

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 inter-national 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? In our opinion the principle competition rules should be applied in every free market economy independent of its size. However, these rules and their application could be adjusted to particular peculiarities of functioning of a small free market economy taking into account the criteria listed below in item 2.

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 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? *Yes.*
- 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? *Only by the size of economy in terms of GDP and by population in absolute figures, economy of Lithuania maybe could be treated as a small economy, but by the degree of regional economic integration it could be defined rather as a “midsize economy” than a small economy. In the same way could be defined also some neighbouring countries’ economies. The same is true and for major trading partners.*

As regards legal system of competition, Lithuanian Law on Competition is fully harmonised with that of the EU and in relevant cases the Community law is directly applicable. Therefore, all principle competition rules are enforced in Lithuania’s economy as it would be in a large one.

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? *Lithuanian Competition Council focused and focuses great attention on disclosure of cartel agreements. Relying on last several years' investigations data it could be said that in some more concentrated relevant goods markets, the Competition Council of Lithuania disclosed several restrictive agreements on exchange of confidential information between competitors. Maybe this allow to presume that in more concentrated markets where a number of market operators is not large, a greater probability of conclusion of prohibited agreements between competitors acting in the same goods market exists. As regards sanctions, in our opinion, on the one hand, they should have a deterrent effect, and on the other hand, should be of a "reasonable size".*
- 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? *As regards analysis of vertical restrains the Lithuanian Competition Council follows the practise and guidelines of the European Commission, case law of the European Court of Justice.*

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

issues? *The principal provisions defining the dominance in the Lithuanian competition law are fully harmonised with that of the EU.*

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? *Again, in substance the merger control regime in Lithuania is the same as in the EU. While defining geographic market the Lithuanian Competition Council follows the guidelines and practice of the European Commission and accumulated practise of implementation of the Lithuanian Law on Competition. As regards the remedies, according to the Law on Competition the Competition Council of Lithuania can allow the implementation of concentration with certain conditions and obligations for the participating undertakings or controlling persons in order to prevent creation or strengthening of a dominant position; or can refuse to allow the implementation of concentration by imposing on undertakings or controlling persons concerned to undertake actions restoring the previous situation.*
- 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? *According to Lithuanian competition law notification regime is mandatory, i. e. the intended concentration must be notified to the Competition Council and its permission is required where combined aggregate income of the undertakings concerned is more than LTL 30 million for the financial year preceding concentration and the aggregate income of each of at least two undertakings concerned is more than LTL 5 million for the financial year preceding concentration. While examining notifications on concentration important are turnover thresholds, and structural criteria; and the test of creation or strengthening of a dominant position is applied.*