

## **SURVEY ON COMPETITION LAW IN SMALL ECONOMIES**

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**Contribution by the Luxembourg Competition Council**

### **A) The Notion of a “Small Economy”**

The listed criteria may give an appropriate reflection grid in order to evaluate the characteristics in terms of size of an economy, with the following additional remarks:

- the GDP is an appropriate criteria if considered in absolute value. It does not seem that the GDP considered in its value per habitant may be of incidence when considering the size of the economy
- the size of the territory is an appropriate criteria, given that the notion of territory is accurately defined and that this definition is generally accepted.  
The analytical framework points out the divergence between, on the one hand, the States which have the power to organize the functioning of their economy and which are defined by boundaries and, on the other hand, the notion of “economy” whose extend may not coincidence with the territory of the States. But it seems to maintain that the legal boundaries of a State, prescribing the territory on which a State regulation may develop its effects, is still a notion to be considered.  
This being said, the criteria of the size of the territory seems relevant if referring to the maximum extend of the territory on which the same State regulation may apply.
- the criteria of the population may perhaps be completed by a criteria referring to the population working within the boundaries defined with regard to the considered territory
- the criteria of the 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 directly refers to the (in some respect acceptable) assumption that an economy is mainly defined with reference to a territory. The number and size of undertakings may be influenced by factors, such as the legal framework, the industrial tissue,

the evolution of the economy in terms of openness or historical events. But shouldn't this criteria at the least be refined in some way. What should the size or the number be compared to? What is the level of number or size of undertakings below which the economy they are implemented in is to be considered as being small?

As a matter of fact, most, if not all, of the criteria refer to the notion of "State" or "territory" in which a public authority is enabled to define economic policy and enforce it, notably with regard to competition aspects through its competition authority.

The situation of Luxembourg is quiet ambiguous with regard to the question whether it is to be considered as a small economy.

On the one hand, numerous criteria point to the conclusion that indeed it is a small economy:

- its GDP is small in absolute terms compared to that of the neighbouring countries
- the territory of the country is small
- the population is small
- the legal, cultural, social and historical frameworks are not that much different from those of the neighbouring countries. In fact, all three neighbouring countries influence more or less these frameworks, be it historically or actually. But perhaps it may be said that during the time, these various influences have generated a Luxembourg specific situation which makes it different from those of the neighbouring countries

On the other hand, it may not be contested that the Luxembourg economy is open to exports and imports, that the country is part of an advanced regional economic integration processes, including a transnational competition authority, that it has important economic ties as well with its neighbouring countries as with more far away countries not necessarily being a member of the regional economic integration organization. On its territory are as well established a number of big undertakings with worldwide activities.

At the end of the day, shouldn't it be considered that the question to know whether an economy is small or not will require a different response, depending on which problem is at stake? On this behalf, the main question put forward in the analytical framework is to know whether "the size of the economy affect[s] the application of competition law, and if so how". This question points to the legal aspect of enforcement proceedings, which should be considered, where an NCA exists, under a mainly national point of view, as these proceedings are organised by national law and as the NCA has jurisdiction only on the territory of its State. This leads to the conclusion that with this respect, Luxembourg should be considered as a small economy. The answer would perhaps be different if the question referred to the economic process in itself, i.e. the functioning of the economy, where the openness and the enshrinement in a developed regional economic organization would play an important role for an adverse conclusion.

## **B) Anticompetitive Agreements**

We agree, on the basis of an empirical assessment, with the conclusion that close relations, networking, information sharing and availability of information are mechanisms that may favour collusion, be it implicit or tacit, and that such mechanism are more likely to occur in an economy that is small, sharing a common history and tradition of making business, especially in markets that are local and which are not important enough to attract new entrants which could change longstanding practices. Thus, open borders are of importance, but only insofar as the market conditions really attract new entrants.

This makes detection of collusion still more difficult, as concerned undertakings enjoy, or feel to enjoy, a strong mutual dependence and reliability. The incentive to cease anticompetitive agreements is still lower where the competition authority either is young, and has not yet had the possibility to show publicly on a concrete example the value its work may add to the economic process, and/or does not have the necessary resources to diligently and correctly carry out investigations.

This leads first of all to the conclusion that a small economy does not equal the need for only a small competition authority. Even in a small economy, the authority must have the ability to persuade the population and the economic decision makers of the usefulness of the open economic process. This persuasion may be done either by repression, sanctioning the faulty undertakings, or by competition advocacy initiatives. Neither of them seems to be of more importance than the other. Competition policy in small economies should cover all relevant aspects of competition policy in general, without a special focus on any particular point.

We are not in a position at this time to determine whether beyond the enhanced risk of collusion, this risk materialises in Luxembourg, as we do not have the necessary setback after 4 years of work. No particularly important number of collusive behaviour has been detected, but it is not possible to say whether this is because they do not exist or because they have not been detected.

It does not seem to us that the existence of an enhanced risk of collusion should lead to an increased level of sanctions. They should be decided on the consideration whether an anti-competitive behaviour occurred and be dissuasive in all event, regardless of whether the collusion was favoured or not by any external element. However, it may well be that the incidence of such behaviour is much more important in a small economy than it would be in a big economy. With regard to this consideration, where the sanctions take into consideration the damage done to the economy, it may well be that collusive behaviour in small economies should be sanctioned more severely. But this would not be linked to the fact that it occurred in a small economy, but because it caused a big damage to that economy.

Vertical restraints seem to merit particular consideration in small economies. It seems to us that the territories of small economies are easily subject to exclusive distribution agreements, foreclosing parallel imports to the detriment of free competition. It may well be that vertical agreements are more common in a small economy, or affect more deeply a small economy than a big economy. It might as well be that it is more difficult for undertakings in a small economy to overcome the hurdles that constitute vertical agreements. This situation is regularly put forward by local undertakings as a justification for certain behaviour or problems, and empirical data show that indeed, the Luxembourg territory is generally included in distribution agreements covering Belgium and sometimes the Netherlands as well, preventing Luxembourg buyers from buying directly in other countries, thus raising prices and often reducing choice. The practical problem with such agreements is however that the initiators, i.e. the producers/distributors of the goods, are generally located abroad, making it more difficult for the competition authorities of the small States to act against them. Thus, the problem seems first of all to be an enforcement problem, rather than a problem linked to the analysis of such vertical agreements.

Where it comes to the analysis of such vertical agreements, the economic strength of the concerned undertakings should be considered with regard to the fact that a strong undertaking has more facilities to impose its will on more weak undertakings. Often, it may occur that the buying undertaking in the small economy is small compared to the producer/distributor, and thus is more vulnerable to retaliatory measures applied when it does not follow the politic favoured/suggested/imposed by the producer/distributor.

### **C) Abuse of Dominance**

The considerations described in the canvas of this paragraph should be regarded as correct, and may be confirmed by our practice. We face a situation where longstanding monopolies, or nearby monopolies, have developed their specific view of the functioning of the market, and in general try to achieve monopolistic profits, without any regard to efficiencies. Faced with ongoing enhancement of competition considerations, they may have developed a business model based on a diversification of their activities, but they generally try to protect as far and as long as possible their monopolistic situation.

It seems that two situations should be distinguished. The first situation is that where the dominant undertaking offers an intermediate product, acquired by other undertakings because necessary to their own production. This situation generates efficiency problems, as well as foreclosure effects, mainly where the dominant undertaking is vertically integrated and active itself on the downstream market. A competition policy based on efficiency considerations might bring some improvement here, but it should also be particularly aware of the foreclosure aspects.

The second situation is that where the dominant undertaking is dominant on the retail market, and directly charges (too) high prices to the end consumers. It seems to us that this situation gives rise to a certain number of considerations with regard to exploitative

abuses. Considering that this problem is not specific to small economies, but that it seems however more likely to occur there, it might be usefully addressed by a more in depth reflexion in relation to small economies.

#### **D) Mergers**

It seems as if a merger control regime in a small economy should take into account the economic constraints put forward in the canvas to the “abuse of dominance” paragraph: economies of scale require that the undertakings acquire a certain dimension in order to work efficiently, which leads inevitably in certain circumstances to a situation where only a few undertakings have the necessary size. Thus, there will be a concentration process for efficiency reasons, which should not be hindered by a too strict merger control.

This may lead to situations where a merger that would be prohibited in a large economy should be authorized in a small economy, as well as to a different view on legal presumptions.

However, the concentration process allowed by a more liberal approach to a merger control regime should not exceed a given level, in order to insure and maintain sufficient competition. Moreover, particular attention should be given to situations where the merger would lead to a dominant position of the merging entity in an upstream market, whilst it would be vertically integrated and active on a competitive downstream market.

In order to address in an adequate way the various problems that may arise due to a merger process which in itself may be considered as beneficial or necessary, the competent authority should have at its disposal a large range of remedies that may be imposed, including as well behavioural as structural measures.

The merger control regime should not however be too different from that of the neighbouring countries. Due to the smallness of the economy they are working in, the merging undertakings may indeed as well be subject to merger control under the jurisdiction of other countries. Diverging assessments by the different national authorities may then lead to different solutions, which could interfere with the undertakings development.

As mentioned above, the integration of the merging undertakings and of the final merged entity seems to be of great importance when deciding on an inquiry into a merger project, as this may have a decisive effect on the competitive process, which should be the fundamental consideration. The concentration level might as well be a *prima facie* criteria, but it should not be regarded at too thoroughly. Other aspects proper to small economies might as well be considered, such as the risk of tacit collusion with the remaining competitors or the ability of the market to attract new entrants such as to compete effectively with the merged entity.

The substantive rules on merger control should ensure a real control over these operations, and the procedural regime should of course scope with the requirements of the business world and not unnecessarily delay the operation. A basic requirement therefore is that the competent authority has the necessary resources to deal efficiently with the merger files. As the substantive assessment shall not be subject to any compromise, the question is to know whether one of the two other aspects should suffer in any way. Ideally, the procedural regime will be drawn in a way to ensure a real assessment of the operation, and the resources available will allow such an assessment. But this aim will only be achieved if several conditions are fulfilled. Notably, do the political authorities have to recognize the importance of a merger control regime and provide for sufficient resources, and the manpower available has to be skilled and trained in competition law matters. This last aspects may however be problematic, as the smallness of the economy, combined with the frequent rule reserving civil servant functions to nationals, may lead to a bottleneck effect when recruiting case handlers.

Basically, in order to catch all the problematic files and ensuring legal certainty to undertakings, the best procedural regime would probably combine mandatory filing of the case with a prohibition to proceed without clearance, and stringent delays imposed on the authority.

#### **E) Additional Thoughts**

The survey does not address the question of public procurement and of its control. It may be said that it is commonly accepted, and Community rules emphasise this, that the respect of open competition during the procurement process is of importance.

These considerations may be of particular importance in small economies, where not only undertakings and economic operators know each other, but where they do also have close relationships to decision makers in the administrations. It may not be excluded that in case of doubt, an undertaking may be favoured, even unintentionally, due to such privileged relations. Public tenders may even be organized upfront in a way to favour certain undertakings, either by prescribing a material that is available only to some undertakings or by dividing the tender in such a manner as to exclude any interest from certain undertakings.

Thus, a further reflection might be carried out in this regard.

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