Swiss Competition Commission
Israel's Antitrust Authority

SURVEY ON COMPETITION LAW IN SMALL ECONOMIES

Special Project for the 2009 ICN Annual Conference

1. Analytical Framework

The application of competition law in a small economy brings into play the notion of the State ("law") and the notion of a social fact ("economy"). While the economy is given and constitutes a fact of life, the State which has the power to adopt the legal system governing the functioning of its economy, is created by law and defined by boundaries which may not coincide with the "size" of the economy. The "effects doctrine" translates the mutual international understanding that each State has the right to organize its market and to protect it, if it chooses to do so, against anticompetitive behaviour that affects it, independently of the place where this behaviour originates, and independently of the fact that a small economy may more often be exposed to anticompetitive behaviour which originates in another State.

These observations give rise to the general question which can be formulated as follows:

Does the size of the economy affect the application of competition law, and if so how?

The question raises at the outset the problem of the definition of the size of a (small) economy. It then can and must be restated in more concrete terms, depending on the context in which the question comes up.

2. The Notion of a "Small Economy"

For the purpose of this Survey, an "economy" in the context of competition law refers to a distinct legal jurisdiction, defined by borders and governed by legal institutions empowered to enact and enforce a competition law regime.

The "smallness" of such an economy depends on the framework in which we operate the comparison. Possible criteria to be used include, *inter alia*, the following:

- Size of the economy, in terms of GDP;
- Size of the territory, in which the economy "takes place" and its geographic location;
- Population in absolute terms, or population compared to the neighbouring economies;
- Legal, cultural, social and historical differences compared to the neighbouring economies;
- Comparative importance or size of the undertakings, or of the number of global players which have their seat in the territory of a small economy, etc.
- Degree of regional economic integration, including entry barriers, dependence on international trade, economic ties with neighbouring countries.

Analysis of the above abstract criteria brings us to the following questions, most notably:

- Are the abovementioned criteria adequate in your view?
- How do you define your economy ("large" or "small")? By which standards? How do you define the size of your neighbouring economies or major trading partners?

3. Anticompetitive Agreements

Anticompetitive agreements are the best analysed and least controversial part of competition law. There will probably be fewer differences in the application of competition law in this respect. But the fact that people and operators know more about each other in smaller economies than in larger ones may make a difference. To this end the role on information, information sharing and networking mechanisms may play a significant role in facilitating collusion. The limitation of the relevant market by state borders may make another difference.

- How, if at all, should such elements be taken into account? What is the importance of open borders in this context? Is there evidence for more oligopolies in small economies? If so, what type of competition policy is best suited to cope with the implications that oligopolies have on competition? Could the enhanced risk of collusion and anti-competitive conduct justify harsher sanctions or a different focus of the competition laws?

- Vertical restraints are often linked to imports in small economies Does this require or justify a different analysis of vertical restraints, especially of resale price maintenance and of parallel import bans, in small economies? Moreover, could the fact that the risk of foreclosure is higher justify a different analysis?

4. Abuse of Dominance

It is likely that the number of large firms and their respective weight affect small economies more than large economies. State monopolies might also be more common in small economies than in large ones. Economies of scale may call for these sizes and at the same time limit the number of viable companies within the territory of such a small economy.

Since small economies may not be able to accommodate too many competitors in each industry, more emphasis might be put on efficiency considerations.

- Does this mean that a specific regime should apply to the conduct of dominant undertakings in a small economy? Or does this make no difference? Is there a different approach towards collective dominance issues?

5. Mergers

Competition law enforcers in small and large economies alike, aim at maintaining an effective and efficient merger control regime. To this end, the size of the economy as well as other specific market conditions might affect the optimal design of a merger policy. Subsequently, merger regimes in small economies might exhibit certain features that reflect their specific market conditions and address potential competitive concerns which are relevant to the size of their economy.

This fact may matter with respect to factors concerning the substantive appraisal of the merger, such as the role of imports as a competitive constraint, as well as of the procedural aspects of the merger, such as the appropriate notification duties and thresholds. This may lead to the following questions:

- Are there any differences with respect to the substance of the merger control regime? Are there different justifications for having a merger control regime in small economies? Should there be different guidelines for geographic market definition? How might the size of the economy affect the application of legal presumptions? Which types of remedies are best suited for small economies?

- On the level of the procedural regime, what are the appropriate criteria triggering an intervention or an inquiry into a merger project: turnover thresholds; structural criteria, such as the degree of organisational integration (existence of branches or subsidiaries) of one or both of the merging companies; effect on competition? Should there be a mandatory or a voluntary notification regime, with or without a prohibition to proceed without clearance?