

Competition law in small economies

Is there a problem with merger control?

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Merger control and small economies I

- The special report on small economies concludes that there is no need for additional or different powers with respect to merger control in small economies (neither on standards for assessment, nor on notification duties)
- What options are available when an international merger has local effects? Not necessarily prohibition. In Australia, in the case of the Rothmans-British American Tobacco merger (cleared in a number of big jurisdictions) the ACCC imposed that the Australian assets be sold to Imperial Tobacco.
- **A Problem:** The characteristics of a small economy is that everybody knows everybody else and there is a lot of continuity between the economy and politics. Furthermore the competition authority is generally small and weak

Flexible rules on procedures and substance

- In a small economy the more rules are flexible the more the position of the Authority is weak and subject to political pressure. The best for a well connected company is not to have a case at all.
- A few years ago a small economy agency claimed that “Since in a small economy everybody knows everything there is no need of ex ante notification.” To the contrary, notification makes the Authority more independent
- The same can be argued for presumption of dominance. Market shares (rebuttable) presumptions strengthen the independence of the competition Authority. “If you do not like the results change the law” should be the answer to a request for a more lenient enforcement approach.

Substantive analysis in small economies

- No problem with the substantive analysis. It is the same as in bigger economies. However, as Bill Baumol suggests, oligopolies are the greatest source of innovation and of economic progress, much more than monopolies. Oligopolies should be looked at with favor.
- Sometimes oligopolies, especially in mature, stable demand industries, face strong incentives to collude, not only via fully established cartels.
- This is a danger especially for local industries like banking, finance or insurance. The more so in a small economy

Merger control and minority shareholdings

- Minority shareholdings are stakes in the capital of another firm that do not yield any control or material influence.
- Elimination of the incentives to compete aggressively: unilateral effects. This occurs when a maverick takes a minority interest in a dominant firm.
- Elimination of the incentives to compete aggressively: coordinated effects. Minority shareholdings give stability to a cartel, reducing the incentive to deviate. When associated to board membership minority shareholdings provides information on companies strategies, possibly reducing rivalry. See the US 2007 merger between CommScope and Andrew where the problem was the minority shareholding in maverick Andes
- According to the NYT, the US FTC is investigating Apple and Google for having on their board two common members, both with managerial responsibilities in the two companies.

Minority shareholdings, merger control and small economies

- In Italy, like in most jurisdictions, the acquisition of control of a company is the triggering element for notifying a merger to the competition Authority. Minority shareholdings are not notified. Only in a few banking and insurance mergers Italy has dealt successfully with cross holdings.
- F Jenny gave a presentation at the IDRC pre-ICN Conference where cross minority shareholding was a facilitating practice for some possible market sharing agreement in the beer industry in Africa. Competition Authorities lacked the legal power to intervene
- It might be necessary to introduce notification thresholds based on the value of the assets being acquired rather than the acquisition of control.
- This is particularly important in small economies, where cross holdings, also across borders, are quite frequent.