COMPETITION POLICY IN SMALL JURISDICTIONS

Abstract. This paper argues that in small jurisdictions, the formulation and implementation of competition policies should take account of the special characteristics associated with small domestic markets. Special reference is made to Malta, where competition legislation is modelled on EC law. The thrust of the argument is that while the main principles of competition law that have evolved in larger economies are relevant also to smaller economies, the mode and intensity of application may have to be different in order to take into account the particular characteristics of small insular markets. The right balance should be struck between competition and the need for productive and dynamic efficiency in numerous industries in small market economies where high levels of minimum efficient scales of operation (MES) are needed.

1. INTRODUCTION

This paper argues that in small jurisdictions, the formulation and implementation of competition policies should take account of the special characteristics associated with small domestic markets Special reference will be made to Malta, a small island state, with a very small domestic market, with a competition legislation modelled on the law of larger European states and to a lesser extent of the United States.

The paper will attempt to show that there are many factors associated with small domestic markets that have a bearing on competition law and policy. The thrust of the argument is that while the main principles of competition law that have evolved in larger economies are relevant also to smaller economies, the mode and intensity of application may have to be different in order to take into account the particular characteristics of small insular markets. The paper is organised as follows. Section 2 which follows this introduction, lists the characteristics that distinguish small economies from larger ones, while section 3 discusses the factors that may require a more nuanced application of competition law principles in small jurisdictions. Section 4 concludes the study by proposing ways in which the national competition and regulatory authorities in such jurisdictions may apply competition law principles in order to better address competition concerns in these jurisdictions.

2. CHARACTERISTICS OF SMALL JURISDICTIONS

The term "small jurisdiction" is often used when discussing small geographical entities. This term includes small independent states as well as parts of larger states with a degree of administrative autonomy, and island provinces or regions with an isolated geographical market. In this paper, small states and small jurisdictions are used interchangeably.

2.1 The Meaning of Small Size

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

So far there has not been any attempt to classify jurisdictions 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; and Gal, 2001a; 2002). One possible 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 jurisdiction, is to be considered as a small one.

2.2 Small Domestic Markets

Small jurisdictions are likely to have a small domestic market, which in turn limits competition possibilities, due to the ease of market dominance by firms. For this reason, small markets tend to be characterised by monopolies and oligopolies. In addition, in such markets utilities such as electricity, fixed line telephony, gas and water, are provided by so called natural monopolies, due to the relatively large overhead costs which 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.

In addition, arrangements between importers and distributors may be easier to put in place and to justify in small jurisdictions. These often result in market entry restrictions and lead, amongst other things, to limitations in intra-brand competition. Although this is likely to stem from self-interest, it is often proposed as an argument against uncontrolled competition which leads to excessive fragmentation and instability. This issue will be discussed further below.

Yet another characteristic of small jurisdictions is parallel behaviour between firms, due to the fact that family ties in business are common. In such circumstances, the competition authorities may find it difficult to distinguish between concerted practices and independent action.[1]

[1] See also Muscat (1998).

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. 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 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 1993). In addition, there are severe limitations on import substitution possibilities (Worrell, 1992: 910).

This reality often leads to domination of the market by undertakings monopolising import channels. One also finds in small jurisdictions a strong resistance by the existing businesses against parallel imports and a strong lobby for exclusive dealing arrangements, on the grounds of rationalisation. The Director for Fair Competition in Malta has been reported as saying that resistance against parallel imports was one of the main problems relating to competition in Malta.[2]

2.5 High Reliance on Export Markets

A small domestic market gives rise to a relatively high dependence on exports (see Briguglio, 1993) and therefore on economic conditions in the rest of the world. The high degree of export orientation is essentially a pro-competition situation, since success in export performance requires competitiveness. 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, tends to be a strong one.

2.6 State Aid

As is well known, state aid is often considered as a distortion to competition[3] but in small jurisdictions, especially insular ones, the case for providing state aid may be stronger than in larger territories, given the high degree of economic openness of such states and the need to be internationally price competitive. For this reason, state aid may be considered as justified in order

[2] On this question see also Gatt (1996).
[3] The EU makes several exceptions to this principle and it has drawn up a number of guidelines on the extent to which these exceptions may be used, including aid granted for the purposes of restructuring and for rescuing companies which risk bankruptcy, aid for research and development, aid granted to promote Small and Medium-Sized Enterprises (SMEs), aid to promote employment, aid for training, aid to assist deprived urban areas and aid granted to promote the environment. The EU also allows aid which is granted to promote economic development in disadvantaged regions to support investment projects and in certain cases to compensate for transport disadvantages.

to permit some form of level playing field across countries, in cases where small size and insularity have an important bearing on the cost of production.

2.7 Insularity and Transport Costs

Many small states and small jurisdictions are also islands, and therefore face additional transport costs, which are included in the price of imported industrial supplies and finished goods. Islands, being separated by sea, are constrained to use only air and sea transport 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. Apart from high per unit cost of transport, 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.

An additional problem 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 implies additional cost of production, associated with tied up capital, rent of warehousing and wages of storekeepers.

2.8 Small Population Pool and Administrative Constraints

The size of the population has a bearing on competition law and policy. In small jurisdictions, where the population pool is small, the chances of finding the necessary expertise to administer competition law and policy are smaller.[4] Although smaller jurisdictions will need a smaller number of personnel, the proportionality rule does not hold, due to the problem of indivisibility, especially in matters associated with administration. As a matter of fact, the number of public administration personnel per capita of population, are likely to be larger in small jurisdictions when compared to larger jurisdictions. As a result many government functions tend to be very expensive per capita when the population is small, due to the fact that certain expenses are not divisible in proportion to the number of users.

3. IMPLICATIONS FOR COMPETITION LAW

The characteristics of small jurisdictions described in the preceding section have implications relating to competition law and policy, notably with regard to 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[5] when

[4] To make matters worse, many trained specialists originating from small jurisdictions often emigrate to larger countries, where their specialised services are better utilised and where remuneration is more attractive.

[5] In other words, economic benefits are not traded off against the adverse effects of dominance as they are under Art 81 EC Treaty type of provisions—this lack of consideration to offsetting economic benefits could, in some cases, be detrimental to consumer welfare and consumer interests.

considering abuse of a dominant position, although dominance per se is not normally prohibited. In competition regimes modelled on Article 82 of the EC treaty, abuse arising from dominance, such as limiting production, applying dissimilar conditions, (including price discrimination to equivalent transactions), charging excessive 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 will be sanctioned.

Interestingly, however, in its *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, the European Commission is now acknowledging that there might be room for an efficiency defence even under Article 82.

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. Conversely, in some instances what may constitute abuse in a small market need not be so in a large market, as may be the case with refusal to supply.

Moreover, even in relation to the notion of dominance, a National Competition Authority (NCA) must be wary of following blindly rules of thumb that have evolved in larger jurisdictions as in small economies lower market shares may indicate a higher degree of market power because there is a higher degree of inelasticity of supply (see Gal, 2006: 24).

Discriminatory conditions.

In some cases letting dominant oligopolies indulge in discriminatory practices may be to the advantage of the consumer. As Gal (2001a) 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.

Gal is also of the opinion that discounts are generally to be encouraged. She argues that:

> "To forbid them would often reduce efficiency and slow reactions to changed market conduct ... Discrimination in small economies, thus, merits a deeper analysis of its real effects on the market."[6]

Excessive pricing

Similarly, a seemingly excessive price, when compared to the price of similar products in larger countries, may be justified in a small jurisdiction, 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. One implication on competition is that a straightforward comparison with analogous goods in nearby mainland markets may not be appropriate.

[6] On this issue see also Buttigieg (1999).

Foreclosure of the market

In small jurisdictions, where the number of players must necessarily be small, existing firms may tend to forestall new entrants, fearing that they will lose their share of the market. This is of course also true in the case of large jurisdictions, but the effect of new entrants on existing firms is likely to be more pronounced when the domestic market is small.

In the case of small domestic markets, the new entrants may find themselves suddenly controlling a large share of the market, as was the case with a supermarket chain in Malta. The sudden exit of this supermarket chain from the market left many business creditors at a disadvantage, and excessively destabilised the market, to the detriment of consumers. Such destabilising effects of exit and entry into the market are likely to be more pronounced in small domestic markets than in larger ones.

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

This is also noted by Ovum and and Indepen (2005) who opine that in a microstate the number of mobile telephony licences must be limited to a number that strikes the right balance between maximising competition and maximising productive efficiency. They observe that such small markets limit the prospects for competitive entry at efficient access prices and they stress that in microstates, more than in macrostates, it is imperative that inefficient entry is discouraged as this is more damaging to the market than in large states.

A microstate incumbent's ability to meet its universal service obligation and to invest in new technologies is more vulnerable to inefficient entry than that of a macrostate incumbent. Small market conditions increase the importance of ensuring that microstate incumbents have the necessary investment incentives to build a nationwide next generation network. The report notes that it is especially important to build economy of scale effects into regulated access prices in microstates.

While it is important that the incumbent firm or firms face competition, or at least the threat of competition, encouraging inefficient entry generates significantly greater social costs in microstates than in larger states with larger markets.

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 jurisdictions. This of course leads to the argument that refusal to grant third party access to essential facilities owned and controlled by a dominant firm should be more readily and rigorously checked in small markets (Buttigieg, 1999).

Thus, for example, what to a US 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 jurisdiction the first entrant would be able to monopolise the sector where there is heavy sunk costs. This would of course be an argument for considering as anti-competitive a refusal to grant access or to grant access on equal terms that in a larger jurisdiction would not be deemed an abuse of a dominant position.

Overall remark with regard to dominant positions

These arguments relating to abuse of a dominant position should not be interpreted as proposing a case for allowing such abuse in small jurisdictions, but to explain that maximising consumer welfare may, in these jurisdictions, require an economic analysis which takes into account the issue of smallness and insularity.

3.2 Agreements

In the case of certain agreements, restrictions are often legally permitted, if the agreement between undertakings contributes towards the objective of improving production or distribution of goods or services or promoting technical or economic progress.[7] This is the case in Maltese law. In other words, agreements containing anti-competitive clauses may escape the prohibition if, on balance, the economic efficiencies they generate outweigh the negative effects.

In the case of Malta, various vertical agreements including certain exclusive distribution agreements, exclusive purchasing agreements, selective distribution agreements and franchise agreements and some horizontal agreements are allowed and exempted in block, on such grounds. Exemption regulations were adopted on Vertical Agreements and Concerted Practices (Legal Notice 271 of 2001), Research and Development Agreements (Legal Notice. 177 of 2002), Specialisation Agreements (Legal Notice 178 of 2002) and Technology Transfer Agreements (Legal Notice 176 of 2002).

It may be argued that in small jurisdictions collaborative arrangements (horizontal as well as vertical ones) may have positive effects for business and ultimately for consumers, for acting on their own, the local operators that are typically micro enterprises, are likely to face strong often insurmountable constraints in competing with larger foreign enterprises based in larger jurisdictions. Such arrangements would enable them to rationalize cost and boost research and development and specialization efforts. Consequently, it could be argued that a wider spectrum of agreements should be covered by block exemption in small jurisdictions, to encourage efficiency generating collaboration.

Up to 2004, Malta's Competition Act, as the competition statutes of several other jurisdictions, required undertakings concluding efficiency generating agreements that were not covered by block exemptions to notify such agreements to the national competition authority for individual exemption. Although such notifications systems do not prevent the agreement from being

[7] 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.

implemented immediately, they create uncertainty for the notifying parties as the exemption might take months to be granted and would be granted for a short period of time and might even be subject to conditions. It could be argued that a system based on self assessment in lieu of notification as is now the case in Malta is more appropriate for small market economies where delaying efficiency generating collaboration might damage the viability of operators trying to meet competition from larger foreign competitors.

3.3 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." [8]

In the Guidelines on Efficiencies, which accompany 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 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. On the other hand, under EC Merger law it is only in the recently adopted new Merger Regulation that the efficiencies defence was finally recognised while it is still not expressly recognised under the law of several Member States.[9]

However, in a small country, where market dominance and natural barriers to entry are common, and sometimes cannot be easily dismantled, efficiency claims are likely to have more significance. 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". As Gal (2006:13) observes:

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[8] Legal Notice 294 of 2002 Reg 4(4).

[9] Council Regulation 139/2004 [2004] OJ,L24/22 Recital 29. It was sometimes argued that in assessing the legality of a concentration under the previous Merger Regulation, the European Commission did implicitly consider efficiencies as part of the dominance appraisal test. However, now, in the guidelines on the assessment of horizontal mergers published in February 2004 accompanying the new Council Regulation that replaced the previous Merger Regulation as from 1st May 2004, the Commission the Commission explicitly acknowledges that consideration of efficiency claims forms part of its assessment. It should be noted in this regard that in the US an anti-competitive merger would rarely be saved by the magnitude of efficiencies it generates because most are neither verifiable nor large enough to offset negative deadweight loss. Moreover the so called "pass on requirement", i.e. that efficiencies must be passed on to consumers means that perceived cost savings must be quite high and that makes it difficult for the defence to succeed (see Buttigieg, 2003).

> "An overly aggressive or rigid stance toward mergers may prevent desirable efficiency-enhancing mergers from taking place. A small economy should, instead adopt a merger policy that is more accommodating to efficiency defences, and that relies less on rigid structural variables".

Another argument in this regard relates to network benefits. Such benefits acquire greater relevance in the so-called "new economy" sector. In such sectors, concentration could enhance consumer welfare, as otherwise consumers would lose the benefit that a more extensive network generates 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 jurisdictions 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.

Indeed it has been observed that even if the merger law of a small jurisdiction is modelled on the US regime with its 'substantial lessening of competition' test[10] as is the case with Malta's concentration regulations, it would be wrong for the state's competition authorities to simply follow the thresholds followed in the US for market concentration purposes as a merger increasing concentration might be of concern in the US but not in the small jurisdiction where that degree of concentration might actually be necessary to help the incumbent firms to achieve efficient scales. So in view of the higher level of MES required in such economies, small jurisdictions might have to adopt much higher concentration thresholds than those adopted in the US (see Gal, 2006:24).[11]

Mergers also raise extraterritorial issues that in small economies are harder to resolve. Mergers between foreign firms that export to the small market might affect negatively the market but the merger law of that state might be powerless to control or block such mergers. Even if the law might ostensibly claim extraterritorial jurisdiction, in practice this is hard to exert. Indeed, this is true also of collusive or unilateral anticompetitive behaviour by foreign operators exporting to the small market. Neither the law nor domestic market forces can effectively regulate foreign operators.

In merger cases if the merger has an effect in all the jurisdictions where the merging firms operate then control by the larger jurisdictions involved will remedy the situation. However, if the merger has different effects in these jurisdictions there is a danger that the respective NCAs might reach

[10] Gal (2006:14) notes that this behavioural lessening of competition test is actually more suited to small economies than the structural dominance test that was adopted under the old European Community Merger Regulation because it focuses on the effect that a concentration has on competition and in particular because 'the dominance test might not prevent coordinated interaction of firms as a method of exercising market power, which is a major concern in small economies'.

[11] In Malta neither the concentration regulations nor the accompanying guidelines set any thresholds, presumptions or safe harbours. It would be difficult to do so as scale economies differ from industry to industry.

conflicting decisions or they might seek to safeguard divergent interests. Particularly problematic for a small jurisdiction would be the case where the merger has positive or neutral welfare effects on the home jurisdiction but negative welfare effects in the export markets including one that happens to be a small economy. This might arise because in the foreign markets unlike the home market the merging firms face weak competition and so with that merger the merged entity would obtain massive market power. Also damaging for the small jurisdiction would be the opposite scenario where the merger has a negative effect in the home market but positive effects in foreign markets (i.e. it generates efficiencies) so that the home jurisdiction blocks it while the foreign jurisdiction allows it as it is welfare enhancing.

Most jurisdictions apply a system of merger control that subjects even mergers that take place outside their jurisdiction to control if certain thresholds denoting presence in the local market are reached. This is the case also under Maltese law. However, as Gal (2006: 26) observes 'the main problem is that small economies can rarely make a credible threat to prohibit a merger of foreign firms'. If the NCA imposes restrictions that the merged entity does not like it may simply exit that jurisdiction which would be a minor market as far as it is concerned and the effect of this would be more harmful to that jurisdiction than allowing the merger. Moreover, in any case the small jurisdiction may lack the resources and relevant information to block the merger or impose conditions on the merger. Thus, ultimately, in practice a small jurisdiction can't really exercise effective control in respect of several of its operators that would be foreign based. Maybe the solution for the NCA in a small jurisdiction would be to enter into enforcement cooperation agreements with NCAs in jurisdictions where the market's main foreign operators are established or, as Gal (2006:27) suggests, to simply take these changes in the market structure as given and contain the damage by regulating their actions and their structures in the local market through the tools that it has. So for instance the NCA could approve the merger imposing conditions relating only to its own market such as divestiture or conduct concessions relative only to the local market.

3.4 Enforcement

For national competition and regulatory authorities in small jurisdictions the task of ensuring a competitive environment and enforcing competition norms is harder than it is for their counterparts in larger jurisdictions, particularly for two reasons.

Firstly any misconceived intervention, wrongly striking down efficiency generating collaboration or conduct or blocking beneficial mergers, is likely to have a more pronounced and prolonged negative effect on the market than in larger economies. The main reason for this is that in small economies local operators in certain segments of the economy are particularly vulnerable to competition from foreign operators enjoying economies of scale and lower levels of MES and so they need such collaboration or external growth to be able to achieve more productive and dynamic efficiencies or the required minimum efficient scales of operation to survive.

On the other hand, the authority's failure (or delay) to intervene to prevent market foreclosure or to curb exclusionary practices against equally or more efficient operators is likely to heighten the industrial concentration in the market that in most sectors of small market economies would likely be already very high and this might have a prolonged effect as this failed or delayed intervention dissuades potentially efficient entrants from attempting to penetrate the market and adds to the

already high entry barriers existent in these sectors; likewise the authority's failure to stop concentrations that create or strengthen monopolistic or oligopolistic positions in small market economies might further exacerbate the lack of competition in these markets. In larger economies, market forces are more likely to play a corrective role in the short term to neutralize the effects of bad decisions. As Gal notes (2006:7):

> "Given that the market's invisible hand has a much weaker self-correcting tendency, the costs of improper design and application of competition laws might be greater in both the short and the long run."

Secondly, since, as has been shown, concepts and doctrines developed in larger economies to address competition problems might not necessarily provide an appropriate answer to competition problems in small market economies, National Competition Authorities and national regulatory authorities (NRAs) in such jurisdictions may not rely on *per se* rules, presumptions or rules of thumb followed in other larger jurisdictions but must consider the merits of each case in the light of the peculiarities dictated by the smallness and insularity of the market, taking due account of efficiency claims. As Gal (2001b:56) observes 'small size affects the accuracy of many of the rules of thumb and indicators of market dominance and anti competitive conduct used in large economies'.

Moreover, even in prescribing the remedies to address competition concerns, competition authorities in small economies have a great responsibility to show restraint and proper consideration as a remedy that does not adequately take into account the effect that it might have on the market could lead to disastrous effects. In very concentrated markets with high barriers to entry they must be wary of remedies that might place an incumbent in such a disadvantageous position that it is forced to exit the market.

Such an assessment requires particular acumen and expertise in economics as authorities may not rely blindly on the established case law and decisional practice of larger jurisdictions such as the EU and US even if the legislation is modelled on the law of these jurisdictions. This aggravates the human resources problem indicated above. As noted by Evans and Hughes (2003:25):

> "[T]he complexity of the dynamic efficiency issues and the need to consider the avenue of efficiency defences – rule of reason – suggest a resource intensive regulatory authority."

This also creates legal uncertainty for operators, until a solid body of case law emerges that applies competition principles in a way that is sensitive to the local small market economic realities.

Implications Relating to the Culture of Competition

In small jurisdictions, 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 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 jurisdictions to justify monopolistic and oligopolistic structures.

Furthermore even where, in small jurisdictions, 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 jurisdictions, 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.

5. CONCLUSION

The foregoing discussion suggests that NCAs and NRAs in small jurisdictions have to deal more frequently than their counterparts in larger economies with various factors that have a bearing on competition law and policy, including natural monopolies and concentrated markets with natural entry barriers and first-mover advantages. While acknowledging the inevitability of their existence and the problems of minimum efficient scales (MES) inherent in such markets, they should be especially vigilant to ensure that artificial barriers to entry are not created or maintained as these keep out productive and dynamic efficiencies. In addition, NCAs and NRAs of small economies should ensure the contestability of markets.

Acknowledging efficiency claims and properly weighing them against perceived anti-competitive effects in all aspects of competition oversight is essential in small market economies. Collaborative or unilateral action or consolidation through external growth might be crucial for operators in small economies to reach the minimum efficient scale of operation and thereby operate efficiently and optimally for the benefit of consumers.

In such economies any communication between competing firms is likely to involve a significant share of the market and appear widespread because of the small number of firms in highly concentrated industries but, as stated above, account should be taken of the positive dynamic efficiencies that joint ventures between competing firms might generate and the negative impact that an overly rigid approach by NCAs to such collaboration might have on such efficiencies.

It has been noted (Ovum and Indepen, 2005) that, particularly in certain segments of the microstate's economy where the product can only be produced and purchased locally such as the telecommunications sector especially in relation to local network access services, the NCA and NRA, in enforcing competition law, are required to strike the right balance between the need to maximize competition and the need to maximize productive efficiency. Ovum and Indepen (2005: 3) state that:

> "Problems of small scale are not confined to the telecommunications industry. Research by the OECD and Dr Michal Gal suggests that small scale requires a different approach to the application of competition policy in general. In particular there is a need in many industries to balance productive efficiency against the level of competition. Often this problem can be dealt with through international trade. But in the case of telecommunications the need to produce telecommunications locally limits the effectiveness of this remedy."

It has been observed that the geographical market for innovation which together with investment is the key element of dynamic efficiency is by assumption international and that the small size of the market is not likely to serve as a disadvantage as innovation can be transported very easily internationally (Evans and Hughes, 2003:13). However, it is essential for NCAs in small states that in applying competition law they do not interfere too much with intellectual property rights and they should strive to strike the right balance as strong IPR protection is important to encourage innovation.

Consequently, even if the competition law of a small jurisdiction is identical to that of a larger one, these considerations require a different implementation, one that is tailored to the specific exigencies of a small isolated market (Evans and Hughes, 2003:25-26). Thus the challenge facing NCAs in small jurisdictions is how to adapt the doctrines established in a large market to a smaller market. The key should be a proper recognition of the importance of the realization of scale economies in a small market to increase productive and dynamic efficiency while balancing this with the need for competitiveness.

The main argument put forward in the paper is not that competition rules should not be adopted in small jurisdictions or that abuse should be tolerated but rather that competition policy in small market economies should be sensitive to the constraints facing operators in such markets and if and where necessary even trade off competition for improved efficiency. A major implication of all this is that it may be appropriate for competition concepts and remedies to be tailored to suit market realities in the case of small jurisdictions.

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