

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.

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.

The application of competition law does not depend on the relative size of the economy. The analysis of the anticompetitive behaviour is done over a specific relevant market in which, if an anticompetitive conduct is executed by an agent, it will most probably be affected completely. The described situation will affect the whole reference market.

The application of the antitrust law depends on the analysis of significance of the conducts done by the agency, the result of this analysis concludes if a conduct could be pursued by the authority. We must mention that the concept of significance is related to the impact that a conduct has on the economy.

The substantial principles of the competition law are maintained without variables, independently of the type of economy and the way it develops.

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 al/a, 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 brings us to the following questions, most notably:

- *Are the abovementioned criteria adequate in your view?*

We consider the criteria above suitable. The only exception will be the related to legal, cultural, social and historical differences compared to the neighbouring economies, because that implies judging non objective variables, that won't contribute a meaningful amount of information associated to the size of the economy.

- *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?*

Colombia's economy is considered to be a small one. Also, none of our neighbour economies are considered to be significantly bigger, or smaller. After applying the criteria proposed on the first point of the survey, the conclusion would be that our economies are pretty much the same.

Regarding our major trading partners Colombia counts with Venezuela and the United States, consider to be important economies.

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.

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- *How, if at all, should such elements be taken into account?*

The fact that is easy to access the market agents information will ease the prospect of colluding. Despite the previous analysis, it doesn't imply the adoption of special measurements. This circumstance could allow, in markets such as the oligopoly ones, the companies to collude, however,

this component is just one of the pieces that facilitates a cartel.

What is the importance of open borders in this context?

In this context, the importance of open borders is referred to the possibility of foreign agents to enter our market. It generates a competitive pressure that tends to atomize the market to the point where sharing information is not that simple.

However, it's possible that the entrance of those foreign agents might be obstructed by the local competitors, using the capacity that they have to share information.

Is there evidence for more oligopolies in small economies?

There are more oligopolies in small economies; in fact we can provide some examples, that belong to important markets of our economy, such as, aerial services and telephony.

Could the enhanced risk of collusion and anticompetitive conduct justify harsher sanctions or a different focus of the competition laws?

No

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?

We believe a different analysis of vertical restraints should be made if in the conditions surrounding an import is included a vertical restraint clause and is related to an agent that does not have a subsidiaries or branches which could be claimed for an anticompetitive behaviour. In this case, the solution would be put into consideration of supranational offices such as the Andean Community. The Andean Community knows of antitrust cases through the 608 Decision.

- *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?

It doesn't make any difference, the affectation is the same, in terms of competition, the abuse of a company in a dominant position in a large economy than in a small one, independently of the number of habitants or the specific territory. Efficiency considerations may apply, independently of the size of the economy as well, and should be proved. This means that if the undertaking represents advantages for the consumers, any argument associated to the size of the economy could be placed against the operation.

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:

Should there be different guidelines for geographic market definition?

No.

- *On the level of the procedural regime, what are the appropriate criteria triggering an intervention on an inquiry into a merger project: turnover thresholds; structural criteria, such as the degree of organisational integration (existence of branches on 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?

About the proceedings for the merger control regime, we believe the criteria previously mentioned involves all the elements that should be considered to trigger an intervention from the authority. Non the less, our agency applies a regime of prohibition to proceed without clearance, in the event the companies to be merger exceed the established thresholds.

Are there any differences with respect to the substance of the merger control regime?

No

Are there different justifications for having a merger control regime in small economies?

No, the purpose is the same one, prevent situations that could produce an inadequate restriction to the competence, caused by the reinforcement of a dominant market power

How might the size of the economy affect the application of legal presumptions?

No, we cannot see how.

Which type of remedies are best suited for small economies?

Regarding merger cases we consider conditionings such as, making one of the mergering companies sell part of its assets.

Concerning anticompetitive behaviours, the remedies are associate to the imposition of sanctions-fees, and to the pursuit of instructions that the agency emits in order to avoid the affectations caused by these type of conducts.

