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Small Economies and Competition Policy – A Fair Deal?

Summary of presentations and discussions

Contents	Page
Welcome and Introduction	2 – 4
Panel 1: The Unique Position of Small Economies	4 – 15
Panel 2: Cartel Regulation in Small Economies	15 - 25
Panel 3: Merger Control in Small Economies	25 – 34
Panel 4: Dominance in Small Economies	34 - 44

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Welcome

Pierre Gramegna

Director, Chambre de Commerce, Luxembourg

It is my privilege and pleasure to welcome you to this interesting seminar. Competition policy in small economies is an interesting subject, which might sound very dry to non-specialists, but is a very exciting prospect to the specialists present. Luxembourg is a good place to have this seminar, because it combines being both very small and extremely open. Those two criteria do not necessarily make it easier to deal with competition law. So Luxembourg is a bit of a paradox, a country that exports 90% of what it produces, imports 95% of what it consumes, receives banks throughout the world, and has a diverse range of services, while at the same time being a very small country where everybody knows each other. The paradox is that business is done on a very personal basis, while also being done with the rest of the world. The danger is that you can underestimate the rules of competition, because you are in such a friendly and open environment.

There is a need to highlight the competition rules, both in Luxembourg and other countries, which have been brought up to date in recent years, and holding this seminar is one such way of doing so. We have representatives present from many countries today, with speakers giving us the benefit of their experience. I would like to thank the Conseil de la Concurrence of Luxembourg, and the Inspection de la Concurrence, and the law firms Allen & Overy of Luxembourg, Sherman and Sterling and FIPRA, as well as the Chambre de Commerce itself.

Thierry Hoscheit

President, Conseil de la Concurrence

I would like to give a brief explanation of the institutional framework in Luxembourg. We have two authorities, the investigative authority, which is the Inspection de la Concurrence, headed by Daniel Becker, and the decision-making authority, the Conseil de la Concurrence, headed by myself. Some months ago we were approached to participate in this conference. While the subject matter is interesting, we also came to the conclusion that there were two areas of the conference that justified Luxembourg's interest. It is self-evident that Luxembourg is small, but its participation within the Benelux countries, the European Union, and its large import and export functions lead to the view that its economy is not so small. We thought this a good occasion for us to consider the different criteria that affect Luxembourg's future orientations.

Linked to the question of whether Luxembourg is small or not, and what the consequences of that would be, is the youth of both the Conseil de la Concurrence and the Inspection de la Concurrence. Leading from this is the absence of a real competition culture, with no real competition legislation prior to the 2004 law. It is interesting to consider the impact of this on the small Luxembourg economy, as well as how work being done by the two organisations is perceived. Therefore I welcome you today to participate and contribute to our topic of small economies.

Daniel Becker**Rapporteur Général, Inspection de la Concurrence**

There are a number of differences between small and large economies, which might have consequences for the conception and application of competition law. On the one side those in charge of competition matters in large economies might sharpen the awareness of aspects or problems that their counterparts in small economies have to take into consideration. It is useful to have such people present here today, in order to raise awareness and give the benefit of their experience in tackling potential problems. Conversely, those in charge of competition matters in small economies might raise situations they had to raise in the past, and this conference can become a platform for shared experiences and together we can identify solutions to a more efficient application of competition law in small economies.

The overall objective is to ensure an efficient and comprehensive application of competition law, which might raise some important questions. First of all, what is the definition of a small economy? Are there different kinds of small economies? Furthermore, should aspects relating to small economies be tackled different to the way they are tackled in large economies? Are there aspects of small economies that do not appear in large economies? Finally, do those aspects hinder an efficient application of competition law, and if so, how can those problems be solved?

Introduction**Dr Philip Marsden****Director, Competition Law Forum & Senior Research Fellow, British Institute of International and Comparative Law**

I would like to thank the Luxembourg Chamber of Commerce, the Conseil de la Concurrence and the Inspection de la Concurrence for welcoming us today. It is timely that we are holding this conference this week, because a new draft bill is under discussion, and it will be interesting to get perspectives on your modernising initiatives. I would especially like to recognise Gabriel Bleser's contribution. He is now at Allen & Overy, but was previously at the Inspection, where he was conspicuous in his arguments for reforms, and has also been instrumental in organising this conference.

The Competition Law Forum is a group of 120 officials, lawyers, and economists who care about the effectiveness and efficiency of competition law enforcement. Our centre is in London, but we also hold meetings abroad. It is only through a free and frank exchange of experiences and views that we can better understand the problems we face, the causes of these problems, and come up with solutions.

Small economies face problems due to lack of enforcement structure, and a historical lack of a competition culture. The market power and concentration of business interests in small economies arises naturally, and is not usually a problem in itself, because the economy cannot cope with more than a few players. However, that kind of economic structure is ripe for oligopoly and cartelisation. With scarce resources, does it make sense for small agencies to team up with sector regulators or even house the agencies

under one roof? Perhaps bilateral or regional coordination could be an answer to these problems. If an authority becomes more of an independent administrative agency, what does it gain or lose?

It is most important to have a competition law that is relevant to your economy. Discussions concerning convergence, theories of harm, and international best practices are conducive to analysis and enforcement and can help with coordination amongst authorities. My law firm is part of the British Institute of International and Comparative Law. The Institute's mission is to compare the laws and their enforcement and application around the world, and thereby to promote the rule of law. How relevant is that to small economies, which might have particular economic structures, different degrees of concentration in different sectors, and is it even necessary to have a competition law? It is clear that one size does not fit all.

So while global convergence is important, it has to be relevant. The powers to enforce the law have to be tailored to the particular economic situation, which is expensive. The reason we hold this conference is so that we can pool our limited resources, learn from each other's successes and failures, and find out what works and does not. From the beginning of this conference we need to get the message out that competition law is important, helps businesses and consumers, and is here today.

Panel 1: The Unique Position of Small Economies

I. Introduction

William E Kovacic, Commissioner, Federal Trade Commission, Washington DC

Thank you for giving us the opportunity to consider questions that often become submerged in routine discussions of competition policy. There is a tendency to focus on questions of doctrine, and what tends to be overlooked is the degree to which substantive policy decisions and matters of doctrine are not suspended in air, but are carried out through institutions. A focus on institutional arrangements and the way in which they influence policy is being seen as an increasingly crucial element of policy-making. A concern for the quality of institutions has to underpin an assessment of what competition agencies should do, and how jurisdictions should carry out their authority.

The relevant institutions are a mix of the agency itself, as well as, increasingly, institutions outside of the agency in a form of a host of collateral bodies and organisations, whose effectiveness is key to the overall effectiveness of the agency itself. The panel today reflects the important contributions of both the authorities and these collateral-supporting institutions.

II. The Unique Challenges of Small Economies

Dr. Michal S. Gal, University of Haifa

1. Preamble

It is a pleasure to be here today to discuss the issue of competition law and small economies, a subject that has fascinated me for the last 10 years. The fundamental question we are going to deal with in this conference is whether size matters. To put it more bluntly, whether small economies can simply copy and paste the laws of larger jurisdictions. I argue that the answer is no. I would like to talk about some of the unique challenges faced by small economies in order to set a basis for the ensuing discussion.

2. What Makes it Small?

The effect of a small economic market on the characteristics and performance of economies has long been recognised by leading economists. They have argued that the fundamental structural traits of small economies are so pronounced that small economies belong to a "different class of market economies." I would like to investigate what makes these economies a "different class of economies"

3. Definition of a small economy

Let me first define a small economy. There are many ways to define a small economy, but I suggest focusing on market conduct and market performance, which are important for competition law. The definition I suggest is as follows: a small economy is an independent sovereign jurisdiction that can support only a small number of competitors in most of its industries. The definition is arbitrary, because there is no magic number separating a small economy from a large one. It is better to look at jurisdictions on a continuum in accordance with their size, some like Jersey and Guernsey are micro-economies; others like Malta and Barbados are larger. New Zealand is a small economy, but it is considerably much larger given its population of 4 million. The high level of concentration in its markets is affected, inter alia, but its geographic seclusion. All small economies are characterised by monopolistic or oligopolistic structures in most of their industries.

Market size is influenced by three factors: population size, population dispersion and openness to trade. A small population size decreases domestic demand, and decreases the number of firms that can serve the market. Geographic dispersion is important, because it may create several local markets within a large geographic area.

The size of an economy is also influenced by the height of its artificial and natural trade barriers. Some countries are so integrated with their larger neighbouring states that they can be regarded as part of those larger markets. Therefore, a high degree of openness to trade might negate a conclusion of smallness based on population size alone. Yet in most cases, openness to trade does not remove all trade boundaries. Some government trade barriers might still exist, as well as geographical and cultural differences that cannot be bridged over by a liberal trade policy.

For a market to be considered small, not all industries need to be highly concentrated. For example, retail services can be highly competitive even in small economies. Nonetheless,

when such forms are the exception rather than the rule, the jurisdiction should be regarded as a small economy.

4. Why is it a 'Different Class'?

Research has shown that there are three main economic characteristics of small economies. Firstly, high industrial concentration levels in many industries. Assuming a firm has to produce 10,000 units to produce its lowest costs, and market demand is 20,000, the market can only support two efficiently sized firms. Studies of industrial concentration level have shown that the smaller the economy, the higher the industrial concentration levels of most of its industries. Secondly, high entry barriers; the main entry barrier is created by scale economies, the need to produce to levels that cater to a large portion of demand in order to achieve minimum costs. Therefore, in smaller economies, competition often becomes competition for the market, rather than competition in the market. Thirdly, the most important cause of small economies' inefficiencies is the problem of sub-optimal levels of operation. Studies have shown that a considerably large proportion of output in small economies is produced in sub-optimal volumes and plants, which can impact on the efficiency of firms and prices in the market. Part of this is due to the inter-dependence of the firms operating in the market.

5. The Basic Dilemma

In summary, the small size of an economy places a handicap on its economic performance, so that the small number of competitors means that competition is likely to be limited, with the existence of a disproportionate number of natural monopolies and oligopolies than in large economies. This creates a basic dilemma between productive efficiency and competitive conditions. If a given number of firms can operate efficiently in the market, then productive efficiency determines that only a certain number of firms operate in the market. This usually means that industrial concentration levels will be high, and firms will have market power, which translates into the problems that we are aware of. Therefore, these salient characteristics have policy implications, requiring small economies to devise policies that offset at least some of the adverse effects of their small size. To be sure, many of the principles and doctrines that apply to large jurisdictions apply equally to small ones. The main goal of competition law- to increase social welfare, and its main tool- increased competition, are similar. Yet the comparative prevalence of concentrated market structures in a small economy creates a set of trade-offs that may require a different set of rules to regulate the conduct of market participants. The main factor that creates the need to tailor competition law to economic size is that competition laws often consist of "fit-all" formulations. Such formulations are designed to achieve the stated goals in each category of cases to which they apply, while recognizing that some false positives and some false negatives may occur at the margin. The marginal cases of large economies constitute, however, the mainstream cases for small economies. The effect of small size is similar to that of a magnifying glass: special market phenomena become more significant as extremes become the rule. This requires small economies to change the focus of their competition laws to regulate their markets efficiently.

In addition to the economic characteristics, small economies also suffer from institutional limitations, stemming from limited resources and political issues, making the application of competition law more difficult.

So why apply competition law at all? True, a small economy means high enforcement costs per capita. However, the benefits of competition law in small economies are so large, it would be foolish to give it up. Market forces alone cannot maximise efficiency

in small economies, they need assistance, guidance and rules. Competition law can significantly improve market performance by reducing the opportunities and the incentives of firms to abuse their market power, either unilaterally or jointly. Yet to reduce enforcement costs, the competition authorities of small economies should acknowledge the effects of size to ensure that the benefits of enforcement justify its costs.

6. Types of Effects

I suggest that small size has two types of effect on markets. The type one effects are those in which the small economic size strengthens the need for the introduction of a specific rule. The type two effects are those in which the small size affects the content of the rule itself.

7. To Follow or Not To Follow

The dilemma of whether to adopt the competition laws of larger countries is a real one. The European Union and US competition laws are the most widely used, and offer legal certainty as well as clarity and comprehensibility of provisions. Adopting the laws of larger jurisdictions reduces the resources needed to create a tailored competition law. However, there are pitfalls, especially the inappropriate nature of a one-size-fits-all approach. The challenge is therefore to adapt the doctrines established in a large market to a smaller market.

William Kovacic

A number of the concerns that Dr Gal raised point to questions around how to organise a competition policy system and structure its implementation, and there is debate around how to do this. Some believe the right approach is to work at building effective internal markets, rather than creating a competition policy system. We will turn to the implications of these concerns and how to go about structuring the system itself.

III. Agency Structure: Does it make sense in a small economy to combine several competencies in one agency?

Thierry Hoscheit, President, Conseil de la Concurrence

1. Efficient Application of Competition Laws

We do need competition laws; the question is how to design them to ensure efficient application. I will outline additional problems that might arise in small economies due to the structure of competition agencies, and how they might be solved. If the current law being considered is adopted, there will be a unification of the Luxembourg competition authorities. When speaking of small economies, with reference to the size of the population, there is a problem of recruitment. Where do we find trained people to work for the competition agencies? There are, by nature, a limited number of students that will be trained in competition law, and an even smaller number will be attracted to work for competition agencies. It is essential to have well trained people who want to effectively apply competition law. Only Luxembourg nationals can be appointed to the competition

authority, whereas private sector law firms can recruit elsewhere. This might be a problem for ensuring an efficient and effective application of competition law.

2. Merging Competition and Regulatory Authorities

The recruitment problem is enhanced when the pool of potential applicants has to be shared amongst the different authorities and regulatory bodies concerned with competition law. A solution might be to merge the competition and regulatory authorities. However, a legal problem might emerge if the same people are working for both the regulatory framework and also for the competition authority, given the tension between the activities of the competition authorities and that of the regulatory authorities. Perhaps we should look at the solutions that have been adopted in other small economies, to see how they have dealt with those tensions.

3. Budgetary Resources

Secondly, there is also an issue over what budgetary and personnel resources are made available for a competition authority in a small economy. A small economy does not entail that there is less work to do and that less resources are needed. Perhaps we need to raise the awareness of the importance of competition law among public authorities, so they are aware of the importance of the work for the whole economy.

4. How Far To Go?

Thirdly, if we consider merging the different authorities into one single body, how far would that operation go? We have considered competition and regulatory authorities, and perhaps consumer protection authorities, but in most countries there are also specialised bodies in charge of applying regulations to specific sectors, for example, the financial sector. Those authorities do not have a competition mission, but they do have a great deal of information that might be useful for a competition authority intervening in those markets. Would it be possible to join those authorities in the merger operation? While that would probably go too far, there could be other ways to explore how all bodies could be involved in a more intensive cooperation and exchange of information, for example, a staff exchange programme.

William Kovacic

In my experience it is rare to have an authority dedicated exclusively to competition policy alone, and the norm is some collection of different responsibilities, rather than a single competence form of agency. Thierry's points raise the question of how you decide what to bundle together, and also points out the concern that bundling too many functions together could upset the culture of an agency.

IV. Agency Independence

Monique van Oers, Head of Legal Department, The Netherlands Competition Authority (NMa)

1. The Netherlands Example

Firstly, I am grateful to the organisation for inviting me here, and I would like to share my experience, which is based on my present job, working with the Netherlands Competition Authority and my past experience when I was working as a legal consultant for the Panamanian Competition Authority and the authorities in Honduras. For smaller countries there may be good reasons to bundle, due to budget and recruitment issues. It is very possible to bundle where the activities of the agencies involved concern concepts related to competition. When you go to banking controllers, which are concerned with licensing issues, that is taking bundling too far, there are no real benefits in bundling.

In the Netherlands we started with the idea that it would be both economic and efficient to have a large agency dealing with competition and regulation. A political development introduced the idea of having separate agencies, so we have separate healthcare and telecom agencies. From a viewpoint of scale and scope, it is good to have one agency. I also see that the general public in the Netherlands do not really understand the need to have many agencies, and think that it is a waste of money.

2. Combining Functions

William Kovacic

The CLICAC (Commission for Free Competition and Consumer Affairs) in Panama combined competition, consumer protection and trade related functions in one agency. Over a decade ago I met Monique working as an advisor to the CLICAC. Would you do something like that or is that a matter of idiosyncratic jurisdiction-by-jurisdiction decision-making that does not flow from an underlying principle?

Monique van Oers

Would I do it again? At the beginning, I did not think that having competition, trade and consumer protection together would work. I am now more lenient, but I still have a problem with trade. When trade issues are involved politics is also involved, which may lead to the involvement of politics in competition issues as well, which is something to avoid.. Therefore, I would rather have left out trade. Involving competition and consumer protection in the scope of task is helpful for the outside world, because consumer protection issues allow you can show some quick results, which my help the agency to get positive response and reputation. This may help to get attention for competition issues However, it should be borne in mind that the purpose of the two laws are quite different and that both fields of law require their own expertise, budget & personel..

William Kovacic

To have competition in the portfolio it gives you a basis for building support for other functions that are key to what you want to do?

Monique van Oer

That is my experience.

William Kovacic

What place should the agency have in the government, and what links should it have to the political process itself? In my mind it is a bit of a cliché that agencies should be independent, what precisely does it mean, and what kind of framework and position for the agency in the government do we imagine.

3. Independence**Monique van Oers**

I have thought about the need of an agency's independence in small economies and how we view this in the Netherlands. From a geographic perspective, the Netherlands is a small country indeed, but we have a large population of 16 million people and in terms of GDP rank in the top 15 of the world's economies. We are also a very open economy, with a lot of trade, and are part of the EU. In view of these latter characteristics, the Netherlands do not really qualify as a small economy. However, irrespective of these characteristics, the Dutch business community likes to refer to itself as small whenever that is to its advantage.

There are three periods in the competition history of the Netherlands. Up to 1998, there were no strict rules on competition: everything was permitted by business unless it was prohibited by ministerial decree. In 1998, the Netherlands competition law was adopted and the Netherlands Competition Authority was established. However, the Minister of Economic Affairs was still allowed to interfere in individual cases, so the Authority was not totally independent. In 2005 the Dutch Competition Authority became completely independent, with board members appointed by the government, an independent budget and the Minister no longer being allowed to intervene in individual cases. The Competition Authority can also give recommendations to the Ministry of Economic Affairs concerning the development of new laws (advocacy role). The Competition Authority does not form part of the legislative, executive or judiciary. This does not mean that there are no checks and balances. The Competition Authority must enforce the law as set by the legislator, and all decisions made by the Authority are subject to judicial review. In addition, the Minister may give general policy instructions to the Authority.

4. Impact of Independence

Has that independence been important for the development of competition policy in the Netherlands? I am inclined to say that it has been crucial. I think that we also have to say that the fact that the Netherlands is a small economy has also had an impact. In a small economy the link between businesses and politicians is very narrow. In their attempt to influence the politicians, businessmen like to use the argument that the economy (the Netherlands) is small. Indeed, many times we have heard business people argue that extra support is needed for the national business community in order to compete successfully on international level with companies from larger economies. Politicians who are indifferent so such an appeal will not gain the business men's vote. The fact that such attempts may have an effect has a negative impact on competition policy, because not knowing which way the politicians will decide makes the outcome of competition cases

uncertain. Investors are not happy to invest in an economy that is subject to those kinds of forces. Such influence will also have a negative impact on recruitment activities. In small economies, recruitment as such is in general already difficult. Recruitment is likely to become even harder when the outcome of a case is not determined by the professional analysis of a professional, but by the analysis of the political forces. This is hardly stimulating for professionals wanting to develop their expertise.

In the period to 1998, when everything was permitted unless explicitly prohibited by Decree there was little intervention in the Dutch economy. The Minister of Economic Affairs is not to be blamed for this, as he was quite willing to build a competition policy, but the rest of the cabinet had to agree on the intervention measures which were proposed by the Ministry. This was complicating matters and made achieving consensus more difficult as business men were using their influence on the other cabinet members to block such initiatives. Under the present law, the Ministers has no say in individual cases anymore and lobby activities at ministerial level are not useful as individual cases are dealt with by the Competition Authority independently. This is quite a change compared to the past but I think the overall picture is that everybody is happy and that there is more certainty, and enforcement by the Authority is done through a transparent process. That has, in the end, made us quite a respected agency.

V. Political Influence or Control

Fod Barnes, Principal, OXERA

1. Preamble

I have been a regulator and was particularly involved in setting up the first independent regulatory body in the UK. It was interesting to see how the political machinery reacts against the emergence of an independent regulator. I have also advised governments on how to set up regulatory agencies, as well as advising clients under investigation by regulatory agencies.

2. Achieving Independence

I have worked at both ends of the spectrum in both large and small economies, like Jersey. The first conclusion I have come to when looking at independence is that it is extremely important in both large and small economies, but is more difficult to achieve in small economies. However, the notion of complete independence of regulatory agencies is itself flawed. You cannot have complete independence when the activity of being a competition authority is inherently political, because it moves wealth between companies and different consumer groups. That makes it fundamentally an issue of politics. It also involves the exercise of discretion, because competition decisions are rarely completely clear-cut. There are considerations as to what outcome is desirable, and questions of prediction, when the outcome is fundamentally unknown. Therefore, competition and regulatory authorities fundamentally perform a set of inherently political activities, and the relevant decisions are taken by an authority that is, generally speaking, not directly accountable through the democratic process.

3. Political Intervention

Politicians are always going to be interested in what regulatory or competition authorities do. The question is how you design a system that allows the legitimate intervention of politicians and stops the illegitimate intervention. In small economies the regulators, politicians and businesspeople generally turn out to be much more likely to be the same person or group of people, making it more difficult to isolate oneself from wearing more than one hat, or interacting with those people in everyday life. That raises the question of how to design a system to counter the informal pressure brought to bear by the different interest groups. A system in a small economy might need more explicit rules of engagement to try to ensure that the implicit, informal interactions do not dominate the formal processes.

4. Legitimate and Illegitimate Influences

If there is always going to be a legitimate reason for intervention, the failure to recognise that in the overall structure of the regulatory system will legitimise illegitimate influences. If politicians do not have a legitimate route by which to discuss objectives with regulators, it will nevertheless happen in an illegitimate way. Therefore, small economies need to think carefully about how they legitimise the interaction between the political process and the authority itself.

The problem, in terms of solutions, is that if you go down the route of legitimising certain types of interventions and control of those interventions, you have to take account of how the rest of the political process, media and other people interested in the work of the authority will react and interact. These reactions/interaction are outside the specific interest of the regulatory authority itself. The wider context of regulatory structures and where they fit in to the wider political economy needs to be addressed, as well as the specifics of the powers etc of the authority itself.

5. Open Decision Making

However, some things are more universal. Emphasis should be put on how regulators justify what they have decided on in public. The more open those decisions are, the more you can call upon other parts of the economic system to keep the politicians and the competition and regulatory authorities on track. It might require stronger rules about the kinds of uses that can be made of confidential information and what should be put into the public domain. There are always likely to be things that should be kept confidential, and there is always information that is kept confidential, often to prevent outrage by the public and politicians, rather than for legitimate competition reasons.

In terms of the design of regulatory structures, thinking carefully about whether the regulatory authority can engage in the public debate is instructive. I would say that although in the short run you get conflicts, in the long run a system that allows the agency to defend itself in public against criticism, is likely to end up with a bigger resistance to illegitimate influence.

6. Legitimacy

Finally, we have to address the legitimacy of the agency itself, and the kinds of structures that make its decisions legitimate in the eyes of the public, and whether it can do that unless it is explicit about its own objectives. I think that when you start to try and define

objectives for regulatory agencies, and split consumer protection from competition, it makes it more difficult to design proper, coherent objectives for those institutions. Combining competition and consumer protection might better line up the objectives of the agency with what the public would see as a legitimate activity.

William Kovacic

The reality is that, due to the enormous stakes involved in what regulators do, the political pressure is ubiquitous and powerful. The question is how destructive impulses are pushed aside, and constructive influences are brought to bear. I have never been to a conference in which those issues were discussed as directly as Fod just did.

I would like to turn to the question of market opening initiatives. Among the highest stakes in which a competition agency can be involved includes the liberalisation of the market and the deregulation of previously controlled sectors. Subsequently, we will discuss the role of the media in scrutinising the competition authority.

VI. Market-opening initiatives; trade; liberalising sectors

Prof. Walter Stoffel, President, Swiss Competition Commission

1. Switzerland

On the issue of independence, until 1995 in Switzerland we had a very generalised analysis, called the Balance Sheet Analysis. After 1995 this was removed from the jurisdiction of the competition commission, and handed back to the minister, in the form of the Article 8 solution. Parties can bring a case to the minister for an exceptional authorisation based on grounds of public policy. This has not been used very often, and until now the ministry has stayed remarkably strong in these cases. It has the advantage of being more visible, but perhaps does not answer the concerns that have been voiced, because it comes at the end of a case.

2. Autonomy

I would like to support what Monique said, that especially in small economies autonomy is important, because the temptations for politicians to intervene is stronger in a small economy in my experience. There may be a case for the government to give general instructions on agenda setting, but not on the decisions of individual cases. That raises the concern of the 'rise of the unelected', but the answer to that is judicial review based on the law.

3. Market Initiatives

Turning to the market initiatives, on becoming President I was asked why Switzerland, being so small, needed a competition at all. That is a point that can be made, because a critical mass is certainly needed in order to have a competition system. Lichtenstein might be too small. If the borders are open, then the size does not matter so much, a factor that is linked to the definition of a small economy. I think that what makes an economy small is the artificial limitation of a space that economically would be larger. An economy is limited by certain regional boundaries, and some areas might be cut out by artificial means, such as the law or language.

4. Foreign Competition

Traditionally the Swiss trade policy made for a very prosperous economy, but that was no longer enough with the stronger integration within the region. That was the competition authority opened the borders to bring in foreign competition. One example is car imports. Switzerland does not have a car manufacturing industry, but in the 1980s and 1990s cars were 30% more expensive in Switzerland than in neighbouring countries. The competition commission found that import authorisations were needed, which the Swiss legislator had stipulated were given to a certain person. The legislator abolished the personal specificity of the authorisation, which had some impact, but not enough.

A second intervention introduced a more open system, allowing the possibility of parallel imports, which was rarely used because the industry reacted by reducing car prices. Switzerland now has some of the lowest car prices in Europe, showing how effective a boarder-opening initiative can be, and how such an initiative can be introduced by competition authorities. We have found these patterns in other fields, including geographical markets, mergers, and the field of distribution, where the aspect of the smallness of the economy and openness of borders play a crucial role.

William Kovacic

The importance of documenting specific experiences that indicate how individual policy adjustments generated specific outcomes was highlighted in Walter's speech. That answers the question of why to do this, and what its worth is. It shows how interventions generate specific results, rather than asking people to accept an abstraction that competition law policy can be a valuable component of growth.

Prof. Walter Stoffel

You are right. We are lucky that independent research was done in the area of car prices. Although there were disadvantages, in that car garages had to restructure, and there are now fewer of them, overall there were only winners.

William Kovacic

Turning to the role of journalists in providing a source of scrutiny for what the agencies do and as a source of knowledge to the public.

VII. Role of the media

David Lawsky, Anti-trust Correspondent, Reuters

1. Public Interest

I am going to talk about the effectiveness of competition agencies in small economies from the perspective of my Reuters colleagues. If you cannot interest reports in a story, the public is unlikely to hear about it. Competition policy can be difficult to understand, and confusing to the public. Competition agencies try to use the press to get across the importance of their decisions to the public. Reporters in Brussels and Washington are specialised in competition policy, and understand the policies. The non-specialist reports

not only look at the press releases from the competition authorities, but also look at our stories. That is not always a luxury that small economies have.

2. Views Across Europe

This week I called up my colleagues in Belgium, the Czech Republic, Denmark, Hungary, Romania, Slovenia and Switzerland. The lowest profile agency was in Denmark, where the bureau chief could not remember dealing with the competition agency at all. In Belgium the local staff said that they dealt with the occasional story. Our Zurich and Czech bureaus see some stories come through, with Slovenia having even fewer stories. In Romania the chief correspondent said that while there were a fair number of press releases, the companies were very small and she generally ignored the press releases. In Hungary there was a marked difference, with the competition commission sending out press releases on most days. The reporter did not distinguish between the competition function and consumer function, with most press releases relating to companies that had misled consumers.

3. Advice

For those of you not lucky enough to have a competition and consumer affairs agency, make certain that the press releases explain who you are and what the point of competition law is. It might be worthwhile to hold a news event, get to know some of the reporters, and explain the import of what you do. That will explain your next press release and help create a demand for what you do.

William Kovacic

How much does it help to have primer on what competition commissions do including attractions for the year ahead, acquainting journalists with who the players are and the purpose of the regulator?

David Lawsky

Regular engagement is helpful, but getting people out to a background briefing when they have little time is be difficult unless you have a hook to get them through the door.

William Kovacic

Implicit in many of the comments today is the opportunity for comparative study, benchmarking the work of individual agencies, and gaining some powerful insights into how existing institutions make refinements over time. I am increasingly less interested in where a system begins than how it evolves over time. The fact of such broad experiences enables us to make assessments over time and to learn from the experience of others.

Panel 2: Cartel Regulation in Small Economies

I. Introduction

Dirk Arts, Partner, Allen & Overy

The second session is dedicated to the difficulties competition authorities face in small economies when they try to go after cartels. Before we start I would like to present the panel. Mr Mehta is the Director of the Cartels Unit at the EC; Mr Palsson is the Director General of the Icelandic Competition Authority, who will touch on the sensitive issue of the relationship between business, the political community and the cartel authority; Mr Becker, who has already been presented, will deal with issues of leniency in the enforcement of cartels in small economies; Dr Gal will shed light on the specific characteristics common to small economies that might allow a cartel to flourish; and Mr Bleser will present a practical example as to how cartel authorities in small economies attempt to develop their policy.

II. How Does Market Size Affect Market Conduct

Dr. Michal S. Gal, University of Haifa

1. Oligopolistic Markets

I have been asked to focus on how size affects cooperative market conduct. The natural starting point is market structure, as comparative conduct generally occurs in oligopolistic markets. Oligopolistic market structures are characterised by rivalry among a small amount of competitors, protected by high market barriers. Each participant is forced to take into account the effects of its actions on the other players in the market. The hallmark of an oligopoly is the presence of strategic interaction among rival firms, which might reduce or eliminate competitive pressures by creating incentives for firms to coordinate their conduct. Such coordination can be direct, by cartels; or indirect, by oligopolistic coordination.

By avoiding competition among themselves the oligopolies can obtain shared market power, allowing them to maintain prices above the competitive level, but more importantly, such agreements can lead to sub-optimal levels of production, by preventing the realization of each firm of scale economies. Due to limited demand and high entry barriers, many markets in small economies are oligopolistic. In such situations regulation plays an important role in bringing about more competitive outcomes.

2. Inherent Characteristics of Oligopolistic Markets

Firms in oligopolistic markets have strong economic incentives to coordinate conduct, in order to eliminate cooperation amongst them and elevate profits above the competitive level. That situation is not necessarily stable, because it creates a tension between competition and cooperation. Any collusive agreement based on a joint profit maximising scheme is inherently plagued by the natural temptation of each cartel member to cheat, by deviating from the joint scheme.

George Stigler, the Nobel laureate, identified three conditions needed for the existence cartels or coordinated conduct. Firstly, reaching a joint maximising agreement; secondly, detecting deviations from the agreed upon trade terms; and thirdly, punishment of the deviations that have been detected in order to limit such deviations in the first place. A small sized economy affects all three of those conditions. Firstly, the lower the number of firms operating in the market, and the more stable their market shares, the easier it is for them to reach an agreement. High entry barriers limiting potential competition, which could potentially break down the cartel, often protects such markets. Secondly, the smaller the number of sellers, the easier it is to obtain knowledge of transactions and exchanges in the market and thereby more easily detect deviations from agreements. Thirdly, the punishment of those who have deviated from the agreement might be more focused and effective where there are only a few sellers.

3. Challenges for Small Economies

I have identified four challenges for small economies. Firstly, the most important task of authorities is to differentiate between cartels, which are illegal, and oligopolistic coordination, which is considered to be legal. Secondly, authorities should limit the incentives for and the ability of firms to engage in coordinated conduct in the first place. Cartels should prohibit facilitating practices, where firms seek to limit the friction between themselves to increase the likelihood of coordinating conduct, and to prevent cartels. Thirdly, authorities should differentiate wealth-enhancing joint ventures from wealth reducing agreements or cartels. Agreements can allow firms to enhance productive and dynamic efficiency, while lowering costs, in a way that firms could not do alone. The final task is for authorities to use institutional and other limited resources wisely.

Páll Gunnar Pálsson, Director General, Icelandic Competition Authority

4. Iceland

My thoughts on this issue are based on the experience of a competition authority in a small economy. Iceland had the good fortune of implementing its Competition Act already in 1993, when it was joining the European Economic Area based on an agreement between EFTA and EU there upon. The domestic rules on competition have from that point of time been similar to the EU-rules.

It is true that the size of the economy affects market conduct. Evidently oligopoly is a common market structure in a small economy. Small economies face difficult challenges, such as to differentiate cartels from oligopolistic coordination.

In determining how to tackle this situation, I would say that competition authorities cannot afford to suffer from an inferiority complex. In a small economy you have to have the courage to run a clear and focused competition policy, with the authority being able and prepared to dive into difficult issues, investigate and reach conclusions on cartels and difficult issues such as joint dominance. A clear message has to be given that cartels will not be tolerated, which can only be done by tackling big cartels and punishing them severely. In Iceland we are prepared to levy high administrative fines upon companies involved in cartels and other breaches of the Competition Act. And we have done so.

Recently the Icelandic Competition Act was amended in order to make it perfectly clear that individuals involved in serious cartel activity could face up to 6 years imprisonment.

And the law was also amended in order to strengthen further our leniency program. The message given by the Parliament is that cartels will not be tolerated.

A competition authority also has to be prepared to facilitate entry when someone shows an interest in coming into the market. It should aim at convincing the existing domestic players that the best way to prepare for outside competition is not always to merge the existing companies on a domestic level, but to conduct fair competition in the domestic market from the start.

Dirk Arts

On practising cartel enforcement do authorities have a tendency to go only after smaller cartels? Do you have the capacity and are you willing to go after the big boys? You might want to go after the easy wins, firms that do not have the resources to defend themselves. Is that a factor?

III. The policy of cartel enforcement in small economies

Gabriel Bleser, Senior Associate, Allen & Overy Luxembourg

1. Luxembourg

I wanted to share some cases in Luxembourg's competition culture. We had two cartel cases dealt with by the EC, the Luxembourg beer cartel and the elevators case. A third was a national case, which is still ongoing, so I cannot give any details.

In the first Luxembourg cartel case, decided by the Commission, four Luxembourg brewers shared the market in the hotel, café and restaurant sector. This example shows how difficult it is for small economies to tackle cartels. Interbrew, having merged with a local player and found out about a secret cartel, made an application for, and were granted, leniency by the Commission. The local press were not in favour of the Commission's decision, which fined the Luxembourg companies. The fined companies have lodged an appeal against the judgement of the CFI, which confirmed the decision of the Commission. The appeal is still ongoing.

The recent elevators case received the same reaction from the press, and the parties involved were fined.

The last case resulted from the first ever cartel dawn raid, in 2005, made on the basis of the Luxembourg law on competition and was based in the construction sector. The press contained a lot of comments stating that the cartel wanted to protect itself against large foreign companies, a defence used by the companies themselves.

Kirtikumar Mehta, Director, Cartels Directorate, DG Competition, EC

2. The Typology of Cartels

In these types of cartel cases many people do not look at the typology of cartels. In small economies that are open and have regulatory oversight, you should look for the sort of cartels that tend to keep out other suppliers. It is clear that the beer cartels wanted to keep out other beer brands, and it just happened that Interbrew asked for leniency and

found out the ongoing cartel. Even in the elevators case there are six players. So it is not the number of players that determines the presence of a cartel, the literature shows that there can be up to 40.

3. Big Cartels

Is it true that small agencies do not go after big players? Firstly, if you are doing an investigation, it is a matter of getting replies from companies involved. If they are outside of your jurisdiction it is difficult to get those replies. Secondly, the law has to be phrased in a certain way. In the US the law is about conspiracy by a natural legal person, which is the subsidiary, but the EU always focuses on the subsidiary, and in case of 100% ownership or any other clear indication of exercising control then also on its ultimate parent company.

4. Focus

In the EU we have a network of enforcers, and we try to have complementary enforcement. If there is a multi-jurisdictional cartel, and not all jurisdictions take up the case, then there is an enforcement gap. In the EU we have found a particular way of working. Firstly, once you know that there is a cartel that is being prosecuted you have to see whether you have these producers in your regions. In a small economy you might have no producers and no suppliers, or some producers and some suppliers, or only producers. However, usually there are suppliers and one or two producers. That can at least be investigated. Secondly, it is important to focus on hard-core cartels, that is, secret agreements and practices, which are the ones that are difficult to detect. I am sure there are more good ideas on that, which the smaller agencies here can contribute.

Dirk Arts

How to allocate resources in tracking down cartels is indeed difficult to address. An additional difficulty in enforcing cartel laws in small economies is the close relationships between the enforcers, business communities and politicians. Mr Palsson is qualified to comment on this issue.

IV. A Close Business Sector and Political Influence

Pall Gunnar Palsson, Director General, Icelandic Competition Authority

1. Preamble

Firstly, how does the fact that the economic and political elites are intertwined effect enforcement? Some of the characteristics of oligopolistic markets have been outlined, such as the negative economies of scale, and the well-connected business associations that tend to exist in small economies. In Iceland, every time the Competition Act comes into parliament it receives a detailed discussion, and the fact that competition issues are political issues is unavoidable..

2. Challenges

This situation can lead to challenges. Firstly, there is the question of whether there is a cartel or an unavoidable situation. Secondly, there may be disbelief towards a particular

involvement, that is, you cannot believe that some friend of yours is really involved in a cartel. Thirdly, there is often powerful propaganda against the competition authority from the business community, and also belief that the competition authority is either not strong enough or too strong.

Business associations tend to lobby in all economies, but in smaller economies they have a political influence, often on a personal level, and also have very good media connections. This goes both ways, and the competition authority should also gain from good access to parliament and the media.

3. The Icelandic Oil Cartel

For the sake of discussion I want to describe shortly to you the most significant cartel case to date in Iceland. And by the way, I cannot agree to what has been said here, that all competition authorities in small economies tend not to go after the big cartels, and I do not think that that is the experience in Iceland. When we come across a big cartel; that becomes our priority. In 2001 a dawn raid was conducted on three companies engaged in importing, selling and distributing fuel and related products, and who had a market share of 99%. The investigation revealed extensive cartel activities, including bid rigging and price fixing, market sharing and prevention of new market entries. In 2004 the competition authority administered fines of €30 million against the companies, and in 2005 the Appeals Committee acknowledged the main findings of the competition authority, but lowered the fines to €18 million.

These were difficult and testing times for the Competition Authority, which often received bad press on the issue. The business associations fought against the investigation, for example demanding actions from the Ministry of Commerce, that the information taken in the dawn raid was returned and the competition laws were changed. The CEO of one of the oil cartel companies was also the husband of the Minister of Justice at that time, which added to the sensitivities. However, once the conclusions of the case emerged, it became clear that the Competition Authority had done an important job. Since then claims have been brought against the companies, and the whole case has had a deterrent effect on the market. This shows that action against big cartels is essential to build up trust in the competition rules in a small economy.

4. Recommendations

A major key to success is to ensure the maximum professional independence of the Competition Authority. That is, to ensure the decisions on what to investigate, how to investigate and how to conclude the case belong with the competition authority and not the business associations or politicians. The Icelandic authority lies within the public administration, but the Ministry of Commerce is not to interfere with decision-making in any way. Parties can appeal to a specialist committee, and case can also be taken to court.

Another key to success is that the Competition Act must be similar to the competition rules in countries that the economy does business with. Iceland bases its rules on the EU regulations, which are similar to rules in other Nordic countries. This is key to the proper enforcement of the competition rules in a small economy. You can use precedents from throughout Europe, and if the political arena knows the competition commission is enforcing similar rules to those in neighbouring countries and the EU, it becomes easier to safeguard the autonomy of the competition authority. The similarity of the Icelandic rules

to those of the EU and other Nordic countries is at the heart of our fight against the large cartels.

V. How can authorities effectively fight against cartels?

Dirk Arts

What does a small competition authority need in order to engage in an effective policy of fighting cartels?

Gabriel Bleser

In my opinion the small authorities need to be more efficient and quick in their reactions than the big authorities, because the political influence of the business sector, and close ties between the two, means you need to act quickly, get a result and impose your fine. I am of the opinion that it is unwise to give a very young authority, such as the Luxembourg authority, the new powers that are contained in the legislation being discussed in parliament. In my opinion you need to be efficient, but there is a risk with concentrating all the powers in one authority that you will not gain a beneficial result for consumers. I would caution against giving the authority an advisory role, because it could take up so much time that the authority does not go after cartels. I would be interested in the opinions of small authorities regarding staff exchange programmes and their benefits. There are a lot of questions, and I do not pretend to have remedies, but I have some opinions and would welcome the opinions of other members of the panel and the floor.

Kirtikumar Mehta

The best advocate for competition in the economy is a credible enforcement record of the competition agency. You have to enforce, make decisions, make them stand up, and then it will have its impact. The advantages for a small agency is that they perhaps only have one language to work in, a limited investigative scope in a small economy, as well as a limited geographical scope, which makes for more speedy procedures. You only have to look at past decisions regarding international cartels to see that progress in competition advocacy is already being made. Small economies also often have much better input from complainants and in house whistle blowers. Cartels originate in terms of being reported, but also from focused compliance, which often works better in small economies.

If detection of cartels and enforcement is serious, companies adopt serious compliance programmes themselves, and they do not have to be advocated. I think that much of the cartel work is learning by doing well, and you can see that in the experience of many agencies that have an enforcement record. Specialised training, for example forensic IT and so on, is needed for the investigative phases.

VI. Leniency programs: does size affect their effectiveness and if so - how and when?

Daniel Becker, Rapporteur general, Luxembourg Competition Inspectorate

1. Leniency Programs in Small Markets

It is a general fact that leniency is one of the most important tools that competition authorities have at their disposal for detecting cartels. Nearly all member states of the EC, as well as DG Competition of the European Commission, operate such leniency programs these days. It is interesting to see whether the size of an economy affects leniency policy, and more precisely, the effectiveness of leniency programs. From our own experience in Luxembourg we have found that small economies generally have more family-owned and family-run businesses, which might be more vulnerable to the fining policy. This vulnerability can be taken into account, with the result that fines are less high, thereby reducing however the incentive to apply for leniency. This raises the general question regarding the proportionality of the fines applied in small economies in comparison to those applied in large economies. In small markets there might be more human ties, for example through marriages, between the managers or stakeholders of the companies involved, which might prevent some of them from seeking leniency. This could reduce the efficiency of the leniency program.

Typically in a small economy like Luxembourg everybody knows each other, and there is a risk that a member of a cartel visiting a competition authority might be noticed. Some actors in the economy might not be aware of the option of applying for leniency, and its implications. A general lack of competition culture may induce a certain unawareness of the existence of a leniency program and, all the more, a lack of experience with the procedures and possible consequences. That means the businesses will often feel uncertain about its potential results.

2. Soft Fines

If competition law has been recently imposed, some behaviour might have become the norm despite being unlawful, which could lead to discomfort in revealing that such behaviour is illegal. In such situations it is possible to apply soft fines initially. As has been outlined before, there might be stronger incentives for creating cartels in small economies, and other reasons for creating cartels or secret agreements, for example, to protect against foreign players. In such cases the incentives for applying for leniency may also differ.

3. Procedure

Another point concerns the procedure for the leniency application. In small economies it might be more difficult for smaller players to give the relevant information needed for a leniency application, because they generally have less experience and resources. Therefore, the procedures should be made less complicated in a small economy. There might also be points where the incentive for leniency is stronger in a smaller economy: for instance, for a large firm the risk of a certain loss of overall profit when a cartel in a specific market is detected may be diversified and partly offset by means of acting on different markets. Hence, the incentive to seek leniency might be weakened, since the impact of its consequences might be weaker. In a small economy a small business might,

on the contrary, be incited to apply for leniency when it does not have such leveraging options.

4. Effectiveness

What can be done to enhance the effectiveness of a leniency program in a small economy, and are there tools other than legal tools that can be applied? In this context we already mentioned the simplification of the application procedure. When conducting a surprise inspection an authorisation has to be gained from a judge, and an appeal against such an authorisation would make the information public. For the reasons outlined above whistleblowers in small economies generally take a higher risk than in a large economy. Should the incentives for applying for leniency therefore be stronger in small economies?

Kirtikumar Mehta

5. Incentive

We do not have a workable theory of how cartels start. Otherwise, we would be able to design a very good leniency policy. We have to work with what we have got, and the leniency policy is an instrument that enables you to encourage the reporting of cartels. The incentive is the fine that they avoid, and if that fine is small there is no incentive. Therefore, on that view, in a smaller economy, in order to give a bigger incentive, the fine should be very high. The main issue is that you want to encourage reporting of incriminating evidence against the cartel. It is not enough just to confess, you also want to be able to prosecute. You want the inspection to be a surprise, in order that evidence is not destroyed. Therefore, there is a need to maintain confidentiality. There must be a reasonable threshold of evidence on which to allow unannounced inspections, in order that evidence can be gathered. Inspection is an important tool, because documentation is vital to back up oral evidence. You must offer reduced fines to companies that bring significant added value to the investigation, which might help prosecution. These issues, to some extent, apply to both large and small companies.

Dr. Michal S. Gal

6. The Political Economy of Cartel Enforcement

One can identify positive and negative externalities that affect cartel enforcement in small economies. Positive externalities are created by the fact that because large jurisdictions often go after large cartels, small economies can just free ride upon their activities, especially if those cartels affect the small economies as well. Negative externalities are created by the fact small economies rarely go after those international cartels and rarely, if ever, impose remedies upon them. This, in turn, might affect the profitability of the cartel. For example, the vitamins cartel affected the whole world, but only five economies went after the companies, and the damages collected were only based on the economies that went after the cartel. Therefore, a significant proportion of the profits of the cartel are still held by the vitamin companies. Thus, the under-enforcement of competition laws in small economies creates negative externalities for limiting the existence of international cartels.

The incentives of small economies to prosecute a large firm, especially a multinational firm, may be affected by the fact that such firms might create a credible threat to exit the market if sanctions imposed on them are high. Such a threat might be credible as the profits to be had in a small economy might be small, and thus the firm might not lose much from exiting the market. The exit of such firms from the market might further weaken competitive conditions in small economies, thereby reduce welfare even further than the anti-competitive conduct. . That is a real problem that enforcers have to think about. There is no one solution to these issues, but I propose one measure. Regional enforcement agreements may provide good solutions for small economies by allowing them to join forces together.

7. Fighting Cartels in Small Economies

Small economies can do several things to fight cartels. First, it is extremely important to have a clear and strict prohibition of cartelistic activity. Such a prohibition should be per se, and should apply even when effects are de minimis. Second, facilitating practices which are welfare-reducing should be prohibited. Thirdly, sanctions should be prohibitive. Criminal sanctions are most effective against individuals. In addition, private enforcement should be encouraged, especially if the agency is short of resources. Lastly, in rare cases in which oligopolistic markets are stable and there is no prospect of competition in the horizon, governmental might consider creating a maverick, for example, have some kind of government holding in one of the oligopolistic firms in order to signal that the government might intervene in the market through that company.

Questions and Answers

Prof. Walter Stoffel

Sometimes I think small economies experience problems of young agencies, which is not to do with them being small but to do with the fact that they are young. Regarding whistleblowers, I would agree that there is a stronger social pressure against them in smaller areas than in larger areas. When the leniency programme worked in our areas, it almost always had a foreign connection. I also have the impression that the press is more easily influenced in smaller economies, because of the closer ties between business and press. We must be modest in certain respects, and consumer associations often ask us why we did not do anything against Microsoft. The answer was that there was no point in us doing that. We asked Microsoft to execute whatever conditions it had to in Europe in Switzerland as well. They signed up to that agreement, but there was no point in us pursuing a separate case parallel to others. I would not be so negative regarding sector inquiries, which have the advantage of being much less formal and procedurally easier. In the 1980s a sector inquiry dismantled banking cartel agreements in Switzerland, when no other competition agency dealt with banking services. Bankers now refer to the dismantling of Swiss cartel agreements as the biggest incident of the 1980s.

Godfrey, Director General, Fair Competition Commission, Tanzania

I was grateful to hear from Dr Gal, because I have read about her but never met her. David Lawsky was saying that not many people know about competition. I think that is the most important point. Many politicians and people in Europe do not know what competition is about, and it is even worse in underdeveloped countries and small

economies. There are countries with huge populations, a small GDP, but huge potential in their economy. In those situations you need competition laws, because the issue is not only production but also consumption. There is competition even in importation and distribution. The link between competition and development also has to be made clear. It is only through competition that you get innovation, which can excite development.

Once that is made clear, it then depends on the design of the law itself. There is no reason for anybody designing competition law to make a mistake, because you can learn from what others have done, and avoid some of the issues that have been raised here. We have done that in Tanzania. The issue is that competition without a strong consumer group cannot work. That is the situation where competition becomes political. The last thing I want to stress is the importance of the credibility and integrity of the authority and the people who work within it.

Panel 3: Merger Control in Small Economies

I. Introduction

Charles Webb, Legal Advisor, Jersey Competition Regulatory Authority

With the global spread of anti-trust and competition law enforcement today, economies both large and small engage in merger review. When global companies are thinking of merging their counsel has to think about where in the world the deal is reportable. While it is easy to identify large jurisdictions, like the US and Europe, smaller jurisdictions, like Malta and Cyprus, which might have their own filing obligations, are harder to identify. Even smaller jurisdictions, like Jersey and Barbados, also have merger filing obligations.

We have a panel that will discuss merger control in small economies. I am currently the legal advisor of the Jersey Competition Regulatory Authority, and Jersey qualifies as a small economy under anyone's definition. We have Michael Koenig, a case manager at DG Competition in one of their merger sections, who was formerly with the OECDs Budapest centre. Jacques Steenbergen is the Director General of the Belgian competition authority. Liga Hartmane is a partner in the law firm of Klavins & Slaidins in Latvia, and we also have James Webber, an associate with Shearman & Sterling, where he works on global mergers, guiding companies through merger review.

II. Should Small Economies Even Engage in Merger Control?

Liga Hartmane, Klavins & Slaidins

1. Preamble

The answer to the question of whether small economies should engage in merger control seems obvious. However, there are several issues that should be considered in determining whether merger control is the best approach in a particular country. As discussed yesterday, small economies are usually defined as having concentrated markets, where mergers can lead to further concentration, because they usually reduce the number of market players, and mostly increase the market shares of merging entities. Additionally they may facilitate asset cohesion and cooperative behaviours. Under these

conditions, the objective of merger control, protecting consumers from the negative consequences of mergers and preventing market power, is also important in the highly concentrated small market economies.

However, as Dr Gal pointed out, the smallest also means there are adverse effects for domestic market structures. In some industries size matters, particularly where limited demand constrains the development of a critical mass of domestic productive activities, which is necessary to achieve the lowest cost of production. In some cases, an already concentrated market structure may need to become more concentrated in order to achieve the minimum efficient scales. Any resultant reduction of prices is desirable if it will benefit consumers.

2. Should Merger Control be Left to the Market?

The important question for merger control enforcement in a small economy is how to find the balance between productive efficiency gains and competitive conditions. That requires both knowledge of the market and of competition law, which is not always present in small and developing economies. In those cases, should merger be left to the market, an ‘invisible hands’ approach? It has been argued that market forces alone cannot maximise efficiency, therefore merger control is necessary in the regulation of markets.

3. Arguments Against Merger Controls

The main arguments raised against merger controls in small countries are that companies in small economies are unable to compete with the large companies in larger economies. Also, due to lack of financial resources, local companies are unable to compete with the subsidiaries of large companies entering the smaller markets. These issues can be resolved in several ways, with the most efficient way being effective application of efficiency defence. Another way is to widen the geographical market definitions by extending borders, although this might be more theoretical than practical.

4. Latvian Merger Controls

The main question for the panel today is not about whether small economies should have merger control at all, but rather over the substance and quality of the merger controls that are applied in small economies. Latvia is a good example of a country that does not have a reasonable merger control system. That is something that I should not say as a practitioner, but still, the due to market share notification threshold and a broad interpretation of definition of market players, the Latvian competition authority is overloaded with merger filings that have no relevance to the merger market. Of course, that leads to a situation where many investigations by the Latvian competition authority are brought to a second phase purely due to the lack of internal resources of the competition authority. That probably requires some efficiency considerations, because some mergers do not get the attention they require due to the authority’s limited resources.

Gabriel Bleser

I would be pleased to have some thoughts from the panel on whether it would be necessary to have merger controls in Luxembourg, being the only country in the EU that

does not have merger controls. In my opinion it would make sense to adopt such controls, but I would welcome thoughts from the panel.

Michael Koenig, DG Competition, European Commission

We have only had a European merger control regime since 1990. In Germany merger control was only introduced in the 1970s. The question is whether a market can do without such controls. The enforcement of the laws concerning abuse of dominance alone have proved inadequate, particularly when victims of that abuse for various reasons do not come forward to the authorities. Additionally, the control of abuse of dominance also always comes after the problem, and generally addresses only one particular practice, rather than the structural issues leading to the practice. As a response merger control was considered necessary, and those basic fundamentals are valid whether the economy in question is large or small. However, the application in practice has to be developed and adapted to the individual situation of the country.

James Webber, Associate, Shearman & Sterling

In response to Michael's comment, merger control regimes carry particular costs for competition authorities and parties. Some regulators have thin resources, and some parties want to engage in transactions, which will mostly be pro-competitive or neutral. You do not want a situation where parties have additional costs put on them. In a market as open as Luxembourg, which also benefits from the merger controls of its neighbours, particularly the EU, I feel that the advantages of adopting merger controls would be slim.

Prof Jacques Steenbergen, Director General of Competition, Competition Directorate, Belgium

There is massive evidence that anti-trust enforcement in respect of cartels and abusers makes a significant contribution to sustainable development. The case for merger control is shaky at any level; at the same time we all feel that we do need some merger control. Therefore my starting point would be to use such controls with prudence and constraint. A distinction could be made between small economies, like Luxembourg, which are member states of a union, with a merger control policy that captures the big cases. Even the transactions in smaller economies have become much bigger nowadays, and are usually above the thresholds captured by the EU polices.

If you have a big merger that is prohibited by the neighbouring jurisdictions, is it going to take place in the small country that has no merger controls? That would be over-estimating the importance of that market. It simply will not take place.

Small economies have an additional reason not to introduce controls, and if they do, should design it to be limited, and pick up the significant cases for the local market not caught by any other type of merger control. The first question is to ask whether you have the resources to put merger controls in place. If you do not, think twice about imposing such controls. If you cannot also deal with the complaints you get on cartels and abusers, you are not making an efficient contribution to sustainable development. Therefore, while some merger control is necessary, it should be designed in a way that it does not catch too much, and should not jeopardise your anti-trust enforcement capability.

III. How Should Small Economies Structure Merger Control Systems

Prof Jacques Steenbergen, Director General of Competition, Competition Directorate, Belgium

1. Preamble

I act on the assumption that you do not need merger control to fill the gap between jurisdictions if you are a small company. That is a problem, because it means that the turnover thresholds probably will not work. You cannot go for turnover thresholds aligned with international practice if you want to catch the relevant transactions in a small economy. If you do go for turnover thresholds that will allow you to catch the relevant cases in a small economy, you will end up with many notifications of transactions happening all over the world, between parties that happen to be active in your markets. As small economies tend to be wealthy and open, almost everybody has some presence or turnover in many of these small companies. Therefore, you cannot conclude that small member states should require notification of transactions below the EU threshold, which is a conclusion that embarrasses me, because turnover thresholds are best practice, and market share thresholds are bad practice if combined with mandatory notifications.

2. Belgium

Belgium switched from market share to turnover thresholds in 1999. Market share catches the relevant cases, but if you combine market share thresholds with mandatory notification, the pre-notification research takes, on average, up to 40% of the total time spent on the case. If knowing whether you should notify is almost as expensive as notifying, you are not serving either public or private interests. I am dragged to the conclusion that market share thresholds are best if you want to catch the cases that might cause a significant problem in your own market, but since mandatory and market share practice is bad practice, I would be inclined to go with the combination of market share thresholds and voluntary notifications.

3. Voluntary Systems

The disadvantage of a voluntary system is that authorities have often found out that something has happened too late. However, it is unlikely that a significant transition would take place in a small economy without anybody knowing. Therefore a small country could easily live with the combination of voluntary notifications and market share thresholds.

Herwig Hofmann, University of Luxembourg

It seems that in economies like Luxembourg the question is how we combine general competition law with regulatory law, rather than general competition law with merger control. Those transactions that post a problem for a local market are where there is a former state monopoly or state regulated industry. Those issues are generally dealt with through the EU system, and it is unlikely that those types of cases would be sent back to Luxembourg. Therefore, I would agree that the question shifts more to competition versus regulation.

Peter

If you have a very simple obligation to notify, the onus could then be on competition authorities to ask for further information if they want it.

Charles Webb

In Jersey we have a mandatory filing regime and market share thresholds, but I would argue that Jersey is a very isolated economy where competition laws are new. In that environment the benefit of a mandatory merging regime is that it makes the legal obligation more black and white. Peter's idea is similar to that in Canada, where they have a short form and long form notification, and the parties decide which one is appropriate. In certain cases the authorities can request that the long form is used.

Michael Koenig

We need to find the balance between effectively protecting competition, and avoiding unnecessary burden on the companies. Merger control cannot just be a bureaucratic exercise for the sake of it. Fast-track exercises should be introduced where possible. A simplified procedure exists on the European level, and in Germany it is possible to file in a three-page memo, and if it is clear from the outset that the case is unproblematic, then the clearance letter will be done in a few days.

Khalib Mirza, Chairman, Pakistan Competition Agency

We have just started merger control, and we have an initial basic type of notification, based on a market share threshold. Thereafter, if we need to investigate then we ask for more information on a long form. It seems to be working very well. Prior to that we were not financially independent, whereas because of the fees that are coming to us we are now.

Participant

In a small economy small companies merge due to authorities clamping down on cartel-like behaviour. Therefore, merger controls should be introduced at the same time as competition law regimes. In Switzerland we have high thresholds, which means that the system only catches mergers held at the European or global level. On a practical level, if companies cooperate we generally do not investigate. However, the small mergers are not caught at all. One could also think of having an upper threshold as well as a lower threshold, in the knowledge that mergers over the upper threshold would be picked up somewhere else, a corridor. Certainly there is room for thought regarding merger control in small economies, including how the merger is assessed where you do not have markets that are not confined to the small economy. In that situation you generally do not need to intervene when the borders are open.

Prof Jacques Steenbergen

I think that the corridor idea is very attractive.

Michael Koenig

In leaving the larger mergers to be picked up by international merger rules, is it not the case that the bigger jurisdictions might not be aware of the issues in these countries and their particular effects. Looking at the bigger effect you might lose sight of the issues that paramount in smaller jurisdictions.

Liga Hartmane

Regarding the ability of small economies to rely on the merger enforcement of large economies, in some cases a small economy might have other types of actions available to them that the large economies would not do. Israel did not think that it could block a merger between Ben and Jerry's and Nestle, which had been sanctioned in all large jurisdictions, however they required Ben and Jerry's to promise to sell all the new kinds of ice creams that it introduced in Europe in Israel, to maintain the level of service. So in rare cases a small economy could use those types of remedies to save some of the competition in its market.

Participant

Competition authorities apply regional solutions in particular classes of mergers. Therefore, while a region does not require merger laws, regional solutions are required. It is more complicated than saying whether a merger should happen or not, but rather thinking about the solutions that a small region could impose. If is likely that those are going to be useful solutions then you need a way of facilitating those, which might be merger controls, but only for a particular class of merger.

IV. Does or Should “smallness” Affect a Jurisdiction’s Substantive Standards for Merger Review?

Michael Koenig, DG Competition, European Commission

1. Basic Principles

The EC only rarely has cases that purely deal with small economies, as these are generally notified or referred to national authorities. We are confronted with small economies mainly when we have to investigate multi market cases across the EU. There is no room for a different approach in such investigations: The Schneider court case underlined that we have to look into every single product and geographic market very carefully. In substantive terms there cannot be a difference in the standard, because of two core perspectives of non-discrimination. First, from a consumer perspective, it is difficult to argue that standards of protection from companies with excessive market power should be different lower in small economies than they are in large economies. Secondly, on a company level, they should not be advantaged or disadvantaged by merger control standards depending on the size of the market in which they are present.

2. Natural Monopolies and efficiency arguments

Natural monopolies are an accepted antitrust concept. Authorities in a small economy might be faced more often with such arguments, and the duplication of infrastructures etc. might indeed more often not be viable in very small economies. However, even if one

accepts these types of arguments, one has to be careful to install measures to keep competition open on markets up and down stream.

The merging parties may also argue that there are scale efficiencies, which is also an accepted concept. But scale economies equally exist in large economies, so I do not see a substantive difference there. Consequently, there is no case for accepting this defence more often in small economies.

3. Safe Home Base as a "small economy defence"?

Going beyond the local perspective, there is an argument that a company needs a safe home base to enable it to compete on a wider European level. We have consistently pointed out that we are not convinced by this argument, primarily because there is absolutely no evidence that it is true.

First, only competition creates companies that are fit to succeed on international markets. Secondly, why should we harm consumers in the home market (through the reduction in competition, lower innovation, higher prices) to enable the potential success of a company in other markets, especially when it is not clear that that success will benefit the economy of the home country, for example in terms of jobs. If a company cannot succeed by competing at home, what chance does it have abroad?

4. Barriers to Entry

Companies may argue that in small economies there is no reason for concern about mergers which lead to strong market positions, as competitors active on neighbouring geographic markets could easily enter. This may be true for some sectors and for small but internationally well integrated economies. However, there are also situations where the small market size might make it unattractive for competitors to enter the markets, which would create an entry barrier. Therefore again there is no clear-cut story that the threshold for concern about mergers in small economies should be different (higher) than in larger economies.

5. Conclusion

My main point is that I do not think there is a case for discrimination between small and large countries in the merger control standard. However, it appears that there are particularities in small countries that have an impact on the substantive assessment.

Prof Jacques Steenbergen

The debate becomes more complicated because the notion of 'small' keeps shifting all the time. If we are talking about Australia or Canada, then I do not think that we need a different approach. I think that small is no bigger than a really big city, which is about 10 million people, and really small is no bigger than a big provincial town, which is between 250 – 500k people. In small and really small markets, questions of whether you can expect anything more than an oligopoly become relevant.

James Webber

The question for small economies is when recognising the substantive test falls to you. The characteristics of small economies, tending towards oligopoly et cetera, informs the cases in which a regulator needs to get involved in the substantive side of a case.

V. How can authorities in small economies effectively enforce merger control in a global economy?**Charles Webb****1. Well-defined thresholds**

The first point of effective enforcement in a small economy starts with well-defined thresholds and having a jurisdictional nexus to your thresholds. Enforcement flows from your thresholds. If they are crafted too broadly, either your agency will be ignored, or it will be flooded. Neither of which outcomes are in your interests.

2. Information gathering

The JCRA has a good record in getting the information it has needed from companies both inside and outside Jersey. For the Jersey Merger Filing Form we used an adaptation of the Irish form that was introduced in 2005. The later information request form instructions are adopted from a US second request, although they are a lot less onerous. My point is that in a small agency, if you are trying to construct your merger control regime, you do not have to work from a blank slate. There is learning out there that can be adopted and incorporated into your jurisdiction, especially from the EC.

Information gathering is not just with the agency, it is also with the local law firms. The JCRA has made an effort to educate the law firms about anti-trust and the requirements of merger regimes, why we have it and the information we need. I have been impressed with the speed at which the local bar has become accustomed to Jersey's merger filing requirements and their ability to advise clients accordingly. That is important, because at the agency we rarely deal directly with merging companies, but generally deal with their local counsel, who either deal directly with the clients themselves or law firm in another jurisdiction. By educating the local counsel in merger control they then know what the agency needs, which filters back through them to the companies.

3. Remedies

ICN best practice will recognise that structural remedies are preferred to behavioural remedied. However, I think that in a small economy you need to think outside the box when it comes to behavioural remedies. In a small economy such as Jersey, if there is a merger going on and all the assets are located outside of your economy, there might not be much you can do practically speaking in a structural way, but there may be more scope for active enforcement. So in terms of market access, as mentioned with the ice cream case in Israel, as a matter of general practice small agencies do need to think more creatively about behavioural merger remedies.

James Webber**4. Enforcing a regime**

Small economies and small regulators might be over paranoid about their inability to enforce their merger regimes. The overwhelming majority of the mergers that I work on involve companies that are not prepared to run the reputational risk, if nothing else, of being found to have breached a regulatory requirement. Therefore, in terms of filing requirements most clients will obey laws anyway.

There is also room to be overly paranoid when it comes to information requirements. If you have got a case concerning global markets, all the information will be available to the company from the lead jurisdiction filing, which is easily available. Where it is difficult, and private clients resist providing information, is where it is specific information and information that is not relevant to the merger. It might be a good idea to try to unify some of the information requests, not just so that they are more easily obeyed, but so they are more likely to be obeyed.

5. Remedies

What is key is that structural remedies are going to be equally applicable to small jurisdictions as they are in large jurisdictions. In terms of behavioural remedies, I like the Swiss idea in the Microsoft case, the 'whatever you agree with the EC we want that too' approach, which is perhaps less attractive from the practitioners perspective, but makes sense from your resourcing perspective.

Participant

If the EC was to block a merger, say, between a snow chain manufacturer and a snow equipment manufacturer in a Nordic country, and as a result the Swiss authority decided that it did not need to block it also. The companies might still decide to go and merge in the countries that did not block the merger. So there is no blanket remedy, it must be looked at on a case-by-case basis.

James Webber

That case is likely to be so extraordinary rare, that the cost benefit analysis tends towards accepting the remedy of the larger jurisdiction.

Participant

What is the difference in your mind between Luxembourg, which is highly integrated in the European Competition Authority's network, and Switzerland, which is not? I think the information gathering conditions are different, due to the highly integrated system in the EC.

Charles Webb

Luxembourg has the advantage of being inside the EU and the European competition network. My authority is outside that network, so I cannot speak of the advantages of being a member of that club. I think that it is not necessarily small, but how isolated your

economy is. Monaco is very small, but you would never say that it is isolated. So the information needed and merger control in general will depend on isolation as opposed to smallness.

Panel 4: Dominance in Small Economies

I. Introduction

Peter Carlo Lehrell, FIPRA

I would like to introduce the two members of the panel that we have not met so far. Chris Taylor, from Cable & Wireless, is responsible for anti-trust and competition in 33 small economies, the largest of which is Panama, which has 3 million inhabitants, and the smallest of which is Ascension Island, where 1,000 people live. Frank Fine has his own practice in Brussels, has written a number of books on competition policy, and is known to many of you as the General Editor of Lexis Nexis European Competition Law, the compendium of all EU cases.

For me, competition policy and enforcement is a triangle, comprising efficiency, innovation and consumer welfare. Those three things are why we are all in business, and every tool we have devised looks at one of those components. It is important that we maintain a holistic view, which is particularly important when it comes to dominance.

II. Do special circumstances apply in the assessment of dominance?

Dr. Michal S. Gal

1. Preamble

Abusive dominance regulation in the US is now extremely limited, the Department of Justice has not brought a single monopolization case in the past seven years. In Europe a limited number of abuses of dominance cases have also been brought, although this might change following the Microsoft case. Defining abuse is the most controversial question in competition law today, but still there are at least some core types of conduct that most agree are abusive. The issue at hand is the extent to which the small size of economies affects dominant firm regulation.

2. Motivation

Small economies have a stronger incentive than their larger counterparts to limit abuse of dominance, because in a small economy dominance is much more prominent, and more difficult to erode once created, due to the existence of scale economies and high entry barriers. Therefore, dominant firms are a common feature of small economies. The smaller the market, generally the lower the likelihood that dominance will be easily and quickly eroded by market forces once it is created, due to either barriers erected by government regulations or private constraints, or natural barriers created by scale economies of production. Firms have an incentive to strengthen their dominant position further, to the point where it is almost impossible to challenge.

It is not only that the market in which the monopoly operates is concentrated, in many cases downstream and upstream markets in small economies are also concentrated. It might thus be easier for the monopolist working at one level of the chain of supply to abuse its monopoly power in such markets. For example, if there is only room in the market for one or two distribution outlets, and those enter into exclusive contracts with the monopolist, then a potential competitor in the monopolist's market would incur a high cost in entering the market. Therefore, reducing limits to competition via competition law is especially important for small economies.

3. Defining dominance

Dominant firms are defined by their degree of market power. The question of what degree of market power defines dominance involves four key issues: what is market power, what market are we dealing with, how do we determine the degree of market power in a market, and what is the threshold degree of market power that is necessary to infer market domination. The answers to the first three questions generally do not depend on size. However, differences in economic size will influence the answer to what is the threshold degree of market power that is necessary to infer a dominant position.

In small economies, the typical market share that will signify dominance should be lower than in large economies. Accordingly, a small economy cannot afford to apply the assumption that market shares below 75 or 80% are not an indicator of dominant market power. Small economies are generally characterised by high entry barriers and scale economies, which in turn make elasticity of supply lower. When entry barriers are high, the dominant firm is less constrained in its conduct by potential entrants, because scale economies cannot support many efficient competing firms. Accordingly, small economies typically adopt lower market shares in their laws, for good reason.

4. Conduct regulation in small economies

A small economy cannot afford to leave the regulation of monopoly power to market forces alone. Therefore, conduct regulation becomes more important. A strict policy should be taken against exclusionary practices taken by monopolies. Competition law enforcement must focus on deterring the creation and maintenance of artificial entry barriers, which limit the ability of new firms to enter or expand. New entrants must have the opportunity to enter a market without handicaps other than the first-mover advantages employed by existing competitors.

Should small economies apply a different set of rules than large economies? Generally there are no reasons, based on size, to regulate the conduct of dominant firms differently in small economies. However, size does affect some rules.

Firstly, small economies might need to apply a different set of rules to achieve the goals of competition policy when discriminatory policies are involved. In oligopolistic markets, discriminatory pricing or trade terms may be part of pro-consumer market scenarios, where previously stable price structures are lowered for the benefit of the public. To forbid such moves would reduce efficiency and slow reactions to changes in market conduct. Accordingly, if oligopolistic markets are caught under the abuse of dominance provisions then scenarios in which discrimination is a means for the breakdown of oligopolistic price coordination should be allowed. Discrimination in small economies thus merits a deeper analysis of its real effect on the market.

Secondly, there is much debate as to whether predatory pricing is a viable strategy, and whether we should invest any resources in limiting it in the first place. However, small economies make a predatory strategy attractive, due to high entry barriers and a prevalence of large conglomerates that might wish to send a message that they are willing to use predatory measures to expand or maintain market power. So, again, we need to look more carefully when we analyse predatory pricing in small economies.

5. Excessive pricing regulation

Single firm dominance, whatever its origin, commonly results in high prices, which might not be accompanied by exclusionary or predatory conduct, and so are not reached by conventional conduct-based regulation. Accordingly, an important debate involves the regulation of monopoly pricing per se. The control of trade terms of a monopolist is generally not an integral part of competition law, because competition law generally operates to indirectly reduce prices by ensuring that the market's 'invisible hand' can take its course, and it generally does so by removing artificial trade barriers. Some countries prohibit excessive pricing through their competition laws, specifically through the EU's Article 82 based provisions.

Whether or not small economies should include monopoly pricing regulation in their laws is a tough question. What I would like to do is to highlight some of the considerations that should be taken into account when making such a decision. As I elaborate in more depth in my book, size does affect many of the parameters that determine the efficiency of price regulation. Firstly, Small size increases the costs to society from monopoly. . Second, the strength of the self-correcting powers of the market in a small economy is much more limited than in large economies , because new entrants face difficulties in entering the market. Large economies usually rely on the fact that market forces are strong enough to limit monopoly pricing, an assumption which cannot be easily relied upon in small economies. Third, restraining monopolists that achieved their position solely by fair competition distorts the incentives of firms to be more efficient or to create superior products in order to become or to remain a monopoly. Yet the unavoidability of dominant position in a small economy will most likely dominate and the disincentive effect may not be significant. Also, the disincentive effect can be reduced by following some guidelines as suggested in my book..

Given these different considerations, a small economy requires a more serious deliberation of proposals to regulate monopoly pricing. In any case, such regulation should be limited to markets where competition can definitely not take place, and no new entries are possible. Caution should be exercised to ensure that regulatory measures do not harm competition.

In addition, even after many years in which excessive pricing has been considered an antitrust offense in the EU, there are still no good tools for determining when a price becomes excessive. For that reason, regulation of prices should not be done through abuse of dominance prohibitions which carry an uneasy social price tag. If countries do want to engage in some form of price regulation they should also think carefully about whether the competition authorities are the right tool for that.

6. Attempted monopolisation

Most competition laws in small economies do not prohibit attempted monopolisation of the market. That is, they do not prohibit conduct that will most likely succeed in creating a dominant position, and, in the course of doing so, harms the competitive process. Rather,

they only impose limitations once a dominant firm has become so. I think the prohibition of attempted monopolisation, which exists in the US, closes the gap between the limitations imposed on the unilateral conduct of dominant firms once created, and the fact that no such limitations exist on not-yet dominant enterprises that are abusing their power in order to become dominant. I believe that adding such prohibition to the competition rules of small economies is an important tool in tackling the issue of dominance from its incipiency.

III. The View in Business

Peter Carlo Lehrell

Is this theory or is it meaningful, how far does this impact business in its attempt to make a profit?

Chris Taylor, Director of Regulatory Affairs, Cable & Wireless International

1. Preamble

I think I am the only regulated firm who has been brave enough to sit on any of the panels. I would like to give you some perspectives from the telecom industry. We operate in a large number of small economies, which puts us in a fairly unique position. Virtually everything that has been discussed over the last two days has been resonant for us.

2. Barriers to entry

One of the biggest challenges we have is that in none of our markets is it possible for us to achieve anything close to an optimum productive efficiency. The markets are too small. That has a couple of consequences for us, the consumers, and the regulators. Firstly, it increases our unit costs, and secondly, it leads to market concentration, which naturally leads us to discussion of the central theme of this event - dominance. The entry barriers to telecoms are high, not just in the markets that we serve, but in the large western European and mature economies. In small markets, counter to the general proposition, barriers to entry in telecoms are slightly lower for the simple reason that it is quicker and easier to build a small network than it is to build a large network.

3. How much competition

We are regulated by industry specific regulators, and only two of our markets have a competition authority. When faced with capital intensity and market concentration our regulators have to ask how much competition is enough, and, in some markets, whether a duopoly is enough. We operate in 13 Caribbean markets, and there are two main providers of mobile services in most of those markets, creating a regional duopoly. My experience is that the duopoly is vibrantly and aggressively competitive. In markets of that scale, my observation is that a duopoly has operated in a competitive way.

4. Cost of regulation

Over the last couple of days we have established that the principles of competition regulation are common between large and small economies. If you strip away the detail,

the basic fact is that consumers and competitors need protection from abuse of a dominant position. The key issue for small economies is the cost of that regulation and how proportionate it is, given the resources available. There we have a problem, because often there is a greater need for regulation in small markets, but the resources available are much less. We should also not forget that many small markets in the world are also the least developed nations, making them least equipped to bear the cost of regulation. Regional sharing of best practice is one solution to that, but the skills needed are in short supply.

5. Demand

Our experience is that whilst our markets are small, and there is a high level of market concentration, our consumers are very demanding, because they are looking at what other consumers get offshore. For example, customers in the Caribbean tend to want the same level of service and price points as in North America, and customers in the Channel Islands have expectations set primarily by the UK market.

Another point is the relationship between upstream and downstream markets. Most of our upstream suppliers are multinational corporations. So the main characteristic of our smallness is that they have overwhelming bargaining and negotiating strength with us. That has a tendency to raise costs in small markets.

6. Changing markets

There is no single point at which you can pinpoint a telecoms market and dominance within it, due to the dynamic nature of markets. Most telecom companies are investing in new technology, which means that the boundaries of our markets are changing. Communications is an international business and I do not think that any small market can afford to constrain its telecoms industry within its geographic boundary any longer, which leads to difficult questions over licensing and jurisdiction.

IV. The Practitioner's View

Frank Fine, Director, EC Competition Law Advocates

1. Dominance

I am going to talk about some of the dominance issues from a practitioner's view. Speaking from my own experience with developing countries' competition authorities, I think that one needs to be careful when marking market share. If you go too low you will capture conduct you do not want to go after at all, and where market power does not even exist. An approach like the one taken in Brussels or South Africa is a good solution, which allows flexibility but does not tie up your hands with cases that are a waste of resources. That would be prima facie dominance of 45 or 50%. If you are above that there could be a per se dominance, if you are below that the burden could be on the accused company to prove that they do not have market power.

2. Essential facilities

Doctrine has a role to play in small economies, and there are certainly monopolies dealing with infrastructure that are the result of privatisation, legislation that confers a monopoly

on a single company, and one can argue that it is a role of a regulator, sector or competition authority to break down that monopoly. That is especially pertinent when there are potential competitors, and it could result in better prices for consumers.

I would also urge you to consider intellectual property rights and patents as being a potential subject matter of essential facilities, especially in the developing world. South Africa pursued a well-established pharmaceutical company that was distributing AIDS drugs. The South African competition commission accused the firm of abusing its dominant position by virtue of its ownership of the relevant patents and refusing to license those patents to generic producers. Some would say that is an abuse of an IP right, but in a situation where those lifesaving drugs are not being provided, let alone at an acceptable price, the public interest might outweigh the interest of the IP owner, as in that case. In telecoms there can be instances where access to local loop can be essential for long-distance carriers to participate with the incumbent.

3. Refusal to supply

Refusal to supply is a situation that has arisen in Egypt construction arena, concerning steel supports that are used in the construction of buildings. A supplier has refused to supply many of its domestic customers in the construction business because it is exporting a lot of the product. The question is what leverage does the competition authority have to claim that such a producer is abusing its dominant position by refusing to supply its products to domestic purchasers? The Egyptian Competition Authority is presently investigating this case.

4. Modes of distribution

In developing countries modes of distribution are monopolised, which can be dealt through abuse of dominant position, or you could argue that those modes of distribution could be essential facilities that need to be opened up to other players.

Parallel imports are a way of stimulating cross-border competition, with heavy fines imposed by the EU for imposing bans on parallel imports from one member state to the other. Should that same rule be applied to non-EU enforcers? This was applied in South Africa in a case that also included vertical restraints. A car manufacturer had their Zimbabwean distributors sign up to the obligation not to export into the South African market where the cars were more expensive. That was a restraint on competition going into South Africa. This was dealt with under the South African Competition Commission as an anti-competitive vertical restraint.

5. Excessive pricing

The EC are reluctant to take on these cases, because they are a form of price regulation. However, there are cases where dominant players employ excessive pricing. The Commission is also dealing with excessive prices in the Microsoft case, where there is a continuing issue over whether Microsoft is allowing its interoperability information to be made available to competitors at a reasonable price. How does a national competition authority determine what is reasonable? One option is to benchmark against a related industry, to get an indication of where prices should be, as well as looking at whether the excessive pricing evolved from what was historically a reasonable price (with no logical explanation for the increase), or by using production costs as a basis for calculating what

should be a reasonable profit margin. There are also tests employed by US federal courts for determining what is a “reasonable” price.

Participant

I come from Lithuania. Excessive pricing is a controversial area, and I find it reasonable to say that excessive pricing is much more likely to occur in small countries. On the other hand, I find it difficult to agree with the proposal that we have to use tougher competition law measures to deal with it. The reason for that is because there are no good tools to determine the right price. If that is the case, it means the chances of getting it wrong are high, and the competition authority is only likely to add administrative costs. I would rather avoid doing anything when we do not know how to do it right.

Dara McDermott, Jersey Telecom

There is a real and significant cost associated with intervening in the market, and regulatory authorities need to be careful in terms of not blindly applying remedies seen in larger jurisdictions. What kind of assessments should they carry out to ensure the significant costs and impact on companies like Jersey telecom in a small market, are taken account of in any remedy that is under consideration?

Dirk Hamann, Allen & Overy Luxembourg

I would like your comments on the issue of the labour market and social systems in small economies. Countries might have an interest in maintaining a local industry, because the market might have a negative effect on the labour market. Sometimes a dominant company is required, for example car manufactures, to establish a market in a country to begin with.

Fod Barnes

I think there is a misunderstanding about what delivers benefits in relation to price control. There issue is not to get the price exactly right, but to get a price better than the current price, which is not as difficult.

Participant

I am interested in dominance, and would like to say that today we know that a dominant position itself is not prohibited, only abuse. You said that dominance harms economies, but my opinion is that dominance is the normal behaviour of companies, because all companies try to gain higher shares in the market and maximise profits.

Dr. Michal S. Gal

In no economy, large or small, would it be good policy to punish a firm just because it is becoming a dominant player or has monopoly power. You do not want to prohibit the creation of a dominant position per se, as it would be problematic for small economies, where large size sometimes justified on efficiency grounds. The idea is not to prohibit the act of becoming a monopolist, but to prohibit those types of conduct that are likely to succeed in creating a dominant position by abusing the firm's market power and by creating artificial entry barriers.

Since it is so problematic to determine when prices are excessive, it should not be done through the abuse of dominant position, because then a court has to decide exactly when a price becomes unfair, which is a difficult task. As was emphasized, it is not necessarily getting the price right, but getting a better one than exists without regulation. Yet in most cases I do not think that the authority is the right vehicle to engage in such price regulation as it lacks the tools to determine the "correct" price.

The enforcement of competition law might often create labour related and cultural issues. For example, in Jersey the Jersey cow serves as a national emblem. It may thus be good policy to protect that market despite the potential creation of competitive problems. Therefore, competition is only one part of the puzzle of public policy. I would add that the competition agency is generally not the right vehicle to balance competing considerations.

Chris Taylor

Regarding the cost issue raised by Jersey Telecom, the burden of regulation should be proportionate and should not be too much of a drain on a small market. We don't have time to debate the right steps to take, but the key principles are proportionality and transparency. Regarding price regulation, I would give a plea that a company has to have an opportunity to make a fair return, and must have some incentives for efficiency. That is a feature of a well-designed price regulation mechanism.

Charles Webb

Most in this room know that after the Cape Town meeting of the International Competition Network ("ICN") a Unilateral Conduct Working Group was comprised to try to develop common understandings in the area. Given the importance of unilateral conduct rules in a small economy the JCRA has been a very active member of that working group. One of the working group's first tasks was to report on the manner in which ICN members assess dominance. Part of this work, in turn, looked at the specific question of the assessment of dominance in small and/or isolated economies. To this end, we asked firstly, in assessing dominance does the sub-set of rules change because an economy is small or isolated? The overwhelming response was that it did not. However, the fact that an economy is small or isolated can have a material effect on the outcome of that assessment. The key point, however, is not whether an economy is small, but whether it is isolated.

A potential example of this can be seen in practice in my jurisdiction, Jersey. Jersey is a world class offshore financial banking sector, which takes up about half of the island's GDP. We have not had a dominance assessment in the banking sector, but we have reviewed many mergers in the area. The indications we have seen are that in many banking areas it does not make sense to define Jersey as its own relevant market because there are many other offshore banking jurisdictions offering similar services. These include Guernsey, Isle of Man, Cayman Islands, Luxembourg, and others. While this primarily concerns geographic market definition, it has direct impacts on the dominance assessment.

Compare this to Jersey's dairy industry. The Jersey cow is a purely iconic symbol of Jersey, firstly because it is small in stature, secondly, it is one of the most productive breeds of cow when it comes to milk production, and thirdly, it is an adorable animal. Another important industry in Jersey is tourism, and it is positive for tourism to have adorable cows running around the fields on your island. As a result of that there are now three pieces of legislation, first, for the past 300 years the importation of cows into Jersey

is prohibited, second, the importation of genetic material that one otherwise makes cows with is also prohibited, third, the importation of liquid milk into Jersey is so highly regulated it is, in effect, prohibited. Therefore, since World War II there has been one dairy in Jersey, which was a monopolist. Although this situation has changed recently thanks in part to our intervention, the incumbent dairy still has a dominant position. Thus, same island, different markets with drastically different approaches to the international market place, result: dramatically different outcomes in the assessment of dominance. Again, it doesn't really depend on how small your country is, just its isolation to international competition.

The second question that the ICN addressed, going to Professor Gal's point, is whether smallness affects the market indications that you use to measure dominance. The Latvian and South Africans said that high entry barriers made them more susceptible to dominance and therefore the threshold should be lower. Three large economies, Germany, Sweden and Spain, said that the size of markets should make no difference in market share assessments. Singapore said that because they are small but open to global trade, and that they wanted to avoid false positives in a jurisdiction where competition law is new, their indicative share of supply for share of dominance is high, at 60%. Thus, while I have no disagreement with Professor Gal over her theory of a lower level of market share being indicative of dominance in smaller economies (all else being equal), our survey suggests that this hasn't been uniformly accepted in practice among the ICN's members.

Excessive pricing is a resource intensive exercise for a regulator, in terms of investigation, setting the price and monitoring compliance. I am not scared of price regulation when it is appropriate, but I agree with Professor Gal, Article 82 is not the proper means to do it. If you want my organisation to price regulate, give us the sector-specific powers with which to do so. Regarding consumer perception, in Jersey we hear that a controlling influence on a dominant firm is the fact that people see prices in a neighbouring market, and they want those in their local market. I discount this point of view in a dominance assessment, because the ultimate defeat of the use of market power is the ability of consumers to vote with their feet and pocket books. If players in a joining market are seen by consumers but are unlikely to compete in your market, consumer perception is not a guarantee against the exercise of market dominance in the face of high barriers to entry.

Godfrey, Director General, Fair Competition Commission, Tanzania

I do not think that it is the case that small countries cannot adopt competition regulation. We should encourage developing countries to learn competition and adopt the best practices of competition, because that is the only way that we can have integrity of the market system, and have it accepted in the world. The topic that we are discussing today affects most developing countries and small countries. If you have predominance of firms in a small country, it becomes like taxation in that area, because the disposable income is taken up by excessive pricing. That is an area that needs more focus.

Frank Fine

South Africa's decision in the Mittal case shows that even a small economy feels comfortable applying the excessive price form of abuse. If you decide to go down the route of applying essential facilities you are going to have to deal with price at some point because an excessive "access price" may amount, effectively to a constructive refusal of access. Microsoft is still in the sights of the Commission with regards to the royalty rate

applicable to its interoperability information arguably because the Commission's 2004 decision did not include a methodology for the calculation of a reasonable royalty rate.

If you are going down the road of excessive prices, or you are going down the road of essential facilities, my advice is to establish before taking your decision how a reasonable price is to be determined. Otherwise, you could be left with a prohibition decision without an effective remedy on price. I am not suggesting I am a big fan of this doctrine (excessive pricing), because some other things need to be asked, for example, why the dominant firm is able to impose an unreasonable price and why it does not have lower priced rivals because excessive prices should provide an open door to competitors to take market share from the dominant firm. I would suggest there are reasons why it is happening in the first place: either there is a cartel and everybody is charging unreasonably, or there are entry barriers. These are the issues that really need to be addressed; but until they are, a ban on excessive pricing may be a good intermediate solution.

Peter Carlo Lehrell

Thank you to the panel, and to the audience. You will receive a feedback form, and we would welcome suggestions on what you would like us to look at if we were to hold this conference again.

Conclusions

Gabriel Bleser, Senior Associate, Allen & Overy Luxembourg

Thank you to everyone who has attended this conference. I think it has been a fruitful discussion. It is the first time that this topic has been discussed by such a wide audience. Therefore, I would like to thank in particular Philip Marsden from the Competition Law Forum for having accepted to organize this conference.

It would be impossible to summarise all of the discussions, but I would like to highlight some issues which I found particularly important.

I think that it has become clear, if it needed to be demonstrated, that you need an independent authority in a small economy.

Resources are the biggest problem for a small competition authority, and Thierry Hoscheit yesterday discussed whether it would be possible to combine competencies with the sector regulator or other regulatory bodies. I share Kirtikumar Mehta's view that the best advocacy a small authority can do is focus on cases, and then the consumer will understand the benefit of your actions. He also pointed out that sector inquiries should be used when needed, cannot be used too often due to cost.

In my view there is an argument for the existence of a national merger control, even in Luxembourg. You need to find the right balance when you design the law, and I believe that Jacques Steenbergen's ideas on this issue were very interesting.

A competition authority should refrain from engaging in excessive pricing, where it is more a question of giving the necessary resources to the regulatory authorities.

We are all quite happy that the specialized media attended this conference. Media is important for small competition authorities, and they should not be humble but foster contacts with the press.

William Kovacic gave the most important message of this conference; you need leaders and a strategy as a small authority.

A report will be drawn up summarising the discussions and recommendations of the two days, , which will be available on the website within the next month.

On behalf of the Competition Council, the Competition Inspectorate and the Chamber of Commerce, FIPRA, Shearman and Sterling and Allen & Overy Luxembourg I would like to thank you for attending.