

Survey on Competition Law in Small Economies
(Special Project for the 2009 ICN Annual Conference)

Submission by Hungary

Introduction

1. Although Hungary can be considered to be a small economy, the Hungarian Competition Authority (GVH) practically has not tried to use small economy specific arguments in substantive issues. First, for convenience, as mounting a specific regime could have interfered with the harmonisation of Hungarian competition law with that of the European Union. Second, the GVH has not seen the absolute necessity of using a specific approach in a small economy context, instead it has been pursuing to adapt and apply a “mainstream” best practice based competition policy. This may be due to the fact that Hungary is not only a small economy, but a small *and* open economy, with regulations greatly harmonised to those in many neighbouring countries.

2. Nevertheless, certain characteristics of GVH’s enforcement and advocacy practice can be derived from the small size of the Hungarian economy. In this respect the sharper focus on the role of imports as a major source of competitive pressure in many industries and perhaps also a constant emphasis on the importance of efficiency ever since the creation of the GVH in 1991 could be mentioned. In our view these two considerations leave the “mainstream” antitrust analytical framework untouched. Emphasizing the relevance of imports is a particular small country outcome of the same analytical setting rather than an altered one. Efficiency considerations (such as efficiency defence) play an increasing role not only in small economies’ jurisdictions but in major ones too (as the review of Art 82 within the EC illustrates).

3. Clearly, the GVH is facing process-related or even substantive specificities and problems, either regarding law enforcement or in competition advocacy. However, as far as these specificities are present, their source is not, or not solely the small size of the economy or the jurisdiction, but primarily a relative underdevelopment of Hungary. The present social, cultural and economic environment is still to a very large extent a result of a historically peripheral position in Europe, worsened by decades of planned economy and isolation from the trends and developments of the West. These factors of course can act together as “small economy factors”, but the historical setting seems to dominate the picture.

4. This submission conveys GVH experiences and approach that, naturally, is neither necessarily perfect nor should be interpreted as per se best practice.

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 inter-national 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?*

ANSWER:

5. On the one hand, all the above-mentioned factors seem to be relevant, and may play a role, especially in combination in making an economy small. On the other hand however, there is a variety of definitions of a small economy for antitrust purposes as the OECD GFC background paper points out. In addition, the same document suggests that the relevance of these concepts may depend on the particular subject matter and analytical approach. Therefore one should not apply such criteria mechanically, instead, the best is to make clear which notion of smallness is applied and to make sure that it fits to the particular analysis.

6. From a GVH perspective, it seems to be especially relevant to distinguish between two aspects when speaking about consequences of being small: first, when one considers impact on substantive issues (substantive law and applied doctrines), second when one focuses on effectiveness of enforcement and interventions from a procedural or operational point of view. For the first dimension, probably the *relative* size of “national markets” compared to “natural” relevant markets matters the most, while for the second dimension *absolute* size seem to be the most relevant, as the administrative capacity and effective enforcement power of an agency also depends to a great extent on the absolute size of the economy or the jurisdiction and the country, causing constraints, less present for a bigger administration. This second aspect is also related to development issues, especially in terms of the quality of administration.

7. Administrative capacity and effective power issues may imply that the optimal structure of competition authority activities may be different to some extent and in certain respects in a small jurisdiction. For example, competition policy R&D for an agency in a small country can be equally important, but may have a different kind of nature. Instead of doing their own “basic” research they can rely on the achievements of the major agencies and may concentrate on secondary, economy-specific research when doing their own competition policy R&D.

8. There may be an impact on enforcement too. When national markets are smaller than relevant markets, data collection may be difficult to administer, and the competition authority may also find it hard to accumulate in-house knowledge of the markets that is comparable to the understanding of firms involved. The practical enforcement of decisions may be also harder. On the other hand, the difficulties may be partly alleviated by the fact that larger competition authorities exert a positive externality towards smaller agencies. In certain “big” cases (such as international cartels, mega-mergers, as well as abuse of dominance practices that are internationally prevalent) the intervention by “larger” competition authorities in larger jurisdictions may also solve the problems of the “smalls” (“piggy backing”). However, these are not always universal solutions, and may leave the specific problems of the small market in question untouched.

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?

ANSWER:

9. The GVH considers Hungary to be a small or moderately small economy, in both aspects of smallness mentioned previously in paragraph 6.

10. Regarding the dimension of substantive law and relative size of markets, our conclusion is the same, it does not matter whether we take geographic size, population number or GDP. However, it is crucial that Hungary is a member of the European Union, and an open economy, which reduces the consequences of being small.

11. Regarding the dimension of administrative capacity and effective enforcement power however the situation is worse as Hungary is linguistically isolated, and Hungary is one of the EU-27 where people speak least foreign languages. EU and specifically ECN membership however also alleviated somewhat this problem.

12. We think that the countries neighbouring Hungary belong to the same category from both dimensions, although undoubtedly there are differences – for example Slovenia has 2 million while Romania 22 million inhabitants.

13. The most important trading partners are big economies, EU members that are significantly larger than Hungary, such as Germany or Italy, or countries that are similar to Hungary, such as Austria. In terms of imports, Russia also plays a significant role in certain areas of the economy.

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?

ANSWER:

14. Regarding small economy specificities of cartels, which are by their nature secret, one can only speculate. So far the GVH has not experienced that Hungarian cartels would be significantly different (in terms of firms and products involved or what cartel members agreed upon) compared to what we heard from our colleagues from other countries.

15. If there is a difference however, then in Hungarian cartel episodes informality may often play a more significant role, due to the small size of the economy and the country. Yet, the relative absence of better organised cartels with a formal operation and sophisticated monitoring methods could possibly be also explained by arguing that the more professionally managed cartels are international, better organised and thus less likely to be exposed to a GVH investigation.

16. There are signs that some cartels, especially those related to public procurement, overlap with politics. If this is really so, this may support what the OECD GFC background paper says about institutions and interest groups in a small economy compared to a big one. Yet, there are similar “overlapping” cartels also in other jurisdictions, and we do not know whether their prevalence is in fact proportionally higher in Hungary than in elsewhere. Moreover, even if such overlapping cartels were more prevalent in Hungary, this may be due to the less developed way of interactions and dynamics between economy and politics rather than being small.

17. It also holds that the Hungarian leniency policy has failed to produce spectacular results so far, the GVH receives only one or two leniency applications each year. Some observers argue that this is because of the small size of the economy and the more significant role of informal ties (everybody knows everybody and a ‘traitor’ could be punished more easily, as he or she could only follow his career in a similar job). This can make the collusive equilibrium stickier. These observers add that paradoxically stronger sanctions may not help, rather obstruct cartel enforcement in this environment. With the information available to the GVH the validity of this scenario cannot be verified (neither confirmed nor refuted).

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?

ANSWER:

18. The GVH has not experienced that because of the small size of Hungary the vertical restraints in general would have a different anticompetitive effect than in larger economies. The GVH has not seen a reason for a different analysis, besides it has not seen that the analysis would often lead to different conclusions and that there would be a need for different rules of thumb.

19. The role of imports and the competitive pressure from imports is obviously highly important for small economies. The GVH has always paid close attention to restrictions of import competition, and this emphasis is reflected in one of its major policy documents¹: ”1.16. *Following from the openness of the Hungarian economy and the country’s small size, the GVH attributes particular importance to import competition, which applies to both the competitive pressure exerted by imports and the impact of policy on import competition.*”², This holds for law enforcement as well as in advocacy.

¹ Fundamental Principles of Competition Policy as Applied by the Hungarian Competition Authority (GVH) (*Principles*) http://www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_alapelvek_antitrosztpolicy_2007_05_a_pdf.pdf

² This is justified, as set out in the *Principles*, by the openness and size of the Hungarian economy as well as by its geographic size. Hungarian consumers are often buyers in markets that transcend Hungary’s national borders; where

20. Administrative capacity challenges to enforcement may be reflected in the fact that the GVH initially had not treated imports as relating to the size of the relevant geographic market, but as new entry.

21. Restrictions on parallel imports may be a significant issue for small economies, and certainly are for Hungary. The GVH had used its advocacy powers in relation to exhaustion of intellectual property (IP) rights, which by their nature may restrict parallel imports. The GVH was pushing to switch from the regime of national exhaustion of IP rights to one with international – or geographically wider – exhaustion. This issue was solved finally with accession to the EU, by which national exhaustion was transformed into Community exhaustion. This is a good example of the benefits of being an open economy and to integrate to other economies.

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 under-takings in a small economy? Or does this make no difference? Is there a different approach towards collective dominance issues?

ANSWER:

22. We are not convinced that in Hungary there would be more state monopolies as a consequence of the small size of the economy. Regarding abuse of dominance, the GVH has not tried a non-mainstream approach, and certainly not with the reasoning of being small.

23. Although there has been an over proportionate number of exploitative cases, this is better explained by historic and other factors (the competition authority being created from the communist era price regulator, high expectations towards the GVH during the turmoil of the economic transition, low discretionary powers in starting cases and dealing with complaints) than by being small.

24. Exclusionary abuses or allegations that related to recently liberalised sectors have been also relatively well represented in GVH case record, but this again probably has nothing to do with the size of the economy, or at least there is no direct link between the two.

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?

Hungarian firms compete with foreign firms. In light of this, failing to take into account imports would result in a distorted picture of the market; it would appear more concentrated, and in many cases, significantly more concentrated than it actually is. Experience, such as development following import liberalisation in the early 1990's, also confirms that the competitive pressure set by imports plays a critical role in maintaining and strengthening competition in a number of areas. Therefore, imports form an important part of the GVH's competition policy analysis, determining both the competitive pressure they exert in the market and the impact of the examined practice on them (so that, for instance, a restriction on imports is also deemed to be a restriction on competition) in line with the above.

ANSWER:

25. The GVH has not seen a reason for a specific approach in merger control. Relating to administrative/enforcement capacity however this may be an area where the competition authority may face serious constraints that are also related to the size of the economy.

• *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?*

ANSWER:

26. These are certainly relevant questions for merger control in general, yet we do not see that they would require different answers in large and Hungary-sized open economies. Probably, in small economies, because of resource and administrative capacity constraints, simpler methods are more important. In the case of GVH however there is no example of trying fundamentally simpler substantive analysis (compared for example to an EU standard).