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COMPETITION LAW AND POLICY IN SMALL STATES**

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Abstract. The paper will attempt to show that there are many factors associated with a small domestic market that have a bearing on competition law and policy, and therefore competition regime of a small state should take these factors into account. Special reference will be made to Malta, where competition legislation is modelled on EU competition law. The thrust of the arguments put forward in this paper is not that competition rules should be discarded in small states or that abuse should be tolerated. The basic contention is that exceptions, normally based on considerations such as improved efficiency, distribution, and overall consumer benefit, are more likely to be relevant in small states in certain circumstances.

1. INTRODUCTION

This paper will attempt to show that there are many factors associated with a small domestic market that have a bearing on competition law and policy, and therefore competition regimes of a small state should take these factors into account. Special reference will be made to Malta, where competition legislation is modelled on EU competition law.

The paper is organised as follows. Section 2, which follows this introduction, lists the characteristics of small states which may have a bearing on competition law and policy. Section 3 the implications for the implementation of competition law, associated with a small domestic market. Section 4 concludes the study by summarizing the main thrust of the arguments put forward in the paper.

2. CHARACTERISTICS OF SMALL STATES

2.1 The Meaning of Small State

The size of a country can be measured in terms of its population, its land area or its gross domestic product.¹ Some studies prefer to use population size as an index of country size, while others take a composite index of the three variables. There is no general acceptance as to what constitutes a small state, although a state with a population of around 1.5 million or less would generally be considered as a small one.²

So far there has not been any attempt to classify countries according to the size of their domestic market, although the issue has been discussed in a few studies (see for example Armstrong and Read, 1998; Murphy and Smith, 1999; Gal, 2002; ICN, 2009; McKoy, 2009). One possible

* This paper updates and extends an earlier version entitled "Competition Constraints in Small Jurisdictions", published in *Bank of Valletta Review* No. 30, Autumn 2004, authored by Lino Briguglio and Eugene Buttigieg.

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¹ On this question see Downes (1988) Jalan (1982) and Briguglio (1995).

² This is the population threshold adopted by the Commonwealth Secretariat as indicated at: <http://thecommonwealth.org/our-work/small-states>.

indicator could be a composite index consisting of population multiplied by real consumption expenditure, suitably standardised for international comparisons. Such an index would take account of the number of actors and the value of transactions within a given market. A cut off point would also be needed to establish whether a domestic market, in a given state, is to be considered as a small one.

2.2 Small Domestic Market

Small states are likely to have a small domestic market, which in turn limits competition possibilities, due to the ease of market dominance by firms.

In addition, a small domestic market tends to be characterised by natural monopolies in utilities, such as electricity, fixed line telephony, gas, and water, where the relatively large overhead costs, with the existing technology, do not permit more than one entity to viably supply the service.

Another characteristic of small markets relate to barriers to entry. There are natural barriers, due to the poor chances of success of setting new business in goods and services already supplied by existing firms. In addition, in a small market, bulk buying is often required to avoid excessive fragmentation of cargoes, especially in the case of raw materials, and this limits the number of players in that market. There may also be artificial barriers to entry, often imposed by governments, to make it viable for a business to invest in certain types of production of goods and services, where overhead costs are large, and hefty capital outlays are required. In many cases, entry is also limited in the provision of services where competition could be possible, but the nature of the service requires licensing.

Still another characteristic of small states is parallel behaviour between firms, which tends to be easier to conduct where family ties predominate in business. In such circumstances, the competition authorities may find it difficult to distinguish between concerted practices and independent action.³ In addition, arrangements between importers and distributors involving restrictions with the aim of minimising intra-brand competition may be easier to put in place in small states. Although this is likely to stem from self-interest, it may have beneficial impacts on the consumer since uncontrolled competition may usher in excessive fragmentation and instability. This issue will be discussed further below.

The size of the population has a direct bearing on the running and enforcement of competition law and policy. In small states, the chances of finding the necessary expertise to administer competition law and policy are smaller when compared to larger countries.⁴ Although smaller states will need a smaller number of personnel, the proportionality rule is not likely to hold, due to the problem of indivisibility (discussed further below), especially in matters associated with administration. The number of personnel and the cost of administration, per capita of population, are likely to be larger in small states when compared to larger states.

³ On this issue see Muscat (1998).

⁴ On this issue see Brown (2010). To make matters worse, many trained specialists originating from small states often emigrate to larger countries, where their specialised services are better utilised and where remuneration is more attractive.

2.3 Market Failures and Externalities

In a small domestic market, especially in the case of islands, it is more likely to find market failures, due to a number of factors, including the existence of relatively large external social and environmental effects. In such cases, market forces cannot be relied upon to ration supply and demand. In Malta, for example, business activity tends to have relatively large environmental impacts, due to the limited land available for development. This often leads to the need to limit the number of producers, permitting existing producers to continue enjoying dominance, even if the market, small as it may be, can take more suppliers.

2.4 High cost per Capita

Small states also tend to be disadvantaged due to the so-called “indivisibility” problem, which is associated with the inability to downscale overhead costs in proportion to the size of the population. This disadvantage is related to the limited ability of small states to enjoy the benefits of economies of scale. Because of this, many small states find it impossible to compete in certain those types of production that carry high overhead costs, including manufacturing.

In addition, government and its institutions, being mostly overhead costs for the whole economy, are generally very costly for small states (Brown, 2010). This limits the country’s ability to provide adequate administrative and support structures, including the regulatory institutions, to advance competition law and policy (McKoy, 2009).

2.5 Limited Natural Resource Endowments

Small country size often implies poor natural resource endowment and low inter-industry linkages, which result in a relatively high import content in relation to GDP (see Briguglio 1995). In addition, there are severe limitations on import substitution possibilities (Worrell, 1992: 9- 10).

This reality often leads to domination of the market by undertakings monopolising import channels. One also often finds in small states a strong resistance by the existing businesses against parallel imports and a strong lobby for exclusive dealing arrangements, on the grounds of rationalisation. In Malta, for example, resistance against parallel imports was one of the main problems relating to the introduction of competition legislation in Malta, and after its introduction, there were several legal complaints by firms against parallel importers.⁵

2.6 High Reliance on Export Markets

A small domestic market tends to give rise to high dependence on exports (see Briguglio, 1995) and therefore on economic conditions in the rest of the world. A high degree of reliance on

⁵ A case in point is when in Malta an exclusive distributor of Macintosh computers (Firm A) unsuccessfully complained to the Office of Fair Competition, against another firm (Firm B) that imported these computers from Sicily, the latter selling the computers at a fraction of the price previously charged by Firm A, even after adding the Sicilian wholesalers markup and the transport costs. Firm A then appealed against the decision of the office of Fair Competition in the law courts, but the decision of the Office of Fair Competition was upheld.

exports could be a pro-competition situation, since it implies an orientation towards free trade and the need for competitiveness in foreign markets. However, as already explained, small size renders the exploitation of the advantages of economies of scale difficult, mostly due to indivisibilities and limited scope for specialisation, which give rise to high per unit costs of production. It is thus often the case that a critical size is required to enable a firm to compete in the international market, and again here, the argument for rationalisation, and against fragmentation, is a strong one.

2.7 Insularity and Transport Costs

Many small states are also islands, and therefore face relatively high transport costs, which are included in the price of imported industrial supplies and finished goods. Islands, being separated by sea, are constrained to use air and sea transport only for their imports and exports. Land transport is of course out of the question, and this reduces the options available for the movement of goods.

High per unit cost of transport resulting from insularity may also give rise to additional problems such as time delays and unreliability in transport services. These create risks and uncertainties in production. Such disadvantages are more intense for islands that are archipelagic and dispersed over a wide area.

Yet another problem associated with insularity is that when transport is not frequent and/or regular, enterprises in islands find it difficult to meet sudden changes in demand, unless they keep large stocks. This, in turn, leads to additional cost of production, associated with tied up capital, rent of warehousing and wages of storekeepers.

3. IMPLICATIONS FOR COMPETITION LAW

The characteristics of small states just described have implications associated with competition law and policy, notably abuse of a dominant position, agreements, mergers and enforcement of the law.

3.1 Abuse of a Dominant Position

Generally speaking, competition legislation does not take account of economic benefits when considering abuse of a dominant position, although dominance per se is not prohibited. In competition regimes modelled on Article 102 of the Treaty on the Functioning of the European Union (TFEU) abuse arising from dominance, such as limiting production, applying dissimilar conditions, (including price discrimination to equivalent transactions), charging unfair prices and refusing to supply goods or services in order to eliminate a trading party from the relevant market, are generally prohibited, and once detected the undertakings responsible are sanctioned.

There could be situations where what may be considered as abuse of dominant position in a large market, need not be so in a small market particularly with regard to discrimination, excessive pricing and foreclosure of the market, as explained below.

It should be emphasized here that the arguments presented below with regard to abuse of a dominant position should not be interpreted as proposing a case for allowing such abuse in small states, but to explain that maximising consumer welfare may, in these states, require an economic analysis which takes into account the issue of small size.

3.1.1 Dominance and discriminatory conditions

Due to the small size of the domestic market, oligopolies are common in small states. In some cases letting dominant oligopolies indulge in discriminatory practices may be to the advantage of the consumer. As Gal (2001) argues, in oligopolistic markets, discriminatory pricing may work against rigid oligopolistic price structures and could result in lowering prices to the benefit of the consumers. She argues that to forbid discrimination could “reduce efficiency and slow reactions to changed market conductDiscrimination in small economies, thus, merits a deeper analysis of its real effects on the market.”⁶

3.1.2 Dominance and excessive pricing

Similarly, a seemingly excessive price, when compared to the price of similar products in larger countries, may be justified in a small economy, since this may be one way in which a firm could cover costs associated with importing the product, particularly in the case of islands where transport costs tend to be relatively high, or to cover the relatively high overhead expenses associated with importing small quantities or producing on a very small scale.

The issue of transport costs is very important in this regard.⁷ One implication relating to competition law and policy is that a straightforward comparison with analogous goods in nearby mainland markets may not be appropriate.

3.1.3 Dominance and foreclosure of the market

In a small state the chances of destabilization effects of new entrants into its small domestic market is relatively high, when compared to a large state. In a small domestic market, a relatively large new entrant firm may find itself controlling a large share of the market, and this may seriously destabilize same market. If this same firm decides to exit at short notice, possibly leaving many business creditors at a disadvantage, the business environment would be further destabilized to the detriment of consumers. It is to be expected, in such circumstances, that existing firms may tend to forestall new entrants, not only because they fear that they will lose their share of the small market, but also to reduce the chances of instability of the same market.

Although the destabilising effects of exit and entry into the market exist also in large economies, such effects are likely to more pronounced when the domestic market is small.

This does not mean that barriers to entry should be encouraged, but that (a) the limited number of players that can be accommodated in a small market constrains competition possibilities and (b) the high degree of instability that arises by the entry and exit of a relatively large firm in a small

⁶ On this issue see also Buttigieg (1999).

⁷ On this issue see UNCTAD (2014). http://unctad.org/meetings/en/SessionalDocuments/cimem7d8_en.pdf.

market should be given due importance when assessing consumer welfare in the context of competition law.

3.1.4 Dominance and refusal to supply

Due to the constraints of replicating infrastructural facilities, there is more scope for the application of the essential facilities doctrine in small states. In a small state, a dominant firm may try to deny entry of new competitors into the market by refusing to share facilities. Competition law generally compels a dominant firm which owns a facility essential to other competitors, generally one that involves high overhead cost, to provide reasonable use of that facility. In a small state, where infrastructural facilities are costly and difficult to replicate, refusal to grant third party access to essential facilities owned and controlled by a dominant firm should be more readily checked (Buttigieg, 1999).

Thus for example, what to a German agency would not appear to be an essential facility as it could be replicated by a potential entrant who is just as efficient as the incumbent, in a small state, where sunk costs tend to be relatively high due to the indivisibility problem, the first entrant would be able to monopolise the sector.

This means that what may not constitute refusal to grant fair access in a large country could be deemed an abuse of a dominant position in a small state.

3.2 Implications relating to Agreements

Competition legislation modelled on Article 101 of the TFEU, relating to agreements between undertakings, often permit restrictions in this regard, if the agreement contributes towards the objective of improving production or distribution of goods or services or promoting technical or economic progress.⁸ This is the case in Maltese Competition law. In other words agreements containing what may appear to be anti-competitive may be exempt if, on balance, they have an overall positive impact on the consumers.

It may be argued that in a small state collaborative arrangements (horizontal as well as vertical ones) may have positive effects on the consumers, due to the advantages of business consolidation, given the very high incidence of micro-enterprise in such states.

For example, within the EU, the Commission recognises that joint purchasing arrangements can often be pro-competitive because they allow smaller rivals to achieve similar purchasing economies to larger competitors, which can lead to enhanced competition, for example, in the form of lower prices and/or better quality products or services.⁹ In general, there are two main benefits that may be considered in permitting certain types of agreements between undertakings namely (a) substantial efficiency gains (e.g. through economies of scale and scope) that are

⁸ This is subject to the so-called 'pass-on requirement,' meaning that consumers should ultimately get a fair share of the benefits, that the restrictions to competition are indispensable to achieve the benefits and that competition is not substantially curtailed as a result of the agreement. See European Commission (2010).

⁹ See Ashurt LLP (2014) for a discussion on possible co-operation agreements between competitors under Competition Law.

passed on to the consumer, and (b) intensification of supply competition through a better bargaining position of the firms forming the agreement.

Again here, this argument should not be construed as one that unrestricted collusion in small states should be allowed, but that there are special circumstances, which prevail in small states, where the pass-on benefits are substantial.

3.3 Implications relating to State Aid

As is well known, in general state aid is considered as a competition distortion.¹⁰ However the EU makes several exceptions to this principle. Competition regimes based on EU General Block Exemption Regulation (GBER), permit public bodies in Europe to grant state aid for a broad range of activities for relatively high outlays without these being subject to prior European Commission scrutiny, in areas of research, development and innovation (RDI), regional urban development funds, culture and heritage conservation and infrastructures for broadband, energy and sports and recreational projects. The GBER covers various categories of aid measures, including Regional aid, Aid for SMEs, Aid for environmental protection, aid research & development and innovation, aid for disadvantaged workers and for workers with disabilities, social aid for transport for residents of remote regions [the outermost regions plus Cyprus and Malta), Aid for sport and multifunctional recreational infrastructure. Generally speaking such aid must have an incentive effect and not be granted after a project starts.

In the case of small states, especially insular ones, the case of support of these types may be stronger than in larger territories, given the high degree of market failure in small economies and the social dimension of transport in the small states that are also islands. There may therefore be a case for considering state aid as permitting some form of level playing field in cases where the small size and insularity have an important bearing on the cost of production.

3.4 Mergers and Efficiency

In the case of mergers, Malta's Regulations on Control of Concentrations state that: "Concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration shall not be prohibited if the undertakings concerned prove that such efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services."¹¹

In the *Guidelines on Efficiencies*, that accompanied Malta's Regulations on Control of Concentrations, it is stated that the type of efficiencies that are more likely to be cognizable and substantial than others, are efficiencies resulting from shifting production among facilities formerly owned separately, which enable the undertakings concerned to reduce the marginal cost of production as these are more likely to be susceptible to verification, concentration-specific, and substantial, and are less likely to result from anti-competitive reductions in output. Such

¹⁰ See http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf

¹¹ Subsidiary Legislation 379.08, Reg 4(4).

justifications to anti-competitive behaviour are found in competition regimes in certain countries, such as the US, Canada and Australia, where the efficiencies defence is expressly mentioned in the law.

According to ICN (2009:31) many members of the International Competition Network: “... made it clear that the size of the economy may ultimately affect the economic realities surrounding the merger and, in turn, the final outcome of the analysis. Numerous contributors point out that the size of the economy may also shape procedural elements of the merger control regime, such as the statutory thresholds which trigger a duty by the parties to a proposed merger to submit a pre-merger notification filing to be reviewed by the competition authority.”

One factor that should be considered when discussing mergers in small states relates to the notification thresholds, in that the turnover upper limit which applies to merging undertakings when they notify their merger. It makes sense that such a threshold is determined in relation to the size of the economy, as otherwise if set too high, all mergers will not need notification.¹²

Another issue relating to mergers in a small economy is efficiency consideration. In a small economy, where market dominance and natural barriers to entry are common, and sometimes cannot be easily dismantled, efficiency clauses are likely to have more significance than in larger countries. In such cases, merger control that does not sufficiently acknowledge efficiencies may actually impede restructuring of firms, in their attempt to attain a “critical mass”.

A third important issue in this regard relates to the benefits of networks. Such benefits acquire greater relevance in the case of sectors relating to communications and information technology. In such sectors, concentration could enhance consumer welfare, as otherwise consumers would lose the benefit that a more extensive network could generate in such sectors, including wider choice of complementary products and enhanced quality and service that this brings about. For example, in mobile telecommunications, as more users join a particular mobile network, that network becomes more valuable to those users as they can contact more people, in more locations, at lower cost as the network expands. In the transport sector, more integrated transport services can lead to network benefits that would improve service quality through strengthened hubs, better through-ticketing arrangements, more extensive services, more comprehensive and coherent information or better co-ordination of connecting services.

The relevance of all this to small states is that the positive impact on the economy arising from mergers are likely to be more pronounced than in larger states, due to the fact that in a small market it may be desirable to avoid excessive fragmentation and encourage consolidation.

4. Implications Relating to the Culture of Competition

In small states, the culture of competition may not easily take root due to the fear that intense competition may destabilise a small fragile and thin market. Another reason is that, as already noted, government involvement in such states tends to loom large over the market, and public

¹² See CMS (2014) for a description of merger control regulations of 44 jurisdictions including those in the following small states: Cyprus, Estonia, Iceland, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Montenegro, and Slovenia.

undertakings often clamour for exclusion from competition law provisions claiming that they have a social role to play. In addition, the advantages of business consolidation and the disadvantages associated with business fragmentation often lead authorities of small states to justify monopolistic and oligopolistic structures.

Furthermore even where, in small states, competition legislation is in place, its enforcement may be more difficult than in larger countries due to the fact that everybody knows each other, and social and inter-family links predominate. Thus, in small states, methods other than enforcement may sometimes bring better results as far as implementing competition policy is concerned. Competition advocacy among citizens, to render them aware of the benefits of competition policy are of relevance in this regard.

An OECD report on the role of the competition agency states that such an agency "... must assume the role of competition advocate, acting proactively to bring about government policies that lower barriers to entry, promote deregulation and trade liberalization, and otherwise minimize unnecessary government intervention in the marketplace." According to UNCTAD (2013) advocacy interventions are likely to be more effectively undertaken by the competition agency, if that agency has a stakeholder strategy, identifying the different methods and tools to be used for interaction with the different stakeholders. Advocacy requires reaching the stakeholders, central and local government bodies, business representatives, consumer organizations, trade unions, professional bodies, the media, and educational establishments. In small states reaching these stakeholders may be easier to do than in larger states.

The issue of enforcement vs advocacy is a very important consideration for small states. It is not being suggested here that advocacy and enforcement contradict each other or are mutually exclusive, as in many ways they are interdependent, as argued in Clark (2004), principally because advocacy can favourably affect enforcement by fostering a competition culture, based on awareness that abuses of dominance and collusion are undesirable. Difficult as it may be in small state enforcement will remain important as there are always vested interests that gain from weak legal control. The argument proposed here is that advocacy, aimed principally to foster a competition culture, is of major benefit to small states as this itself encourages compliance.

5. CONCLUSION

This paper has highlighted a number of areas which are associated with small states and which are likely to have a bearing on competition law and policy. The main argument put forward in the paper is not that competition rules should be discarded, or that abuse should be tolerated in small states.

The basic contention is that exceptions, normally based on considerations such as improved efficiency, distribution, and overall consumer benefit, are more likely to be relevant in small states in certain circumstances.

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