager and Ebru Gökçe participated on behalf of UNCTAD. The team drafted a questionnaire, which was distributed by the UNCTAD Competition and Consumer Policies Branch to competition authorities and their members. The competition agencies of 35 jurisdictions, or in some cases a researcher, answered the questionnaire. Most questionnaires were ultimately completed or reviewed by a competition agency.

The results span six continents. Seven participants are members of the European Union. Twelve are developed countries, three are transitional countries and 19 are developing countries. Classified by income, one country is low income, 16 are middle income and 17 are high income.

The data show a surprisingly wide breadth of competition laws, including coverage of SOEs in general, coverage of entities (often SOEs) to which the State has granted special and exclusive privileges, and in some cases coverage of corrupt procurement practices, which are often biased in favour of SOEs.

Our study reveals the wide extent to which SOEs are covered by competition laws and confirms the shift across the world to a more copious pro-competition policy including growing appreciation of the market harm caused by unjustified State restraints.

The authors thank all of the respondents to the questionnaire and others who assisted with answers and translation. Also, we thank our collaborators at UNCTAD, Ulla Schwager and Ebru Gökçe, for their assistance with conducting the information gathering. We also thank Graham Mott of UNCTAD for his assistance in compiling this volume. We list below the jurisdictions covered by the questionnaire and the many individuals in the various countries who answered the questionnaire, reviewed answers, or assisted in answering.

Thereafter, we present a summary of the data culled from the questionnaire answers. An appendix of sample excerpts from competition statutes that prohibit or control anti-competitive State acts is provided in Volume 2 of this study.

Eleanor Fox, Professor, New York University School of Law
Deborah Healey, Associate Professor, Law Faculty, University of New South Wales

Electronic copy available at: https://ssrn.com/abstract=3705247

Jurisdictions that responded to the questionnaire

Australia, Barbados, Brazil, China, European Union, France, Greece, Guyana, Hong Kong (China), Hungary, India, Italy, Jamaica, Japan, Kazakhstan, Kenya, Republic of Korea, Lithuania, Malaysia, Mauritius, Mexico, Pakistan, Peru, Poland, Russian Federation, Serbia, Seychelles, Singapore, Spain, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

Individuals who responded to the questionnaire, reviewed answers, or otherwise assigned

Dhaniah Ahmad, Stefanie Alder, Mor Bakhoum, Oxana Bassalaeva, José Antonio Batista de Moura Ziebarth, Hector Alarii Robles Bucio, Paulo Burnier da Silveira, Thomas Cheng, Evangelia Chrysanthopoulou, Gonçalo Coelho, Russell Damtoft, Sophie-Ann Descoubes, Holger Dieckmann, Sean F. Ennis, Jesus Espinoza, Daniel Gappy, Seema Gaur, Ridha Hajkacem, Mohamed Faouzi Ben Hammed, Kusha Haraksingh, Graeme Jarvie, Jin Jing, Vladimir Kachalin, Dmitry Kaysin, Markus Langenegger, Sang Hyup Lee, Toh Han Li, Andrés Calderón Lopez, Karin Lunning, Kiran Meetarbhan, Lilian Mukoronia, Matteo Negrinotti, Eiichiro Omata, Burton Ong, Stephanie Panayi, Mark Pearson, Dragan Penezic, Heidi Claudia Sada Correa, Paola González Sanz, József Sárai, Marta Skrobisz, Lina Strikauskaitė, Georges Tirant, Lerzan Kayihan Ünal, Mark Williams, Joseph Wilson

Electronic copy available at: https://ssrn.com/abstract=3705247

II. Summary of the Data on the Reach of Competition Laws to Cover State Anti-competitive Acts

Competition Law and the State

Independent researchers, assisted by UNCTAD as a part of its Research Partnership Platform, distributed a questionnaire and compiled the information from 35 responding jurisdictions on the extent to which their competition laws cover State anti-competitive acts and measures. This monograph presents a summary of the data. The data are organized in accordance with, and following, the questionnaire questions below. A summary of the data of the responding countries is inserted after each question.

The Questionnaire and Summary of the Answers

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, and Mor Bakhoum of Max Planck Institute, Munich, and Ebru Gökçe of the Competition and Consumer Policies Branch of UNCTAD. This research project will be carried out within the Research Partnership Platform (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.

Preliminary Definition and Instructions:

"State," when used herein, includes local government and State and local government officials.

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.

Electronic copy available at: https://ssrn.com/abstract=3705247

2.1. Anti-competitive Acts by State or State-Privileged Entities Operating on the Market

1a. Does your competition statute cover State-owned entities and other entities in which the State has an interest (hereafter "State-interested entities")? For example, is the State a "person" or "undertaking" capable of violating the competition law?

All jurisdictions responded "yes" to this question.

China

According to article 7 of the Anti-Monopoly Law of China ("AML"), for industries where State owned economy holds a controlling position which affects the lifeline of the national economy and national security and industries which implement exclusive dealing pursuant to the law, the State shall protect the legitimate business activities of the business operators, implement control and regulation over the business activities of the business operators and the prices of their commodities and services pursuant to the law, safeguard the interests of consumers and promote technological advancement. Business operators in the industries stipulated in the preceding paragraph shall conduct their businesses pursuant to the law, act honestly and trustworthily, exercise strict self-discipline, accept public supervision and shall not use their controlling position or exclusive dealing position to harm the interests of consumers. There has been some controversy over how to interpret the cited provision, namely whether this clause provides for an exemption for SOEs. Nevertheless, the enforcement actions taken by MOFCOM and NDRC have shown that SOEs are not exempted from the AML.

Hong Kong (China)

The Competition Ordinance applies to State-owned entities but there is an exemption for statutory bodies, which are bodies established under individual statutes. They may be made subject to the law by regulation.

Italy

In line with Article 106 of the Treaty on the Functioning of the European Union ("TFEU"), Article 8(1) of Law No. 287/1990 (the Italian competition law, hereinafter "ICL") states that competition law equally applies to private and public undertakings. Public undertakings are those that are subject to State – direct or indirect – control. Therefore, public undertakings as well as public entities when carrying out economic activities are subject to competition law.

Pakistan

The Competition Act, 2010 applies to all undertakings and all actions or matters that take place in or outside Pakistan and prevent, restrict, reduce or distort competition within Pakistan. Section 2(1)(q) defines an "undertaking" to mean any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings.

Poland

Article 4, point 1) of the Act of 16 February 2007 on Competition and Consumer Protection: "an "undertaking" shall mean an undertaking in the meaning of the provisions on freedom of business activity, as well as: a) natural and legal person as well as an organizational unit without a legal status to which legislation grants legal capacity, organizing or rendering public authority services, which do not constitute business activity in the meaning of the provisions on freedom of business activity".
Article 4, section 1. of the Act of 2 July 2004 on Freedom of Business Activity:
"Within the meaning of this Act the entrepreneur shall be a natural person, legal person, and an organizational entity which is not a legal person and is endowed with legal capacity by force of a separate Act – carrying on economic activity in their own name".

Electronic copy available at: https://ssrn.com/abstract=3705247

However, in Poland, there is a difference in the application of competition law in terms of central and local government and State owned entities. The State as in the central government and its officials are not bound by the provisions of competition law. The Competition Authority cannot control the activity of the central government administration and its compliance with the rules on competition protection. On the other hand, the local government and its representatives (for example the municipalities) are undertakings in the meaning of the Act on Competition and Consumer Protection when they are acting within their obligations of managing public property (*the dominium*). When they are exercising their governmental authority prerogatives of public authority (*the imperium*) they are not considered to be undertakings. The third category of entities, the State owned entities, are sole property of the State. They are considered to be legal persons to whom the provisions of competition law apply fully.

Switzerland

According to art. 2 para. 1 the Swiss Act on Cartels "(…) applies to private or public undertakings that are parties to cartels or to other agreements affecting competition, which exercise market power or that participate in concentrations of undertakings".[1]

Tunisia

The Tunisian Competition Council, as a specialized jurisdiction in competition cases, is empowered by the Competition and Prices Act to solve (or judge/decide on) all disputes concerning Anti-competitive practices having a negative impact on the market equilibrium and the proper functioning of the economy. Despite the silence of the law which is not explicit about this issue, the exercise of this function extends to all practices regardless of the status (or nature) of their authors. Indeed the Council's jurisprudence is unequivocally to hold that the competence of the latter extends to all branches of economic activity including public enterprises and even public administrative institutions. The Council considered that when these entities are engaged in an economic activity outside the exercise of prerogatives arising from public power or public service mission, they are likely to infringe competition law and as such they must respond to the Council on all violations committed. No exemption from the application of competition law is granted to them.

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

The following jurisdictions responded to this question with N/A:

Poland, Seychelles

Australia

The competition law covers SOEs generally and other government bodies to the extent that they are carrying on business

Brazil

Brazilian Competition Law (Law No 12,529 of November 30, 2011) expressly sets forth (Article 31) that all legal entities (either privately or publicly owned) are subject to its provisions.

CARICOM

In the competition legislations of Jamaica and Guyana, no distinction is made in the competition statute. For these jurisdictions the definition of enterprise is broad. However, for Barbados and Trinidad and Tobago, distinctions are made.

China

The AML should apply on an equal basis to all kinds of State-owned entities.

[1] See http://www.admin.ch/ch/e/rs/c251.html

Electronic copy available at: https://ssrn.com/abstract=3705247

EU

A SOE is considered to be an 'undertaking' for competition law purposes when it engages in an 'economic activity' (Case C-41/90, *Hofner* [1991] ECR I-1979, at 21)

France

Both French and European Union Competition laws apply to any entity which can be qualified as an **undertaking** as provided by articles 101, 102 and 106 of TFEU and articles L.420-1 and L.420-2 of the commercial code.

The European Court of Justice stated that the concept of undertaking encompasses every entity engaged in **an economic activity**, regardless of its legal status, the way in which it is financed and its profit or non-profit purpose[2].

Furthermore, article L.410-1 of the commercial code provides that competition law "*shall apply to all production, distribution and service activities, including those which are carried out by public persons, in particular in the context of public service delegation agreements*".

Greece

According to Arts 1 and 2 of the Greek Competition Law (Law 3959/2011, as amended by Laws 4013/2011 and 4072/2012), competition rules apply on undertakings and associations of undertakings. The statute does not explicitly distinguish between State-owned entities that are covered by competition rules and those that are not covered. According to the existing case law (as interpreted in accordance with EU law) the activities of State-owned entities fall within the scope of competition rules to the extent that they constitute economic activities (i.e. activities that may be caught by the equivalent of Arts 101 or 102 of the Treaty on the Functioning of the European Union).

Hong Kong (China)

Government statutory bodies established under a special statute are not caught unless specified by regulation under the Competition Ordinance.

Hungary

Article 1 of the currently effective Hungarian Competition Act LVII of 1996 (on the prohibition of unfair and restrictive practices) reads as follows:

"This Act shall apply to market practices carried out on the territory of the Republic of Hungary by natural and legal persons and companies with no legal personality, including branches in Hungary of undertakings domiciled abroad with the exception for practices regulated in Chapter VI (hereinafter together: undertakings), except where otherwise regulated by statute". (Chapter VI of the HCA is about "Control of Concentration of Undertakings")

This means that statutes may regulate some of the issues falling under the Competition Act differently, but there is no any reference to the ownership (whether the activity of the undertaking what is regulated differently is public or private). So, in spite of this exception-related provision of the Hungarian Competition Act it may be stated that the Hungarian competition law is neutral from the point of view of the type of ownership.

[2] ECJ, *Höfner and Elser v Macrotron GmbH*, *23 April 1991*, C-41/90.

Electronic copy available at: https://ssrn.com/abstract=3705247

India

All State owned enterprise are covered except the following-

a. Activity of SOE relatable to sovereign function of the Government including all activities carried on by the department of central government dealing with atomic energy, currency, defence and space. (Section 2 (h)).

Italy

As specified above, it is not the ownership of the undertaking that determines whether or not it is subject to competition law provisions, but rather the fact that it carries out an economic activity (indeed an undertaking may be qualified as such only if it carries out an economic activity, see Case C-41/90, Höfner and Elser v. Macrotron [1991] ECR I-1979).

According to Art. 1(4) ICL, the interpretation of Italian competition rules shall be carried out on the basis of the EU principles in competition matters.

The notion of "economic activity", as defined by the Court of Justice, consists in offering goods and services on a market (see Case C-35/96, Commission v. Italy [1996] ECR I-3851, para. 36).

However, activities which must necessarily be carried out by the State or which fulfill a social function are not considered economic activities. In particular, the following activities are considered not economic:

Activities which are based on solidarity

Solidarity has been defined by AG Fennelly as "the inherently uncommercial act of involuntary subsidisation of one social group by another" (Opinion AG Fennelly in Case C-70/95, Sodemare v. Regione Lombardia [1997] ECR I-3395, para. 29) and the analysis of whether the activity is based on solidarity or on (free market) economic principles must be carried out on a case by case analysis (Cases C-264/01, AOK Bundesverband [2004] ECR I-2493, para 46-64). Thus, in Poucet&Pistre, it was held that French regional social security offices administering sickness and maternity insurance scheme to self-employed person were not acting as undertakings because the benefits payable were identical for all recipients, contributions were proportionate to income and pension rights were not proportionate to the contributions made by the insured person (Case C-159-160/91, Poucet&Pistre, [1993] ECR I-637).

Activities connected with the exercise of the powers of a public authority

In Eurocontrol (Case C-364/92) [1994] ECR I-43), the Court of Justice ruled that Eurocontrol was not an undertaking when it created and collected route charges from users of air navigation services on behalf of the States that had created it.

Similarly, in Cali e Figli, the Court held that a private company engaged in anti-pollution surveillance in the port of Genoa was not acting as an undertaking when discharging certain tasks, as they were performed in the public interest and constitute one of the State essential functions in protecting the maritime environment (Case C-343/95, .Diego Calì & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG), [1997] ECR I-1547).

Procurement that is ancillary to a non-economic activity

In FENIN (Case C-205/03P, FENIN, [2006] ECR I-6295), the Court found that procurement activity (purchase of medical equipment) carried out by the Spanish hospitals was not an economic activity, as it was related and could not be dissociated from the non-economic activity for which the material was purchased, i.e. the provision of healthcare which was carried out by Spanish hospitals on the basis of solidarity (see also Case C-113/07, SELEX Sistemi Integrati SpA v. Commission, [2009] ECR I-2207).

Employees and Trade Unions

Although individuals have been routinely qualified as undertakings, employees are not considered undertakings because for the duration of their contract they are incorporated within the undertaking which employ them and, foremost, they do not bear the financial risk of the business (see Case C-22/98, Becu [1999] ECR I-5665, para. 26).

In Albany, AG Jacobs argued that competition rules were not designed to cover activities of employees (and trade unions) which do not perform the functions of undertakings, as work and labour are different from the provision of goods and services (Opinion AG Jacobs in case Case C-67/96, Albany International AG [1999] ECR I-5775, para. 209 and ff.).

Electronic copy available at: https://ssrn.com/abstract=3705247

Japan

As far as it does business, it is subject to the Antimonopoly Act (hereinafter referred to as the 'AMA'), the competition statute in Japan, whether or not it is an SOE. The section 2(1) of the AMA defines the enterprise subject to the AMA as "The term 'enterprise' as used in the Act means a person who operates a commercial industrial financial or any other business", which does not require "profit-making".

Kazakhstan

State entities may be established in cases where there is a social need in production of goods in those spheres and areas of public production which have no competition in place or it is insignificantly developed. Setup of such State entities shall be done with the preliminary consent of the antimonopoly body.

Kenya

The Competition Act, 2009 (the Act) does not distinguish between them. Section 5 of the Act applies to all persons including the government, State corporations and local authorities in so far as they engage in trade.

Republic of Korea

We do not distinguish between the two.

Lithuania

The main feature how to distinguish the State-owned entity is covered by the Law on Competition of the Republic of Lithuania ('the Law on Competition') is established in the definition of an undertaking (Article 3 (4)).

Article 3 (4) of the Law on Competition: "**Undertaking"** means an enterprise, a combination of enterprises (associations, amalgamations, consortiums, etc.), an institution or an organization, or other legal or natural persons which perform or may perform economic activities in the Republic of Lithuania or whose acts affect or whose intentions, if realized, could affect economic activity in the Republic of Lithuania. Entities of public administration of the Republic of Lithuania shall be considered to be undertakings if they engage in economic activity.

Pursuant Article 3 (4) of the Law on Competition, it is deemed that State-owned entities which engage in economic activity are covered by the Law on Competition, and thus, the behaviour of State-owned undertakings like actions by private undertakings in the market shall comply with competition rules.

Malaysia

The Malaysia Competition Act 2010 applies to any commercial activity. Hence, the Act shall apply to any State-owned entities which are carrying out any activities commercial in nature.

Mauritius

Section 3(3) of the Competition Act 2007 stipulates that "This Act shall bind the State to the extent that the State engages in trade or business for the production, supply, or distribution of goods or the provision of any service within a market in Mauritius which is open to participation by other enterprises."

Mexico

The Federal Law of Economic Competition (FLEC) makes no distinction between subjects or organisations, including State entities. The law treats every subject equally.

Art. 3 of FLEC states that "All economic agents are subject to this law, both physic and moral persons, with or without aims of profit, public administration dependencies and entities at federal, State or municipal level, associations, cameras, professional associations, trusts or other form of participation in economic activity.

Pakistan

The Competition Act, 2010 does not distinguish between State-owned entities and private entities. It has taken action against State-owned enterprises.

Electronic copy available at: https://ssrn.com/abstract=3705247

Peru

There is no distinction. The Legislative Decree No. 1034 (Repression of Anti-competitive Conducts Law) is applicable to all persons and companies "whether public or private, State or not… that in the market supply or demand good or services."

Russian Federation

The Federal Law on Protection of Competition, 2006 (the Act) does not distinguish between them. Article 3(1) of the Act encompasses all persons including the government, State corporations and local authorities in so far as they engage in trade. The only exception is made for the limited number of so called State corporations in accordance with the Law 'On State corporations'.

Serbia

Scope of application: Article 3 (Law on Protection of Competition). The provisions of this law shall apply to all legal and natural entities that directly or indirectly, permanently, occasionally or ad hoc, perform economic activities in trade of goods and services, regardless of their legal status, ownership affiliation or citizenship or state of origin (hereinafter: undertakings), including:

1) domestic and foreign companies and entrepreneurs;

2) State institutions, bodies of territorial autonomy and local self-governments;

3) other natural and legal entities and associations (unions, business associations, sports organizations, institutions, cooperative associations, holders of intellectual property rights and other);

4) public enterprises, companies, entrepreneurs and other undertakings, performing the activities of public interest, or those that have been given the fiscal monopoly, through the act of the State authority in charge, except if through the application of this law, they are prevented to perform activities of public interest or tasks assigned to them

Singapore

The State is not an "undertaking" or a "person" for the purposes of the competition law framework, but State-owned and controlled companies and similar business organizations are "undertakings" that are subject to these rules. Statutory boards, which are bodies set up by government under individual laws, are exempt but their activities may be made subject to the competition law by regulation.

Spain

The Spanish Competition Act (Act 15/2007, of July 3) applies to both public and private undertakings without distinction. The Competition Act (CA) defines an undertaking as any person or entity which carries out an economic activity, regardless of its legal form and the manner in which it is financed. However, non-economic activities, such as regulation, carried out by public entities do not fall under the scope of the CA.

Thus, the prohibitions of CA do not apply to conduct harboured by Law (Article 4, CA), an exemption which is applicable to both public and private enterprises. By contrast, Anti-competitive conduct emerging from the exercise of Public Administration powers, or caused by the action of public authorities or entities without this legal protection (or simply covered by a lower range rule) are not exempted.

Even if the law allows Anti-competitive conduct that cannot be prosecuted by the Competition Authority, the law itself could be breaching article 106 (former 86) of the European Treaty. As regards Public undertakings granted with special or exclusive rights and undertakings that operate services of general economic interest, article 106 establishes that Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular the rules on competition.

Sweden

According to Chapter 1, Article 5, Swedish Competition Act (2008:579) "an undertaking shall be defined as a natural or legal person engaged in activities of an economic or commercial nature. To the extent that such activities involve the exercise of authority, they shall not fall within the scope of this definition." Hence, it is the concept of an undertaking that decides if SOEs in a particular case are covered or not. We follow EU practice in this regard.

Electronic copy available at: https://ssrn.com/abstract=3705247

Switzerland
According to art. 2 para. 1bis ACart "undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organizational form". That is, the application of competition law is neutral as to ownership and organizational form of companies.

Tunisia
Tunisia's competition law prohibits Anti-competitive practices regardless of their initiators, public or private. The competition authority is vested with the authority to take the appropriate sanctions.

Turkey
In principle, the Act No. 4054 on the Protection of Competition (Competition Act) is applicable to all undertakings regardless of their ownership. Therefore, the Competition Act applies to anti-competitive conduct by public undertakings similar to such conduct by private undertakings. However, in practice the Competition Act may not apply in case public undertakings operate in accordance with a particular legal or administrative authority. Under these circumstances, the public undertakings *either* lose their independence in taking their decisions and thereby lose their status as the subjects of the Competition Act *or* in accordance with the Turkish legal system the Competition Act as a general law may not apply because the authority is enabled by a particular legislation such as a special statute which has precedence over the general laws.

United States
If owned or controlled by a State or local body, they are covered.

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

The following jurisdictions responded "no" to this question:
Peru, Russian Federation, Turkey, United States

Australia
The Competition and Consumer Act 2011 (CCA) allows governments to exempt particular persons or conduct from the application of the CCA by law under rigorous conditions on the basis of rigorously demonstrated public benefit (s51(1)) but the provision is not widely used. The presumption is that the CCA will apply. Government bodies which are not SOEs are not amenable to fines or penalties.

Brazil
Brazilian antitrust law provides (Art 13 and 19 of the Brazilian Antitrust Law) that antitrust authorities shall not have jurisdiction to rule on legislation issued by publicly owned entities, i.e. it is not possible for the antitrust authority to determine sanctions (such as payment of fines) based on the enactment of a law or decree deemed as having Anti-competitive implications. In this event, antitrust authorities are entitled only to advise publicly owned legal entities in this matter.

CARICOM
There are no exceptions. The Act applies to State-owned (publicly-held) companies. According to Section 3 (1) (g) Telecommunications is exempted from the Act and Section 3 (2) and (3) Electricity and Water are subject

China
The AML does not provide any special exemptions for SOEs.

Electronic copy available at: https://ssrn.com/abstract=3705247

EU

Yes. Pursuant to Article 106(2) of the Treaty on the Functioning of the European Union ('TFEU'):

> *"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."*

A second type of exception relates to the interpretation of the concept of 'economic activity' which triggers the qualification of an SOE as an 'undertaking' for Competition law purposes. An 'economic activity' falls under the realm of Competition law when it could be in principle carried out by a profit making private party (Case C-41/90, *Höfner* [1991] ECR I-1979, at 22). This broad concept of economic activity has, however, been narrowed by the Court of Justice so as to exclude two types of activities: those that are considered to be connected with essential prerogatives of the State (e.g., defence and air traffic control) and those that are underpinned by a principle of solidarity as long as the following criteria are met: (i) activities regulated by the law (ii) that have a purely social function based on a principle of national solidarity and (iii) that are carried by a non-profit entity (namely social security funds) – see Joined Case C-199/91 and C-160/91, *Poucet* [1993], ECR I-637, at 18 and 19.

In order to interpret the concept of solidarity, the Court of Justice ruled in Poucet that the sickness and maternity insurance schemes in Poucet were not operated by undertakings because (i) they were compulsory, (ii) they attributed equal benefits regardless of contributions, and (iii) the amount of contributions was set proportionate to the income.

Furthermore, the General Court has ruled that the purchase of products with the purpose of being used in a non-economic activity, such as one of a purely social nature is not sufficient to qualify a given entity as an 'undertaking' for the purposes of application of Competition law. According to the General Court's ruling in *FENIN*: "Whilst an entity may wield very considerable economic power, even giving rise to a monopsony, it nevertheless remains the case that, if the activity for which that entity purchases goods is not an economic activity, it is not acting as an undertaking for the purposes of Community competition law." (Case T-319/99, FENIN v Commission [2003] ECR II-237, at 37).

France

As a rule, exceptions to the statutory coverage of State-owned entities by competition law may only be granted insofar as they do not contravene the rules set forth by article 106 of the Treaty on the Functioning of the European Union (TFEU):

"Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union".

Therefore the only limitation to the application of competition law consists of circumstances where such application would entirely thwart the provision of a *service of general economic interest*. The EU member State seeking to put this exception into place has a duty to demonstrate that a *service of general economic interest* needs to be established, and that the infringement of competition law is necessary and proportionate to the general interest it claims to hereby pursue.

Greece

There is no explicit exception in the Greek Competition Law. State-owned entities are considered as undertakings for the purposes of applying (Greek and EU) competition rules to the extent that are deemed to engage in economic activity. On the other hand, if the activities of the specific entities have the nature of exercise of public power and are not profit-driven, they are exempt from competition rules (as they are deemed to constitute an expression of public authority).

Electronic copy available at: https://ssrn.com/abstract=3705247

Hong Kong (China)
Yes, similar to EU provisions there is an exemption for services of general economic interest but there is an additional exemption for statutory bodies (see earlier).

Hungary
See reply to Question 1(b).

India
All State owned enterprise are covered except the following-

a. Activity of SOE relatable to sovereign function of the Government including all activities carried on by the department of central government dealing with atomic energy, currency, defence and space. (Section 2 (h)).

Italy
In line with Article 106 TFEU and by way of exception to Article 8(1) ICL, Article 8(2) ICL provides that competition law does not apply to "undertakings which, by law, are entrusted with the operation of services of general economic interest or operate on the market in a monopoly situation, only in so far as this is indispensable to perform the specific tasks assigned to them." However, in those instances, the following rules must be observed by the undertakings which are exempted from the application of competition rules:

- The aforementioned undertakings shall "operate through separate companies if they intend to trade on markets other than those on which they trade within the meaning of the same sub-section" (8(2) bis). In this case, the incorporation of such separate companies or the acquisition of controlling interests in an undertaking operating in other markets by companies falling under Article 8(2) above require prior notification to the Italian Antitrust Authority (the "IAA") (8(2)ter). In case of failure to comply with this obligation, the Authority can impose a fine of up to 100 million lire (approximately € 50,000).
- When the undertakings falling under Article 8(2) above supply their subsidiaries or controlled companies active on the different markets "with goods or services, including information services, over which they have exclusive rights by virtue of the activities they perform [...], they shall make these same goods and services available to their direct competitors on equivalent terms and conditions."

The IAA enjoys full powers to monitor the compliance with the above-mentioned rules and, in case of infringement, depending on the gravity and the duration of the infringement, it can impose a fine up to ten per cent of the turnover of each undertaking or entity during the prior financial year (see, inter alia, SP130 - CONFINDUSTRIA PALERMO-PALERMO CITY SIGHTSEEING/AMAT PALERMO, where AMAT, a public company controlled by the municipality of Palermo was fined for having infringed Article 8(2) *bis* and 8(2)*ter*; see also *ex multis* SP83, SP123).

Kazakhstan
According to Article 31, para 2, and setup of State enterprises, where the government holds over 50% of shares (interests) and affiliated legal entities, which had been directly foreseen by the laws of the Republic of Kazakhstan is not subject to the preliminary consent of the antimonopoly body.

Kenya
There are no explicit provisions under the Act that provide for this. However there is room for undertakings to be granted an exemption under section 25 of the Act. In making a decision under this section the Authority will evaluate the public benefits which would outweigh the lessening of competition.

Republic of Korea
We do not apply our competition law (MRFTA) to acts of an entrepreneur or trade association as committed in accordance with other legitimate Acts.
Article 58: This Act shall not apply to acts of an entrepreneur or trade association as committed in accordance with any Act or any of its decrees.

Electronic copy available at: https://ssrn.com/abstract=3705247

Lithuania

The Law on Competition of the Republic of Lithuania does not contain any clauses that would directly establish exemptions for State-owned entities. The Law on Competition provides for with a general purpose to protect freedom of fair competition in the Republic of Lithuania which is applicable to both private and public enterprises. However, Article 2 (1) of the Law on Competition provides for that it shall prohibit undertakings from performing actions which restrict or may restrict competition, regardless of the character of their activity, except in cases where this Law or laws governing individual areas of economic activity provide for with exemptions and permit certain actions prohibited under this Law.

Article 2(1) of the Law on Competition: "This Law shall prohibit undertakings from performing acts which restrict or may restrict competition, regardless of the character of their economic activity, except in cases where this Law or laws governing individual areas of economic activity provide for exemptions."

This clause institutes general exemption that could be also applied to the State-owned entities. However it must be emphasized that any exceptions must be clearly stated in other laws (not bylaws) in order to exempt certain economic activities of undertakings (including State-owned entities) from application of the Law on Competition.

Thus, there might be a law which for example may give exclusive rights in certain field of economic activity to the State-owned entity to engage in particular activity that would be carried out only by this undertaking. In such case, the law provides the exception and the Law on Competition would not be applicable as long as the State-owned undertaking does not abuse its dominant position or it does not perform any other action that is not covered by the specific sector regulation law and prevents, restricts or distorts competition.

Additionally, it is considered that this general exception established in the Law on Competition of its nature complies with Article 106 (undertakings entrusted with services of general interest) of the Treaty on the Functioning of the European Union ("TFEU"). Moreover, there are laws granting exclusive rights to one undertaking (it could be either State-owned , either a private) to engage in particular activity, mainly in the field of gas transmission and distribution, nuclear sector, railways, airport, electricity transmission and distribution, postal services of post, State seaport and others.

It should be noted that the competition rules are applicable to all undertakings in the same manner, except for the case of special laws which grant exemptions usually with the aim to ensure that particular services are being provided for the society. Additionally, the exceptions are interpreted narrowly and general competition rules are interpreted broadly.

Malaysia

The following are the exceptions applicable for State-owned entities:

1. When conducting any activities in the exercise of governmental authority;
2. When conducting any activities based on the principle of solidarity;
3. When entering into an agreement or carrying out a conduct in order to comply with a legislative requirement; and
4. When the State-owned entities are entrusted with services of general economic interest or having the character of revenue-producing monopoly.

Mauritius

No. However, in case of merger resulting in substantial lessening of competition or monopoly abuses, section 50 of the Act provides that the Commission before deciding on appropriate remedial action should take into account any offsetting public benefits. Offsetting public benefits are referred to as the safety of goods and services, the efficiency with which goods are produced, supplied or distributed or services are supplied or made available; the development and use of new and improved goods and services and in the means of production and distribution; or the promotion of technological and economic progress. It should however be noted that this applies to State-owned enterprises and non-State owned enterprises alike.

Mexico

The FLEC does not consider exceptions, even in the case of State owned entities. This is grounded in Art 28 of the Mexican Constitution that states the strategic areas that will be exercised by the State only, as well as those that shall not be considered as monopolies.

Electronic copy available at: https://ssrn.com/abstract=3705247

On the other hand, the FLEC states that entities from these sectors are subject to the dispositions on those acts not specifically included within the protection indicated in art 28 of the Constitution, and also, it establishes specifically that it will be applicable to all economic agents, including government entities.

Pakistan
There are no exceptions from the statutory coverage for State-owned entities.

Poland
No, only Art. 3 of the Act on Competition and Consumer Protection permits an exemption from the application of the Statue by a specific legislation, constituting lex specialis to this Act: "The provisions of the Act shall not apply to restrictions of competition allowed by virtue of separate legislation". Nevertheless, these exceptions can cover State-owned entities as well as other undertakings.

Serbia
See answer to Question 1(b) above.

Seychelles
State owned entities are not distinguished from other entities and the State is bound by the Act under Section 3 (2): "This Act shall bind the State to the extent that the State engages in trade or business for the production or supply of goods or services within a market in Seychelles which is open to participation by other enterprises."

Singapore
Yes, para 1 of the Third Schedule of the Competition Act 2006 contains an exception for undertakings "entrusted with the operation of services of general economic interest or having the character of a revenue- generating monopoly in so far as the prohibition would obstruct the performance, in law or fact, of the particular task assigned to that undertaking."

Spain
From a functionality perspective, Spanish legislation distinguishes between instrumental public enterprises and the rest. Instrumental public enterprises are those in charge of implementing public interest policies.
Some of these enterprises are considered *own means of management* of the Public Administration. Due to this consideration, they can be appointed to provide goods and services to the Administration without the public tender that would otherwise be necessary, which has evident implications in terms of competition.

Sweden
See answer to Question 1(b). SOEs may be exempted only to the extent that their activities are a direct outflow of the special tasks that they are entrusted with.

Switzerland
Article 3 ACart entails the general principle to distinguish which State-owned activities are covered by competition law or not. This article reads as follows: "Statutory provisions that do not allow for competition in a market for certain goods or services take precedence over the provisions of this Act. Such statutory provisions include in particular: a. provisions that establish an official market or price system; and b. provisions that grant special rights to specific undertakings to enable them to fulfil public duties."
Example: The Swiss Post Office has a legal monopoly for letters up to 50 grams.

Tunisia
Tunisia's competition law does not grant exemptions to public undertakings.

Electronic copy available at: https://ssrn.com/abstract=3705247

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

The following jurisdictions responded to this question with only N/A:
Australia, CARICOM, China, Hong Kong (China), Hungary, Poland, Russian Federation, Serbia, Seychelles, Singapore, Sweden, United States

Brazil
N/A. It should be noted that the Brazilian antitrust statute was enacted in 2011. Therefore, case law issued based on the new law is very scarce. Also, it is yet uncertain whether case law issued under the former regime will apply.

EU
Member States are free to define which services have a general economic interest. However, this definition is subject to strict constraints.
Firstly, the public mission needs to be clearly defined and explicitly entrusted by the Member State to the relevant undertaking (Case 127/73 *BRT v. SABAM* [1974] ECR 313). Secondly, the restriction of competition is subject to a proportionality review (*Albany International* [1999] ECR I-5751 para. 107). Finally, the undertaking entrusted by the State with the provision of a service of general economic interest must be able to meet the demand. This latter criterion was elaborated by the Court of Justice in *Ambulanz Glöckner*, a case concerning the extension of the monopoly over emergency ambulance services to the profitable market segments of non-emergency ambulance services. The Court ruled that opening the non-emergency services to competition could 'jeopardise the quality and reliability' of the emergency services; nonetheless, the Article 106(2) exemption could not be invoked if the non-profit entity was manifestly unable of meeting the demand in the two reserved markets – *Ambulanz Glöckner* [2001] ECR I-8089 para. 61.

France
General rules in this respect were first set out by the case law of the European Court of Justice (*Corbeau*, 19 May 1993; *Commune d'Almelo*, 27 April 1994; *Altmark*, 24 July 2003), defining the extent, means and rationale of the possible restrictions to competition.
The appreciation thus made by the State is also subject to legal review by the Administrative Courts. The judge checks out the economic nature of the activity at stake and, in the affirmative, rules on whether it qualifies as pursuing a general interest, with respect to criteria established by domestic as well as European case law[3].

Greece
The aforementioned distinction is based on case law. In that respect, the Hellenic Competition Commission (HCC) and Greek administrative courts follow the jurisprudence of EU courts and the European Commission's practice.
More specifically, as regards recent HCC decisions, the following are noteworthy:

- A complaint filed by a private individual concerned the usage of pavements, open pedestrian spaces and public squares for leisure by retail stores (café bars and restaurants) with the consent of the Athens Municipal Authorities, which determined the appropriate usage fee in order to grant the relevant municipal licenses. The complainant argued that the said fee was excessive and arbitrary. The Hellenic Competition Commission (HCC) concluded that the administration of public spaces does not constitute an economic activity within the meaning of competition law, that the Municipality of Athens does not thus constitute an undertaking regarding the specific activity and that, as a consequence, article 2 of the Greek Competition Law could not be applied (see Decision No 501/VI/2010). The relevant Acts by the Municipality could, however, be challenged before administrative courts (on general administrative law grounds, as an act of a public authority).

[3] E.g. Conseil d'Etat, 31st May 2006, *Ordre des avocats au Barreau de Paris*, n° 275531; 22nd February 2007, *Association du personnel relevant des établissements pour inadaptés*, n° 264541; 6 April 2007, *Commune d'Aix-en-Provence*, n° 284736.

Electronic copy available at: https://ssrn.com/abstract=3705247

- A similar Decision was reached by the HCC in the case of another complaint against a Municipality, concerning excessive fees charged by it in the context of services provided for in a cemetery (graveyard) (see Decision No 336/V/2007).

- On the other hand, there have been several Decisions of the HCC, in which State-owned entities were considered as undertakings and the competition law was normally applied. These State-owned entities included "Gas Supply Company of THESSALONIKI S.A." and "Gas Supply Company of Thessaly" (Decision No 516/VI/2011), as well as the "Public Power Corporation S.A." (Decisions No 389/V/2008, 457/V/2009 and 458/V/2009 – currently under appeal).

India

What constitutes abuse "sovereign function" is not defined in the Act. However the Supreme Court of India and various State High courts in respect of other statutes have defined the Sovereign Function. Sovereign Function has been defined to include inalienable function of the State such as maintaining law and order, dispensing justice.

Peru

No. There are no different rules of coverage or qualifications in the case law.

Russian Federation

No, there are not.

Spain

Act 5/1996 on the creation of certain public law entities, created SEPI (*Sociedad Española de Participaciones Industriales* - Spanish Society of Industrial Stakes) as a strategic instrument for implementing the Government's policy for the State entrepreneurial sector. The SEPI Group agglutinates the non-instrumental public enterprises, while the public enterprises of instrumental nature depend on the Ministries in charge of the public service responsibilities which are to be carried out by the corresponding instrumental public enterprises.

State enterprises attached to ministries provide public services for citizens or the ministry itself. ICEX (export promotion), Interés (promotion of foreign investment in Spain) and Red.es (encouragement of the use of new technologies), all of them attached to the Ministry for Industry, Tourism and Trade, are just three examples. As the Instituto de la Vivienda de las Fuerzas Armadas (Institute for Army Housing), the Fábrica Nacional de Moneda y Timbre (National Mint) or Aeropuertos Españoles y Navegación Aerea, AENA (public trading entity attached to the Ministry of Infrastructure, in charge of managing civilian airports of general interest and infrastructures for air navigation) and TRAGSA, an engineering public enterprise, are examples of own means of management of the Public Administration, entitled to do in-house providing for that Public Administration as well as, in some cases, to compete with private firms in certain markets (for instance, the National Mint in the market of digital certification).

Switzerland

The principle stated in Art. 3 ACart has been specified by case law of the competition authorities.

Tunisia

The case law of the national competition authority states that its competence to deal with Anti-competitive matters covers all activities of all business actors including public enterprises. Despite their mission of general economic interest, public enterprises have to operate in a competitive environment and should, therefore, be held accountable for their Anti-competitive conduct.

Turkey

See answer to Question 1(b).

Electronic copy available at: https://ssrn.com/abstract=3705247

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

The following jurisdictions responded "yes" to this question:
Australia, Barbados, Brazil, China, European Union, Greece, Hungary, India, Italy, Jamaica, Japan, , Republic of Korea, Serbia, Seychelles, Singapore, Spain, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

France
Yes it is with the only exception where the two following criteria are combined: the activity a stake fulfills a public interest mission and, in carrying it out, the State or SOE makes use of the powers conferred by public authority.

Guyana
In Guyana, the legislation and Commission are still very new; thus far the Commission has not dealt with any case in which the State was a party

Kazakhstan
Against SOE

Kenya
SOE, since it is a legal entity

Lithuania
The Law on Competition in practice shall be enforced against both the State-owned entity and a State body that breached competition rules. Article 4 (which would be discussed below) of the Law on Competition provides for that the State bodies are prohibited from adopting decisions that give rise or may give rise to the differences in the conditions of competition for undertakings competing in the relevant market.

Pakistan
The Competition Act, 2010 is applied against State-Owned Enterprises, but not against the State. The Commission can only extend policy recommendations to the government, as mentioned in Section 29 (b) of the Competition Act, 2010, which states: The Commission shall promote competition through advocacy which, among others, shall include:-reviewing policy frameworks for fostering competition and making suitable recommendations to any laws.

Poland
As mentioned in point 1a, competition law is enforced against the State when it concerns the activities of the local government, acting as a manager of public property (*the dominium*). The provisions of competition law do not apply to the central government and to its officials.

Russian Federation
Competition law may be enforced against both governmental agencies (State authorities) and SOEs.

The following jurisdictions responded to this question with N/A:
Hong Kong (China), Malaysia

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

The following jurisdictions responded "yes" to this question:
Australia, Barbados, Brazil, China, European Union, France, Greece, Guyana, Hungary, India, Italy, Jamaica, Japan, Kazakhstan, Kenya, Republic of Korea, Malaysia, Mauritius, Mexico, Pakistan, Peru, Russian Federation, Serbia, Singapore, Spain, Sweden, Switzerland, Trinidad & Tobago, Turkey, United States

Electronic copy available at: https://ssrn.com/abstract=3705247

Lithuania
As was stated above, the competition rules are applied both to the private and public entities, however, State-owned entities and State bodies might have an exclusive rights granted by other special law that would provide an exemption from the Law on Competition.

Poland
However, again competition law applies to the State in the meaning of the local government acting within the area of *the dominium* activity

The following jurisdictions responded "no" to this question:
Seychelles, Tunisia

The following jurisdictions responded to this question with N/A:
Hong Kong (China)

If not, please explain

Seychelles
The approach to State actors tends to be softer with more advocacy, behavioural remedies rather than penalties.

Tunisia
The Tunisian competition law applies to all economic actors including State economic undertakings which infringe the law. There is no exception to this principle.

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

Country	Yes	No	Comments
Australia	X		
Brazil	X		
CARICOM			
• Barbados	X		
• Jamaica		X	
• Guyana		X	
• Trinidad and Tobago	X		
China	X		
EU	X		Pursuant to Article 106(1) TFEU: "In the case of public undertakings and undertakings to which Member States grant 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 to those rules provided for in Article 18 and Articles 101 to 109." Even though Article 106(1) read in combination with Article 102 TFEU does not determine a per se illegality of exclusive and special rights, the Court of Justice ruled that "a Member State will be in breach of the prohibitions laid down by those two provisions if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses *(Höfner and Elser, paragraph 29; ERT, paragraph 37; Case C-179/90 Merci convenzionali porto di Genova [1991] ECR I-5889, paragraphs 16 and 17; and Case C-323/93 Centre d'insémination de la Crespelle [1994] ECR I-5077, paragraph 18)"* – see Case C-49/07,

Electronic copy available at: https://ssrn.com/abstract=3705247

Motosykletistiki Omospondia Ellados NPID (MOTOE), [2008] ECR I-04863, at paragraph 49.

The General Court has recently classified the cases in which the award and maintenance of exclusive and special rights breaches competition law (Judgment of the General Court of 20 September 2012 in Case T-169/08, *DEI v Commission* – not yet reported).

The Court of Justice has ruled that the award of exclusive and special rights breaches Competition law when it creates one of the following circumstances: (i) limitation of demand, (ii) conflict of interests (iii) serious and reiterated abuses, (iv) inequality of opportunity between economic operators and (v) unnecessarily wide exclusive rights.

- In *Höfner* it was found that an exclusive right that is granted to an undertaking that is unable to adequately meet the demand for one good or service leads to a breach of Article 102(b) TFEU, as it is limiting the output to the prejudice of consumers.
- Conflict of interests abuses relate to State measures that place a dominant undertaking in a conflict of interest, either by granting regulatory powers to an undertaking that is active in the regulated market (or by bundling regulatory and commercial activities); or when the reservation of certain commercial activities in the same undertaking leads to abusive practices. An example of the latter situation occurred in the ERT case where a company held both the exclusive right to broadcast in-house programs and programs produced abroad was found to lead to a discriminatory broadcasting policy which would benefit its own programs (Case C-202/88, France v Commission (Telecommunications Terminal Equipment) [1991] ECR I-1270. The Court addressed this issue again in *MOTOE*: "a rule which gives a legal person such as ELPA the power to give consent to applications for authorization to organize motorcycle events without that power being made subject by that rule to restrictions, obligations and review, could lead the legal person entrusted with giving that consent to distort competition by favouring events which it organizes or those in whose organization is participates."
- In *Merci Convenzionale*, the Court considered that reiterated serious abuses by an undertaking with an exclusive right lead to the presumption that it is the very own existence of the right that favours the commission of abuses and for that reason is incompatible with Articles 106(1) and 102 TFEU.
- In *Connect Austria*, the Court of Justice addressed the issue of different charges to mobile economic operators. This case concerning the allocation of a DCS ("Digital Cellular System") 1800 licence to Mobilkom (incumbent) without the imposition of a separate fee, whilst a new entrant to the market would be subject to a specific fee. According to the Court, such difference in treatment: "is likely to lead the public undertaking in a dominant position to breach Article 82 EC by extending or strengthening its dominant position, (…) by distorting competition. Given that the distorted competition would therefore result from a State measure which creates a situation where equality of opportunity for the various economic operators concerned cannot be ensured, it may amount to a breach of Article 86(1) EC in conjunction with Article 82 EC." – Case C-462/99, Connect Austria [2003] ECR I-5197, point 87. More recently, in the *Greek lignites* case, the Commission extended the boundaries of *Connect Austria's* 'equality of opportunity' test. In the Commission's view, since "lignite is the most attractive fuel for electricity generation in the Greek market", the former incumbent (PPC) near monopoly over the exploitation of the deposits offer it a low cost competitive advantage vis-à-vis its competitors. This advantage is then reflected in the offers made by PPC in the wholesale

Electronic copy available at: https://ssrn.com/abstract=3705247

			market. In order to counter balance the absence of a level playing field, the Commission has decided that Greece "must ensure that the competitors of PPC have access to sufficient amounts of lignite and to generation of electricity on the basis of lignite allowing them to exercise competitive constraints on PPC during off-peak periods and to have sufficient base load production to build balanced generation portfolios – see Commission Decision of 4 August 2009 establishing the specific measures to correct the anti-competitive effects of the infringement identified in the Commission Decision of 5 March 2008 on the granting or maintaining in force by the Hellenic Republic of rights in favour of Public Power Corporation S.A. for extraction of lignite. The General Court on 20 September 2012 in Case T-169/08, *DEI v Commission* (not yet reported) would annul the Commission decision on the following grounds: it does not follow from the Court's case-law "that the mere fact that the undertaking in question finds itself in an advantageous situation in comparison with its competitors, by reason of a State measure, in itself constitutes an abuse of a dominant position" (paragraph 103). Pursuant to the ruling, the Commission cannot establish an infringement of Article 102 read in combination with Article 106(1) TFEU simply by determining that "a State measure distorts competition by creating inequality of opportunities between economic operators, without it being necessary to identify an abuse of the dominant position of the undertaking." (paragraph 105) • The Court ruled in *RTT* that the extension of a dominant position through a State measure into a neighbouring competing market, without any objective justification, constitutes an infringement of Article 106(1) read together with Article 102 TFEU (Case C-18/88 RTT [1991] ECR I-5941 at 20-21). In the paramount case of *Corbeau*, the Court of Justice ruled that the extension of the core monopoly to potentially competitive markets was unnecessarily broad to finance the provision of a service of general economic interest. This case concerned the financing of the Belgian universal postal service; in order to compensate for the non-profitable universal service segment, the Belgian Government opted for an extension of the exclusive rights held by the Régie des Postes to other profitable market segments (cross-subsidization) – Case C-320/91 *Corbeau* [1993] ECR I-2533 para. 14. More recently, the Commission has challenged the Slovak Republic decision to extend, without justification, the Slovenska Posta's postal monopoly to cover hybrid mail, a market segment that was subject to competition before February 2008. Slovenska Posta is the provider of universal service in Slovakia and before the Postal Act of 2008 was enacted, hybrid mail was provided by two companies (Case COMP/39.562 *Slovakian Postal Law*, OJ C322, 17 December 2008).
France	X		
Greece	X		
Hong Kong (China)	X		Strictly speaking, statutory bodies previously mentioned are bodies which have been entrusted with a specific task by government and not necessarily granted special rights or privileges.
Hungary	X		
India	X		
Italy	X		
Japan	X		
Kazakhstan	X		
Kenya	X		Section 5 of the Competition Act applies to all as long as they are engaged in trade. However, can be exempted upon application under section 25 of the

Electronic copy available at: https://ssrn.com/abstract=3705247

			same Act.
Republic of Korea		X	
Lithuania	X		
Malaysia		X	
Mauritius		X	
Mexico	X		.
Pakistan		X	
Peru	X		
Poland		X	Art.3 of the Act on Competition and Consumer Protection stipulates: “The provisions of the Act shall not apply to restrictions of competition allowed by virtue of separate legislation”. Sometimes legislative acts grant to some entities exclusive rights to carry out a certain activity (legal monopolies). In those cases, competition law is not applied. For example: art. 106 of the Act of 27 July 2005 on the Law of Higher Education stipulates that: ”teaching, educational, research, experimental, artistic, sport, diagnostic, rehabilitation and therapeutic activities are not considered to be economic activities within the meaning of the provisions on freedom of business activity."; or art. 83a sec. 1 of the Act of 7 September 1991 on the System of Education disposes that running a school is not considered to be an economic activity.
Russian Federation	X		
Serbia	X		
Seychelles	X		
Singapore	X		Paragraph 1 of the Third Schedule provides that “Neither the section 34 prohibition nor the section 47 prohibition shall apply to any undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as that prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking.” The services of “general economic interest” or “having the character of a revenue-producing monopoly” are not further defined in the Competition Act. In addition the section 34 prohibition and the section 47 prohibition (anti-competitive agreements and abuse of dominance) shall not apply to any agreement or conduct which relates to activities specified in Para 6 of the Third Schedule (postal services, piped potable water, wastewater management services, scheduled and licensed bus services, rail services and licensed cargo terminal operations)
Spain	X		
Sweden	X		
Switzerland		X	See also answer to Question 2.
Tunisia		X	There is no exemption [exception] to the application of Tunisian competition law for entities which enjoy exclusive rights or specific privileges from the State.
Turkey	X		
United States	X		

If yes, specify any qualification or defense in the statute

Australia

No qualification.

Electronic copy available at: https://ssrn.com/abstract=3705247

Brazil

Brazilian antitrust law does not exclude from its scope of application such legal entities with State-granted exclusive rights or privileges. On the other hand, it also does not grant them for any specific qualification or special defense.

In fact, the current wording of the antitrust law, with regards to scope of application, is substantially broad and inclusive, referring to "any natural person or legal entity, whether publicly or privately owned, including any associations, entities or persons, organized by law or fact, even if on a temporary basis, with or without legal existence, even if under a legally instituted monopoly regime".

CARICOM

For Barbados, there is no specific defence available only to State enterprises. They are treated like other enterprises and are eligible to the same efficiency defences. The same applies to State enterprises in Trinidad and Tobago.

China

There is no special defense in the AML that applies to such entities.

EU

As mentioned above, under Article 106(2) TFEU, undertakings with special and exclusive rights may invoke the performance of a service of a general economic interest as a defense against the breach of Competition law.

Greece

There is no explicit provision in the statute regarding entities to which the State has granted special or exclusive rights or privileges. However, such entities may constitute possible violators of competition law if they engage in economic activities.

As an aside, activities of such entities may constitute an infringement by the State of EU rules (Art. 106 EU Treaty, in conjunction with 102 of the EU Treaty).

Hong Kong (China)

Schedule 1 Article 3 of the Competition Ordinance (HK) (not yet operative) provides that the substantive provisions (sections 34 and 47) do not apply to an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to that undertaking.

Hungary

See also reply to Question 1(b), i.e. the Hungarian Competition Act covers, as possible violators, entities to which the State has granted special or exclusive rights in so far as they are not regulated "otherwise by statutes". There is no express rule in the Hungarian Competition Act which would contain definite qualification or defence.

India

The Act, under section 54, provides that the Government may exempt for a specified period any enterprise or class of enterprise, any practice or agreement arising out of and in accordance with any obligation assumed by India under treaty, convention etc., any enterprise which performs sovereign function on behalf of the Government.

Recently, the Government under this section has exempted merger and takeover plans for loss-making and failing banks from the purview of Competition Commission of India for a period of five years.

Italy

The same specified in Question 2 above.

Japan

Please refer to the answer of Question 1(b).

Electronic copy available at: https://ssrn.com/abstract=3705247

Kazakhstan
Pursuant to Article 32, para 3, the entity of the State monopoly shall not be allowed to:
1) produce goods that do not relate to the State monopoly, except for the activity technologically related with the production of the goods;
2) hold shares (participation interests) in the authorized capital, or otherwise participate in the activity of legal entities;
3) reassign the rights related to State monopoly.

Lithuania
As it was stated above, since the competition rules cover both public and private undertakings, the Competition Council has power to investigate whether actions performed by the State-owned entities (even having exclusive rights) are in conformity with competition rules laid down in the Law on Competition and if the Competition Council finds a breach, it may impose fines on the undertakings concerned. Additionally, these entities might be exempted from the competition rules only if they engage in the particular activity regulated by other laws.

Mauritius
To the extent that this exists, it is provided for in the Act itself. For example, the Schedule to the Act excludes certain agreements or practices from the application of the Act. These are as follows:
(1) Any practice of employers or any agreement by which employers are parties in so far as it relates to the remuneration, terms or conditions or employment or employees.
(2) Any agreement in so far as it contains provisions relating to the use, licence or assignment or rights under or existing by virtue of laws relating to copyright, industrial design, patents, trademarks or service marks.
(3) Any practice or agreement approved or required under an international agreement to which Mauritius is a party.
Are also excluded under the Act under the same schedule the following products:
1. Petroleum products
2. Liquid Petroleum gas.

Mexico
There is not one in particular; all subjects to the law have the same guarantees and/or requirements of defence.

Poland
Article 3 of the Act on Competition and Consumer Protection cited above.

Serbia
See Question 1(b) above.

Seychelles
Unless excluded by a schedule in the FCA 2009. Also, as the Act does not differentiate between State owned entities and exemptions given by the State to such entities, all entities which are “enterprises” under the Act are bound by the Act as well as the State by a separate provision. The practice may be exempted under the relevant exemption provisions (Section 7 (4), 11 (4), 26 (2)).

Singapore
(As above). Yes, Paragraph 1 of the Third Schedule provides that “Neither the section 34 prohibition nor the section 47 prohibition shall apply to any undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as that prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking.” The services of “general economic interest” or “having the character of a revenue-producing monopoly” are not further defined in the Competition Act.
However, it should be noted that for specified activities defined in Para 6 of the Third Schedule (postal services, piped potable water, wastewater management services, scheduled and licensed bus services,

Electronic copy available at: https://ssrn.com/abstract=3705247

rail services and licensed cargo terminal operations) the section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct which relates to those specified activities.

Spain

The Spanish National Competition Authority has referred in several occasions to the application of antitrust rules to public undertakings (See for instance cases 325/93 Emorvisa and 361/95 Funerarias de Madrid (See for instance cases 325/93 Emorvisa and 361/95 Funerarias de Madrid 2)), as stated both in EU and Spanish rules on competition and ratified by the EU Court of Justice.

When establishing the Competition Authority's competence to assess conducts of the Public Administrations, the key is to identify if, at the time they were carried out, such Administrations were acting as regulators within the scope of its responsibilities or as economic operators. Only in the second case the conduct would be subject to competition rules. This criterion emanates from the doctrine of the Spanish Competition Authority, upheld by the Courts (As an example, case r 267/97 Tragsa 3, case r 409/00 Seguridad marítima, case r 447/00 Piñas Andalucía, case r 621/06 CST/ AENA, case r 572/03 Servicios Deportivos Logroño, case 2779/07 Consejo Regulador de Denominación de Origen Vinos de Jerez y Manzanilla de Sanlucar).

Sweden

See answer to Question 1(b).

Turkey

No specification in the Competition Act.

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

Brazil

The Brazilian antitrust statute was enacted in 2011. Therefore, case law issued based on the new law is very scarce. Also, it is yet uncertain whether case law issued under the former regime will apply. However in 2012 the State-owned Banco de Brasil agreed a settlement with the Council for Economic Defence (CADE) over exclusivity arrangements for the provision of payroll loans to civil servants in the first investigation of the financial sector. Banco de Brasil agreed to pay a 99 m reais (E37million) fine, 34 million reasi (E13 million) of which was for none compliance when CADE asked the bank to cease the conduct in September 2011. Civil servants' salaries were paid into Banco de Brasil accounts. Payroll loans were given to workers and the bank took the money directly from salaries once civil servants were paid. The civil servants' association, Fesempre, filed a complaint, and it will now be able to choose other banks to use for this service.

Greece

The HCC has never dealt with a case referring to a privately-owned entity, to which the State has granted special or exclusive rights or privileges. Regarding State-owned entities possessing such rights, the aforementioned case law referring to the "Public Power Corporation S.A." applies.

Spain

According to the above, the Competition Authority has prosecuted and fined several public undertakings. Some examples are hereby presented:

For participating in Anti-competitive agreements: In 1997, *La Lactaria Española S.A.*, a public enterprise attached to the Ministry of Agriculture, was sanctioned with a fine of € 1.01 million for leading a cartel of industrial dairy firms that agreed on the basic prices, quality bonuses and discounts for raw milk. Total fines reached € 6.61 million (Case 352/94, Industrias lácteas).

For abusing dominant positions: La *Sociedad Estatal Correos y Telégrafos*, the State postal service, a 100% State-owned public limited company, has been fined several times for abuse of dominance. In 2003 and 2004 the sanctions rose up to € 5.4 million Euros (Case 542/02, Suresa-Correos) and € 15 million (Case

Electronic copy available at: https://ssrn.com/abstract=3705247

568/03, ASEMPRE/Correos.). In both cases, the enterprise had taken advantage of its dominant position in the market in which it held a monopoly to prevent new entrants in a connected liberalized market.

Commitments: Case 2458/03 CORREOS/ASEMPRE. The public postal undertaking, Sociedad Estatal de Correos y Telégrafos, committed itself to the Spanish Competition Authority to implement a new accounting methodology which would entail the establishment of prices above costs.

The Spanish Competition Authority has applied the aforementioned criterion in several resolutions. For instance, in the case *Ports of Andalusia* (Case R 718/07, Puertos de Andalucía), decided upon in 2008, the public enterprise acted as the regulator and as an undertaking in the same market, which, according to the Competition Authority, could cause severe distortions on competition due to asymmetric information problems and biased incentives in the drafting and implementation of the regulation. No sanction followed in this case since the abuse of dominance could not be proved.

Switzerland
Whether an enterprise has special rights according to Article 3 ACart is ascertained on a case by case basis. Article 3 ACart is interpreted restrictively by the Swiss Competition Commission (COMCO) and the courts.

Turkey
The analysis is based on whether the conduct of the entities to which the State has granted special or exclusive rights or privileges is within the scope of exclusive right/privilege or results from the application of that right/privilege. If not, then Competition Act is applicable.

2.2. Anti-competitive Acts by State Administrative Authorities

6. Does your competition law prohibit certain Anti-competitive acts of State bodies such as administrative authorities?

The following jurisdictions responded "yes" to this question:
Australia, China, EU, France, Hungary, India, Italy, Japan, Kazakhstan, Kenya, Republic of Korea, Lithuania, Malaysia, Mexico, Pakistan, Russian Federation, Serbia, Seychelles, Spain, Sweden, Switzerland

The following jurisdictions responded "no" to this question:
Brazil, CARICOM, Greece, Hong Kong (China), Mauritius, Peru, Poland, Singapore, Turkey, Tunisia, United States

If yes, please explain.

Australia
Only to the extent that those authorities are carrying on business.

China
According to Article 8 of the AML the administrative authorities and organizations which are empowered by the laws and regulations to carry out public administration functions shall not abuse their administrative powers to eliminate or restrict competition.

EU
The Court ruled in *Ahmed Saeed* that there is a duty upon all national authorities (and not only national competition authorities) not to make European competition law ineffective (Case 66/86 Ahmed Saeed [1989], ECR 80).

Electronic copy available at: https://ssrn.com/abstract=3705247

The Court of Justice ruled in CIF that "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" (Case C-198/01, Consorzio Industrie Fiammiferi (CIF) ECR I-8055, at 49).

Hungary

Article 85 of the currently effective Hungarian Competition Act targets any resolution made by an authority by saying that:

- First, the Competition Authority may request public administrative bodies (i.e. government bodies, local governments, mayors of communities, notaries and public bodies or persons vested with administrative competence by an act or government decree) to amend or revoke their resolutions if the Competition Authority finds that the decision violates the freedom of competition; and,
- Secondly, if the public administrative body fails to comply with the request within 30 days, the Competition Authority may seek court review at the administrative court.

It is very important that the main goal is to convince the public administrative body to improve or withdraw the resolution. The court action comes only if this first attempt is unsuccessful.

No such claims by the GVH may be lodged after one year has elapsed from the entry into force of such a resolution, and no application for justification may be submitted where the time limit is missed.

India

Law is equally applicable to all State entities including Government administrative authorities. The Commission has taken up cases against several State entities.

Italy

Article 21 ICL provides that the IAA can identify the cases "in which the provisions of laws or regulations or general administrative acts distort competition or impair the sound functioning of the market and are not justified in the public interest" and notify the Parliament and the Prime Minister of any distortion arising as a result of legislative measures, and the Prime Minister, as well as any other relevant ministers and the relevant local authorities, for distortions arising in any other case (*e.g.*, from an administrative measure). Moreover, in such cases, the IAA may also issue an opinion suggesting how to remove Anti-competitive effects of the measures above.

This article essentially describes the advocacy function attributed to the IAA with the aim of steering and improving current and future legislation which may distort competition.

However, based on Article 21 ICL, the IAA did not have the power to sanction the aforementioned behavior by the public authorities (including local authorities), which were ultimately left unpunished for not following the IAA's recommendations.

The situation has slightly changed with the recently introduced Article 21-*bis* ICL. Indeed, while the IAA still does not have the power to directly sanction the aforementioned behaviors, Article 21-*bis* ICL grants the IAA the power to challenge before the competent administrative courts general administrative provisions, regulations or measures of any public administration distorting competition. In particular, pursuant to Article 21-bis (2) ICL, should the IAA consider that a provision issued by a public administration infringes competition law, it may issue "a reasoned opinion specifying the nature of the infringement within sixty days from the adoption of the act"; if the public administration fails "to comply with the opinion within sixty days of notification," the IAA may lodge an application before the competent administrative court for the annulment of the alleged Anti-competitive measure within the following thirty days.

Note: Whereas Art. 21 ICL attributes to the IAA the power to advocate for change in current and future Anti-competitive legislation (primary sources in Italian law), regulations (secondary sources in Italian law) or administrative measures, Art. 21-bis attributes to the IAA the power to challenge before courts administrative regulations (secondary sources in Italian law) or administrative measures restricting competitions.

Moreover, under Article 22 ICL, the IAA may, on its own motion or upon request, issue opinions on legislative and regulatory proposals which may have the effect of: a) submitting the exercise of an activity or the access to a market to quantitative restrictions; b) establish exclusive rights in certain economic sectors; c) imposing standard practices concerning prices and selling arrangements (again this is part of

Electronic copy available at: https://ssrn.com/abstract=3705247

the advocacy mission of the IAA as there is no sanction for ignoring the opinion/recommendation issued by the IAA under Art. 22 ICL).

Japan

Since State bodies are subjects of the AMA as far as they do business, the AMA applies equally to them. Hence they are prohibited from conducting illegal conducts prohibited by the AMA such as unreasonable restraints of trades, private monopolization, unfair trade practices and others.

Kazakhstan

According to Article 33, para 1, Anti-competitive actions by State authorities such as adoption of acts or decisions, written or verbal instructions, conclusion of agreements or other actions that resulted or may result in restriction or elimination of competition or infringement on consumers' lawful rights, unless such actions are envisaged in the laws of the Republic of Kazakhstan, shall be prohibited and deemed fully or partially invalid in accordance with the procedure established in the legislation of the Republic of Kazakhstan.

Kenya

Section 5 of the Act applies to all persons, including the local authorities as long as they engage in trade.

Republic of Korea

If competition restraining acts are not exempt from MRFTA application, it is the general principle that MRFTA is applied to the acts regardless of the principal agent of the acts.

Lithuania

The Law on Competition (Article 4) establishes a duty of entities of public administration to ensure freedom of fair competition. According to this article: "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, except where the difference in the conditions of competition cannot be avoided when the requirements of the laws of the Republic of Lithuania are complied with." Additionally, in case the Competition Council finds the decision is impeding competition, the Competition Council has power to oblige the State body to abolish or amend the measure concerned in order it would be in conformity with the competition rules. Article 19 (1)(1) of the Law on Competition provides that: "The Competition Council shall control the compliance by undertakings and entities of public administration with the requirements of this Law." Moreover, Article 19 (1)(4) of the Law on Competition provides that: "The Competition Council shall examine the conformity of the legal acts or other decisions adopted by entities of public administration with the requirements of Article 4 of this Law and, if there are grounds, apply to entities of public administration with a request to amend or repeal legal acts or other decisions restricting competition. In case of failure to comply with the requirement, the Council shall have the right to appeal against the decisions of entities of State administration, except for the statutory acts issued by the Government of the Republic of Lithuania, to the Supreme Administrative Court of Lithuania, and against the decisions of entities of municipal administration and other entities of public administration— to the regional administrative court."

The Competition Council during numerous cases concerning infringement of this article has developed a scheme for application of this rule, which requires ascertaining of the entirety of the following circumstances:

- The act or decision of institution privileges or discriminates different undertakings or their groups;
- Due to such act or decision differences in the conditions of competition for competitors are created or may be created in the relevant market;
- Different conditions for competition are not determined by the requirements of the laws of the Republic of Lithuania.

It should be noted that mostly infringements of this provision concern unlawful procedure of public procurement of certain services organized by municipality institutions, when municipalities granted

Electronic copy available at: https://ssrn.com/abstract=3705247

contracts to certain undertakings (mostly to SOE, but in some cases – to private entities) without any competitive procedure thus creating different competition conditions to the undertakings acting in certain relevant market.

Malaysia
Please see the explanation given for Question 1b.

Mexico
For effects of the FLEC, government entities are considered economic agents and therefore all FLEC dispositions are applicable without distinction at all.

Pakistan
The definition of an undertaking includes a regulatory authority.

Russian Federation
Articles 15 and 16 of the Act specifically address these questions forbidding certain Anti-competitive acts of State bodies.

Serbia
See Question 1(b) above.

Seychelles
See Questions 2 and 5(a) above.

Spain
Article 12.3 of Spanish CA attributes to the National Competition Commission legal authority to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived.
The sanction established by the CNC in respect of a price fixing agreement in the sherry grape and grape must market (see below [Q: Is the prohibition regularly enforced?]) creates a precedent for the CNC Council to apply articles 1, 2 and 3 of the competition law as far as the responsibility of a public body for a breach of the competition rules and regulations are concerned.

Sweden
Chapter 3, Article 27, Swedish Competition Act stipulates that:
"A certain conduct by the State, a municipality or a county council within a sales activity covered by Chapter 1, Article 5, first paragraph, may be prohibited through an injunction, if such conduct
1. distorts, by object or effect, the conditions for effective competition in the market, or
2. impedes, by object or effect, the occurrence or the development of such competition.
An injunction may not be imposed in relation to conduct that can be justified by public interest considerations. A certain sales activity by a municipality or a county council may also be prohibited in cases referred to in the first paragraph. However, such a sales activity may not be prohibited if it is compatible with law."

Switzerland
There is in general no exemption for State bodies. Like private enterprises they are subject to competition rules (see Questions 1 and 2).

Tunisia
Tunisian competition law prohibits all Anti-competitive practices regardless of the personality of the authors. According to case law, the national competition authority is also competent for the actions of administrative authorities insofar as they exercise economic activities outside the boundaries of their prerogative of public authority.

Electronic copy available at: https://ssrn.com/abstract=3705247

Is the prohibition regularly enforced?

The following jurisdictions responded "yes" to this question:
Australia, European Union, India, Japan, Kazakhstan, Kenya, Republic of Korea, Lithuania, Peru, Russian Federation, Serbia, Seychelles, Spain, Sweden, Switzerland

China

On January 26 2010 three global positioning system (GPS) operators filed a complaint to Guangdong claiming that the municipal government of Heyuan city, Guangdong province, abused its administrative power in the course of promoting the GPS for automobiles and eliminated and restricted competition in this industry. After investigation, the Guangdong officially proposed to the Guangdong Government asking for rectification of the Heyuan Government's abusive conduct.

France

This prohibition is regularly enforced in France by Administrative Courts when the litigation involves either the organization of public service or the provision of a public service by a public entity making use of powers conferred by public authority[4]. It is enforced by the French competition authority ("the Autorité") or Civil Courts when the litigation concerns a public entity in the course of its economic activity.

Italy

The IAA has used its powers under Articles 21 and 22 extensively, issuing opinions and notifying the Parliament / Prime Minister in several instances (until April 2010, the IAA had issued approximately 655 opinions, see F. Munari, "Poteri di segnalazione, legge per la concorrenza, dialogo fra Autorità Garante e Istituzioni" in di P. Barucci e C. Rabitti-Bedogni (eds.), *20 Anni di Antitrust. L'evoluzione dell'Autorità Garante della Concorrenza e del Mercato*, Torino, 2010, vol. I, p. 295). Notably, only in 2001, the IAA has sent 69 opinions under Article 22 and 36 opinions under Article 21 in connection to legislative provisions, regulations and administrative measures restricting competition (see AGCM,"L'attività di segnalazione e consultiva", 2012, www.agcm.it). By way of examples, more recently, through the aforementioned opinions under Article 21, the IAA has requested/suggested to the State and other public authorities to:

- Remove the legislative provisions, which imposed minimum costs - to be approved by the Ministry of Transport - to ensure minimum quality standards to trucking services, as these provision had the ensuing effect of creating minimum tariffs (AS885);
- Eliminate the provisions contained in a public tender, limiting to possibility to participate in the tender to auditing companies registered in a public registry kept by a regulatory authority. (AS895);
- Avoid the direct award of local public services and proceed with a tender instead (AS873);
- Amend the requirements for obtaining a subsidy by the Regione Valle d'Aosta, which result to be burdensome for undertakings other than those established in the Region (AS863);
- Remove obstacles preventing/limiting access to the exercise of an economic activity, in this case tourist guides (AS914);
- Eliminate fiscal discrimination caused by the different tax regime applied on two similar banking products (libretti di risparmio v. conti di deposito) (AS936);
- Remove the distortion arising from subsidies granted by the Italian State that would reduce incentives for an efficient management (AS938).

In half of the cases, as a result of the IAA's opinion, the relevant provisions had been amended so as to follow the indications provided by the IAA (see F. Munari, "Poteri di segnalazione, legge per la concorrenza, dialogo fra Autorità Garante e Istituzioni", in P. Barucci e C. Rabitti-Bedogni (eds.), *20 Anni di Antitrust. L'evoluzione dell'Autorità Garante della Concorrenza e del Mercato*, Torino, 2010, vol. I, p. 295)

Please also note that, according to Article 47 of the Law No. 99/2009, the Italian Government is required to draft a law proposal and submit it to the Parliament, on a yearly basis, in order to propose amendments to current legislation and regulation whose potential incompatibility with ICL (and more

[4] Tribunal des conflits, 6 June 1989, *Préfet de la région Ile de France*; 18 October 1999, *Aéroport de Paris et Air France c/ TAT*

Electronic copy available at: https://ssrn.com/abstract=3705247

generally the sound functioning of the market) has been signaled by the IAA's opinions under Articles 21 and 22 (see, *e.g.*, AS659 and AS901).
Although Art. 21-*bis* (above) has been enacted only recently (*i.e.*, December 2011), following the adoption of these new provisions, the IAA has opened several proceedings against State and local administrative authorities as well as against private entities entrusted with the management local public services (see, for instance, list included in the table below)

No. of proceeding	Proceeding	Date	Scope of the IAA's opinion/recommendation
AS900 (ex S1348)	COMUNE DI LUCCA - REGOLAMENTO COMUNALE SUGLI ESERCIZI DI SOMMINISTRAZIONE DI ALIMENTI E BEVANDE	04/01/2012	Aimed at removing the obstacles for exercising an economic activity
AS908 (ex S1389)	COTRAL SPA - DOCUMENTAZIONE DI GARA RELATIVA ALL'AFFIDAMENTO DELLA FORNITURA DI RICAMBI DI CARROZZERIA ORIGINALI - MANUTENZIONE DI AUTOBUS FIAT-IVECO-IRISBUS	23/01/2012	Aimed at removing certain provisions included in the tender for selecting the entities charged with a public service
AS976 (ex S1561)	COMUNE DI CASTRIGNANO DEL CAPO (LE)-CONCESSIONI ESERCIZIO NOLEGGIO NATANTI DA DIPORTO	09/08/2012	Aimed at removing the exclusive rights granted by the Municipality
AS951 (ex S1530)	PROVINCIA DI MONZA E BRIANZA - PIANO TERRITORIALE DI COORDINAMENTO PROVINCIALE	27/06/2012	Aimed at removing the obstacles for exercising an economic activity
AS913 (ex S1358B)	DISPOSIZIONI IN MATERIA DI AUTOTRASPORTO	05/03/2012	Aimed at removing provisions by the Ministry of Transport (and by another body connected to it) imposing minimum costs on trucking services to third parties with the ensuing risk that these could result in minimum tariffs
AS975 (ex S1571)	ROSETO DEGLI ABRUZZI (TE) - AMPLIAMENTO DI CONCESSIONI DEMANIALI MARITTIME	09/08/2012	Aimed at removing the measures of a municipality through which the scope of the exclusive rights (*i.e.*, license in respect of public land) granted had been expanded to the benefit of those entities that are already holders of such rights, without any public tender proceeding.
AS977 (ex S1570)	PROVINCIA DI CREMONA-DETERMINAZIONE DELLE TARIFFE MINIME DI FACCHINAGGIO	09/08/2012	Aimed at removing minimum tariffs imposed by the administrative authority for the purpose of ensuring minimum quality services
AS960 (ex S1529)	PROVINCIA DI TRENTO - DISPOSIZIONI IN MATERIA DI PROGRAMMAZIONE URBANISTICA DEL SETTORE COMMERCIALE	13/07/2012	Aimed at removing the obstacles for exercising an economic activity

Electronic copy available at: https://ssrn.com/abstract=3705247

AS958 (ex S1519)	PROVINCIA DI RIETI - CONCESSIONE DI ESERCIZIO DELL'IMPIANTO SEGGIOVIA BIPOSTO MONTE TERMINILLO	06/07/2012	Aimed at removing the measure through which a municipality had extended the duration of a license to the benefit of the existing holder without any public tender proceeding
AS941 (ex S1486)	REGIONE PUGLIA - ORARI E TURNI FARMACIE	01/06/2012	Aimed at removing the obstacles for exercising an economic activity
AS961 (ex S1555)	COMUNE DI VENEZIA - RIORGANIZZAZIONE SOCIETARIA DELLA MOBILITÀ. COSTITUZIONE DELLA SOCIETÀ CAPOGRUPPO AVM S.P.A E ATTI CONSEGUENTI	13/07/2012	Aimed at removing the exclusive rights granted by the Municipality
AS920 (ex S1366)	REGIONE ABRUZZO - DISPOSIZIONI DI ATTUAZIONE PER LA CONCESSIONE DEI CONTRIBUTI IN CONTO INTERESSI PER INTEGRAZIONE DEI FONDI RISCHI	20/03/2012	Aimed at removing the requirements for obtaining regional subsidies based, inter alia, on territorial links.

Russian Federation

There is significant case law. More than 50% of the antitrust violations considered by the FAS annually are those by the government agencies and State owned enterprises.

Spain

The CNC Council has resolved to impose fines totalling €544,000 on the Federation of Wineries in the Sherry-Producing District (Federación de Bodegas del Marco de Jerez- FEDEJEREZ), the Cádiz Association of Viticulture Businesses (Asociación de Empresarios Viticultores de Cádiz –ASEVI-ASAJA), AECOVI, the Cádiz Union of Farmers and Livestock Breeders (Unión de Agricultores y Ganaderos de Cádiz – UAGA-COAG CÁDIZ), the Association of Sherry and Manzanilla Artisans (Asociación de Artesanos del Jerez y la Manzanilla – ARJEMAN) and the Regulatory Council of the Denominations of Origin Jerez-Xérès-Sherry, Manzanilla de Sanlúcar de Barrameda and Vinagre de Jerez (Consejo Regulador de las Denominaciones de Origen Jerez-Xérès-Sherry, Manzanilla de Sanlúcar de Barrameda and Vinagre de Jerez) for having engaged in a concerted practice to fix the prices of sherry grapes and grape must.

In addition, the CNC Council declares in its Resolution that the Department of Agriculture and Fishing of the Government of Andalucía has been responsible, together with the associations involved in these proceedings, for a breach of the competition rules and regulations, due to its participation in agreements to fix the prices of grapes and grape must from September 2002 until, at least, July 2007. Despite the fact that it has not imposed any sanction in this case, the CNC Council takes the view that the active role of the Department of Agriculture and Fishing in the organization and monitoring of the proper performance of the price fixing agreement has been proved and that it has contributed considerably to keeping the agreement in force and, therefore, to severely restricting competition in that market over a prolonged period. The lack of any prior ruling by the CNC Council in which the responsibility of a public body for a breach of the competition rules and regulations has been recognized represents a change of approach that has been taken into account when determining whether or not to impose a pecuniary sanction on the Department of Agriculture and Fishing of the Government of Andalucía. In relation to this declaration that the Department of Agriculture and Fishing of the Government of Andalucía has committed an offence, one of the CNC´s directors gave a dissenting opinion.

Electronic copy available at: https://ssrn.com/abstract=3705247

The following jurisdictions responded "no" to this question:
Hungary

The prohibition is not enforced 'regularly', but there are examples for its application. E.g. a taxi driver applied for a licence to the municipality of a town which was very popular with tourists. He was refused for two reasons:

- first, according to the municipality decision, taxi licences could have been given to taxi drivers who were either local residents or lived within a 10 mile radius of the town - and our taxi driver lived further;
- secondly, the number of taxi licences was maximized by the municipality.

The taxi driver complained to the Competition Authority, which requested the municipality to revoke the decision and after we had been rejected by the local government we went to the administrative court and finally we won the case.

The following jurisdictions responded to this question with N/A:
Barbados, Brazil, Guyana, Hong Kong (China), Jamaica, Kenya, Malaysia, Mauritius, Mexico, Pakistan, Poland, Singapore, Trinidad & Tobago, Turkey, United States

Greece
There is no explicit provision in the statute regarding State Administrative Authorities and the Greek Competition Law cannot be applied to them, unless they engage in economic activities, as already mentioned. However, the HCC can issue formal Opinions against the acts of these Authorities that may deemed to constitute regulatory barriers to competition, using its consultative/advisory powers, either upon request from the competent government official or acting ex officio. Up to the present, formal Opinions of the HCC have been issued mainly with regards to draft legislation and existing regulatory restrictions to competition (see answer to question 9a below).

2.3. Procurement, Bidding and Corruption

7. Does your competition law apply against the State or officials of the State who are complicit in bidding rings, preferences or other Anti-competitive corruption in the awarding of State contracts?

The following jurisdictions responded "yes" to this question:
Australia, Brazil, Guyana, Jamaica, Kazakhstan, Mexico, Seychelles, Spain

China
The Law on Government Procurement and the Law on Bidding and Tendering govern procurement and bidding in China. Relevant articles in the AML that address this issue include Article 34 of the AML, which provide that: the administrative authorities and organizations which are empowered by the laws and regulations to carry out public administration functions shall not abuse their administrative powers to create discriminatory qualification requirements or review standards and shall not disseminate information in a manner which is non-pursuant to the law to exclude or restrict foreign business operators from participating in tenders organized in China.

European Union
Furthermore, the EU Public Procurement Directives place fraud and corruption amongst the causes of exclusion from participation in a public contract (Article 45 of Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts).

Poland
Article 6 section 1 point 7 of the Act of 16 February on Competition and Consumer Protection: "Agreements which have as their object or effect elimination, restriction or any other infringement of competition in the relevant market shall be prohibited, in particular those consisting in: (…) collusion

Electronic copy available at: https://ssrn.com/abstract=3705247

between undertakings entering tender, or by those undertakings and the undertaking being the tender organizer, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price". However, again competition law is enforced only against the local government acting within the field of the *dominium* activities or State owned enterprises being sole property of the State.

Russian Federation

Besides general provisions of Articles 17-18 (bidding) of the Act, there is the separate Federal Law on Placing Orders of Delivery of Goods, Execution of Works, Rendition of Services for State and Municipal Needs of 2005 that regulates bidding in the State (municipal) sector in detail. Also preferences are allowed in a limited number of cases listed in Articles 19-20 of the Act. Article 37 of the Act is dedicated to liability in general.

Tunisia

Under Article 9 paragraph 2 of the Competition and Prices Act, "The Competition Council is called to recognise the petitions pertaining to anti-competitive practices as provided by Article 5 of this Act and to advise on the requests for consultations." It is clear from the reading of these provisions that the Tunisian legislature has not specified explicitly and clearly the authors of these practices and has not foreseen any exemptions to this rule either. Faced with this legal vacuum and in order to avoid any confusion, the Council's jurisprudence has provided the necessary clarification to this situation by extending its competence to all offenders regardless of their status to include public enterprises and even public institutions of an administrative nature.

The following jurisdictions responded "no" to this question:

Barbados, France, Hungary, Republic of Korea, Lithuania, Malaysia, Mauritius, Peru, Serbia, Singapore, Sweden, Switzerland, Trinidad & Tobago, Turkey

Greece

To the extent that State officials may be involved in bid-rigging cases, this may constitute a criminal offence (pursued by the criminal prosecutor). The HCC is obliged to notify to the public prosecutor all of decisions finding and sanctioning cartel-type infringements (against enterprises). On the basis of those HCC decisions, the public prosecutor may subsequently initiate proceedings against individuals.

Hong Kong (China)

However, Prevention of Bribery Ordinance does make such criminal conduct.

India

Such officials though can be prosecuted under the Prevention of Corruption Act.

Italy

ICL does not apply to individuals, but merely to undertakings. Therefore, the ICL does not apply to officials of the State who are complicit in bidding rings, preferences or other Anti-competitive corruption in the awarding of State contracts. This conduct may however infringe the relevant criminal law provisions punishing corruption (see Chapter II, Section II, sub-Section I of the Italian criminal code).

Japan

In the case of government-involved bid rigging, government officials are subject to criminal accusation under the Act on Elimination and Prevention of Involvement in Bid Rigging etc. and Punishment for Acts by Employees that Harm Fairness of Bidding, etc.

Kenya

Nonetheless, the Competition Act (section 21 (3) (c) applies to bid-rigging among business undertakings.

Pakistan

The competition law of Pakistan does not apply against the State or officials of the State who are complicit in bidding or other Anti-competitive corruption in the awarding of State contracts, but Section

Electronic copy available at: https://ssrn.com/abstract=3705247

4(e) of the Competition Act, 2010 prohibits agreements that involve collusive tendering or bidding for sale, purchase/or procurement of any goods or service.

United States
See Columbia v Omni Outdoor Advertising (Sup. Ct 1991)

7a. If yes, is the competition law in fact so applied?

The following jurisdictions responded "yes" to this question:
Australia, European Union, Jamaica, Kazakhstan, Mexico, Poland, Russian Federation, Seychelles, Spain

The following jurisdictions responded "no" to this question:
Brazil, Lithuania

China
The Law on Government Procurement and the Law on Bidding and Tendering are applied in practice. It is not entirely clear whether the AML has been applied in this regard.

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?

Country	Yes	No	Explain
Australia		X	No examples.
Brazil	X		Over the last years Brazil has developed a strong criminal policy program for prosecuting cartels. Brazilian antitrust authorities act in partnership [with] the federal and State prosecutors for legal prosecution in the courts of any Anti-competitive practices that are also typified as crimes. Moreover, there is a member of the Federal Public Prosecutor permanently acting with the antitrust authorities in this regard. A 2002 federal law allows federal police to assist the antitrust authorities in cartel investigations when the conduct has interstate or international effects. Competition officials and the Department of Federal Police have entered into a formal co-operation agreement, renewed in 2008. The agreement provides for an exchange of information and technical assistance. It creates a Working Group comprising [of] two representatives from each party, whose responsibilities are: "(*i*) coordinating the exchange of information, documents and expertise between the Parties and (*ii*) setting up a Cartel Investigation Centre which shall use the synergies of the work done regarding Anti-competitive conduct..." The police actively assist antitrust public servants in their cartel investigations, particularly in conducting dawn raids. An interesting effect of this co-operation results from the fact that Brazilian criminal law authorizes the temporary jailing of individuals (*for up to five days, with the possibility for a five day extension*) at the time of a search or dawn raid of their premises, for the purpose of preventing the destruction of or tampering with evidence. As an illustration, in one case in 2007, involving a suspected retail fuel cartel in Belo Horizonte, Brazil's third largest metropolitan area, 250 police and antitrust officers participated in dawn raids on 42 companies. Twenty-three individuals were temporarily detained. This power is exercised pursuant to court orders sought by the prosecutor. Competition authorities can suggest that the prosecutor seek such

Electronic copy available at: https://ssrn.com/abstract=3705247

			orders, but they seldom do so in their investigations. It is more likely to be employed by prosecutors in cases that they initiate independently. In addition to joint investigations, prosecutors are invited to sign leniency agreements, thereby ensuring that the applicant will not be subject to parallel criminal prosecution. In 2008 the Sao Paulo State Prosecutor's Office created a special unit to investigate cartels and to co-operate with the antitrust officials in joint criminal and administrative investigations. This arrangement became a template for co-operation between competition officials and other State prosecutors. These arrangements culminated in the "National Anti-cartel Strategy (in Portuguese, *Estratégia Nacional de Combate a Cartéis – ENACC*)," adopted in October 2009 as a part of the second national Anti-Cartel Enforcement Day. Two hundred prosecutors and police officers from different Brazilian states gathered to discuss to the implementation of the country's criminal anti-cartel laws. At the end of the event the principal authorities signed the "Brasilia Declaration," dedicated to re-affirming and enhancing the co-operation among these authorities in the anti-cartel program. Federal and State prosecutors can initiate competition cases under the Economic Crimes Law independently of the BCPS. While data describing these cases are not readily available, it seems that this practice is fairly common. For further details, see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Competition Law and Policy in Brazil Peer Review* 19 (2010). Violation of the Competition Law is an administrative offense. However, cartel conduct is also a violation of the Federal Economics Crimes Law (Law no. 8,137, of December 27, 1990). Article 4 of the mentioned statute prohibits as a crime: "*agreements among competitors designed to fix prices or quantities, divide markets, or control supply or distribution channels*." (free translation). This Article also prohibits other types of conduct, including "*abuse of economic power*," "*exploitation of monopoly power by increasing prices without justification*," "*sales below cost to hinder competition*," and certain forms of price discrimination. The law applies only to individuals and not to corporations. Antitrust authorities do not have authority to enforce the Federal Economic Crimes Law. That falls to federal and State prosecutors. There are 26 states and a Federal District in Brazil. While the Economic Crimes Law is a federal statute, State prosecutors also have jurisdiction to enforce it. Due to the enactment of new competition law, SDE was abolished and its investigative and preliminary enforcement responsibilities in competition cases are transferred to a new CADE Superintendency General (SG). In 2009, SDE and the OECD collaborated in a joint initiative named "*Fighting Bid Rigging in Public Procurement*", which took place in five cities. In each city there were two training sessions on detecting and prosecuting bid rigging, one for procurement officials and another for criminal investigators. More than 600 trainees attended. For further details, see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Competition Law and Policy in Brazil Peer Review* 22 (2010). As a part of the bid rigging initiative antitrust authorities released their Guidelines for the Analysis of Complaints Involving Public Procurement, describing the methodology for analyzing bid rigging and related conduct. Additionally, SDE has signed co-operation agreements with three other government agencies – the *Brazilian Federal Court of Auditors* and the

Electronic copy available at: https://ssrn.com/abstract=3705247

			Office of the Controller General, which conduct audits of government contracts, and the *Public Expense Observatory*, which focuses on fraud and corruption in government – the purpose of expanding the anti-bid rigging program. Finally, at SDE's behest the Brazilian Ministry of Planning issued in September 2009 a regulation requiring participants in federal public tenders to present a *Certificate of Independent Bid Determination* (CIBD), stating that they have not engaged in bid rigging.
CARICOM			
• Barbados	X		The Authority can but has never had cause to.
• Jamaica	X		N/A
• Guyana	X		The Authority can but has never had cause to.
• Trinidad and Tobago	X		No authority as yet.
China			There are no guidelines about this issue in the AML
EU			Nothing in EU law bars such cooperation. However, the EU public procurement rules do however not contain any specific rules dealing with the issue of collusion/bid-rigging.
France	X		French criminal antitrust enforcement is under the responsibility of Criminal Courts. Article L.420-6 of the commercial code provides that individuals who take a personal and decisive part in the conception or operation of a corporate breach of antitrust law can be fined or jailed for a maximum of four years. Any type of antitrust infringement, including vertical restraints or unilateral conduct, can give rise to criminal proceedings. The second paragraph of article L.462-6 of the commercial code specifies that when the facts of a case before the Autorité appear to warrant the application of article
Greece		X	As already mentioned, in the case of violations of article 1 of the Greek Competition Law and 101 EU Treaty (Anti-competitive agreements, notably cartels) by private undertakings in public procurements, the HCC notifies the public prosecutor, who may then initiate against them proceedings for the imposition of the criminal sanctions provided for by the law.
Hong Kong (China)			N/A
Hungary		X	
India		X	The Act doesn't provide for criminal sanction.
Italy	X		The ICA may ask the public prosecutor to access criminal files in order to prosecute bid- rigging under Italian competition law once the criminal investigation is over. Likewise, the public prosecutor may ask the ICA to access documents used for fining Anti-competitive bid rigging in order to bring criminal actions against the conspirators.
Japan			
Kazakhstan	X		The functions are allocated according to the legislation.
Kenya		X	N/A
Republic of Korea		X	But the KFTC has the exclusive right to file complaints to the public prosecutor in case of serious violations of MRFTA. MRFTA §71 (1) any offence in violation of articles 66 and 67 shall be prosecuted through public action only after a complaint is filed by the KFTC. (2)_If necessary, the KFTC shall file complaints together with the Prosecutor General for cases involving the offenses listed in Articles 66

Electronic copy available at: https://ssrn.com/abstract=3705247

			and 67 because the violations deemed gross and considerable it may substantially suppress competition
Lithuania		X	Firstly, it is necessary to mention that the competence of investigating cases on corruption is assigned to another State body named Special Investigation Service of the Republic of Lithuania. What regards the investigations of infringements of the procedure of public procurement, the task is assigned to the Public Procurement Office. It is worth noting that the Competition Council has a duty to inform these institutions if by carrying out its tasks the Competition Council notices infringements of other laws, such as public procurement fraud or corruption.
Malaysia		X	
Mauritius	X		Fraud and corruption are outside the ambit of the Competition Law. It falls under the Prevention and Corruption Act and under a separate law enforcement agency known as the Independent Commission Against Corruption. The Competition Commission has signed a Memorandum of Understand with the ICAC and any matters relating to issues regarding fraud and corruption which comes to the attention of the Competition Commission is referred to the ICAC under the provisions of the MOU.
Mexico	X		The LFCE establishes that the Federal Competition Commission (FCC) shall adjudicate the cases of its competence, to impose administrative sanction for violations to the FLEC, as well as to denounce or submit complaints before the Public Ministry with respect to criminal conduct that it may detect in the areas of competition and free concurrence (Part IV, article 24 FLEC)
Pakistan		X	
Peru		X	
Poland	X		According to Art. 31 point 16) of the Act on Competition and Consumer Protection, the President of the Office of Competition and Consumer Protection co-operates with the Head of the National Crime Information Center in the scope essential for the fulfilment of his statutory tasks. The National Crime Information Center is responsible for the collection, processing and the transmission of criminal information to entities which prevent and combat crime.
Russian Federation	X		Unlike administrative cases, criminal cases cannot be investigated by the antimonopoly body and the relevant materials must be passed to the office of the public prosecutor. The Office of the public prosecutor is empowered to prosecute in civil (commercial) courts on its own.
Serbia		X	For these issues are responsible Anticorruption agency and/or Public Procurement Office
Seychelles		X	The FTC is newly established and is currently entering into agreements with other bodies to allow for such cooperation.
Singapore	X		The secrecy/confidentiality obligations imposed on the competition authority are qualified by statutory provisions which permit communications “lawfully required or permitted under… any other written law”
Spain		X	There is not protocol in place for this type of cooperation and it has not been done yet.
Sweden	X		There is nothing that hinders the Swedish Competition Authority from working with public prosecutors in such criminal cases. The Authority has not done that so far and there are no recommended practices in place governing this kind of cooperation. However, the SCA has recently intensified its cooperation with the National Anti-Corruption Unit within the Swedish Prosecution Authority. In practice this cooperation means exchange of anonymous information regarding suspected markets and

Electronic copy available at: https://ssrn.com/abstract=3705247

			different pre-studies to some extent. In the beginning of 2012, the SCA will organize mutual education activities whereby staff from the SCA will educate police officials who investigate e.g. bribery of public officials in how to recognize signs of bid-rigging. Similarly, staff from the National Anti-Corruption Unit will teach case handlers at the SCA on how to recognize signs of corruption.
Switzerland		X	In principle, this area is covered by the Federal Act on Public Procurement (see http://www.admin.ch/ch/f/rs/c172_056_1.html) and cantonal (regional) laws. Furthermore, art. 322ter and art. 322quater of the Swiss Criminal Code (see http://www.admin.ch/ch/e/rs/c311_0.html) prohibit corruption. However, the Swiss competition authority can take action (in a parallel procedure) against bidders that are suspected to collude in order to eliminate or restrain competition within the meaning of art. 5 ACart (Art. 5 ACart: "Agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful").
Tunisia	X		It is possible under Tunisian competition law to initiate a criminal action before the public prosecutor against violators of the competition act in addition to their condemnation for violation of the competition law.
Turkey			N/A
United States	X		

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?

Country	Yes	No	What are those requirements?
Australia	X		
Brazil	X		The requirements include prior registration of all public bidders with the government, with delivery of select documentation; in public procurement proceedings all bids are revealed simultaneously, proceedings for the rejected bidders to challenge the procurement proceedings.
CARICOM			
• Barbados	[N/A but implies yes]		Contained in the Barbados Financial Administration and Audit (Supplies) Rules, 1971. Financial Administration and Audit (Supplies) (Amendment) Rules, 2011
• Jamaica	X		Set out in the procurement rules and contractual terms
• Guyana		X	
• Trinidad and Tobago	[N/A – but implies yes]		The Central Tenders Board Act (Chap. 71.91 of the Laws of Trinidad and Tobago) treats with certain procurement by the Government. Procurement by companies would be treated with by their internal procurement rules. The Act makes provision for a transparent process in respect of requests for bids (Section 20) and it also provides for the best offer to be accepted (Section 24.)
China	X		According to Article 34 of the AML, the administrative authorities which are empowered by the laws and regulations to carry out public administration functions shall not abuse their administrative powers to create discriminatory qualification requirements or review standards and shall not disseminate information in a manner which is non-pursuant to

Electronic copy available at: https://ssrn.com/abstract=3705247

			the law to exclude or restrict foreign business operators from participating in tenders organised in China. According to Article 3 of the Government Procurement Law, the information concerning government procurement shall be published in good time to the general public in the mass media designated by the departments supervising government procurement, with the exception of those that involve business secrets. According to Article 51 of the Government Procurement Law, the information concerning government procurement shall be published in good time to the general public in the mass media designated by the departments supervising government procurement, with the exception of those which involve business secrets.
EU	X		These requirements set forth in the Public Procurement Directives: Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. L 134/114 of 30 April, 2004 and Directive 2004/17/EC of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, O.J. L 134/1 of 30 April 2004.
France	X		The legal principles governing public procurement in France and integrated in the public procurement code are the following: - public procurement is the most economically efficient process to provide public bodies with the best services at the best price; - guarantees equal access for businesses to public purchasing and protects free enterprise and the effectiveness of competition; - the transparency of proceedings is a good way to prevent collusion between buyers and suppliers and to fight corruption. Similarly, the European law principles of publicity and equal access have been progressively extended at the EU level in view of the creation of the internal market, transposed into French law and incorporated into the public procurement code.
Greece	X		The law governing State procurements in Greece (Presidential Decree No 118/2007 – 42 articles) prescribes in great detail every aspect of the relevant procedure, including, inter alia, the required terms of the requests for bids and the ways in which they should be written, the publicity requirements, the necessary certificates for the participants, the minimum time periods within which bids can be submitted, the exact procedures for the submission and the opening of the bids, the selection criteria for different kinds of requests for bids, the way of notification of the award of contracts, the possible administrative appeals, the contents of the contracts, the required guarantees, the exact procedures for the signing and the implementation of the contracts, the necessary controls, the cases in which a contractor can be declared in default, as well as the timing, the necessary documents and the exact procedure for the payment of contractors. Please note that, to a large extent, the above rules reflect EU legislation.
Hong Kong (China)	X		By regulation.
Hungary	X		According to the Act on Public Procurement (Act No CVIII of 2011) the contracting entity must indicate in the notice published for setting the procedure in motion the criteria based on which to award the contract. The criteria for the award of contracts shall be either the lowest price

Electronic copy available at: https://ssrn.com/abstract=3705247

			only; or selecting the most economically advantageous tender. In the latter case the contracting entity must define a) the evaluation factors, b) the rated multiplier of each evaluation factor (weight of the factor), c) the lowest and highest number of evaluation points and d) the procedure of how to determine the number of points. The Act on Public Procurement regulates also in great detail the grounds for exclusion. Moreover, according to the Criminal Code "Any person who enters into an agreement aiming to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or an activity that is subject to a concession contract by fixing the prices (charges) or any other term of the contract, or for the division of the market, or takes part in any other concerted practices resulting in the restraint of trade is guilty of felony punishable by imprisonment for up to five years. Any person who partakes in the decision-making process of an association of companies, a public body, a grouping or similar organisation, and adopting any decision that has the capacity for restricting competition aiming to manipulate the outcome of an open or restricted tender published in connection with a public procurement procedure or an activity that is subject to a concession contract shall also be punishable."
India			There is no central public procurement related law in India. Public Procurement Bill, 2012 is pending in the legislature. Central Government, State Government, State Government and various agencies under these governments have their own policy with respect to public procurement. Besides that Courts have also from time to time laid down certain policy.
Italy	X		
Japan			N/A
Kazakhstan	X		N/A
Kenya	X		The Public Procurement and Disposal Act, 2005, whose mandate is to establish procedures for procurement has the objective of maximizing economy and efficiency, promoting competition and ensuring that competitors are treated fairly, promoting integrity and fairness of the procedures and increasing transparency and accountability in those procedures. The requirements are depicted under part of IV and V of the said Act.
Republic of Korea	X		(1) General (open) bid; (2) Public notice of a bid; (3) The highest bidder shall be a successful bidder. In case of competition bidding, items concerning bidding shall be publicly announced.
Lithuania	X		General requirements for public procurement which are established in the Law on Public Procurement are these: • Firstly, for arranging and executing procurement, the contracting authority must (or if the usual commercial procedure is followed may) appoint the Public Procurement Commission (formed of at least 3 natural persons). The contracting authority may decide to authorize another contracting authority to perform these acts for it. • In order to ensure clearness and principle of publicity, the contracting authority is obliged to publish prior information notice of any planned procurement, including the procurement for which a framework agreement is signed (the exceptions are established in Law when authority is not obliged to publish). The contracting authority must publish prior information notices without delay at the beginning of the financial year and, in case of public works contracts, immediately after making the decision to approve construction of

Electronic copy available at: https://ssrn.com/abstract=3705247

			objects. Additionally, the contracting authority may announce any information regarding procurement by publishing notices of voluntary ex ante transparency. All the notices to be published shall be submitted to the Public Procurement Office. • The contracting authority must set the deadline for submission of requests or tenders (the date and the hour), and the requirements for candidates by indicating them in the contract documents. Furthermore, in the contracting documents, it is necessary to establish criteria on how the best bid would be picked. The Law institutes two principles which are: 1) when award is made to the most economically advantageous tender for the contracting authority, or 2) the lowest price only. It should be noted the Law institutes an obligation for the contracting authority to fix such minimum levels of qualification requirements for candidates or tenderers that may not have a restrictive effect on competition, and must be reasonable, clear and precise, since this type of information may form legitimate expectations for tenderers or candidates. The specifications for tenderers shall be based on economic and financial criteria, also abilities of professional and technical knowledge. • The Law foresees that tenders shall be submitted in sealed and stamped envelopes or by electronic means. • Tenders shall be opened at the meeting of the Procurement Commission. The initial examination of the tenders received by electronic means shall be equivalent to the opening of tenders. It should be noted that representatives of the suppliers have a right to attend the meeting. In case of absence of the latter, the Commission shall open the envelopes. • The contracting authority is also obliged to verify whether a supplier is competent, reliable and capable of executing the contract. • In case of abnormally low tenders, the contracting authority must request the tenderer to justify the offered price, and if the tenderer fails to produce justification, it must reject the tender.
Malaysia		X	
Mauritius	X		THE PUBLIC PROCUREMENT ACT 2006 11. Functions of the Board (2) The Board shall strive to achieve the highest standards of transparency and equity in the execution of its duties, taking into account - (a) the evaluation criteria and methodology disclosed in the bidding documents; (b) the qualification criteria and methodology disclosed in the bidding documents; (c) equality of opportunity to all bidders; (d) fairness of treatment to all parties; (e) the need to obtain the best value for money in terms of price, quality and delivery, having regard to set specifications; and (f) transparency of process and decisions.
Mexico	X		Article 29 of the Law of Acquisitions, Lettings and Services of the Public Sector (LARSPS) establishes the requirements that every tender announcement must contain. Article 29 of the Law of Acquisitions, Lettings and Services of the Public Sector (LARSPS) establish the requirements that every tender announcement must contain. Article 29. The call to a public tender, which will set the basis for the procedure and in which participation requirements will be described,

Electronic copy available at: https://ssrn.com/abstract=3705247

			shall contain: I. The name, denomination or trade name of the convoking dependency or organisation; II. Detailed description of the goods, lettings or services, as well as the aspects that the procuring party may consider necessary to define the object and scope of the contracting; III. The date, hour and place of the first meeting for clarification of the call of the tender, the act of presentation and opening of bids, and of the opportunity in which the decision will be announced, of the signing of the contract or the reduction of the term, and whether the tender will be actual, electronic or mixed, and to indicate the manner in which the proposals shall be submitted; IV. The character of the tender and the language or languages, in addition to Spanish, in which bids will be accepted. The technical annexes and leaflets in the languages that the procuring party determines; V. The requirements that shall be met by those who are interested in participating in the procedure, which will not limit free participation, concurrence and economic competition; VI. The mentioning of that, to take part in the acts of presenting and opening proposals, it will be enough that participants produce a writing statement in which the signer, under protest to say the truth, affirms that she has sufficient faculties to commit herself and her represented party, without necessary accreditation of legal personality; VII. The way in which bidders shall prove their legal existence and personality, for the subscription of proposals, and, if applicable, the signing of the contract. Also, the indication that the bidder shall provide an electronic mail address, in case of having it; VIII. To specify that it will be a requisite that bidders include, along with the closed envelop, a written declaration, under protest to say the truth, of not being subject to some of the assumptions established by articles 50 and 60 of the penultimate paragraph of this Law; IX. To specify that it will be requisite that bidders produce a declaration of integrity, in which they shall manifest, under protest to say the truth, that either by themselves or by mediating persons, they will restrain themselves from adopting conducts to induce public servants of the procuring dependency or organisation to alter the evaluations of proposals, the result of the procedure, or other aspects that grant more advantageous conditions in relation to other participants; X. If tests are needed to verify the compliance of the required specifications, the method to apply them and the minimum results that must be obtained shall be specified, in agreement with the Federal Law on Metrology and Normalisation; XI. The indication with respect to whether the contracting shall include one or more fiscal years, if it shall be an open contract, and in its case, the justification not to accept joint proposals; XII. The indication of whether the totality of the goods or services that are the object of the tender, or of each account or item if applicable, will be allocated to a single bidder, or whether the adjudication will follow the procedure of simultaneous supplying, in which case it shall specify the number of supplying sources, the percentages that will be allocated to each of them and the differential percentage in price that will be considered; XIII. The specific criteria that will be used for the evaluation of the proposals and awarding of contracts, being due to be preferred the criteria of points and percentage, or the cost benefit one;

Electronic copy available at: https://ssrn.com/abstract=3705247

			XIV. The address of the offices of the Secretariat of the Public Function or the governments of the federal organisations, or in its case the electronic means in which complains could be submitted, according to the dispositions of article 66 of the present Law; XV. Mentioning of the specific causes for discarding, directly affecting the substantiation of the proposal, as for instance the verification of some bidders that may have agreed with others on rising the cost of works, or of any other agreement aiming to obtain an advantage over other proponents, and XVI. Contract model to which parties shall be subject to, which shall contain the requirements referred to in article 45 of this Law. For the participation, awarding or contracting of acquisitions, lettings or services it will not be possible to establish requirements that intend to limit or affect the competition process and free concurrence. In no case requirements or conditions impossible to comply with shall be established. The procuring dependency or organisation shall take into account previous recommendations that, in its case, the Federal Commission of Competition may have issued in terms of the Federal Law of Economic Competition. Previous to the publication of the call to the public tender, dependencies and organisations may disseminate on its prospect through CompraNet, at least during ten working days, during which time they shall receive the pertinent commentaries in the electronic address that facilitated for this purpose. The commentaries and opinions received on the call prospect shall be analysed by the dependencies and organisations, for the effect of, in their case, considering them to enrich the project.
Pakistan	X		While the Competition Act, 2010 is silent on this issue, the Pakistan Procurement Authority Rules do have such requirements (http://www.ppra.org.pk/)
Peru	X		The specifications containing the rules and regulations of every public procurement procedure must be published. Interested parties may also pose questions and make observations to the specifications, which would be publicly available at the Electronic System of Public Procurement. There must be a reasonable period of time between the publication of the specifications and the deadline for submitting bids and applications. The stage of opening and evaluation of bids is public and there is a written record of this stage. Furthermore, under Public Procurement Law (Legislative Decree No. 1017), the public officials who facilitate Anti-competitive practices will be subject to administrative and criminal penalties.
Poland	X		Article 7 of the Act of 29 January 2004 on Public Procurement Law stipulates: 1. “Awarding entities shall prepare and conduct contract award procedures in a manner ensuring fair competition and equal treatment of economic operators. 2. Actions connected with the preparation and conduct of contract award procedures shall be performed by persons ensuring impartiality and objectivity. 3. Contracts shall be awarded only to economic operators chosen in accordance with the provisions of this Act.” Article 8 of the Act on Public Procurement Law stipulates: “ 1. Contract award procedures shall be public. 2. The awarding entity may limit access to information connected with the award procedure only under circumstances specified in this Act. (…)”. Moreover Article 11 of the Act on Public Procurement Law lays down the

Electronic copy available at: https://ssrn.com/abstract=3705247

			principle that contract notices shall be placed in the Public Procurement Bulletin available on the portal of the Public Procurement Office.
Russian Federation	X		
Serbia			N/A. This issue is regulated by the Law on PP and in charge of PP Office
Seychelles	X		The Public Procurement Act 2008 makes provision for the creation of a Procurement Oversight Unit which serves as a policy making and monitoring body with their mandate qualified under Section 10 of their Act.
Singapore			N/A. There is specific law regulating public procurement: the Government Procurement Act ("GPA"); the Government Procurement Application Order ("GPAO") and the Government Procurement Regulation ("GPR"). Anti-corruption laws are applicable in all instances where tenders are procured as a result of graft. Singapore is a party to the World Trade Organisation's Agreement on Government Procurement and several Free Trade Agreements. As such, Singapore's government procurement framework is required to be aligned with international standards and obligations. Government Procurement covers the acquisition of goods and services by contracting authorities which includes Ministries, Departments, Organs of State and Statutory Boards. The Ministry of Finance (MOF) is responsible for the Government Procurement (GP) policy framework, which governs how Government agencies conduct their procurement within the GP framework. The GP framework is based on principles of fairness, transparency and value-for-money. Pursuant to these principles, the government commits not to discriminate in favour of or against any supplier; to provide potential suppliers with clear procurement procedures and to evaluate the supplier's tender not only on price but also on whether all relevant requirements are complied with. The non-discrimination principle is described in Regulation 3 of the GPR. It is a requirement of the GPA (Section 7(1)) for a contracting authority to comply with the GPR. Under the GPR, a contracting authority's treatment of a supplier is subject to the principle of non-discrimniation (Regulation 10(3)) and a procurement agent of a contracting authority is also required to comply with such principle (Regulation 4).
Spain	X		The CNC has published in 2011 a Guide on public procurement and competition to foster competition in public procurement and avoid bid rigging.[5] Public authorities must ensure such competition by enforcing the rules on public procurement applying both at the general level, in accordance with the *Spanish Public Procurement Act 30/2007 of 30 October 2007 (hereinafter, the LCSP for the Ley de Contratos del Sector Público [*On December 16, Royal Decree 3 / 2011 enters into force, approving the revised text of the previous Act on Public Sector Contracts], and in specific areas or industries (*Ley sobre procedimientos de contratación en sectores especiales LPCSE*). Both the LCSP and the LPCSE define the situations in which public entities are required to apply the rules on public procurement, ensuring submission to the principles of publicity,

[5] http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=58137&Command=Core_Download&Method=attachment

Electronic copy available at: https://ssrn.com/abstract=3705247

			competition, transparency, confidentiality, equal treatment, non-discrimination and the safeguarding of free competition. *Additional Provision 27 of Act 30/2007*, imposes on contracting authorities the obligation to collaborate with the Administrative Procurement Consultative Board in notifying to CNC any evidence they might uncover in the pursuit of their functions that may point to the existence of violations of competition law. The LCSP does not apply to purchases by any public sector entity from another public entity which is considered to be an in-house entity.
Sweden	X		The EU principles on transparency are fully implemented in the Swedish public procurement laws.
Switzerland	X		Requests for bids above certain thresholds (e.g. CHF 263,000 for goods and services; CHF 10,07 m. for buildings) must be published. Moreover, the Federal Act on public procurement requires that the economically most favourable offer wins the bid. Regarding requests for bids below the thresholds stated above, the requirements depend on the tendering procedure and the amount put out to tender (see also the corresponding Enactment on Public Procurement: http://www.admin.ch/ch/f/rs/c172_056_11.html). Cantonal (regional) laws regarding public procurement must also be considered.
Tunisia	X		The law governing public procurement in Tunisia requires transparency of procedures. It is required to follow transparent and detailed procedures at all stages of the bidding process and to inform the candidates on the procedures in a timely way. The services delivered have to match the requirements. The technical specifications have to be delivered before starting the bidding process and negotiating the contracts.
Turkey	X		The answer is valid when the relevant legislation on public procurement is taken into account. Otherwise, the answer is “No” if the question is expected to be answered in accordance with the provisions of the Competition Act.
United States	X		Model Procurement Code for State and local government so provides; 17 states and hundreds of local jurisdictions have adopted the code. U.S. Federal Procurement is regulated by the federal Acquisition Regulation and related statutes. Transparency and full and open bidding are required. Requirements are transparency, public access to information, public notice, sealed bidding, no conflict of interest.

Are violations regularly prosecuted?

The following jurisdictions responded “yes” to this question:
Brazil, European Union, France, Guyana, Italy, Kazakhstan, Republic of Korea, Mauritius, Mexico, Poland, Russian Federation, Serbia, Seychelles, Spain, Sweden, Tunisia

China
The Law on Government Procurement and the Law on Bidding and Tendering are applied in practice. It is not entirely clear whether the AML has been applied in this regard.

Hungary
According to the Act on Public Procurement judgments on these violations are rendered by the Public Procurement Arbitration Board.

Electronic copy available at: https://ssrn.com/abstract=3705247

India
A plethora of cases are pending in different courts of India, challenging the fairness of various public procurement policy. Latest being the auction of 2G spectrum by telecom ministry.

Lithuania
Violations made during public procurement procedure are being investigated under administrative procedure by the Public Procurement Office. In cases where the violation of public procurement or corruption has the attributes of a composition of the infringement of the Criminal Code of the Republic of Lithuania, these infringements are being investigated by the Special Investigation Service of the Republic of Lithuania with the supervision of public prosecutor which also maintains public prosecution in the courts.

The following jurisdictions responded "no" to this question:
Jamaica, Kazakhstan, Pakistan, Peru

Kenya
Not regularly prosecuted, but they are regularly reported. Under section 105 of the Public Procurement and Disposal Act, breach of its provisions may lead to ordering the procuring entities to take necessary action to rectify the violation, cancelling of procurement contract if any, terminating the procurement proceedings , or forwarding the case with recommendations to Kenya Anti-Corruption Commission.

The following jurisdictions responded to this question with N/A:
Australia, Barbados, Guyana, Japan, Malaysia, Singapore, Switzerland, Turkey

Greece
As already mentioned, the monitoring of the awarding of contracts by the State does not fall within the competence of the HCC. Therefore, no such information is available.

Hong Kong (China)
Few such cases
United States
No information

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

Only **Tunisia** responded "yes".

France
Answer "No" but adds: Corruption is covered in France under criminal law which provides for several specific offences: the offence of granting unfair advantage in the context of a public procurement, also called "favouritism"[6], passive corruption[7], active corruption[8] and influence peddling.[9] There are also numerous other offences, chiefly financial ones, under ordinary law which can sometimes be applicable to breaches of competition law in public procurement: the unlawful taking of interest (article 432-12 of the criminal code), breach of trust (article 314-1 of the criminal code), fraud (article 313-1 of the criminal code), misappropriation of funds (articles L. 242-6 and L. 242-30 of the commercial code), forgery (article 441-1 of the criminal code) or the subornation of witnesses (article 434-15 of the criminal code).

---

6 Article 432-14 of the criminal code

7 Passive corruption of the person being bribed, who holds the power and accepts or solicits a gift or advantage of any kind in return for carrying out a service that is part of his/her mission for the benefit of the person offering the bribe.

8 Active corruption of the person offering a gift or advantage in exchange for services rendered by the civil servant, elected representative, manager, etc

9 When a private individual takes the initiative and asks a person who has influence to make improper use of it, this is termed active peddling; when the person with influence takes the initiative, this is termed passive peddling (article 432-11 of the criminal code).

Electronic copy available at: https://ssrn.com/abstract=3705247

Russian Federation
The Act itself doesn't operate the term 'corruption'. There is the separate Federal Law on Prevention of Corruption of 2008.

If yes, please explain.

Tunisia
The Tunisian penal code condemns corruption or attempt at corruption perpetrated by civil servants or associates in fulfilling their assignment.

2.4. 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***

The following jurisdictions responded "yes" to this question:
China, European Union, Hungary, Italy, Kazakhstan, Republic of Korea, Lithuania, Mexico, Spain

Kenya
Section 5(2) of the Competition Act spells out that where there is conflict with other written laws, competition law will prevail.

Russian Federation
Antimonopoly issues are regulated exclusively by the Federal authorities. FAS has powers to cease and desist any action by federal, regional, or local government bodies that goes in breach with competition legislation and restricts competition. The antimonopoly body can bring the case against other government body [sic] to the court, if necessary.

The following jurisdictions responded "no" to this question:
Barbados, Brazil, France, Greece, Guyana, Hong Kong (China), India, Jamaica, Japan, Malaysia, Mauritius, Pakistan, Peru, Poland, Seychelles, Singapore, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

Australia
By Constitution; also by agreement under competition policy agreement between States

The following jurisdictions responded to this question with N/A:
Serbia

2. ***Measures that otherwise discriminate against outsiders or block markets***

The following jurisdictions responded "yes" to this question:
Australia (Constitution; competition policy agreements), China, European Union, France, Guyana, Hungary, Italy, Jamaica, Kazakhstan, Republic of Korea, Lithuania, Mexico, Russian Federation, Spain,

The following jurisdictions responded "no" to this question:
Barbados, Brazil, Greece, Hong Kong (China), India, Japan, Malaysia, Mauritius, Pakistan, Peru, Poland, Seychelles, Singapore, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

The following jurisdictions responded to this question with N/A:
Kenya, Serbia

Electronic copy available at: https://ssrn.com/abstract=3705247

3. *Procurement requests-to-bid with discriminatory or Anti-competitive specifications*

The following jurisdictions responded "yes" to this question:
Australia, China, European Union, Guyana, Hungary, Jamaica, Kazakhstan, Republic of Korea, Mexico, Russian Federation, Spain

Poland
Article 6, section 1, point 7) of the Act on Competition and Consumer Protection: "collusion between undertakings entering a tender, or by those undertakings and the undertaking being the tender organizer, of the terms and conditions of bids to be proposed, particularly as regards the scope of works and the price."

The following jurisdictions responded "no" to this question:
Barbados, Brazil, France, Greece, Guyana, Hong Kong (China), Italy, Japan, Lithuania, Malaysia, Mauritius, Pakistan, Peru, Singapore, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

The following jurisdictions responded to this question with N/A:
Kenya, Serbia, Seychelles

India
Not Known

4. *Measures nationalizing/monopolizing competitive markets*

The following jurisdictions responded "yes" to this question:
China, European Union, France, Guyana, Hungary, Republic of Korea, Lithuania, Spain, Sweden

The following jurisdictions responded "no" to this question:
Australia, Barbados, Brazil, Greece, Hong Kong (China), India, Italy, Japan, Malaysia, Mauritius, Mexico, Pakistan, Peru, Poland, Russian Federation, Singapore, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

The following jurisdictions responded to this question with N/A:
Kenya, Serbia, Seychelles

Kazakhstan
Nationalizing – no; Monopolizing - yes

5. Other

The following jurisdictions responded to this question with N/A:
Australia, Brazil, CARICOM, European Union, France, Greece, Hong Kong (China), India, Italy, Japan, Kenya, Republic of Korea, Malaysia, Mauritius, Mexico, Poland, Russian Federation, Serbia, Seychelles, Singapore, Spain, Sweden, Tunisia, Turkey, United States

China
According to Article 33 of the AML, the administrative authorities and organizations which are empowered by the laws and regulations to carry out public administration functions shall not abuse their administrative powers to perform the following acts of restricting free circulation of commodities from one region to another: (1) impose discriminatory fees on foreign commodities, implement discriminatory fee rates or stipulate discriminatory prices; (2) stipulate different technical requirements and inspection standards for foreign commodities and identical domestic commodities or adopt discriminatory technical measures such as repetitive inspection or repetitive authentication of foreign commodities to restrict entry of foreign commodities into the domestic market; (3) adopt specific administrative licensing

Electronic copy available at: https://ssrn.com/abstract=3705247

targeted at foreign commodities to restrict entry of foreign commodities into the domestic market; (4) set up customs barriers or adopt other means to obstruct entry or foreign commodities or outwards shipment of domestic commodities; and (5) any other acts which obstruct free circulation of commodities from one region to another. According to Article 37 of the AML, the administrative authorities shall not abuse their administrative powers to formulate provisions which exclude or restrict competition.

Hungary

In the case of laws, ordinances or other measures (like Government decrees or Ministerial decrees) in the framework of competition advocacy the Competition Authority has the possibility to opine the drafts of these kinds of pieces of the legislation. Would it happen that a draft - which may have a serious impact on competition - is not sent to the Competition Authority and enters into force; the Competition Authority has at least two options. On the one hand it [may] inform the relevant Minister about the fact that the decree has anti-competitive provisions and may request the Minister to remedy the situation. The other option is to address the situation in its Annual Report prepared for the Parliament and may advise the Parliament to take appropriate measure (e.g. to bring a Parliamentary Resolution) requesting new legislative step, which remedies the problem.

Kazakhstan

- instructing a market entity on top priority supply of goods for a specific category of purchasers or top priority purchase of goods from specific sellers (suppliers) or on conclusion of priority agreements;
- setting restrictions for the purchasers of goods with regard to the choice of market entities that supply such goods;
- actions aimed at increase, reduction or maintenance of prices;
- actions aimed at division of the commodity market by regional characteristics, volume of sale of purchase of goods, range of sold goods or by structure of sellers (suppliers) or purchasers;
- granting to certain market entities concessions or other benefits that put them in an advantageous position against other competitors, or creation of unfavorable or discriminating business conditions as compared to competitors';
- direct or indirect compulsion of market entities to conclude priority agreements, make priority supplies of commodities to a specific group of consumers or priority purchases of commodities from specific sellers (suppliers).

Lithuania

The Law on Competition (Article 4) prohibits public bodies from adopting any measures that grant privileges or discriminate against any individual undertaking or their groups which give rise or may give rise to differences in the conditions of the competition for undertakings competing in the relevant market.

Pakistan

The Commission can extend policy recommendations to the government, as mentioned in Section 29 (b) of the Competition Act, 2010, which states: The Commission shall promote competition through advocacy which, among others, shall include:-reviewing policy frameworks for fostering competition and making suitable recommendations for amendments to any laws that affect competition in Pakistan to the Federal Government and Provincial Governments.

Peru

Competition Law does not cover any restrictions on market competition created by State entities or authorities. However, article 26B of Law Decree No. 25868 and article 48 of Law No. 27444 grant authority to the Elimination of Bureaucratic Barriers Commission (part of INDECOPI) to rule inapplicable, case by case, any illegal and irrational barriers to market entry, market competition and market exit, created by Regional and Local Governments, including ordinances.

Switzerland

The COMCO has no power to prohibit or limit laws or ordinances that restrict competition. Nevertheless, the COMCO can issue recommendations in accordance with Art. 45 ACart (Art. 45 ACart: "The

Electronic copy available at: https://ssrn.com/abstract=3705247

Competition Commission may submit to the authorities recommendations on how to promote effective competition, especially with regard to the creation and implementation of regulations relating to commercial matters.") concerning existing laws and regulations (both as the national or regional level) that distort competition. The COMCO is as well involved in the consultation process for pending laws which may affect competition.

On the other hand, please note that the principle *lex superior derogat legi inferiori* applies. That is, any cantonal (regional) or local government law contradicting federal law (e.g. the ACart) is not applicable.

Are these prohibitions regularly enforced?

The following jurisdictions responded "yes" to this question:
Australia, European Union, France, Italy, Kazakhstan, Republic of Korea, Lithuania, Mexico, Peru, Poland, Spain, Sweden

The following jurisdictions responded "no" to this question:
Hungary, Jamaica, Tunisia

The following jurisdictions responded to this question with N/A:
Barbados, Brazil, Hong Kong (China), India, Japan, Kenya, Malaysia, Mauritius, Pakistan, Serbia, Seychelles, Singapore, Switzerland, Trinidad & Tobago, Turkey, United States

Greece
Although the Greek Competition Law does not explicitly proscribe or limit State or local government regulatory measures having a negative impact on competition, it grants the HCC consultative/advisory powers regarding these measures, to the extent that they may be deemed to introduce regulatory barriers to effective competition. The HCC may issue formal Opinions with regards to Draft Laws or any other regulatory measure either upon request from the competent government official or acting ex officio. Opinions regarding regulatory restrictions to competition are nowadays issued frequently, particularly in the context of structural changes currently pursued by the Greek government (notably in the area of liberal professions).

Guyana
In Guyana, so far, the Commission has not had the opportunity to enforce such prohibitions.

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

China
According to Article 51 of the AMl, the administrative authorities and organizations which are empowered by the laws and regulations to carry out public administration functions which abuse their administrative powers to exclude or restrict competition shall be ordered by the higher authorities to make correction; the person(s) in charge who are directly responsible and other directly accountable personnel shall be punished pursuant to the law. The anti-monopoly enforcement agency may propose handling measure pursuant to the law to the relevant higher authorities.

EU
The Court of Justice ruled in CIF that "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" (Case C-198/01, Consorzio Industrie Fiammiferi (CIF) ECR I-8055, at 49.)

France
As part of its consultative powers, the *Autorité* assesses the impact on competition of draft legislation. The findings contained in the opinions it issues can be used as part of litigation before the Administrative Courts or the Constitutional Court, with a view to repel any legal provision that would unduly restrict competition, on the basis of the infringement of the constitutional principle of the freedom of trade and

Electronic copy available at: https://ssrn.com/abstract=3705247

industry. It was for instance the case recently regarding a new statute law which meant to regulate how companies subscribe to healthcare insurance schemes on behalf of their employees. The recommendations made by the *Autorité* to ensure effective competition between the various providers of such healthcare insurance schemes were endorsed by the Constitutional Court to rule out some of the provisions of the proposed law (Decision n°2013-672 DC, 13th June 2013).
As far as "*measures which limit the entry of goods from other localities*" and "*procurement requests-to-bid with discriminatory or Anti-competitive specifications*" are concerned, they are covered by specific rules (cf. answer to question 9b).

Hungary
See the explanation under Part II, Question 6.

Italy
The recently introduced Art. 21-bis of the ICL (see above Question 6) has been used as a tool to challenge some of the conducts listed above (see M. Siragusa and A. Bardanzellu, "Prime considerazioni sulle norme antitrust introdotte dalla legislazione nazionale anticrisi", on file with the authors).
In particular, Art. 21-bis empowers the IAA to challenge before the administrative courts general administrative provisions, regulations or measures of any public administration distorting competition. In the literature, it has been argued that the notion of "acts distorting competition" could be interpreted to include cases/type of conducts/subject matter which are beyond the traditional antitrust categories of conducts distorting competition (such as fixing minimum prices, etc…)
Indeed, in the first opinions issued following the coming into force of Art. 21-bis, the IAA has challenged measures enacted by local governments (as well as by entities in charge of local public services) such as specifications of public procurement bids which may distort competition or reduce participation in the bid (see case AS908 Cotral SpA) as well as measures unreasonably restricting the access to the exercise of economic activities such as local public transport (AS926 Regione Molise) or imposing certain territorial and financial requirements in order to access to certain regional contributions (AS920 Regione Abruzzo). The IAA has also challenged the local rules adopted by the city of Lucca limiting the possibility of serving food in premises whose surface is less than 165 square meters by prohibiting to these establishments/businesses the use of tables and chairs (as used in restaurants)(case AS900 Comune di Lucca).
It remains to be seen whether the Italian administrative courts, in reviewing the application for annulment brought by the IAA on the basis Art. 21-bis against the aforementioned measures adopted by the State, will uphold the extensive interpretation of the notion of "acts restricting competition" adopted by the IAA or if they will lean toward a more restrictive interpretation of that notion.
It is interesting to notice that should the IAA approach above be confirmed, this would allow the IAA to proscribe under ICL conducts which, under the TFEU, would normally follow under the free movements provisions, had the conducts presented a cross-border dimension, thus extending the competence of the IAA to prosecute restrictions to free movement rules in wholly internal situations (when the free movement rules of the TFEU are not applicable, but see Case C-72/03, Carbonati Apuane [2004] ECR I-8027 and Joined Cases C-357 to 359/10, Duomo Gpa Srl, nyr).
As a matter of fact the answer to this question, as far as IAL is concerned, is in flux. On the one hand, the IAA is willing to use the new powers attributed under Art 21-bis to challenge measures such as those listed above (sub points 1,2,3,4 of question 9a); on the other hand, it remains to be seen whether such approach will be upheld by the Italian administrative courts.
Finally, it is worth pointing out that in exercising its advocacy function, the IAA may, on its own initiative or upon request, issue opinions on legislative and regulatory proposals which may have the effect of: a) submitting the exercise of an activity or the access to a market to quantitative restrictions; b) establish exclusive rights in certain economic sectors; c) imposing standard practices concerning prices and selling arrangements (see Article 22 ICL).

Kazakhstan
Detected by the antimonopoly body, penalized by court.

Electronic copy available at: https://ssrn.com/abstract=3705247

Republic of Korea

Our law provides that the administrative authority shall consult with the FTC in advance on enactment of Acts and decrees restricting competition and the FTC give advice to the authority regarding modification of such Anti-competitive provisions.

Lithuania

When the Competition Council finds an infringement and adopts a resolution determining a breach, the undertakings concerned sometimes voluntarily pay fine and bring the infringement to an end. In case of the resolution not being implemented, the Competition Council may request the Court to issue an injunction.

It is worth noting that the Constitution of the Republic of Lithuania establishes general rule that "the law shall prohibit monopolization of production and the market and shall protect freedom of fair competition". Thus, all national legal orders must be in conformity with this clause. Since the monopolization is prohibited by the Constitution, there is no law which gives basis for adopting measures nationalizing/monopolizing competitive market.

Mauritius

Irrespective of the fact that the competition law does not proscribe or limit government laws, it may however under section 19 of the Competition Act 'advise the Minister on any action taken or proposed to be taken by the State or any public body that may adversely affect competition in the supply of goods and services.'

Mexico

The political constitution of Mexico establishes that State and municipal authorities shall not perform acts or issue norms with the aim of or having the effect of:

(a) Charging fees on the transit of people or things across their territory
(b) Prohibiting or imposing fees on entry or exit to the territory of national or foreign merchandising , directly or indirectly
(c) To charge the circulation or consumption of national or foreign effects, with taxes or duties which exemption is issues by local customs, requires inspection or registration of bulk or demand documentation to be attached to merchandise
(d) To issue or maintain fiscal laws or dispositions that impose differences of taxes or requirements due to the origin of national or foreign merchandise, both if that difference is set with respect to similar production within the locality and if it is set in relation to similar productions of different origin.

For such aims, the FCC is authorised to initiate an ex-officio procedure or at the request of parties, by which it shall determine if some authority incurs in some of the previously mentioned violations. If applicable, the FCC shall issue a resolution to forward, to the competent instance within the federal government or to the general attorney of the republic so that this considers exercising the action of unconstitutionality before the relevant judicial instances.

Pakistan

The Commission has extended policy notes to the government bodies at various occasions. Some of these are given on the Commission's website and can be accessed at the following web link: http://cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=42

Peru

By the Elimination of Bureaucratic Barriers Commission, via injunctions and administrative fines (up to 20 Tax Units, approximately US$ 27,000).

Poland

The President of the Office of Competition and Consumer Protection can institute antimonopoly proceedings, if procurement requests to bid are discriminatory or have an Anti-competitive effect. As a result of the proceedings, the President of the Office can issue a decision, in which he can impose a fine amounting to a maximum of 10% of the revenue earned in the accounting year preceding the year within which the fine is imposed.

Electronic copy available at: https://ssrn.com/abstract=3705247

Serbia

According to the Article 21 of the Law, Commission for Protection of Competition is competent to submit opinions to competent authorities on draft regulations, as well as on existing regulations that effect the competition on the market.

Spain

In order to enforce its recommendations, the CNC usually follows two steps (see case study in Question 17 below): first, it files a request to the pertinent administration body to adjust its behaviour to competition criteria, and, if there is no answer, the CNC, by virtue of the power conferred in article 12.3 of the Spanish Competition Act, could bring actions before the competent courts against the administrative acts and regulations which cause unnecessary or disproportionate obstacles to competition.

Sweden

P.4 The prohibitions in the Swedish Competition Act on abuse of a dominant position and on mergers that significantly impede competition may be applied. The prohibition (see answer to Question 6) may also be invoked.

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***

Country	Yes	No	Comments
Australia	X		Constitution; competition policy agreements
Brazil	X		
CARICOM			
• Barbados		X	
• Jamaica		X	
• Guyana		X	
• Trinidad and Tobago		X	
China		X	
EU	X		
France	X		
Greece		X	
Hong Kong (China)		X	
Hungary	X		E.g. from the point of view of national health considerations (only healthy foodstuff may be imported).
India		X	Though different States may have different rates of local taxes. Such as a loaf of bread may cost $1 in Delhi and $1.25 in neighboring State Haryana because of different rate of taxes.
Italy	X		
Japan	X		"Act on Elimination and Prevention of Involvement in Bid Rigging, etc. and Punishment for Acts by Employees that Harm Fairness of Bidding, etc." Act No. 101 of 2002)[10] one of the laws the JFTC has jurisdiction, shall provide for measures to be taken to eliminate and prevent involvement of government employees etc. in bid rigging etc., including demands by JFTC to the Heads of Ministries and Agencies etc. regarding improvement measures necessary to eliminate involvement in bid rigging etc., claims

[10] http://www.jftc.go.jp/legislation_guidelines/ama/aepibr/index.html

Electronic copy available at: https://ssrn.com/abstract=3705247

			directed at employees involved in said bid rigging for damage compensation, investigation of the reasons for disciplinary action against said employees, and coordination and cooperation among the administrative organs concerned, and other matters, and provide for punishments to be imposed on employees for acts that harm the fairness of bidding, etc.
Kazakhstan		X	
Kenya		X	
Republic of Korea	X		
Lithuania		X	
Malaysia	X		
Mauritius		X	
Mexico	X		As previously mentioned, the Mexican Constitution establishes in its article 117 the measures that federal organisations shall not apply. ON the other hand, the FLEC regulates the procedure by which the FCC shall verify these violations.
Pakistan	X		The Constitution of Pakistan contains an Article which states: Article:151 Inter-Provincial Trade 151. Inter-Provincial Trade - (1) Subject to clause (2), trade, commerce and intercourse throughout Pakistan shall be free. (2) 1[Majlis-e-Shoora (Parliament)] may by law impose such restrictions on the freedom of trade, commerce or intercourse between one Province and another or within any part of Pakistan as may be required in the public interest. (3) A Provincial Assembly or Provincial Government shall not have power to- (a) make any law, or take any executive action, prohibiting or restricting the entry into, or export from, the Province of goods of any class or description, or (b) impose a tax which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former goods or which, in the case of goods manufactured or produced outside the Province discriminates between goods manufactured or produced in any area in Pakistan and similar goods manufactured or produced in any other area in Pakistan. (4) An Act of Provincial Assembly which imposes any reasonable restriction in the interest of public health, public order or morality, or for the purpose or protecting animals or plants from disease or preventing or alleviating any serious shortage in the Province of an essential commodity shall not, if it was made with the consent of the President, be invalid. http://pakistanconstitutionlaw.com/article-151-inter-provincial-trade/
Peru	X		
Poland	X		Poland is a member of the European Union and as such is bound by the provisions of EU law. In terms of measures that limit the entry of goods from other localities, the Treaty on the Functioning of the European Union (TFEU) provides for the free movement of goods. Pursuant to Article 28 of TFEU: “The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.” Moreover Articles 34 and 35 of TFEU prohibit any quantitative restrictions on imports and exports and all measures having an equivalent effect. The measures which limit the free movement of goods can be introduced by the Member States if they can be justified as stated in Article 36 of

Electronic copy available at: https://ssrn.com/abstract=3705247

			TFEU: "The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports ,exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." Furthermore, EU law allows member States to apply measures restricting the free movement of goods when they have been identified as justifiable by the case law of the Court of Justice of the European Union.
Russian Federation		X	
Serbia			N/A
Seychelles			
Singapore		X	
Spain		X	
Sweden		X	
Switzerland	X		Internal Market Law (see http://www.admin.ch/ch/f/rs/c943_02.html)
Tunisia		X	
Turkey			N/A
United States	X		

2. Measures that otherwise discriminate against outsiders or block markets

The following jurisdictions responded "yes" to this question:
Australia, Brazil, European Union, France, Jamaica, Kazakhstan, Republic of Korea, Malaysia, Mexico, Pakistan, Peru, Singapore, Switzerland, United States

Italy
According to Art. 120(1) of the Italian Constitution: "Regions cannot impose import or export duties or adopt measures which may hinder, in any way, the free movement of persons and goods between regions or limit the exercise of the right to work in any part of the national territory".
Furthermore, as Italy is a Member State of the EU, in situations where trade between Member States is affected, measures adopted by the Italian State restricting free movement of goods, services, persons and capitals are prohibited according to the TFEU rules on free movement. As a consequence of the primacy and direct effect of these provisions, national measures breaching these rules shall be disapplied.

Kenya
The Public Procurement and Disposal, section 39 stipulates that exclusive preference for government procurement shall be given to citizens of Kenya where the funding is 100% from government of Kenya or a Kenyan body and the amounts are below the prescribed threshold – 15% margin of preference in the evaluated price of the tender shall be given to candidates offering goods manufactured, mined extracted or grown in Kenya

Poland
As stated above, The Treaties which regulate the functioning of the European Union form an integral part of the legal order of each Member State of the EU. The general principle of non-discrimination is formulated in Article 18 of TFEU: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

The following jurisdictions responded "no" to this question:
Barbados, China, Greece, Guyana, Hong Kong (China), India, Lithuania, Mauritius, Russian Federation, Spain, Trinidad & Tobago, Tunisia

Electronic copy available at: https://ssrn.com/abstract=3705247

The following jurisdictions responded to this question with N/A:
Hungary, Japan, Serbia, Seychelles, Sweden, Turkey

3. *Procurement requests-to-bid with discriminatory or Anti-competitive specifications*

The following jurisdictions responded "yes" to this question:
Australia, Brazil, European Union, France, Italy, Jamaica, Kazakhstan, Republic of Korea, Lithuania, Malaysia, Pakistan, Peru, Singapore, Sweden, Switzerland, United States

Kenya
Especially in cases of donor funding e.g. EU as the donor may direct countries to procure goods/services from the member countries and where not possible to apply for exemptions.

Poland
Article 200 section 2 of the Act of 29 January 2004 on Public Procurement law stipulates that: "Awarding entities shall also be subject to a penalty in the following cases:

1. where the requirements to participate in a contract award procedure as defined by the awarding entity distort fair competition,
2. where the awarding entity describes the object of contract in a way that restricts fair competition, (…)"

The following jurisdictions responded "no" to this question:
Barbados, China, Greece, Guyana, Hong Kong (China), India, Mauritius, Mexico, Russian Federation, Serbia, Seychelles, Spain, Trinidad & Tobago, Tunisia

The following jurisdictions responded to this question with N/A:
Hungary, Japan, Serbia, Turkey

4. *Measures nationalizing/monopolizing competitive markets?*

The following jurisdictions responded "yes" to this question:
Brazil, European Union, France, Republic of Korea, Lithuania, Malaysia, Peru, Sweden

Poland
Article 216 section 3 of the Constitution of the Republic of Poland of April 2nd 1997, disposes that: "Any monopoly shall be established by means of a statute."

The following jurisdictions responded "no" to this question:
Australia, Barbados, China, Greece, Guyana, Hong Kong (China), India, Italy, Jamaica, Kazakhstan, Kenya, Mauritius, Mexico, Pakistan, Russian Federation, Singapore, Spain, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

The following jurisdictions responded to this question with N/A:
Hungary, Japan, Serbia, Turkey

5. Other

The following jurisdictions responded to this question with N/A:
Australia, Brazil, CARICOM, China, European Union, France, Greece, Hong Kong (China), India, Italy, Japan, Kazakhstan, Kenya, Lithuania, Malaysia, Mauritius, Mexico, Pakistan, Poland, Russian Federation, Serbia, Seychelles, Singapore, Spain, Sweden, Switzerland, Tunisia, Turkey, United States

Electronic copy available at: https://ssrn.com/abstract=3705247

Hungary
It is a basic principle of law that a lower piece of legislation may not be in conflict with a higher level one; e.g. if an Act regulates the conditions of pursuing an economic activity, the lower level piece of legislation may not be more restrictive, provided that there is no authorization for such restriction in the Act itself.

Republic of Korea
The industries of petroleum, telecommunications, drug, etc. are also regulated by competent Acts.

Peru
See responses to 9.a.5 and 7.c.

Are these prohibitions regularly enforced?

The following jurisdictions responded "yes" to this question:
Australia, Brazil, EU, France, Italy, Kazakhstan, Kenya, Republic of Korea, Lithuania, Malaysia, Mexico, Pakistan, Russian Federation, Serbia, Seychelles, Spain, Sweden, Switzerland

The following jurisdictions responded "no" to this question:
Jamaica, Guyana, Mauritius, Peru, Poland, Singapore, Turkey, Tunisia, United States

The following jurisdictions responded "N/A" to this question:
Barbados, Trinidad and Tobago, China, Greece, Hong Kong (China), Hungary, India, Japan, Mauritius, Peru, Poland, Singapore, Turkey, Tunisia, United States

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

Australia
Courts

Brazil
Most of the prohibitions are based on constitutional provisions regarding free market and free trade. In view of that, any measure of the State or local government restricting free market (other than the authorized exceptions also included in the constitution) can be questioned in the courts on the grounds of being contrary to the constitution.

EU
European Commission, National Competition Authorities, National Authorities, European Courts and National Courts.

France
The cornerstone of the single European market is said to consist in the "four freedoms" – the free movement of people, goods, services and capital. These freedoms are enshrined in the TFEU and form the basis of the single market framework (Title IV of the TFEU).
Within this framework, measures "*that limit the entry of goods from other localities*" or "*otherwise discriminate against outsiders or block markets*" are prohibited as per the principles of the freedom of establishment and of the free movement of goods, if they affect trade between EU countries, as well as under the principle of the free movement of capital – not only protected within the EU but between the EU and third parties.
Moreover, measures that "*discriminate against outsiders or block markets*" and "*procurement requests-to-bid with discriminatory or Anti-competitive specifications*" would clearly contravene the principle of equality, which is the reference notion for a large part of the legal review performed by the French Constitutional Court.
As for "*measures nationalizing/monopolizing competitive markets*", they would be subject to legal review by Administrative Courts, under the main principle that State intervention on a market open to competition is permitted as long as it does not contravene the principle of freedom of trade and industry.

Electronic copy available at: https://ssrn.com/abstract=3705247

This has long been recognized as a "general principle of law"[11] and a "principle of constitutional standing",[12] and as such is consistently applied by the Constitutional and Administrative Courts –three conditions have thus been defined by case law[13]:

- the intervention must be motivated by the protection of a public interest in the context of specific circumstances (e.g. in case of a market failure);
- the measure taken by the State shall not lead to preventing, restricting or distorting competition;
- the State of public authority shall not place its co-contractor in a situation where competition rules would be infringed, e.g. by compelling an abuse of dominance

At European level, the TFEU pronounces the general prohibition of State aid. However in some circumstances, government interventions are necessary for a well-functioning and equitable economy (see articles 106, 107 and 345 TFEU). Therefore, the TFEU leaves room for a number of policy objectives toward which State aid can be considered compatible with EU law. In case of the violation of one of these prohibitions, the European Commission can file suit against a member State before the European Court of Justice.

Italy

Art. 120(1) of the Italian Constitution is generally enforced by the Italian government which may challenge regional measures in breach of this provision before the Italian Constitutional Court (however, a case may reach the Italian Constitutional Court also via a preliminary ruling from a lower court).
Noticeable applications of Art. 120(1) are the following rulings of the Italian Constitutional Court dealing with regional measures limiting the circulation (and stock) of nuclear waste on their territory; the regional measures at stake were eventually quashed by the Constitutional Court (see Sentenza 62/2005, Regione Basilicata and Sentenza 247/06, Regione Molise). The Constitutional Court also found in breach of Art. 120(1) Cost., a regional law limiting the right to renew regional hunting licenses to hunters residing in the region (Sentenza, 220/2004, Regione Sardegna). For other relevant cases dealing with the application of Art. 120(1) of the Italian Constitution see the following judgments of the Italian Constitutional Court: 161/2005; 247/2006; 81/2007; 428/2008; 9/2009; 332/2010; 53/2011; 67/2001; 54/2012; 191/2012. In many of the aforementioned judgments the Italian Constitutional Court also quote the relevant provisions of the TFEU and case law of the CJEU on free movement of goods, services and persons.
As for the provisions contained public procurement laws they are enforced by individuals or public authorities before the competent national courts.

Kazakhstan

By the antimonopoly body.

Republic of Korea

The competent administrative authorities (sectoral regulators) may issue corrective action order or surcharge imposition order, according to the relevant Acts.

Lithuania

It should be noted that the Law on Public Procurement institutes an obligation for the contracting authority to set for candidates such requirements that may not have the restrictive effect on competition. Such infringements may be investigated by the Public Procurement Office and if the breach has not been terminated, this State body may request the court to adopt an injunction.
As it was mentioned above, measures nationalising/monopolizing competitive markets are proscribed by the Constitution, therefore, there are no grounds to adopt such legal act.

Malaysia

By some other bodies.

---

11 Conseil d'Etat, *Daudignac* , 22 June 1951.

12 Decision n° 81-132 DC, 16 January 1982 on nationalizations.

13 Conseil d'Etat (French Administrative Supreme Court), 30 May 1930, Chambre syndicale du commerce en détail de Nevers, Rec. p. 583; Conseil d'Etat, 31 May 2006, Ordre des avocats au Barreau de Paris, n°275531

Electronic copy available at: https://ssrn.com/abstract=3705247

Peru
See responses to 9.a.5 and 7.c.

Poland
For example by the President of the Public Procurement Office or Regional Accounting Chamber

Serbia
The competent authority for this matter is Ministry of Trade.

Singapore
The Government Procurement Adjudication Tribunal hears challenges brought by aggrieved suppliers under the Government Procurement Act (section 7(3)).

Sweden
By the Swedish Competition Authority which exercises supervision of public procurement in Sweden.

Switzerland
In addition to the ACart, the COMCO also enforces the Internal Market Law. The goal pursued by this law is to ensure free access to regional/local markets by providers of goods or services coming from other cantons (regions) or municipalities. The COMCO can judiciary appeal decisions from localities which unduly restrict access to the market within the meaning of the Internal Market Law.

Tunisia
Tunisia's regulation of public procurement tolerate[s] the determination of technical specification which can guarantee the quality of service subject to the bid and promote generation of nation output. Nevertheless this regulation requires that the specifications do not contribute to give more advantages to competitors.

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?

The following jurisdictions responded "yes" to this question:
China, France, Greece, Hungary, Italy, Jamaica, Republic of Korea, Lithuania, Malaysia, Mexico, Pakistan, Peru, Spain, Sweden, Tunisia, United States
European Union
The European Union "shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries" (Article 28 TFEU).

Kenya
Under EAC Competition Law, a partner State shall before granting any State aid, notify the Authority, and shall not grant any which distorts or threatens to distort competition in the community. Otherwise there are clear exceptions in regard to State aid under this Act (Article 16 and 17). According to COMESA treaty Article 54, a subsidy is also outlawed in any form whatsoever which threatens or distorts competition in the common market.

Poland
Poland is a member of the European Union and thus is bound by the provisions of the Treaty on the European Union and of the Treaty on the Functioning of the European Union (TFEU). According to art. 28 of TFEU: "The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with

Electronic copy available at: https://ssrn.com/abstract=3705247

third countries". Moreover, art. 20 of TFEU stipulates: "Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature".

The following jurisdictions responded "no" to this question:
Barbados, Brazil, Guyana, India, Kazakhstan, Mauritius, Serbia, Singapore

The following jurisdictions responded to this question with N/A:
Australia, Hong Kong (China), Japan, Switzerland, Turkey

Does it otherwise limit abuses or undue restraints by the States?

The following jurisdictions responded "yes" to this question:
China, European Union, France, Greece, Hungary, Italy, Jamaica, Kenya, Republic of Korea, Lithuania, Malaysia, Mexico, Peru, Poland, Russian Federation, Spain, Sweden, Trinidad & Tobago, Tunisia

India
Some FTAs have now a Competition Chapter which prohibits anti-competitive practices so as not to limit gains from trade liberalization.

The following jurisdictions responded "no" to this question:
Barbados, Brazil, Guyana, Jamaica, Kazakhstan, Mauritius, Serbia, Trinidad & Tobago, United States

The following jurisdictions responded to this question with N/A:
Australia, Hong Kong (China), Japan, Pakistan, Seychelles, Singapore, Switzerland, Turkey

Are these prohibitions regularly enforced?

The following jurisdictions responded "yes" to this question:
European Union, France, Greece, Hungary, Italy, Republic of Korea, Lithuania, Malaysia, Peru, Poland, Spain, Sweden, United States

Tunisia
We should recall that Tunisia has signed an association with the European Union. This agreement has led to the creation of a free trade area in compliance with the provision of GATT 94 and other multilateral agreements with the WTO. Tunisia has also signed bilateral free trade agreements with its Maghrebian partners whereby member States commit to suppress all quantitative restrictions and nontariff barrier in their intra trade.

The following jurisdictions responded "no" to this question:
Kazakhstan, Kenya, Mexico, Russian Federation, Serbia

Poland
In the event a Member State infringes the provisions of European Union Law, the European Commission can bring an action before the Court of Justice of the European Union. Art.258 TFEU stipulates: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".

The following jurisdictions responded to this question with N/A:
Australia, Barbados, Brazil, China, Guyana, Hong Kong (China), India, Jamaica, Japan, Mauritius, Pakistan, Seychelles, Singapore, Switzerland, Turkey

Electronic copy available at: https://ssrn.com/abstract=3705247

2.4a. State Aids

11. Does your competition law control State aids?

The following jurisdictions responded "yes" to this question:
European Union, France, Kazakhstan, Mexico, Pakistan, Russian Federation, Spain

The following jurisdictions responded "no" to this question:
Australia, Barbados, Brazil, China, Greece, Guyana, Hong Kong (China), Hungary, India, Jamaica, Japan, Kenya, Republic of Korea, Malaysia, Mauritius, Peru, Poland, Serbia, Seychelles, Singapore, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

Italy
State aid control for EU Member States is centralized at the EU level and carried out by the EU Commission whose decisions may be reviewed by the Court of Justice of the European Union (CJEU). Therefore, there is no Italian State aid control as such, not even for State aids which fall outside the material scope of application of EU State aid rules, because the aid does not reach the *de minims* threshold (as established in the EU State Aid Block Exemption Regulations) or does not meet the requirement of affecting trade between Member States (established in Art. 107 TFEU).
However, according to some authors (see M. Siragusa and A. Bardanzellu, "Prime considerazioni sulle norme antitrust introdotte dalla legislazione nazionale anticrisi", on file with the authors and F. Cintioli, "Osservazioni sul ricorso giurisdizionale dell'Autorità Garante della Concorrenza e del Mercato e sulla legittimazione a ricorrere delle autorità indipendenti", in www.federalismi.it n.12/2012), the IAA may use its powers under the recently enacted Article 21-bis ICL in order to challenge before Italian administrative courts a State aid measure (falling within the material scope of application of EU State aid law) which has not been notified to the European Commission according to Article 108(3)TFEU (i.e., the aid has been implemented without the prior approval of the European Commission). In this case, due to the direct effect of Art. 108(3) TFEU, the national judge is entitled to declare that the measure is an unlawful aid and order, amongst others, interim measures against the unlawful aid and its recovery.

Lithuania
Since 2004, when the Republic of Lithuania joined the European Union, the Competition Council is a monitoring institution in the field of the State Aid. The task on the control of State Aid is assigned to the European Commission.

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

EU
Under Article 107(1) TFEU, "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

France
The basis for EU State Aid policy lies in Article 107-1 TFEU. It provides that State Aid is, in principle, incompatible with the internal market. Under Article 108 TFEU, the European Commission is given the task to keep State Aid "*under constant review*". Those rules are exclusively enforced by the European Commission. It also requires that member States inform the Commission in advance of any plan to grant State aid in the situation where aids are above determined thresholds ("*notification requirement*").

Hungary
In Hungary – being one of the Member States of the European Union - the State aid rules of the EU are applicable, which are enforced basically by DG Competition of the Commission of the EU. There is a "State Monitoring Office" in Hungary within the Ministry of National Development, however, this body is responsible for the domestic coordination of the issue.

Electronic copy available at: https://ssrn.com/abstract=3705247

Kazakhstan

According to Article 35, para 2, State authorities that plan to provide State aid shall send an application to the antimonopoly body for the consent to provide such support.

Lithuania

(As above in table.) Since 2004, when the Republic of Lithuania joined the European Union, the Competition Council is a monitoring institution in the field of the State Aid. The task on the control of State Aid is assigned to the European Commission.

Mexico

The FCC is authorized to promote and enforce that competition and free concurrence principles are observed in the administration by authorities at the three levels of government (Part XVII, Art. 24 FLEC).
In addition, the FCC may issue binding and non-binding opinions, as stated in the following parts of article 24 of the FLEC.
VI: "To issue, when it considers it to be pertinent or at the request of parties, binding opinion in matters of economic competition to the dependencies and organizations of the federal public administration, with respect to adjustments to programs and policies, when these can have contrary effects to the competition process and free concurrence, in accordance with the applicable legal dispositions. The Titular of the Federal Executive will be able to object this opinion. The opinion and, in its case, the objection, shall be published".
VII: "To issue opinion, when it considers it pertinent or at the request of parties, on initiatives of laws and drafts of regulations and decrees as far as they may concern to competition matters and frees concurrence, without binding effects. The mentioned opinions shall be published"
VIII: "To issue, when it considers it pertinent or at the request of parties, binding opinion in matters of economic competition, to dependencies and organizations of the federal public administration, with respect to drafts of dispositions, rules, agreements, circulars and other administrative acts of general character that they intend to issue, when they can have opposite effects to the competition process and free concurrence. The Titular of the Federal Executive will be able to object this opinion. The opinion and, in their case, the objection shall be published"
XI: "When it considers it pertinent, to issue opinion in matters of competition and free concurrence, with respect to laws, regulations, agreements, circulars and administrative acts. Such opinions shall neither have legal effects nor the Commission shall be obliged to issue them".
From this it is deduced that the FCC shall be able to express binding and non-binding opinions to dependencies at the federal level on aids granted by virtue of programs or general acts, whereas for State and municipal authorities it can only issue non-binding opinions on the acts that are mentioned in the applicable parts.

Pakistan

The Competition Act seeks to provide for free competition in all spheres of commercial and economic activity; to enhance economic efficiency and to protect consumers from anti-competitive behaviour. Section 1(4) of the Act states: It shall apply to all undertakings and all actions or matters that take place in or outside Pakistan and prevent, restrict, reduce or distort competition within Pakistan.

Poland

In Poland, the President of the Competition Authority monitors State Aids and notifies them to the European Commission. Only the European Commission controls and authorizes State Aids. The Polish Act on Competition and Consumer Protection does not contain any provision on State Aids. The competences of the President of the Office of Competition and Consumer Protection in the field of State Aid are regulated in article 1 of the Act of 30 April 2004 on the procedural issues concerning State Aid. According to it, the President of the Office:

a) carries out proceedings regarding preparations for notification of draft aid schemes, drafts of individual aid and individual aid for restructuring;
b) co-operates with entities preparing aid schemes, aid granting authorities, entities applying for aid and aid beneficiaries with respect to State aid;

Electronic copy available at: https://ssrn.com/abstract=3705247

c) represents Poland in proceedings before the European Commission and the Courts of the European Union;
d) carries out proceedings regarding State aid recovering;
e) monitors the State aid granted to undertakings.

Russian Federation
N/A. There is a limited set of criteria for provision of State aid. If these are not met State aid is not possible.

Spain
The third chapter of Spanish CA deals with public aid. In this area, the competences of the National Competition Commission are completed, which may analyse the criteria of awarding aid from the point of view of competition with the aim of issuing reports and addressing recommendations to the public authorities. For this, certain obligations of information to the National Competition Commission are established and the possible complementary participation of the competent bodies of the Autonomous Communities is expressly foreseen through the issuing of reports with regard to the aid awarded by the autonomous and local Administrations in the geographical area of their competence.
The Spanish lawmakers have taken the view that it is appropriate to involve the Spanish competition authority in the control and monitoring of State aid. Amongst the instruments given to it, the CNC has an obligation to prepare an annual public report on State aid in Spain (article 11.2 of Spanish Competition Act 15/2007 of 3 July 2007).
The CNC has published three Annual Reports on State Aid, in 2009, 2010 and 2011. Its third Annual Report on State Aid was published in October 2011. The report offers a general overview of the statistical context of State aid in Spain by reference to the most recent data available, along with the main new developments in the rules and regulations or case law emanating from the Community authorities, mentioning the main actions undertaken by the CNC in relation to State aid in 2010.
This third report also contains a descriptive and critical analysis of various measures, instrumented by means of collaboration agreements or arrangements between different entities connected with the public authorities and airline companies, whose aim is to promote particular tourist destinations. These actions have been becoming more frequent in recent years. The results of the analysis reflect the impact of these actions both on the infrastructure and on the operators in the air transport sector and show the existence of various actions by public bodies that are liable to give rise to distortions in competition whose scope may be significant. At the end of the report various recommendations are put forward to reduce such risks.
As with the two previous reports, the CNC hopes that as well as continuing to contribute to a greater awareness of the developments in terms of legislation, decisions and statistics on State aid, this third annual report will be helpful for public authorities charged with the grant and design of State aid when it comes to adopting the most appropriate decisions for the public interest objectives being pursued with the least possible distortion for competition.
All of this, evidently, is notwithstanding the system of control by the European Commission laid down in the Community regulations, since the application of exemptions to the general prohibition of State aid rests exclusively with the European Commission. Moreover, the Commission has the power to recover incompatible State aid.

2.5. Shielding Private Anti-competitive 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?

The following jurisdictions responded "yes" to this question:
Australia, European Union, France, Italy, Jamaica, Republic of Korea, Lithuania, Malaysia, Peru, Serbia, Singapore, Spain, Turkey, United States

Electronic copy available at: https://ssrn.com/abstract=3705247

Hungary

In a particular case (Vj-3/2008- Cartel on the market of rail freight transport services) the parties made "State action defence" references in two directions:

- first, two of the cartel members argued that they had the same owners (the Hungarian State). The GVH did not accept this argument, pointing to the fact that though one of the cartel members was owned indeed by the Hungarian State, the other cartel member was jointly controlled by the Hungarian and Austrian States. Consequently the ownership structures were different and this defence was not accepted since it referred to the actions of the State as an owner, not a regulator;
- the cartel members referred to State compulsion, by stating that their Business Rules – including the tariff system- had to be approved by the Minister Railways Authority). The GVH did not accept this argument either since the decision- making rights of the firms have largely remained. The regulatory bodies controlled only whether the activity of the transport companies met the obligatory rule on railway traffic and transportation. Though this State action did not exclude the responsibility of the relevant firms, the GVH considered it as a mitigating factor in the calculation of fines.

Pakistan

While the law does not specifically provide for "Regulated Conduct" or "State Action" defence, the Commission, however, has considered and addressed it in a few cases.

The following jurisdictions responded "no" to this question:

Barbados, Brazil, China, Guyana, Hong Kong (China), Japan, Kazakhstan, Mexico, Poland, Seychelles, Sweden, Trinidad & Tobago, Tunisia

Greece

The only case in which a "State action defense" could be asserted is when it can be proven that the action or the agreement between the private parties is linked directly with the exercise of public power by the State and that, as a result of such State prescription, private undertakings have no autonomy to decide otherwise. According to the jurisprudence of EU courts (which is followed also by Greek administrative courts), the threshold for such a "State action defense" is particularly high to meet, given that it is essentially conditioned upon private undertakings having no room for decisional autonomy (their actions under review being enti rely prescribed by the State act). For this reason, although this defense is very often brought forward by companies in the context of administrative proceedings, it almost always fail to discharge their responsibility for committing the infringment. However, the intervention of the State may be taken into account by the HCC (and the Courts) as a mitigating circumstance when setting the level of the fine (and this is precisely why companies continue to present arguments attuned to a "State action defense" whenever possible).

By way of recent example, the HCC's Decision (No 512/VI/2010) regarding the setting of minimum fees for private construction projects by decisions of governing body of the Technical Chamber of Greece (TGC) could be considered as relevant. The Technical Chamber of Greece constitutes the professional association for all architects and engineers established in Greece, it serves as a technical advisor to the State and it has been granted the responsibility for the collection of the mechanics' fees paid by the projects' owners. However, in the specific case, the HCC decided that the aforementioned price-setting decisions of the TCG governing body could not be attributed to the State; they were private measures taken by an association of undertakings and they restricted competition.

India

The Act doesn't specifically provide for this.

Mauritius

Not as a matter of law but practice.

Electronic copy available at: https://ssrn.com/abstract=3705247

Russian Federation
In a very small number of instances e.g. State corporations.
Switzerland
Our statute does not comprise a "State action defence" (see also I).

The following jurisdictions responded to this question with N/A:
Kenya
This has not happened. However, this may be possible where government action is in the public interest.

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

Australia
Ordered

CARICOM
For Jamaica only – when State has ordered.

EU
In CIF, the Court of Justice ruled that (i) if an undertaking is required to adopt an anti-competitive conduct by the national legislation, then the State measure may be used as a "justification which shields the undertaking concerned from all the consequences of an infringement" (para 54). Therefore, the Competition Authority may not impose penalties for past conduct that was required by national legislation. However, if national legislation (ii) merely facilitated or encouraged anti-competitive conduct, the undertaking will still be subject to Competition law but the level of the penalty imposed shall take into consideration the national legal framework into consideration as a mitigating factor (para. 57) .
If national legislation leaves a margin of discretion in its implementation such that the nature and scope of competition is, in practice, dependent on the decisions taken by an association of undertakings, then the latter cannot invoke the State action defense (Case T-513/93, Consiglio Nazionale degli Spedizionieri Doganali v Commission ('CNSD'), ECR II-01807). As long as the association of undertakings enjoyed autonomous decision-making power, that conclusion is not invalidated even if the State measure was in itself contrary to Article 101 TFEU (CNSD, paragraph 73).

France
ordered X requested and supervised X merely encouraged ☐
In both EU and national law, anti-competitive behaviour is reprehensible only if it is adopted by undertakings that have freedom of choice.[14] The EU judge has indicated that, in the absence of a constraining legal provision requiring anti-competitive conduct and leaving undertakings no room for independent conduct, the absence of autonomy of undertakings may be concluded *"only if it appears on the basis of objective relevant and consistent evidence that this conduct was unilaterally imposed upon them by the national authorities through the exertion of inexorable pressures, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses"*[15].
In accordance with EU case law, the *Autorité* considers that the fact that anti-competitive practices had been approved and encouraged by the national authorities or a public body is not sufficient to release the offending undertakings from their responsibility. Public intervention may constitute such a case of exemption only if the legal framework that it fixes is constraining[16].

---

[14] See in particular the judgment of the European Court of Justice of 11 November 1997, Commission and France v. Ladbroke Racing, C-359/95 P and C-379/95 P, ECR I-6265, point 33.
[15] Judgment of the Court of First Instance of the European Communities of 18 September 1996, Asia Motor France and others v. Commission, T-387/94, ECR II-961, point 65.
[16] See in this respect decision 05-D-10 of 15 March 2005 on practices implemented in the cauliflower market in Brittany and 10-D-28 on prices and associated conditions applied by banks and financial institutions for processing cheques submitted for encashment purposes.

Electronic copy available at: https://ssrn.com/abstract=3705247

Hungary

When the State orders. If the State merely encouraged, it can be a mitigating factor when the Competition Authority calculates the fine.

Italy

It is available when the State has ordered, requested and supervised.

According to Art. 1(4) ICL, the interpretation of Italian competition rules shall be carried out on the basis of the EU principles in competition matters. Therefore, under ICL, undertakings may invoke the State action doctrine under the same conditions laid down by the case law of the CJEU. In particular, as recently reaffirmed by the Court of Justice in its Deutsche Telekom ruling (Case C-280/08P, Deutsche Telekom AG v. Commission, [2010] ECR I-9555, para. 80), undertakings are exempted from the application of competition rules only if the anti-competitive conduct is required by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part. In such a situation, the restriction of competition is not attributable to the autonomous conduct of the undertakings.[17]

On the contrary, if it is found that the national law merely allows, encourages or makes it easier for undertakings to engage in autonomous conduct, the undertakings remain subject to the application of the competition rules.[18]

The aforementioned criteria have been followed by the IAA also in cases concerning the application of the State action defense to ICL provisions (e.g., decisions No. 10245, 11795 and 11946, where, however, the "State action defense" was rejected by the IAA, as the relevant rules left a certain "marge de manoevre" to the undertakings).

Japan

Private parties concerned may claim, for example, that they just followed what a State said or others when, for example, they appeal to the court and others but in most cases, the courts turned down such claims.

Kenya

No precedent.

Republic of Korea

When the State has ordered. If the State's order is mandatory according to other legitimate Acts and penalty is levied when noncompliant, it is immune from application of the MRFTA. But when administrative guidance is a mere cause of separate law violations, in principle the acts are illegal.

Article 58: This Acts shall not apply to acts of an entrepreneur or trade association as committed in accordance with any Acts or any of its decree

Lithuania

When State has ordered, requested and supervised.

The Law on Competition establishes a clause that actions, constituting the infringement, were determined by the actions of the authorities shall be considered as mitigating circumstances when imposing a fine and setting its amount. The Law on Competition does not specify what actions exercised by public authorities could be deemed to be those that encourage anti-competitive activity. Additionally, in the context of a State action defence there is a rule instituted by the Court of Justice of the EU that was applied by the Supreme administrative court of Lithuania. This was that the undertakings concerned could be exempted from the competition rules only if anti-competitive conduct is required by national legislation or if the latter creates legal framework which precludes all scope for competitive activity on their part. Moreover, this clause was reiterated by the European Commission in its Communication 'Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements'.

---

[17] See also Joined Cases C-395 and 379/95P, Commission and France v. Ladbroke Racing [1997] ECR I-6265, para. 33 and 34).

[18] See Joined cases T-191 and 212-214/98, Atlantic Container Line v. Commission [2003] ECR II-3275, at 1130).

Electronic copy available at: https://ssrn.com/abstract=3705247

It is worth noting that the Competition Council in the recent case of 20th January 2011 Nr.2S-2 has scrutinized if there was a situation that the agreement concluded by the undertakings was induced by the State body. It was acknowledged that the national legislation had not precluded the companies from competitive activity, thus, competition rules were applicable and it was necessary to examine if the actions performed by the public authority could induce undertakings to enter into prohibited agreement and if these actions could be defined as mitigating factors. The Competition Council reduced the fines imposed upon the undertakings by 20 % because the given facts (such as that the public authority was not only aware of the Anti-competitive agreement but also encouraged it) were recognized as mitigating factors.

Malaysia

When State has ordered, or when the State has requested and supervised.

Mauritius

When the State has ordered, or when the State has requested and supervised. As a matter of practice, the Competition Commission has stated that if the government as a policy matter takes a decision for an action which may potentially have an adverse effect on competition, the Competition Commission will merely give advice to the Government and not investigate the said action. This is stated in the different guidelines issued by the Competition Commission.

Pakistan

In the Commission's order against Karachi Stock Exchange (KSE) and Lahore Stock Exchange (LSE), KSE and LSE raised the defense that their act of placing the floor had the tacit approval of the securities regulator, i.e., the Securities and Exchange Commission of Pakistan (SECP). In essence they argued for informal exemption from the application of the Competition Ordinance, 2007 (now Competition Act, 2010) and this type of defense is known as "State compulsion" defense in the E.U., "regulated conduct" defense in Canada, or "grant of implied immunity," in the United States.[19]

Peru

Is it available when the State has ordered X ☐, requested and supervised X ☐, merely encouraged X ☐ the conduct or agreement? Other.
Explain.
Article 3 of Competition Law establishes that "conducts that are consequence of the set forth in a law are out of the scope of [the] Law". Although this article has never been expressly applied, under former Competition Law (Legislative Decree No. 701), the Free Competition Commission of INDECOPI has interpreted that if an Anti-competitive practice is allowed by the State it might go unpunished.

Russian Federation

Generally, according to Article 13 the Law "On Protection of Competition" (FL 135) an entity has a possibility to refer to a government action as a defense of its practices that otherwise would be considered as illegal. I believe for the purposes of the Questionnaire the provisions of Part 2 and 3 of the Article are most important:

"2. The Government of the Russian Federation has the right to determine the cases of permissibility of agreements and concerted practices meeting the conditions stated in items 1 and 2 of part 1 of the present article (general exemptions). General exemptions, concerning agreements and concerted practices indicated in part 2 of article 11 of the present Federal Law, are defined by the Government of the Russian Federation on proposal of the federal antimonopoly authority, are introduced for a specific period of time and provide for:
1) type of agreement or concerted practice;

[19] For details, please refer to the Order in the link given below:
http://cc.gov.pk/images/Downloads/KSE%20Order%2018March.pdf

Electronic copy available at: https://ssrn.com/abstract=3705247

2) conditions which cannot be considered as permissible in regard to such agreements or concerted practices;
3) obligatory conditions for ensuring competition which should be contained in such agreements;
4) obligatory conditions under which such concerted practices are permissible.
3. General exemptions can provide, alongside with the conditions indicated in part 2 of the present article, for the other conditions which agreements and concerted practices should satisfy."

The full text of the Law, including the Articles referred to in the citation above is available at www.fas.gov.ru (click for the English version at the right upper corner). In other words, the government has the right to legalize the practices indicated in the Article 13 on the specified terms and the entities in question may use that as a defense. State corporations are an example of such situation.

Serbia
Available when State has ordered, requested and supervised, and when State has merely encouraged the conduct or agreement.

Spain
The prohibitions in articles 1 to 3 of Spanish Competition Act -on concerted practices, abuses of dominance and unfair practices with effects on competition- do not apply where the concerned conducts are harboured by a legal Act emanating from Parliament, unless such legal Act is itself in breach of the European Treaty.
Nevertheless, the possibility that the offenders acted in the belief that their conduct was legal is taken into account within the principle of *legitimate expectations*, which prevents the Public Administrations from, surprisingly and unreasonably, betraying an expectation of legality generated by their actions. This principle is closely linked to the general principle of *good faith*, as well as to that of *legal certainty*, which enlightens the entire legal system.

The European Court of Justice has recently clarified that EU antitrust rules apply to any conduct engaged in by undertakings on their own initiative. If e.g. prices set by an undertaking have been approved by a regulator, this does not absolve the undertaking from responsibility under EC competition rules (Court case 123/83 BNIC (1985) ECR 391, paragraphs 21 to 23; Court of First Instance, case T-271/03, judgement of 10.4.2008, Deutsche Telekom v Commission, paragraph 107). Also, if national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, EU competition rules remain applicable (Court of First Instance, case T-271/03, judgement of 10.4.2008, Deustche Telekom v Commission, paragraph 87 ss with reference to previous case law).

Turkey
When State has ordered, requested and supervised, and merely encouraged.

United States
When the State has ordered, requested and supervised but not where it has merely encouraged. The State must clearly articulate its intention to replace competition and must actively supervise any private Anti-competitive acts.

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

The following jurisdictions responded "yes" to this question:
European Union, Hong Kong (China), Italy, Kenya, Republic of Korea, Malaysia, Mauritius, Mexico, Pakistan, Seychelles, Singapore, Turkey

Electronic copy available at: https://ssrn.com/abstract=3705247

Japan
The JFTC issued "Guidelines Concerning Administrative Guidance under the Antimonopoly Act" to lay out specifically its interpretations concerning administrative guidance under the AMA.[20]
The following jurisdictions responded "no" to this question:
Australia, Barbados, Brazil, China, France, Guyana, Hungary, India, Jamaica, Kazakhstan, Lithuania, Peru, Poland, Serbia, Spain, Sweden, Switzerland, Trinidad & Tobago, Tunisia, United States

Greece
Although State officials may encourage and/or participate in meetings with trade and professional associations, mainly with a view to increasing quality of products and services and reducing prices for consumers as a matter of general policy, the State is not directly involved in the associations' decisions. When faced with cartel proceedings, companies sometimes invoke the "State action defense" to discharge their responsibility for the infringement, but their attempt regularly fails (given the Courts' jurisprudence at national and EU level – see above, and the fact that State involvement – to the extent that it may still occur –concerns matters of general policy and not detailed discussions and/or decisions on prices, quantities etc.)

Russian Federation
Decisions of trade and professional associations are subject to application of the antitrust legislation in the Russian Federation and, therefore, the government (the antitrust body) can annul such decisions in case they go in breach with the competition law. In other words, a practice cannot be excepted from the antitrust law on the grounds that it has been exercised pursuant to the decision of trade or professional association or reference to such decision cannot be used as a defense for an illegal practice. For example, price fixing or market allocation by members of trade or professional association would be prosecuted as a cartel agreement in accordance with Article 11 of the FL 135 regardless of whether such practice has been exercised pursuant to the decision of trade or professional association or not.

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?

The following jurisdictions responded to this question with No:
CARICOM, Hong Kong (China), India, Lithuania, Mauritius, Mexico, Pakistan, Seychelles, Sweden, Turkey

The following jurisdictions responded to this question with N/A:
Australia, Brazil, China, Hungary, Japan, Kazakhstan, Peru, Poland, Russian Federation, Sweden, Switzerland, Tunisia, United States

The following jurisdictions responded "yes" to this question:

EU
Yes. Decisions by a professional association are considered to be State measures when the Member State defines the public interest criteria and the essential principles that guide the activity of the trade association whilst it retains the power to adopt decisions in the last resort (Case C-309/99 Wouters and Others v. Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577.)

When these criteria are not met, the rules of the professional association shall be attributable to it alone (Wouters). The Court confirmed that Articles 4(3) 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, assists in ensuring compliance with the agreements or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for

[20] http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/administrative.pdf

Electronic copy available at: https://ssrn.com/abstract=3705247

taking decisions affecting the economic sphere (see Case C-35/99, Arduino [2002] ECR p. I-1529, paragraph 35; Case C-94/04; Case C-35/96, Commission vs Italy (CNSD), ECR I-03851; and C-202/04, Cipolla [2006] ECR, p. I-11421, paragraph 54).

France

Trade and professional associations are not immune from the application of competition law. The Autorité has sanctioned several times such associations. Recently, the Autorité fined a veterinaries' regional order and a regional veterinary surgeons' union for entering into an Anti-competitive agreement (decision 13-D-14 dated 11 June 2013). In February 2013, the Autorité also fined the accountants' professional order as well as an association it has created, for implementing a strategy aiming to exclude competitors' online accounting and tax return portals from the market (decision 13-D-06 dated 28 February 2013).

Italy

Yes. According to Art. 1(4) ICL, the interpretation of Italian competition rules must be carried out on the basis of the EU principles in competition matters.

In the Arduino (Case C-35/99, Arduino, [2002] ECR I-1529) and Cipolla (Case C-94/04, Cipolla, [2006] ECR I-11421) cases, the Court of Justice has articulated the conditions under which the regulatory activity delegated by the State to trade and professional associations (in the cases above the Italian Bar Association) is shielded from the application of competition rules.

In particular trade or professional associations are not liable for competition law infringement:

a) when a Member State requires or encourages 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 (Arduino , para. 35)

b) when a the State delegates to private economic operators the responsibility for taking decisions affecting the economic sphere, provided that the State shall retain the power to make decisions of last resort or to review the acts/decisions adopted by the private economic operators (Cipolla, para. 49 and Arduino, para. 39-40). (Note that the State must have an active role in supervising such entities and their rule-making process, thus the State cannot merely "rubber-stamp" their decisions).

Kenya

No, except where restriction contained in their rules is reasonably required to maintain professional standards or the ordinary function of the profession

Republic of Korea

Yes. When the State has ordered in accordance with acts and decrees.

Malaysia

Yes. When the State pursuant to a legislative requirement has ordered for such decision to be made by the associations.

Serbia

Issue regulated by law or sublegal act.

Singapore

It depends. Whether or not trade and/or professional associations and their members are immune from the application of the Competition Act when the State is involved is governed by sections 33(4) and 33(5) and the Third Schedule of the Competition Act.

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?

Electronic copy available at: https://ssrn.com/abstract=3705247

The following jurisdictions responded “yes” to this question:
European Union, Hungary, Mauritius

The following jurisdictions responded “no” to this question:
Australia, Barbados, Brazil, China, France, Greece, Guyana, Hong Kong (China), India, Italy, Jamaica, Japan, Kazakhstan, Kenya, Republic of Korea, Lithuania, Malaysia, Mexico, Pakistan, Peru, Poland, Russian Federation, Serbia, Seychelles, Spain, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey, United States

Singapore
It depends based on the application of sections 33(4) and the Third Schedule – see above.

If yes, explain requirements for immunity.

EU
In Reiff, the Court ruled that there is no illegal agreement between undertakings for the purpose of Article 101(1) TFEU: "if the members of [the] boards, although chosen by the public authorities on a proposal from the relevant trade sectors, are not representatives of the latter called on to negotiate and conclude an agreement on prices but are independent experts called on to fix the tariffs on the basis of considerations of public interest and if the public authorities do not abandon their prerogatives but in particular ensure that the boards fix the tariffs by reference to considerations of public interest and, if necessary, substitute their decision for that of the boards".

Mauritius
Boards will normally not fall within the definition of ‘enterprise’ for the competition law to be applicable. “enterprise’ is defined as “any person, firm, partnership, corporation, company association or other juridical person engaged in commercial activities for gain or reward and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them.”

Singapore
Immunity is governed by the application of section 33(4) and the Third Schedule as outlined above.

Switzerland
This must be ascertained in a case by case basis (see answer Question 1).

United States
In respect of State boards regulating professions, which typically consist of private practitioners of those professions, immunity from prosecution or not depends on the facts and contours of the State action doctrine.

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

The following jurisdictions responded “yes” to this question:
Australia, Barbados, Brazil, China, European Union, France, Greece, Guyana, Hong Kong (China), Hungary, India, Italy, Jamaica, Japan, Kazakhstan, Kenya, Republic of Korea, Lithuania, Malaysia, Mauritius, Mexico, Peru, Poland, Russian Federation, Serbia, Seychelles, Singapore, Spain, Sweden, Switzerland, Trinidad & Tobago, Tunisia, Turkey

The following jurisdictions responded “no” to this question:
Pakistan, United States

If yes, explain requirements for immunity

Electronic copy available at: https://ssrn.com/abstract=3705247

Italy

Contrary to the US where lobbying activity aimed at securing for its members the adoption of regulatory measures restricting competition is generally shielded for the application of antitrust rules under the so called Noerr-Pennington doctrine (American Eastern Railroad v. Noerr Motor Freight (355 US 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965)), in Italy the such activity may be scrutinized under national competition rules.

The application of competition rules to lobbying will discuss distinguishing the cases according to the branch of government towards which the lobbying activity is directed. When lobbying activity is addressed to the legislative branch, it has been ruled in an injunction proceeding decided by the Court of Appeal of Milan (13 Luglio 1998, in Giur. It. (1999) p. 1897) that the lobbying campaign on the provincial elected assembly and on local press by the incumbent operators in a given industry in order to forestall a competitor's entrance on the market constitutes a violation of ICL (note that on this specific issue no EU precedent exists both in the Commission practice or in the CJEU case law).

When undertakings provides false or misleading information to government agencies such as the patent office in order to secure rights to which they are not entitled or are entitled for a shorter period, such activity may result in anti-competitive conduct (at the EU level, see the Case T-321/05, AstraZeneca, [2010] ECR II-2805); at the national level see the IAA's Pfizer decision of 17 January 2012;[21] however, this decision of the IAA has been recently annulled by the TAR Lazio (Sentenza 07467/2012 of 3 September 2012). An appeal against the TAR's ruling is currently pending before the Consiglio di Stato (the highest administrative court in Italy). Another noticeable example is the recent decision of the IAA in case A437, ESSELUNGA v. Coop Estense of 6 June 2012, where the IAA condemned as an abuse of dominant position under Italian competition law the conduct of the incumbent undertaking (Coop Estense) aimed at delaying the entrance of a competitor in the market (ESSELUNGA) by lodging observations and systematically intervening in administrative procedures necessary to obtain the relevant authorizations for ESSELUNGA to carry out its economic activity.

Finally, under certain conditions, the use of the judiciary system and of the right of access to justice may be Anti-competitive when it constitutes vexatious litigation. In particular, in ITT Promedia, the Court of Justice ruled that when legal proceedings (i) cannot reasonably be considered as an attempt to establish the rights of the undertakings concerned and can therefore only serve to harass the opposite party and (ii) are conceived in the framework of a plan whose goal is to eliminate competition, then such actions are in breach of competition rules (see Case T-111/96, ITT Promedia NV. v Commission [1998] ECR II-2937). According to Art. 1(4) ICL the interpretation of Italian competition rules shall be carried out on the basis of the EU principles in competition matters, the principles elaborated in the ITT Promedia case above are directly relevant for the application of Italian competition law provisions in similar situation.

Poland

It depends whether the lobbyist is engaged in an economic activity. If the lobbyist activity is not considered to be an undertaking in the meaning of the statutory act on competition, then it is not subject to competition law provisions.

Art. 4 point 1) of the Act on Competition and Consumer Protection:

"For the purposes of this Act:

1) "undertaking" shall mean an undertaking in the meaning of the provisions on freedom of business activity, as well as:

a) natural and legal person as well as an organizational unit without a legal status to which legislation grants legal capacity, organizing or rendering public utility services, which do not constitute business activity in the meaning of the provisions on freedom of business activity,

b) natural person exercising a profession on its own behalf and account or carrying out an activity as part of exercising such a profession,

c) natural person having control, in the meaning of subparagraph 4 herein, over at least one undertaking, even if the person does not carry out business activity in the meaning of the provisions on freedom of

[21] http://www.agcm.it/stampa/news/5858-farmaci-sanzionata-pfizer-con-una-multa-di-106-milioni-di-euro-per-abuso-di-posizione-dominante

Electronic copy available at: https://ssrn.com/abstract=3705247

business activity, if this person undertakes further actions subject to the control of concentrations, referred to in Article 13;
d) associations of undertakings in the meaning of subparagraph 2 – for the purposes of the provisions on competition-restricting practices and practices infringing collective consumer interests; "

2.6. **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.

Brazil

Oil and Gas Industry: Petrobras

The sector continues to be dominated by Petrobras, which held a legal monopoly until 1997 and which is still controlled by the government. It accounts for by far the greatest share of exploration, production, transportation, refining and distribution of oil and refined products in the country. Its dominance in natural gas (which accounts for a relatively small part of Brazil's energy consumption) is even greater. It controls over 90 per cent of the country's gas reserves and operates the country's interstate gas pipeline system.

In 1997, a new regulatory agency was created to oversee the natural gas and petroleum markets, named National Petroleum Agency ("ANP"). This law also explicitly referred to the interaction between the regulator and competition authorities. ANP is required to notify them if it becomes aware of evidence suggesting a violation of the competition law. CADE, in turn, is required to notify ANP of any sanctions it applies to firms in the sector, so that ANP may adopt any appropriate legal measures of its own (*e.g.*, cancellation of licenses).

ANP exerts its regulatory authority in various parts of the oil and gas sector, notably exploration and transportation. Retail prices of oil and gas derivatives are no longer controlled. CADE regularly considers conduct cases in the oil and gas sectors, though none have directly involved Petrobras' dominant position in the past several years.

CADE has prosecuted cartel cases in retail automotive fuel. It prosecuted local cartels in liquid petroleum gas in 2008 and 2004 and a cartel in diesel fuel in 2004.

It has also evaluated mergers in these sectors from time to time. One of these involved a joint venture between Petrobras and White Martins for the production of liquefied natural gas (LNG). Petrobras was a monopolist in natural gas transportation, and it also was dominant in the production of liquid petroleum gas (LPG), an alternative to LNG for many applications. Petrobras did not produce LNG, however, nor had White Martins, which was a leader in the production of non-energy industrial gases (such as oxygen and nitrogen.). CADE identified vertical concerns in the transaction stemming from Petrobras' control of natural gas, the necessary input. The parties argued that the joint venture would generate significant efficiencies, however, which CADE accepted. It permitted the transaction but imposed a *remedial order* requiring the parties to *make their prices and contracts transparent*, thereby making it easier to identify and prosecute future unlawful conduct. For further details, see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Competition Law and Policy in Brazil Peer Review* 63 (2010).

More recently CADE approved without conditions a merger between two distributors of LPG.

In a recent merger involving vertical restraints in the retail fuel sector, Petrobras/Ipiranga (2009), CADE chose to require the elimination of exclusivity arrangements between fuel wholesalers and retailers rather than to require divestitures of retail outlets.

A co-operation agreement has been signed between CADE and the Brazilian National Petroleum Agency (2012) and further information on this issue can be found at OECD, Roundtable on Competition in Raod Fuel, Note by Brazil 3 June 2013 DAF/COMP/WD(2013)47.

Madeira River Consortium: Hydroelectric Concession Agreement.

In 2008, on a BRL 20 billion hydroelectric concession agreement, Brazilian antitrust authorities entered an interim order suspending an exclusivity agreements between Odebrecht, a construction company, and four major suppliers of hydroelectric turbines, General Electric, Alsthom, Siemens and Voith Madeira, that prohibited the turbine companies from participating with other consortia in this bidding. Odebrecht challenged the order in court, but before a decision was reached it negotiated a settlement with CADE

Electronic copy available at: https://ssrn.com/abstract=3705247

that resulted in the cancellation of the exclusivity agreements. Odebrecht ultimately won the auction, but because CADE's order permitted other bidders to participate, the contract price was significantly lower than it would otherwise have been. The final price was substantially lower than the reserve price, and it was estimated that the total savings for Brazilian consumers over the 30-year life of the concession were approximately BRL 16.4 billion (USD 9.4 billion).

China

In 2011 the National Development and Reform Commission ('NDRC'), the authority in charge of price-related breaches of the AML investigated China Telecom and China Unicom for their alleged breach of dominance in the broadband access and inter-network settlement factor.

France

In this regard, three main actions of the *Autorité* can be mentioned:

- Opinion n°13-A-11 of 29 March 2013 on the effects on competition of the generalisation of employee's collective complementary healthcare insurance schemes: This opinion concerned a new statute law meant to regulate how companies subscribe to healthcare insurance schemes on behalf of their employees. The *Autorité* notably recommended that, so as to ensure effective competition between the various providers of such healthcare insurance schemes, the possibility for social partners[22] to recommend or appoint such entities must necessarily involve several insurers. This position was endorsed by the Constitutional Court to rule out some of the provisions of the proposed law (Decision n°2013-672 DC, 13 June 2013).

- Opinion 12-A-03 of 8 march 2012 relating to a draft decree on the implementation of an automatic procedure for granting gas and electricity welfare tariffs: In this opinion, the *Autorité* de la concurrence stated that the text submitted for examination was compatible with competition law and it also recommended that, in the same way as welfare tariffs are applied in France to the supply of gas, electricity suppliers ought to be allowed to offer welfare tariffs to their eligible customers. Following this opinion the legislator included this proposal in a law which came into force on 15 April 2013.

- Opinion 07-A-12 of 11 October on the legislation on commercial facilities: In this opinion the *Autorité* analysed the negative impact of the zoning system which submitted the opening or extension of sales areas to a licence. Considering the potential distortions caused by this system, the *Autorité* asked for measures to strengthen competition in this sector and in particular to abandon the granting of the licence to economic criteria and to lower the merger thresholds in the retail sector. Both measures were included by the legislator in the Law of modernization of the economy dated 4 August 2008.

Greece

The HCC has recently expanded significantly its advocacy efforts, with a view to removing regulatory barriers to competition, thereby contributing to structural reforms.

Following the adoption of the Law 3919/2011 on the liberalisation of regulated professions which abolished the requirement of prior administrative authorisation (replacing it with a notification obligation coupled with a stand-still period of 3 months), as well as a number of restrictions with regard to access to, and exercise of, professions (including regulated minimum fees, geographic restrictions in the exercise of a profession, numerous clauses restrictions, second-establishment restrictions, etc.), the Hellenic Competition Commission (HCC) was called to examine whether maintaining and/or re-instating limited prior authorisation requirements and/or certain restrictions for specific professions was necessary and proportional for the attainment of overriding policy objectives.

This prompted the most far-reaching intervention of the HCC in the area of liberal professions (and the most far-reaching intervention ever in terms of regulatory obstacles to competition). At the beginning of 2011 the HCC had already examined the impact of specific provisions of Law 3919/2011 on the

[22] Gathering of trade and employers' unions

Electronic copy available at: https://ssrn.com/abstract=3705247

liberalization of some key professions, such as lawyers, notaries, chartered accountants and engineers, proposing further revisions of the respective regulatory regimes with the aim of further fostering competition in those economic activities.
Applying the key methodology of the OECD Competition Toolkit and/or similar competition impact assessment techniques, the HCC reviewed laws and regulations affecting more than 64 regulated professions, ultimately issuing, from January 2012 to September 2012, 11 formal Opinions.
The exercise focused on i) mapping administrative authorization proceedings including any type of examination or certification requirements that may result in quantitative barriers to entry, ii) identifying restrictions resulting from the organization of professions especially through the granting of exclusive rights to associations of professionals and iii) evaluating restrictions to access and exercise of professions.
Depending on the results of such an assessment for each profession or economic activity under review the HCC proposed: The abolition of prior administrative authorization where public interest reasons did not justify the maintenance of such a system (e.g. regarding the professions of actuaries, accountants and tax consultants, teachers in private or foreign language schools, home instructors or tourist guides). The opposite was the case e.g. for licensed professions related to public security due to public order and security reasons, conservators of antiquities and works of art and salesmen of antiquities due to the need to protect cultural heritage, butchers and operators of birds forage plants due to the need to protect public health, licensed economic activities related to education (establishment and operation of private primary and secondary schools, tutoring and language center, private vocational training institute, post-secondary educational centers, certification training centers and liberal studies workshops) due to the need to protect education and vocational education, licensed professions and economic activities in the petroleum/gas sector regarding dilution, transport, supply, bottling and commerce as well as the operation of companies for the supply of gas due to public safety reasons and the need to protect the environment.

The simplification of requirements regarding periodic certification (e.g. accountants and tax consultants), examination systems for access to the profession (in some cases with a view to ensuring sufficient State oversight and thus avoiding risks of quantitative barriers to entry e.g. regarding the profession of actuaries or sworn-in appraisers), conditions regarding additional licences for the provision of specific services by legal persons (e.g. accountant and tax consultant services) or requirements of prior registration with the relevant registry (e.g. infrastructures relating to health).

The re-organization of certain professions and the abolition of exclusive rights in the exercise of such professions (amounting to a numerous clauses restriction in some cases) granted to specific professional organizations with the aim of broadening the scope and number of professionals accepted as members of such associations so as to include natural persons and legal entities of similar qualifications/certifications (based on transparent and objective criteria), or the parallel accreditation of similar professional bodies (e.g. sworn-in appraisers).

The abolition of additional restrictions to access to, and exercise of, the relevant professions such as i) numerous clauses provisions (e.g. sworn-in appraisers, educational services), ii) geographical restrictions (e.g. salesmen of antiquities), iii) regulated fixed fees (e.g. sworn-in appraisers), iv) nationality and freedom to establishment restrictions (e.g. educational services, licensed professions and infrastructures relating to health, tobacco salesmen and sworn-in appraisers), v) maximum capacity restrictions relating e.g. to health infrastructures, vi) provisions establishing the incompatibility of different activities e.g. between the profession of the salesman of antiquities and the capacity of collector of objects of art.

Most of the above proposals were recently adopted by the Greek government and subsequently legislated upon by the Greek parliament.

In addition to liberal professions, the HCC pursued several advocacy initiatives regarding regulatory obstacles to competition in the food and retail sector – by issuing Opinions:

- Reform of Product and Market Regulation Code

Electronic copy available at: https://ssrn.com/abstract=3705247

The HCC has adopted a recent Opinion concerning the reform of Basic Market Regulation Code (already dating since 1946), which essentially provides for delegation powers to issue product-specific market regulations, covering a wide range of themes. The HCC proposed the abolition of all regulatory restrictions concerning minimum and/or fixed prices, export bans and/or export restrictions, as well as transportation fees. It also recommended that regulations concerning the conditions for the sale and marketing of certain products be re-examined and only retained, if in conformity with EU regulations (or with a view to supplementing such regulations on the basis of overriding, objective and pre-defined public policy grounds).

- Abolition of notification requirements imposed on companies, which is practice

  By its Opinion No 21/VII/2012, the HCC proposed the abolition of regulatory obligations concerning the notification by companies of wholesale price lists to the Ministry of Development. The main competition concern was that such notification requirements facilitated transparency of intermediate prices (as opposed to end-consumer prices), thereby facilitating collusive outcomes. How? By facilitating companies to reach an understanding on their terms of coordination (wholesale lists as a focal point of coordination), by enabling them to monitor deviations from collusive schemes and by enabling them to detect new entrants that could potentially destabilize the terms of coordination. In addition, this regulation facilitated umbrella pricing, instead of net pricing, thereby putting upward pressure on prices.

- Removal of restrictions concerning the selling of infant formulas (for infants under the age of 6 months) solely in pharmacies.

  By another Opinion, the HCC proposed the abolition of the regulatory restriction concerning the selling of infant formulas (for infants under the age of 6 months) solely in pharmacies. The HCC concluded that this regulation constituted an impediment to the proper functioning of free competition, which could not be justified on the basis of overriding public policy considerations, and resulted to higher prices to the detriment of consumers.

Again, the above HCC recommendations pertaining to the food and retail sector resulted in the amendment of the relevant laws and regulations.

Hong Kong (China)

Law enacted 2012; not yet fully operative.

Hungary

The GVH investigated the complaint of a funeral entrepreneur against the Municipality of Ajka. The GVH found that the local decree of Ajka prevented the entry of entrepreneurs to the market of funeral services if they offered their service only occasionally. As a municipality decree contained the anti-competitive provisions (a decree which was the result of the executive power of the municipality) the GVH could not open a proceeding but exercised advocacy action by suggesting that the decree of the municipality be amended. Since the letter of the GVH was not successful, as a next step, the GVH turned to the "County Governmental Office" (which was responsible for the legality supervision of the local municipalities) and the GVH requested the Office to ask for constitutional interpretation of the municipality decree. Finally the Constitutional Court declared the Anti-competitive provisions of the municipality decree anti-constitutional.

India

CCI has initiated probe into State-run X Coal India which has allegedly thwarted competition in the sector, robbing it of growth despite the country holding record reserves of the fuel.[23]

[23] http://cci.gov.in/images/media/News/news09/probecoal22dec2011.pdf
http://www.thehindubusinessline.com/companies/coal-india-arms-may-have-abused-dominant-position/article4469580.ece

Electronic copy available at: https://ssrn.com/abstract=3705247

Italy

While applying to public undertakings, Italian competition law does not apply to the State. However, as mentioned, the new powers granted to the IAA pursuant to Article 21-bis of the ICL, will enable the IAA to challenge a measure or a regulation (secondary legislation) adopted by the State which could result in a restriction of competition. The administrative court will then have the power to annul the measure or the regulation. Notwithstanding the above, the ICL does not entrust the IAA with the power to directly sanction State or State-related restraints.

Note that when applying EU competition rules (Art. 101 and 102 TFEU), but not national competition rules, the IAA is obliged to disapply any national rule (primary or secondary) which may jeopardize the effectiveness of EU competition rules (see ECJ, Case C-198/01, CIF v. AGCM, [2003] ECR I-8055; see also Consiglio di Stato, sentenza No. 2808/2009).

Japan

"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)[24] specifies the following four types of involvement of central or local government employees in bid rigging; 1) instruction of bid rigging (e.g. to instruct bidders to engage in bid riggings), 2) Indication of its wish on winning bidders (e.g. to inform bidders of a preferred winning bidder in advance), 3) Leakage of confidential information on bidding (e.g. to tell bidders the target price, etc., contrary to confidentiality) and 4) Aid to specific bid rigging (e.g. to invite a specific bidder to a selective bidding at its request). When the JFTC finds this involvement: 1) the JFTC demands that the Heads of Ministries or Agencies, where the employee works, implement improvement measures on the bidding that are necessary for eliminating the involvement in bid rigging (Art. 3), 2) demanded by the JFTC, the heads of the ministries or agencies investigate if the involvement exists , 3) the heads of the ministries or agencies above a) publicize the investigation result in 2) above and, if proven, improvement measures, b) claim against the employees for compensation for damage (if any), and c)take disciplinary actions against the employees (if appropriate) (Act. 3, 4 and 5).

Kazakhstan

As one of the recent success stories, the Agency has conducted antitrust investigations into the alleged abuse of dominance by State Municipal Entity "Gorkomhoz", which determined the fact of the abuse of a dominant position by concluding agreements on the provision of services on utilization of municipal solid waste with other market entities on condition that they undertake additional liabilities which by their nature are not relevant to the subject of the agreement, in particular concluding additional agreement on the removal of municipal solid waste. The court issued the administrative fine of 1 048 000 tenge (US $7000), which was subsequently paid in full.

Kenya

One of the firms in the alcoholic beverages sector in Kenya complained to the Competition Authority about unfair trade practices that were meted against them at the instigation of Provincial Administration. The allegations included incitement against, intimidation and arrest of the firm's agents with a view of stopping the distribution and sale of its products; defamation, impounding and destruction of the firm's products in order to block sales and distribution; and, licensing of bar owners on condition that they deal with the competitors' products only. Investigations were carried out and the findings confirmed the involvement of the Provincial Administration. The Authority impressed upon the Provincial Administration that its activities were against the competition law, and therefore, it needed to desist from the practice since it was against the spirit of competition. The Provincial Administration ceased the practice.

Republic of Korea

The KFTC has enforced our law positively toward the unfair practices of public utility enterprises such as State – invested firms, local government – owned companies, etc.

[24] (http://www.jftc.go.jp/en/legislation_guidelines/ama/aepibr/index.html)

Electronic copy available at: https://ssrn.com/abstract=3705247

A typical case is as follows. KFTC has issued a corrective action order to the Republic of Korea land & housing corporation on the charge of unfairly taking advantage of its own dominant position in a transaction. The corporation had ordered the construction firms to do additional works concerning apartments floor, however it revoked the order unilaterally after completion of the works and did not pay the cost of additional works (December, 2011). In this case, the KFTC prohibited unduly abusing acts of the biggest public utility enterprise in the fields of public housing and land supplying and ordered it to notice its counterparties of its law violations fact. Accordingly, this case has contributed to establish the order of fair transactions between enterprises in the field of construction.

Lithuania

Below two successful cases will be discussed where the Law on Competition was enforced against State-owned entities, the infringement was found and the Competition Council fined the State-owned undertakings concerned.

One of the cases in the context of State-owned entities was the adoption of the final decision by the Supreme Court of the Republic of Lithuania (the SACL). The decision of the Court overruled the appeal filed by the Lithuanian post company AB Lietuvos paštas – a State-owned enterprise which has an exclusive right for reserved (universal) mail services. By its ruling the SACL acknowledged the validity of the conclusion in the Resolution of 27 September 2007 of the Competition Council to the effect that AB Lietuvos paštas had infringed the requirements of Article 9 of the Law on Competition (the prohibition of abuse of dominant position) by having abused its dominant position in the relevant market by establishing different prices for the mail delivery. The SACL concluded that AB Lietuvos paštas was holding a dominant position in the market for reserved (universal) mail services. In this position the company has been abusing its dominant position and was seeking to oust its two competitors from a closely related market – that of invoice printing, binding and enveloping. The investigation was conducted to assess the results of the tender announced by UAB Vilniaus energija to procure combined invoice printing-enveloping and delivery services. The prices of all three competitors for the service of invoice printing, folding and enveloping were to a large extent comparable; thus the companies could compete in terms of their prices. AB Lietuvos paštas, however, was in an advantageous position to offer much more attractive mail delivery prices being aware in advance of the prices offered by competing companies, since in order to submit a competitive tender the latter had to use the mailing services and fixed the rates set up specifically by AB Lietuvos paštas.

Another case regarding SOEs was the examination of actions of the State enterprise Vilnius International Airport by the Competition Council in 2007 as concerns the compatibility of its behaviour with the requirements of Article 9 of the Law on Competition (prohibition of abuse of dominant position). The investigation was performed in response to the application filed by UAB RSS Motors seeking to determine a possibility of abuse of a dominant position by the Vilnius International airport in the provision of airplanes with fuels in the Vilnius International airport. UAB RSS Motors lodged a complaint against the actions of the Vilnius International Airport, as it firstly required submitting the fuel supply agreements with the customers and other related instructions, and secondly – refused to allow a second fuel vehicle to the airport, which in the opinion of the applicant was contradictory to the provisions of the Law on Competition. While operating in the management and organization marker in Vilnius airport the SE Vilnius International Airport was also competing with the applicant RSS Motors in the market for the provision of airplanes with fuels in the airport in question, i.e. performed commercial activity.

Having regard to the finding of the investigation the Competition Council concluded that the requirement of the SE Vilnius International Airport to UAB RSS Motors to submit the contracts with the customers, as well as refusal to allow entry for a second vehicle, would not be justifiable even for the purpose of the administration of the Vilnius international airport, therefore such actions were recognized to constitute an infringement of Article 9 of the Law on Competition since the possibility to learn the contents of the contracts concluded with the customers of the competitors and refusal of granting entry for additional vehicle reduced competition. The Court of First Instance deemed that the refusal to allow entry for a second vehicle based on aero safety was objective and reasonable, thus, it reduced the scope of infringements and respectively the fine. Furthermore, the SACL upheld the decision of the Court of first instance.

It is worth noting that there is another adopted Resolution finding an infringement of the Law on Competition by Vilnius International Airport. In 2008, the Competition Council found that the Vilnius

Electronic copy available at: https://ssrn.com/abstract=3705247

International Airport abused its dominant position by preventing UAB Naftelf from entering the markets for the supply of the aviation gasoline and jet fuels to air planes in the territory of Vilnius airport. Vilnius International Airport was obliged to terminate the illegal activities, i.e. not later that within 3 months to provide the possibility for UAB Naftelf to enter the market for the supply of aviation gasoline and jet fuels in the territory of the airport. Although UAB Naftelf applied to Vilnius International Airport administration more than once, the applicant was not provided any possibility to compete with the Airport and RSS UAB MOTORS in the market for the supply of aviation gasoline and jet fuels to airplanes in Vilnius airport. The investigation established that the abuse of a dominant position could possibly affect trade among the Member States, therefore, it constituted an infringement of Article 102 of the Treaty on Functioning of the European Union. The view of the circumstances the infringement was assessed as severe, as having considered that it had lasted since 2006 until the completion of the investigation of the case, the fine was increased by 10 % for a year of the duration of the breach. Both the court of first instance and the SACL upheld the Resolution of the Competition Council.

There are also success stories related to Article 4 of the Law on Competition (prohibition for State bodies to adopt measures impeding competition).

In 2006, the Competition Council adopted the Resolution concluding that the provisions of the Order of the Commissar General of the Lithuanian Police granting public police security divisions the rights to provide legal and natural persons' property security services on contractual basis as contradicting Article 4 of the Law on Competition. The Competition Council found that securities divisions of the Public Police, next to the public order maintaining functions are also providing personal and property security services, thus competing with other private security services providing identical services. However, in respect of this activity scope of the rights available to security services of public police and private security services are very different – by law police divisions are vested with a number of special rights that the divisions continue to exercise even in rendering the security services on commercial basis, therefore acquiring significant advantage in respect of private security services. In the opinion of the Competition Council, the rights available to use special vehicles, enter at any time residential and other premises or territories owned by natural persons, stop and enter into vehicles, etc. have an impact upon the price and quality of the service, thus creating in the market different competition conditions and, as a result, the situation is discriminatory in respect of private security services. The court of first instance and the SACL upheld the Resolution by indicating that the scope of the rights available to private security services is much narrower that those exercised by police officers, therefore the services are placed at significant competitive disadvantage as compared to the police security service.

Another important and successful case in the context of measures adopted by State bodies need to be introduced. In 2010, the Competition Council carried out an investigation concerning the compliance of the Rules on the formation, management, accumulation and control of State oil and oil products reserve (hereinafter – Rules), adopted by the Lithuanian Government in 2002, with the requirements of Article 4 of the Law on Competition, and concluded that the 10 per cent State oil and oil products reserve as established in Item 22 of the Rules is not sufficient in order not to restrict the oil products import and ensure a smooth functioning of the Lithuanian market, as well as an efficient competition in the wholesale market of trade in oil products. Furthermore, in the opinion of the Competition Council, the current regulation is ambiguous by not clearly defining the basis for the calculation of the State reserve allowed to be stored in other States. The Competition Council arrived at the conclusion that Item 22 of the Rules was contradicting Article 4(1) of the Law on Competition, and, with a view to ensuring enhanced transparency of the decision making process, recommended the Government to ensure a proper regulation of principles and procedures for the recognition of oil and oil products as part of State reserve, also the procedures for the issue of authorizations to accumulate and store oil and oil products reserves in other Member States, the procedure and the terms for the issue of authorizations, and provide for dispute adjudication procedures.

During the period of the investigation by the Competition Council in 2010, the Government has amended the Rules according to which the per cent of the State reserve to be stored in other States was increased from 10 to 30. Additionally, the Government has made already a reform by deciding to allow 100 per cent of the State reserve to be stored in other States from the 1st of January, 2012.

Furthermore, in one of the recent cartel cases, involving agreements on prices, production quota and market sharing in the market of production and sale of compensatory orthopaedic devices (these are to compensate the loss or malfunction of the limbs, spine (e.g. leg and arm prosthesis, special footwear,

Electronic copy available at: https://ssrn.com/abstract=3705247

splint etc.)), the entity of public administration (the National Health Insurance Fund) entrusted with the organization of the compensation system was also held responsible for the infringement of the relevant national provision. This was due to the fact that the National Health Insurance Fund instigated and tolerated cartels which nearly all producers acting on the market entered into. In addition to that, the National Health Insurance Fund failed to take appropriate measures to ensure undistorted competition in the relevant market. The National Health Insurance Fund was obliged to revoke its actions that resulted in distortion of competition (negative obligation) and take appropriate actions to ensure effective competition in the relevant market (positive obligation): by ensuring that competitive procedure is used to set the base prices for orthopaedic devices and no quota is allocated to each undertaking. It is necessary to note that the Court of First Instance upheld this Resolution of the Competition Council, however this case is still pending before the appeal court.

The other successful litigation that needs to be discussed in the light of article 4 is regarding the measure adopted by the Vilnius municipality. The decision of the Council of the Vilnius Municipality to approve a contract and the agreement between the Vilnius City Municipality and UAB JCDeceaux Lietuva concerning the advertising on outdoor installations for the events related to the "Vilnius – European capital of culture 2009" campaign in foreign States was acknowledged as infringing article 4 of the Law on Competition. The contract was concluded without a tender procedure, thus failing to ensure a competitive environment for economic activity and equal possibilities for other undertakings to operate on equal terms in the relevant market for the supply and the installation of the equipment for outdoor advertising in Vilnius; the arrangement was put in place having eliminated all offers submitted by the undertakings. Under the agreement the Municipality, in exchange for the possibility to advertise in the stands managed by UAB JCDeceaux Lietuva, had granted the company a right to arrange and maintain the advertising boards on bridges and viaducts having disregarded that this could equally be performed by other companies operating in the relevant market. Moreover, both the Court of First Instance and the SACL upheld the Competition Council's opinion, thus the complaint and the appeal were rejected.

There are also cases discussed in the context of Article 4 and public procurement. In several cases the Competition Council recognized the infringement when public procurement procedure according to the provisions of the laws should had been organized but the municipality administration failed to fulfil the obligation. For example, in one case, concerning organization and administration of cleaning works of public territories in one town, municipality administration unilaterally signed a contract with one undertaking which is owned by the municipality without organizing public procurement, i.e. the undertaking was privileged, whereas other possible competitors discriminated thereby. Discrimination by which different conditions for the competition are created is explicitly prohibited by the Law on Competition. Public procurement which could have created possibilities for other undertakings to compete was not organized, and such omission of municipality institution could not be justified by provisions of specialized laws, therefore, a commission of infringement was recognized.

Mauritius

Yes. The Competition Act was applied to advise the government on liberalizing the importation of cement. Importation of cement was conducted by the State Trading Corporation, a State Owned Enterprise, which controlled directly or indirectly the importation of cement for the whole country. Following advice from the Competition Commission, the importation of cement has been liberalized.

Mexico

One of the faculties of the FCC, regarding the FLEC, is to issue opinions, binding and nonbinding, with respect to law initiatives, and drafts of regulations and decrees as far as they concern competition and free concurrence aspects. In all the cases, the opinion of the FCC shall be published (Part VII, Article 24).

Additionally, the FCC has allocated resources, both material and human, to concentrate efforts in advocacy with the aim to promote the adoption of competition and free concurrence principles across different regulatory areas. That is the case, for instance, of the opinion issued by the FCC regarding retail banking services offered to physical persons and SMEs. One, among the recommendations of the CFC, adopted by the Congress of the Union, was to increase transparency and to facilitate the comparison between products in this market. This has allowed consumers to have more information on the services they have contracted, and to have the information to make the comparison and to make a decision on the product and the institution that offers the best conditions, with respect to individual's necessities.

Electronic copy available at: https://ssrn.com/abstract=3705247

Pakistan

The Commission has taken action against some State-owned enterprises that violated provisions of the Competition Act, 2010.

In the Pakistan International Airlines' (PIA) Hajj Fares case, the Commission took suo moto notice of unreasonable increases in Hajj fares by PIA in 2008 – Pakistan's national airline which shares exclusive rights with Saudi Arabian Airlines to fly direct routes between Saudi Arabia and Pakistan. PIA was prima facie abusing its position of dominance by unreasonably increase Hajj airfare from 2007 to 2008 from PKR 38,500 to PKR 70,000 for the South and from PKR 46,200 to PKR 85,000 for North. Further, passengers who paid the higher Hajj fare – almost twice the fare of a regular scheduled flight – owing to the chartered nature of the flight as opposed to regular scheduled flights between points in Pakistan to Jeddah, were in fact carried to and fro through regular scheduled flights – thus discriminating between Hajj passengers and regular passengers on scheduled flights. PIA was afforded due opportunity of being heard, after which the two-member bench of the Commission found PIA violating Section 3 of the Act. For excessive pricing, the bench imposed a token penalty of PKR 10 million (USD 120,000) and noted that it took a lenient view in line with the Commission's stance of promoting good business practices in the market rather than penalizing undertakings. In addition, the bench ordered retribution to those Hajjis who were discriminated vis-à-vis regular passengers. PIA appealed the decision of the bench before the Supreme Court of Pakistan, where the matter is still pending.[25]

In the Pakistan Steel Mills (PSM) case, the Commission held that PSM had abused its position in the low-carbon steel market by refusing to deal with customers in violation of Section 3(3) (g) of the Act. Consequently, a three-member bench ordered maintaining status quo ante and imposed a penalty of PKR 25 million (US$300,000). PSM filed an appeal before the Supreme Court of Pakistan. The matter is still pending.[26]

Another case was regarding PIA's Price Discrimination in Ticket Rescheduling. PIA had a policy to charge a fee based on a percentage of the air fare for rescheduling of domestic reservations within 48 hours of flight. The fee amounted to price discrimination among passengers holding reservations in a particular flight and cabin. A single member bench ordered PIA to stop discrimination among passengers by introducing a flat fee for rescheduling within 48 hours of a flight, just as is the case when rescheduling is done prior to 48 hours. The bench appreciated the cooperation and understanding of PIA, and did not impose any penalty.[27,28]

Peru

Enforcement of Competition Law has helped to put an end to some Anti-competitive practices carried out by monopolistic or dominant State owned enterprises in markets such as seaport services, advertising publications in the official national newspaper and oil storage. However, most State restraints to competition have been addressed by the Elimination of Bureaucratic Barriers Commission under a different Law (See response to 9.a.5). Success cases include the elimination of a legal monopoly in the automobile technical evaluations services, the elimination of territorial exclusivity to bus terminals granted by local governments, the elimination of municipal ordinances prohibiting the installation of telecommunication antennae, the elimination of irrational limitations on competition in the public procurement of medical oxygen, among others.

Poland

According to the Act on Competition and Consumer Protection the definition of an enterprise is wide and also includes enterprises that provide public service. In fact, a large part of the decisions concerning abuses of dominant position relate to such entities. A majority of the Office of Competition and Consumer Protection's decisions in abuse of dominance involve local government (enterprises within the meaning of the act) and those enterprises whose sole owner is a district council (communal or municipal

[25] http://cc.gov.pk/images/Downloads/PIA%20Hajj%20Fare%20Final%20Order%20-%2020%20November%202009.pdf
[26] http://cc.gov.pk/images/Downloads/PSM-Final-Order-March%2022-10.pdf
[27] See http://cc.gov.pk/images/Downloads/PIA%20Rescheduling-Cancellation%20Order%20[8%20Dec%202009].pdf
[28] For other cases: http://cc.gov.pk/index.php?option=com_content&view=article&id=168&Itemid=41

Electronic copy available at: https://ssrn.com/abstract=3705247

enterprises) such as: town refuse collection firms, waste storage sites, town water supply and sewerage networks, sewage treatment plant, cemeteries, and municipal public transport firms.
The municipal services market is characterized by many enterprises which possess dominant positions in small, local markets. Typical cases involve municipalities (directly or through subsidiaries):
• refusing to grant "outsiders" access to a local waste collection market, raising their costs and shielding municipal waste collection companies from competition,
• forcing firms active in the local waste collection market to use exclusively the municipal deposition site, even though there are cheaper sites in the area,
• raising barriers to providing funeral services in a municipal cemetery by introducing discriminatory fees or outright bans on the activity of "outsiders" (it is also very often the behaviour of private funeral services providers, entrusted with the management of cemeteries by municipalities),
• forcing customers seeking access to a local water supply network to use services of a municipal company with respect to necessary piping/construction works.

What those practices have in common is shielding municipal companies from competition, by leveraging municipal positions as a natural monopolies (supply of water) or as an entity organizing a market (cemetery services, waste collection). Another important strand of cases against municipal companies involves imposing terms and conditions in contracts (usually concerning provision of water), which allow the municipal undertakings to obtain unfair gains at the cost of their customers. Insufficient knowledge of competition law can also work the other way around – local governments fall victim of practices of businesses, such as bid-rigging. Therefore, adequate education of these market participants is of a crucial importance.
Cases concerning non-municipal SOEs are usually similar to those pursued against private undertakings. Majority of such cases involve State monopolies (actual or former), abusing their dominant position, typically by treating their customers in a discriminatory way.

One of the State monopolies prosecuted by the competition authority is the "State Forests" undertaking, which manages forests belonging to the State. It is a virtual monopolist in the wholesale supply of wood and was found several times to have abused its market position. Recent case involved the rules under which the wood was sold. There were two ways of obtaining wood from the State Forests: Internet negotiations and open Internet auctions. Internet negotiations were a primary way of obtaining wood for industrial purposes – as much as 80% of the wood was allocated on this basis – while the rest (usually lower quality wood) was sold via Internet auctions. The rules under which the wood was provided made it difficult for new firms to enter the market. The supplies of wood sold via Internet negotiations were allocated on the basis of past sales (usually a firm could not ask for more than it bought during the previous year), so entrepreneurs found it difficult to expand and outsiders were all but blocked from entering the market, as they had no history of past purchases and thus could only buy the leftover wood on the open auction. At the moment State Forests are changing their rules, considering moving most of their wood supply to open auctions.

Another case concerned imposing discriminatory airport charges by the State Undertaking Airports (PP Porty Lotnicze), the State-owned airport operator. As a result of the proceedings initiated upon a complaint from IATA, the undertaking was found to have abused its dominance in the market of "paid services related to making infrastructure of the airports available", i.e. in the market for access to airport infrastructure. Airports had been groundlessly imposing different airport charges (landing, passenger, parking and special services charges) and navigation charges on the national and international carriers. The practice had been discontinued in the course of the proceedings.

Russian Federation
Numerous especially in public procurement.

Serbia
There is no experience in conducting the cases of antitrust with State or State-related involvement.
There is only some experience in implementation of Article 21.7 of the Law. Example: The draft of Law on the beer determined that charging imported beer in bulk in its original packing and service packaging in

Electronic copy available at: https://ssrn.com/abstract=3705247

the original packing may be performed only by the manufacturer. Also, by applying Article 21 of the Law, the Ministry of Agriculture, the proposer of the Law, was asked to clarify the reasons leading to this solution, bearing in mind that it could lead to restricting competition. Ministry of Agriculture informed the Commission that the controversial Article will be adjusted with an Amendment, which will remove perceived deficiency.

Singapore

Just one - the first abuse of dominance case was brought against, and upheld on appeal, a State-linked ticketing services agency (owned indirectly the by the Ministries of Information/Communication/Arts, and Community/Youth/Sports) for entering into exclusive dealing arrangements with event venues and event promoters.

Spain

Because of some problems in the transport sector perceived during a merger file (National Express-Alsa), the CNC commended a study to analyse the problems and identify the solutions.[29] In this market sector, although the law allows the use of other systems, for historic and economic reasons, the concession system is the one implemented, and it provides the exclusivity on a route for the provision of passenger transport services by road (even though this system establishes important entrance barriers). As a result of the study´s recommendations, some major problems were resolved, but only at a national level. At a regional level, under its own regional legislation, the problems persisted (long-term concessions, the possibility of allowing extensions…), restricting competition and violating the European regulation on that sector.

In order to enforce its recommendations, the CNC, firstly, filed several request to some regions to adjust their public tenders in transport sector to competition criteria, and secondly, (since the regional administration didn´t respond), the CNC, by virtue of the power conferred in article 12.3 of the Spanish Competition Act, initiated two processes to challenge autonomic regulations. During 2010, the CNC lodged two appeals for judicial review against the Modernization Plan of the concessions for public passenger road transportation in Valencia and Galicia. Even though the process is still ongoing, the CNC has achieved partial success, since the Ministry of Public Works has decided to, partially, change the specifications of the new concessions.

Sweden

Last summer (2011) the SCA reported to the Swedish government on the application of the supplementary rule on anti-competitive sales activities by public entities, described under answer to Question 6 above. At the time the provision had been in force for just over a year. The conclusion in the written report was that clear positive effects had been found and that fewer companies have been exposed to competition from central or local government. Several public entities voluntarily changed or envisaged changes in their operations to promote or restore competition in the course of the case being processed, and even before the case reached the court.

The SCA is very pleased with the self-policing that has been initiated within central and local government authorities, which is the best way to eliminate anti-competitive public activities. We are closely following the voluntary measures by the public authorities concerned and we are prepared to take further measures should they fail to fulfil their obligations. Of the cases brought so far by the SCA one judgment has gained legal force, in which the court ruled in favour of the Competition Authority and ordered that the Anti-competitive public sales activity in question must be brought to an end. Besides that the SCA is eager to try the rest of pending cases in order to provide important case-law; legal precedents. This is particularly important as regards issues relating to new legislation.

29

http://www.cncompetencia.es/Inicio/GestionDocumental/tabid/76/Default.aspx?EntryId=34752&Command=Core_Download&Method=attachment

Electronic copy available at: https://ssrn.com/abstract=3705247

Switzerland

For an example of a "frustration" that ended as a "success story" please see our answer to the OECD-questionnaire on national practices concerning competitive neutrality (June 2011):

Please describe the institutions/businesses involved.

The Swiss Institute of Meteorology SIM (now called MeteoSwiss) is a non-incorporated business in the Federal Department of Home Affairs, which is obliged by the Act on Meteorology to execute certain sovereign tasks. The act leaves SIM the possibility to prepare meteorological data and exploit them. The prices were set by ordinance but let some room for discounts.

What was the overall nature of the controversy?

Discrimination between trading partners. In 1996, the SIM entered into a contract to supply weather data to the State-owned Swiss Broadcast Company (Schweizerische Rundfunk Gesellschaft, SRG). In July 1998, the SIM made an offer for similar services to Meteotest, a private weather forecasts enterprise, for a sum amounting to approximately twice the amount paid by SRG.

Through which mechanism was the controversy addressed (e.g. complaints office, competition authority)?

The Competition Authority prohibited the discrimination between trading partners as an abuse of a dominant position. The SIM lodged an appeal before the Swiss Supreme Court, arguing that the Swiss Cartels Act was not applying to the SIM in his quality of a State-owned-enterprise, whose prices were set by ordinance.

What were the main outcomes of the investigations/complaints handling? The Swiss Supreme Court upheld the appeal of the SIM and confirmed that the Act on Cartels was not applying to SIM.

In the case of departures from competitive neutrality, were any remedial steps taken (prohibitions, warnings, financial compensation?

As a consequence of this case, the Swiss Cartels Act was revised: in 2004 in the following manner: art. 2 para. 1bis ACart "undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organizational form". In brief: the application of competition law is now neutral as to ownership and organizational form of companies.

Turkey

The Competition Board has the authority to give its opinion before the tender specifications are announced to the public during the privatisation process. As the successful bidders have to be notified to the Competition Board for authorization, the opinions of the Competition Board, the decision making body of the Turkish Competition Authority, are generally taken into account by the Privatisation Administration or any State body responsible to conduct the relevant privatization transaction. Therefore, it can be argued that the Competition Board has the opportunity to ensure that privatisation process results in competitive outcomes

Privatization process can be given as a success story in Turkey._Privatization in Turkey aims to minimise State involvement in economic activities and to relieve the financial burden of State Economic Enterprises (SEE) on the national budget. Many State-owned companies have been transferred into the private sector. It also targets the increase of economic efficiency.

Under the Turkish Competition Act, broad merger control provisions in Article 7 of the Competition Act are also applicable to privatization transactions conducted by the State. To ensure timely review of such transactions, the Competition Board issued a communiqué in September 1998 (Communiqué 1998/4) specifically addressed to privatization proceedings administered by the Privatization Administration. This was soon amended to cover all privatization transactions carried out by any State body.

IGSAS is an important privatization case that dates back to 2003. This transaction involved a State firm that manufactured nitrogenous and composite fertilizers. The Competition Board had rejected an earlier privatization attempt in 2000 because the prospective purchaser already had a significant presence in the relevant market. The second attempt resulted in the sale of IGSAS without objection by the Competition Board to a firm that had no operations in the industry.

Electronic copy available at: https://ssrn.com/abstract=3705247

Privatization of electricity distribution companies (Boğaziçi Elektrik, Gediz Elektrik, Trakya Elektrik and Dicle Elektrik) from 2010 is another important case. The decision of the Competition Board noted that

- Turkish electricity market was experiencing the first stages of liberalization and private sector initiatives,
- although privatization in distribution were at the final stage, privatizations in production were just at the outset,
- therefore, State-owned production facilities were in majority, and those facts should be taken into account.

Within this framework, a dominant position test, which aimed to create a competitive structure for the future and which had the function to design the market in a sense, must be different from a test which would be used in a functioning market. As result of these requirements, certain market shares in various areas are used as indicators. Consequently, it was stated that 30% should be regarded as a guidance to determine dominant position in the privatisation transactions regarding distribution until important stages ended in the liberalization period such as the completion of privatizations and realizing legal divestitures. In line with this, the Competition Board blocked acquisition by some bidders of certain packages of electricity distribution companies.

United States

Successes include cases such as Massachusetts Board of Registration in Optometry, South Carolina Dentists and North Carolina Dentists

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.

The following jurisdictions responded "no" to this question:
Kazakhstan, Mauritius, Poland

The following jurisdictions responded to this question with N/A:
Brazil, CARICOM, European Union, Italy, Japan, Kenya, Republic of Korea, Malaysia, Russian Federation, Tunisia, Turkey

China

The merger of China Unicom and China Netcom in 2008 did not notify the Ministry of Commerce ('MOFCOM') according to the AML. To change this situation the government should take more effort to develop competition advocacy and increase the independence and authority of the competition authorities.

France

The *Autorité* has a manifold competence to assess the impact on competition of draft and existing legislation, by issuing opinions that offer a thorough analysis of the legislation at stake as well as recommendations to Government to ensure it is made competition-compliant.
However, should a competition concern be raised in the course of this process, the annulment of said legislation – if it is already, or eventually comes to be, into force – is the sole prerogative of Constitutional and Administrative Courts. To achieve greater effectiveness of our consultative powers, one may consider strengthening our powers so that, in some circumstances, prior assent of the *Autorité* is required for the enactment of a Government regulation.

Hong Kong (China)

Blanket exemption of statutory bodies and non-application to government departments is a major omission in the Hong Kong (China) Ordinance.

Electronic copy available at: https://ssrn.com/abstract=3705247

Hungary

1. *Compulsory originality control of motor vehicles*

In 2008 the GVH prepared a comprehensive study about the system of compulsory originality control of motor vehicles, its regulation and the functioning of the market. This system was introduced in 1999 in order to filter out stolen cars in the course of sale transactions, but- according to the results of the study- it didn't serve its goal well enough and didn't operate in an efficient way. Consequently the GVH proposed the review of the State supervision, the reduction of the originality control fees or the alteration of the service to become market-based.

In December 2009 significant amendments took place, including the enactment of a new law, but at that time the comments of the GVH were not taken into consideration and cars not affected by the change of ownership were also burdened with compulsory originality control. After the adoption of the amendments, the President of the GVH turned to the responsible ministries with its public letter. This letter contained objections to the amendments, stating that instead of improving the supply of public services, it would presumably place harmful effects on them. The GVH argued that as a consequence of the amendments during 2009, the costliness of the system did not positively cost less but the GVH could not force the codifiers and the participating authorities to replace the existing regulation with amendments that would be beneficial to both citizens and entrepreneurs.

2. Finally, as a result of general indignation - but partly also as a result of the GVH intervention - the provision which made the original owners of the cars also subject to the compulsory originality control exercise was annulled and the costs caused by this improper regulation were reimbursed to the affected clients. The re-regulation suggested by GVH has not been done. *Municipality Decree of the town of Pécs on taxi stands*

In the town of Pécs, referring to the limited number of taxi stands the local government hindered the entry of new taxi service suppliers to the market by limiting the number of taxi licences (it licensed 200 taxi service providers to 164 taxi stands) meanwhile there have already been 320 taxis in the town when the Decree entered into force. (I.e. instead of increasing the number of taxi stands, they limited entry). Fortunately the old licences were not withdrawn, however, new licences were not granted either (until the number of taxis decreased from 320 to 200).

With its letter the GVH approached the Municipality, requesting change, but nothing has been done.

India

Though several cases have been brought against SOEs over the last three years, CCI has not found any violations, though the perception is that SOEs, especially those engaged in the field of oil and gas and mining, are in some way involved in practices that are ultra vires to the Act.

Lithuania

The Competition Council faces difficulty in enforcing its Resolution adopted in light of Article 4 of the Law on Competition. The decisions issued pursuant to this prohibition involve only the obligation (the Competition Council has not power to impose fine when the infringement of Article 4 is found) to the State body to amend the measure in a way that would not impede the competition. As it was mentioned above, since not all public authorities voluntarily fulfil this obligation, the Competition Council may request the court to adopt an injunction. However, the difficulty still exists to enforce the State body to fulfil the obligations even with the court's order, as the public authority has to amend the measure by itself.

Mexico

As mentioned in the answer for Question 11, relative to the type of intervention by the FCC by means of the issuing of binding and nonbinding opinions, the FCC has powers that are well defined within the framework regulated by the FLEC. According to the Political Constitution of the Mexican United States, these faculties cannot extend to the jurisdictions of State and municipal authorities, or to determinations that other organizations of the federal government adopt with respect to their own faculties.

Nevertheless, this is not an obstacle for the FCC to promote competition principles. In fact, through advocacy and the issuing of opinions the FCC has intervened in sensitive sectors of the economy.

Electronic copy available at: https://ssrn.com/abstract=3705247

Currently, for instance, it works with government institutions to promote competition principles of competition and free concurrence in the processes of public procurement of goods and services.
It is important to note that in September 2013 the Commission became the Mexican Federal Economic Commission, an autonomous constitutional body. Following the Constitutional Amendment of 11 June 2013, the Commission has the power to: regulate access to essential facilities; remove barriers to entry and to order the divestiture of rights, shares and stocks as necessary to eliminate the Anti-competitive effects. These new powers reinforce the current Commission's position before authorities, however the secondary legislation, where the scope and details will be drawn, is still under revision in the Congress.

Pakistan

On several occasions, financial assistance is repeatedly extended to State-owned enterprises, which does not give them an incentive to improve and reduces chances of failing firms to leave the market and allow new players enter the industry. Further, bailouts and State aid, while intending to preserve employment and keep afloat State-owned enterprises, in fact distort competition, thereby affecting the whole industry and thwarting growth. It is suggested that State aid rules and policy for State-owned enterprises should be devised for Pakistan, whereby the State gets clearance from the Commission before giving State aid to State-owned enterprises.

Peru

The Ministry of Justice estimated that cases of corruption related to public procurement represent up to 30% of the total amount spent in public procurement (Ministry of Justice, 2007). However, these practices often go unpunished. If Competition Law would allow the competition authority to investigate and sanction public officials involved in practices which restrict competition in public procurement, even though their actions do not qualify as economic activities, it may help in detecting these illegal practices, through collaborative efforts between the competition authority, the public procurement administrative authority (OSCE) and criminal law enforcers.

Serbia

See answer to Question 17. Example: Opinions given by the Commission that reflect the application of Article 21 of the Law are not binding. That is how the Commission reacted to the case when the Ministry of Agriculture also issued a tender for the procurement of regressed mineral fertilizers and as a condition for participation in the tender stated that the company must have production and sales in the territory of the Republic of Serbia. Also in this case, the Commission gave its opinion, but without any reaction from the Ministry.
According to the article 21 of the Law, the CPC is competent to submit opinions to competent authorities on draft regulations, as well on existing regulations that effect the competition on the market. However, according to its rules of procedure, the government is not obliged, to submit draft Laws to the CPC. We are trying to find a solution for this situation with the aim of changing the respective government rules of procedure and to enable the CPC to give opinions on all legislation that effects competition on the market and mechanism to assure that our opinion will be fully respected.

Seychelles

Currently the Fair Competition Act 2009 and the Fair Trading Commission Act 2009 does not differentiate between State owned and private owned enterprises and does not make provision for exemptions with regards to State actions. However, the FCA does stipulate that the State is bound by the Act and the FTC does have the power to take necessary action in order to maintain fair competition. There is however no provision for the FTC's relationship with the State with regards to policy making and compliance to the law.

Spain

Example A. The CNC published a report regarding the relative bargaining power between manufacturers and distributors of food products and its effect on the functioning of this sector.
The report explains that, in recent years, food distribution in Spain (and in many other countries) has undergone a considerable transformation. Among other changes, the bargaining power of distributors

Electronic copy available at: https://ssrn.com/abstract=3705247

has increased greatly when dealing with their suppliers. There is a greater degree of concentration and strong development of distributors' own brands, and also, a growing role for medium and large-sized supermarkets.
The report considers that, due to various distinct factors in this Spanish sector, the distributors' greater bargaining power may have a negative effect in terms of competition and wellbeing, in the long run. Therefore, the CNC has always recommended and recommends nowadays the removal of the legal restrictions on competition in relation to retail distribution and the application of measures to minimize the possible negative impact on competition of certain commercial practices of large distributors.

Example B. In Spain the regulation of the activity of *procura* or representation in court proceedings presents a series of peculiar features that were analysed in a report published by the CNC in 2009. Important competition restrictions were identified and the CNC made a list of recommendations in order to eliminate them before the transposition of the UE Services Directive.
In 2011, Royal Decree 775/2011 entered into force, developing Act 34/2006 of 30 October, which regulated the access to the professions of lawyer and court procurator. The CNC published a statement criticizing this Royal Decree, because it brought unnecessary and disproportionate restriction of competition in relation to the access to the professions of lawyers and procurators, in areas where Act 34/2006 still provided some room to solve some of the competition problems.
The CNC urged the administration body responsible for this regulation to rethink the model of access to those professions and reminded them that there were still some other pending regulation (Act of Professional Services and the review of Professional Associations' statutes) that should respect the current competition legislation.

Sweden
The supplementary rule on anti-competitive sales activities by public entities came into force on 1 January 2010. If petitioned by the Competition Authority, individual companies or an industry organisation, the Stockholm City Court may under penalty of a fine prohibit the State, a municipality or a county council from conducting certain practices in its sales activities. A municipality or county council may also be banned from conducting activities that are incompatible with the law. This means that municipalities, county councils and State authorities – just like public sector controlled legal entities – may be banned from conducting commercial activities in a certain manner if they distort competition for private companies.

It is still early to evaluate whether the new rule is enough to solve the competition problems identified, but so far clear positive results have been seen.[30]

Switzerland: [See answer to Question 17 above].

United States:
The Federal Trade Commission has perennially tried to exercise powers to invalidate unnecessarily Anti-competitive State and local laws and rules of State and local boards, such as restrictions on where eye glasses can be sold and regulations prohibiting laymen from employing optometrists to provide optometric services, but has not been successful. See California State Board of Optometry v FTC, 910 F. 2d 976 (D.C.Cir.1990) (authorizing the FTC to condemn State rules would upset the balance of powers between the federal government and the States). But the FTC has been successful in limiting the State action defense where professional boards comprised largely of market participants take Anti-competitive action. See north Carolina State Board of Dental Examiners v FTC—F.3rd – (4th Cir.May 31, 2013) (the dental board was not immune when it threatened non-dentists who provided teeth-whitening services).

[30] For more information regarding the rules, please read http://www.konkurrensverket.se/t/SectionStartPage____6721.aspx

Electronic copy available at: https://ssrn.com/abstract=3705247