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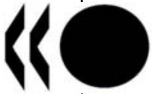

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **31-Jan-2003**

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CCNM/GF/COMP/WD(2003)32
Unclassified

OECD Global Forum on Competition

COMPETITION POLICY IN SMALL ECONOMIES

-- MALTA --

This note is submitted by Malta under Session III of the Global Forum on Competition, to be held on 10-11 February 2003.

JT00138518

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COMPETITION CONSTRAINTS IN SMALL JURISDICTIONS

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The authors would like to acknowledge the useful comments and suggestions by Silvio Meli and Marcel Pizzuto during the drafting of this paper. All errors and omissions are the responsibility of the authors

1. Introduction

This paper will focus on the constraints that small states face in matters associated with competition law and policy in view of their small size. Special reference will be made to Malta, where competition legislation is modelled on EC law.

The paper will attempt to show that there are many factors associated with small markets that have a bearing on competition law and policy. The thrust of the argument will be that certain aspects of competition law may not be desirable to implement or may be more difficult to put in operation in small jurisdictions.

The paper is organised as follows. Section 2, which follows this introduction, outlines Maltese competition policy and legislation. Section 3 lists the main constraints arising from small size, and discusses their bearing on competition law. Section 4 concludes the study by proposing some future directions regarding research on this issue, including the compilation of a competition index across countries.

2. Maltese Competition Legislation[1]

The Competition Act (Act XXXI of 1994) regulates competition and provides for fair trading in Malta. It was enacted on 23rd December 1994, came into force on 1 February 1995 (as per L.N. 13 of 1995) and was amended in 2000 (Act XXVIII of 2000), principally to bring Maltese legislation more in line with the EU's *acquis communautaire*. The substantive provisions of the Act, namely Articles 5 and 9, are based on Articles 81 and 82 of the EC Treaty and on European jurisprudence.

The Competition Act is prohibition-based and generally incorporates the same principles that shape Community competition law, thereby outlawing anti-competitive agreements and concerted practices other than those that are *de minimis* or exempted individually or through block exemptions for countervailing economic benefits and abuse of single firm or collective dominance. There is also a merger control law entitled Regulations on Control of Concentrations (L.N. 294/2002) that while generally modelled on the EC Merger Regulation draws from US experience as far as the substantive test is concerned, as the evaluation criterion is the "substantial lessening of competition" test, with the efficiencies and failing firm defences specifically recognised in the law (see Buttigieg, 2003).

2.1 Aim

The aim of Malta's Competition Act is to promote competition in trade in a manner which best guarantees positive economic results, encourages technological progress and quality and contributes towards price moderation (Government of Malta, 1993). The Act was intended to create a modern system consistent with the European Union rules establishing a framework for effective competition in Malta. It provides a degree of legal certainty to undertakings in Malta by defining the parameters within which they may lawfully conduct their business on the Maltese market and will guarantee business and consumers the benefits of competition.

[1] The authors would like to acknowledge the input by Silvio Meli and Marcel Pizzuto to this section.

2.2 Office for Fair Competition

The Act provides for the setting up of the Office for Fair Competition, empowered to investigate restrictive practices in competition and to take remedial action in terms of this Act to suppress the same. It can initiate investigations of its own motion, or at the request in writing of a complainant, or at the request of the Minister responsible for commerce. Its remit also includes monitoring the market generally and providing advice to the Minister, to undertakings and to the public in relation to matters concerning fair trading practices. The Office is under the control of a Director, who is also empowered to issue cease and desist orders on undertakings acting in breach of the Act.

2.3 Collusive Practices

Article 5 contains a general prohibition against restrictive agreements entered into between commercial undertakings, decisions by associations of undertakings and concerted practices among undertakings having the object or effect of restricting, distorting or preventing competition. The provision is directed at both horizontal and vertical agreements and against restrictions both on inter-brand and intra-brand competition. Provision is made for exemption from the prohibition in Article 7 where the agreement contributes towards improving the production or distribution of goods or to promoting technical or economic progress and which allows consumers a fair share of the resultant benefit. An important requisite for the granting of such exemption is that the agreement must not contain restrictions which are not indispensable for the attainment of its objectives and must not significantly reduce competition. Agreements having a minimal impact on the market calculated in terms of market share, turnover, firm and asset size would be deemed not to fall within the prohibition.

The Act provides for two kinds of exemption, namely (i) individual exemption, i.e. where exemption is given by the Director of the Office for Fair Competition following an application by the parties on evidence that the economic benefits resulting from the restrictive agreement/practice in the form of improvement in production or distribution or promotion of technical or economic progress that would be passed on to consumers to a fair degree would outweigh any adverse competitive effect while the restrictions are indispensable for the achievement of such benefits without leading to a substantial reduction or elimination of inter-brand competition having regard to the parties' market power; and (ii) block exemption - so far the block exemptions that have been issued (all based on their EC counterpart) refer to vertical agreements and concerted practices, horizontal agreements related to research and development and specialisation and licensing agreements related to technology transfer.

2.4 Abuse of a Dominant Position

Article 9 prohibits abuse of a dominant position. It is not dominance *per se* which is curtailed but only the abusive exercise of such dominance. This occurs when a firm, due to its position of strength on the market, indulges in exploitative or anti-competitive behaviour, such as charging discriminatory or predatory prices and limiting production. An undertaking which alone or in conjunction with others has a share of at least 40% of the relevant market shall, in the absence of proof to the contrary, be deemed to be in a dominant position. An undertaking with a share below 40% may also in particular circumstances be considered to be dominant.

2.5 Obligation to seek Negative Clearance

The Act also provides for negative clearance, whereby any person in charge of an undertaking who has reason to believe that the undertaking may be acting in breach of Articles 5 or 9 shall seek a negative clearance from the Director of the Office for Fair Competition to ensure that it is not acting in breach of the Act – failure would make the defaulter liable to a fine.

2.6 Public Undertakings

The Act applies to all sectors of the economy though the Minister may by regulation exempt any agreement, decision or practice in connection with agriculture or fisheries from the provisions of Article 5 – this so far has not occurred. Moreover, the Minister may exempt from the provisions of the Act any or all of the operations of public undertakings or undertakings, which have been granted special or exclusive rights.

2.7 Commission for Fair Trading

The Act also provides for the setting up of the Commission for Fair Trading, which is a judicial body, composed of a Chairman, who must be a magistrate, and two other members, an economist and a certified public accountant. The Commission is empowered, on the request of an aggrieved party, to review any decision of the Director of the Office for Fair Competition and to adjudicate on any matter related to alleged collusive practices referred to it by the ordinary courts. Its decisions are final. It also has the power to order interim measures to suspend immediately restrictive practices or abuses of a dominant position which are being investigated if it is urgently necessary to avoid a situation likely to cause serious, immediate and irreparable harm to the interests of any undertaking or the general economic interest. In the interpretation of the Act, the Commission must have recourse to the interpretation given by the European Union institutions to relevant provisions of the treaties, directives, regulations and decisions relating to competition.

The Commission is also involved in proceedings arising under the Control of Concentrations Regulations, which entered into force on 1 January 2003. In Regulation 18, the undertakings concerned may within fifteen days of the notification of the final decision taken by the Director of the Office for Fair Competition, request the Director to submit the same for review by the Commission and the Director must comply with such request. However, under both pieces of legislation, the submission of a decision for review by the Commission shall not suspend the decision of the Director unless the Commission in exceptional circumstances otherwise directs.

2.8 Fines

Provision is made for offences against the Act and related penalties. Fines under the legislation are deemed to be criminal in nature. The Commission may declare that a particular act infringes the provisions of the law but fines may only be imposed by the Courts having criminal jurisdiction. The Director however is empowered to impose administrative fines such as compromise penalties for non-adherence to a cease and desist order and in an out-of-court settlement he may, in order to expedite matters, with the concurrence of the Commission, even negotiate with the offender the extinction of criminal liability for a fine that is less than the maximum applicable under the Act.[2]

[2] There is some debate as to whether or not more transparency should be instilled into this procedure.

Infringements of Articles 5 or 9, such as continuing with an agreement for which a negative clearance has been refused, acting beyond the provisions of an individual exemption granted or acting contrary to an order issued by the Commission as an interim measure are subject to fines which range between 1% and 10% of the annual turnover but cannot be less than Lm3000.

2.9 The Record

Since the enactment of the Act, the Office for Fair Competition has strived to instil an awareness of competition law on a national scale, with special emphasis on the commercial sector, with a good measure of success as witness the increasing number of complaints lodged at the Office for Fair Competition and the number of applications made for negative clearance and exemptions. There has also been an increase in voluntary compliance by undertakings, in preference to being officially chastened by a formal decision of the Office, or, prior to the recent amendments, appearing before the Commission for Fair Trading. In addition, both the Office and the Commission have been instrumental in strengthening the competition culture in Malta, through their decisions on a number of matters, covering a wide range of competition issues.

When reviewing the competition regime in Malta, the European Commission concluded that overall, administrative capacities and enforcement record Malta are reasonably advanced, except on partial exclusion of public undertakings, the compatibility of the aid granted to the shipyards, as well as the incomplete alignment of various fiscal aid measures granted under past and present legislation. The European Commission report also stated that the administrative capacity of the Office for Fair Competition and the Commission for Fair Trading appears adequate (European Commission, 2002).

3. Constraints Arising from Small Size

3.1 The Meaning of Small Size

The size of a country can be measured in terms of its population, its land area or its gross domestic product. Some studies prefer to use population as an index of size, while others take a composite index of the three variables. There is no general acceptance as to what constitutes a small jurisdiction, although a jurisdiction with a population of around 1 million or less would generally be considered as a small one.[3] So far there has not been any attempt to measure market size in the context of competition law and policy, although the issue has been discussed in a few studies (see for example Armstrong and Read, 1998; Murphy and Smith, 1999; and Gal, 2001; 2002). One possible indicator could be a composite index consisting of population multiplied by real consumption expenditure, suitably standardised for international comparisons. Such an index would take account of the number of actors and the value of transactions within a given market. A cut off point would also be needed to establish whether a market, in a given jurisdiction, is to be considered as a small one.

Often the term ‘small jurisdiction’ is used when discussing small geographical markets. This term would include small states as well as parts of larger states with a degree of administrative autonomy, and island provinces or regions with an isolated geographical market.[4] In this paper, small states and small jurisdictions are used interchangeably.

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3 On this question see Downes (1988) Jalan (1982) and Briguglio (1993).

4 When in 1998 the University of Malta organized a conference on “Competition Law and Policy” the term “in small jurisdictions” was used rather than “in small states” to allow the participation of representatives from island provinces

3.2 Small Domestic Market

Small states and small jurisdictions are likely to have a small domestic market, which in turn limits competition possibilities, due to the ease of market dominance by firms, and disadvantages associated with fragmentation. The advantages of business consolidation and the inclination of authorities of small states to justify such business consolidation, including monopolistic and oligopolistic structures, tend to inhibit the development of a competition culture.

A small domestic market also tends to be characterised by natural monopolies in public utilities, such as electricity, fixed line telephony, gas and water, where the relatively large overheads do not permit more than one entity to viably supply the service.

Another characteristic of small markets relate to barriers to entry. There are natural barriers, due to the poor chances of success of setting new business in goods and services already supplied by existing firms. In addition in a small market, bulk buying is often required to avoid excessive fragmentation of cargoes, especially in the case of raw materials, and this limits the number of players in that market. There may also be artificial barriers to entry, often imposed by governments, to make it viable for a business to invest in certain types of production of goods and services, where overhead costs are large, and hefty capital outlays are required. In many cases, entry is also limited in the provision of services where competition could be possible, but the nature of the service requires licensing, such as the operation of taxi services and pharmacies. Although the licensing of such services is principally carried out to regulate the quality of such services, in practice, licences tend to be very limited and increasing the number of licences tends to be strongly resisted by those who already hold the licence.

Still another characteristic of small jurisdictions is collusion between suppliers, which tends to be easier to conduct when everybody knows each other and where family ties predominate, and where a few firms operate in the market. In such circumstances, parallel behaviour is common, and the authorities may not find it easy to distinguish between concerted practices and independent action. [5]

3.2.1 Dominant Position

Generally speaking, competition legislation does not take account of economic benefits[6] when considering abuse of dominant positions, although dominance *per se* is not normally prohibited. Abuse arising from dominance, such as limiting production, applying dissimilar conditions, including price discrimination to equivalent transactions, charging excessive prices and refusing to supply goods or services in order to eliminate a trading party from the relevant market, are not permitted once they are detected.

There are occasions when it may be beneficial to allow what may be abusive in a large market to take place in a small market, in such matters as discrimination, pricing, and refusal to supply.

Discriminatory conditions. In some cases letting dominant oligopolies indulge in discriminatory practices may be to the advantage of the consumer. As Gal (2001) argues, in oligopolistic markets

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and dependencies with their own jurisdictions and geographical markets, and therefore had similar conditions as those faced by small states.

5 See also Muscat (1999).

6 In other words, economic benefits are not traded off against the adverse effects of dominance as they are under Art 81 of the EC Treaty type of provisions - this lack of consideration to offsetting economic benefits could, in some cases, be detrimental to consumer welfare and consumer interests

discriminatory pricing may work against rigid oligopolistic price structures and could result in lowering prices to the benefit of the consumers. Gal argues that discounts are generally to be encouraged. "To forbid them would often reduce efficiency and slow reactions to changed market conduct." …. "Discrimination in small economies, thus, merits a deeper analysis of its real effects on the market."[7]

Prices. Similarly, a seemingly excessive price, when compared to the price of similar products in other countries, may be justified in smaller jurisdictions, since this may be one way in which a firm may hedge against the risks associated with importing the product to the domestic market, particularly in the case of islands, or to cover the relatively high overhead costs associated with production on a very small scale.

Refusing supply. As is well known, one form of abuse associated with dominant positions, is to refuse to supply goods or services in order to eliminate a trading party from the relevant market. In small jurisdictions, there is probably a higher temptation by existing firms to do this due to the smallness of the market, where the number of competitors must necessarily be small. Often firms in small jurisdictions try to forestall new entrants fearing that the market may be over-supplied. In small as well as in large jurisdictions, one finds copycat investment, where adventurous persons enter the market as soon as they see existing firms making a profit, even when the market is already saturated. It often happens that new entrants are ill-prepared and lack experience in the trade, and after a few years, and even a few months, the business will have to fold up. As stated, such events also happen in large territories, and are a normal course of events.

However in the case of small markets, the new entrants may find themselves suddenly controlling a large share of the market, as was the case with a supermarket in Malta, and their sudden exit from the market leaves many business creditors at a disadvantage, and excessively destabilises the market, to the detriment of consumers. It is not being suggested here that refusing supply is to be encouraged, but that in small jurisdictions, the issue should be viewed within the context of (a) the limited number of players that can be accommodated in a small market and (b) the high degree of instability that arises by the entry and exist of a relatively large firm.

On the other hand, due to the constraints of replicating infrastructural facilities, there is more scope for the application of the essential facilities doctrine in small jurisdictions. This of course leads to the argument that refusal to grant third party access to essential facilities owned and controlled by a dominant firm should be more readily checked in small markets (Buttigieg, 1999). Thus for example, what to a US agency would not appear to be an essential facility as it could be replicated by a potential entrant who is just as efficient as the incumbent, in a small jurisdiction the first entrant would be able to monopolize the sector where there is heavy sunk costs. This would of course be an argument for considering as anti-competitive refusal to grant access or to grant access on equal terms that in a larger jurisdiction would not be deemed an abuse of a dominant position.

These arguments relating to abuse of a dominant position should not be interpreted as proposing a case for allowing such abuse in small jurisdictions, but to explain that maximising consumer welfare may, in these jurisdictions, require an economic analysis which takes into account the special characteristics of such jurisdictions.

7 On this issue see also Buttigieg (1999).

3.2.2 Agreements

In the case of certain agreements, restrictions are often legally permitted, in large and small markets, if the agreement between undertakings contributes towards the objective of improving production or distribution of goods or services or promoting technical or economic progress. This is the case in Maltese Law. In other words agreements containing what may be called anti-competitive clauses may be exempt if they have an overall positive balance on the economy.

In the case of Malta, various vertical agreements including certain exclusive distribution agreements, exclusive purchasing agreements, selective distribution agreements and franchise agreements are allowed and exempted in block, on such grounds. Exemption regulations were adopted on Vertical Agreements and Concerted Practices (L.N. 271/2001), Research & Development Agreements (L.N. 177/2002), Specialization Agreements (L.N. 178/2002) and Technology Transfer Agreements (L.N. 176/2002). These types of agreements are exempt without having to notify the competition office, if they conform to the regulations.

It may be argued that in small jurisdictions, the competition authority should be more tolerant towards collaborative arrangements (horizontal ones, such as cooperatives, as well as vertical ones) due to the more prevalent presence of micro enterprises in such jurisdictions. Acting on their own, these would face strong constraints in competing with larger foreign enterprises based in larger markets.

3.2 3 Mergers and efficiency

In the case of formal mergers, the Maltese Merger Control Regulations state that "concentrations that bring about or are likely to bring about gains in efficiency that will be greater than and will offset the effects of any prevention or lessening of competition resulting from or likely to result from the concentration shall not be prohibited if the undertakings concerned prove that such efficiency gains cannot otherwise be attained, are verifiable and likely to be passed on to consumers in the form of lower prices, or greater innovation, choice or quality of products or services."

In the Guidelines on Efficiencies, which accompany Malta's Control of Concentrations Regulations, it is stated that the type of efficiencies that are more likely to be cognizable and substantial than others are efficiencies resulting from shifting production among facilities formerly owned separately, which enable the undertakings concerned to reduce the marginal cost of production as these are more likely to be susceptible to verification, concentration-specific, and substantial, and are less likely to result from anticompetitive reductions in output.

Such justifications to anti-competitive behaviour are found in competition legislations in certain countries, such as the US, Canada and Australia, where the efficiencies defence is expressly mentioned in the law. On the other hand, the EC Merger Regulation does not recognize the efficiencies defence nor do several member states.[8]

However, in a small country, where market dominance and trade barriers are common, and sometimes cannot be easily dismantled, these exceptions are likely to have more significance. In the case

8 However, it is sometimes argued that in assessing the legality of a concentration under the Merger Regulation, the European Commission does implicitly consider efficiencies as part of the dominance appraisal test. The European Commission is now proposing an amendment to the Merger Regulation that will insert this defence explicitly. It should be noted in this regard that in the US an anti-competitive merger would rarely be saved by the magnitude of efficiencies it generates because most are neither verifiable nor large enough to offset negative deadweight loss. Moreover the so called "pass on requirement", i.e. that efficiencies must be passed on to consumers means that perceived cost savings must be quite high and that makes it difficult for the defence to succeed (see Buttigieg, 2003).

of mergers, merger control may actually impede restructuring of firms trying to attain a “critical mass” which would enable them to compete in world markets.

Another argument in this regard relates to network benefits. Such benefits acquire greater relevance in the so–called “new economy” sector. In such sectors concentration could enhance consumer welfare, as otherwise consumers would lose the benefit that a more extensive network generates in such sectors, wider choice of complementary products and enhanced quality and service that this brings about. For example, in mobile telecommunications, the more users join a particular mobile network, the more valuable the network becomes to those users as they can contact more people, in more locations, at lower cost as the network expands. In the transport sector, more integrated transport services can lead to network benefits that would improve service quality through strengthened hubs, better through-ticketing arrangements, more extensive services, more comprehensive and coherent information or better co-ordination of connecting services.

The relevance of all this to small jurisdictions is that the positive impact on the economy arising from mergers are likely to be more pronounced than in larger states, due to the fact that in a small market it may be desirable to encourage consolidation to avoid excessive fragmentation, rather than promote further division of business into smaller units.

3.2.4 Market failure

Finally in a small market, especially in the case of islands as is the case with Malta, it is more likely to find market failures, due to a number of factors including the relatively large environmental impacts, and the existence of relatively large externalities. In Malta, business activity tends to impact the environment in terms of gaseous and liquid emissions, noise, transport activity, unsightly structures and unpleasant smells. In such cases, market forces cannot be relied upon to ration supply and demand. For example, it may be necessary in small states to limit the number of producers on environmental grounds, permitting existing producers to continue enjoying dominance, even if the market, small as it may be, can take more suppliers. This reality also limits the applicability of competition possibilities in a small country. Again here, the argument is not that competition law should not be applied, but to highlight the constraints that small states face when applying competition law.

3.3 Limited natural resource endowments and high import content

Small size often implies poor natural resource endowment and low inter-industry linkages, which result in a relatively high import content in relation to GDP (see Briguglio 1993, Appendix 4). In addition, there are severe limitations on import substitution possibilities (Worrell, 1992. p. 9-10).

This reality often leads to domination of the market by undertakings monopolising or dominating import channels. One also finds in small jurisdictions a strong resistance to parallel imports and a strong lobby for exclusive dealing arrangements, on the grounds of rationalisation. The Director for Fair Competition in Malta has been reported as saying that resistance against parallel imports is one of the main problems relating to competition in Malta.[9]

In small territories, the enticement to indulge in arrangements between importers and distributors involving restrictions with the aim of minimizing intra-brand competition may be large. This is likely to stem from self-interest. However it may also have beneficial impacts on the consumer since uncontrolled

[9] On this question see also Gatt (1996)

competition may usher in excessive fragmentation in imports leading to the inability of a single importer to buy in sufficient bulk. This issue will be discussed below with respect to transport.

It should be stressed here that this argument should not be construed as one in favour of restrictive arrangements, but to make a case that competition in small jurisdictions merits special consideration.

3.4 High Reliance on Export Markets

A small domestic market and the need for a relatively large amount of foreign exchange to pay for the large import bill, gives rise to a relatively high dependence on exports (see Briguglio, 1993, Appendix 5) and therefore on economic conditions in the rest of the world.

In addition, small countries have very limited ability to influence the prices of exports. Most countries are to varying degrees price takers, but small states tend to be price takers to a much higher extent due to the relative very small volume of trade in relation to the world markets in products they import and export.

The high degree of export orientation is essentially a pro-competition situation, since it implies an orientation to free trade and competitiveness. However a critical size is required to enable a firm to compete in the international market, and again here, the argument for rationalisation, and against fragmentation, is a strong one.

Small size renders it difficult to exploit the advantages of economies of scale, mostly due to indivisibilities and limited scope for specialisation, which give rise to high per unit costs of production.

Apart from being highly dependent on exports, small states tend to be highly dependent on a narrow range of products. In many cases, small size restricts the country's ability to diversify its exports, and this renders the country as dependent on a very narrow range of goods and services (see Briguglio, 1993, appendix 6). This carries with it the disadvantage associated with having too many eggs in one basket.

Due to these disadvantages, exporters in small states tend to clamour for state aid, justifying their call on the grounds that this should their businesses default, a large proportion of the labour force would end without a job, and the balance of payments would be drastically negatively affected.

This is certainly the case with tourism and shipbuilding/repair in Malta, which have a relatively large stake in exports.

As is well known, in general state aid is considered as a distortion to competition[10] but in small states, especially insular ones, the case of support of this type may be stronger than in larger territories, given the high reliance on exports of such states. There may therefore be a case for considering state aid as

[10] The EU makes several exceptions to this principle and it has drawn up a number of guidelines on the extent to which these exceptions may be used, including aid granted for the purposes of restructuring and for rescuing companies which risk bankruptcy, aid for research and development, aid granted to promote Small and Medium-sized Enterprises (SMEs), aid to promote employment, aid for training, aid to assist deprived urban areas and aid granted to promote the environment. The EU also allows aid which is granted to promote economic development in disadvantaged regions to support investment projects and in certain cases to compensate for transport disadvantages.

permitting some form of level playing field in cases where the small size and insularity have an important bearing on the cost of production.[11]

3.5 Public Undertakings in Small Jurisdictions

Under competition regulations, state-owned companies are expected to be subject to competition just like those in the private sector. However, restrictions to competition are allowed in many countries, including the EU in cases where state-owned companies provide a "service of general economic interest" that is essential for the public, such as water supply.

In Malta, the Competition Act initially only applied to the private sector with a few exceptions and this created an unfair advantage for state-owned companies (see Buttigieg, 1999), but the law was recently amended to cover all enterprises, except those public undertakings specifically exempted by the Minister concerned by means of a legal instrument.[12] Further amendments to the Competition Act are currently being debated in Parliament so as to subject all undertakings to the legislation, except for particular operations entrusted to undertakings, considered to be a service of general economic interest. This will bring Malta's legislation in line with EC Law.

The problem with small jurisdictions is that natural monopolies tend to occur in the production of utilities which have high overhead costs and the role of the government tends to be more pervasive in such jurisdictions, due to the risks of privatising operations that will retain monopoly power. Utilities provided by the state or parastatal organisations tend to be constrained by social and political considerations, which are not always in line with the provisions of competition law.

This is not an argument for excluding public undertakings from being caught under competition legislation, but an explanation as to why small states tend to face more limitations than larger ones, in so far as competition is concerned, in the provision of public utilities.

This would seem to suggest that the notion of what constitutes a service in the general economic interest such as to merit exemption from strict competition rules should be more liberally construed in the context of small jurisdictions.

3.6 Transport Costs

Many small states and small jurisdictions are also islands, and therefore face additional transport costs, which are included in the price of imported industrial supplies and finished goods, given that islands are separated by sea and are therefore constrained to use air and sea transport only for their imports and exports. Land transport is of course out of the question, and this reduces the options available for the movement of goods. Apart from high per unit cost of transport, insularity may also give rise to additional problems such as time delays and unreliability in transport services. These create risk and uncertainties in

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[11] In Malta, a State Aid Monitoring Board was set up under the Business Promotion Act (Act XXI of 1988 as subsequently amended) to oversee the compatibility of all state aid measures. All state aid must be notified to this board in advance. However, since Malta's GDP in PPS stands at 55% of the EU average, Malta may continue to grant aid to support investment. For example, Malta may grant state aid of up to 50% of the costs of investments in the case of large companies and up to 65% in the case of small firms.

[12] EC law also subjects to competition public undertakings in which the government has a controlling interest as well as companies which have special or exclusive rights granted by the government. It should be noted however, that under EU competition rules, there is no obligation on the part of Member States to privatise public entities since this remains within the domain of national governments.

production. Such disadvantages are more intense for islands that are archipelagic and dispersed over a wide area.

An additional problem is that when transport is not frequent and/or regular, enterprises in islands find it difficult to meet sudden changes in demand, unless they keep large stocks. This implies additional cost of production, associated with tied up capital, rent of warehousing and wages of storekeepers.

The implication of all this on competition is that pricing in small jurisdictions may take on board these considerations, and therefore a straightforward comparison with analogous goods in nearby mainland markets may not be appropriate. With regard to Maltese competition law, where excessive pricing by a dominant firm is prohibited in terms of Article 9, these considerations are of course of relevance.

3.7 Advocacy and Raising Awareness

In small jurisdictions, enforcement may sometimes be more difficult than larger countries due to the fact that everybody knows each other, and social and inter-family links are important. Thus methods other than enforcement may bring better results as far as implementing competition policy is concerned.

Competition advocacy among citizens, to render them aware of the benefits of competition policy are of relevance in this regard. It is important also to translate the difficult legal and technical jargon into a language that is easily understood. In addition, the competition authorities themselves should be seen to be fair and transparent. Dissemination of the benefits of competition should also be fostered among government entities. The ultimate idea of advocacy is to develop a competition culture in society.

Although competition advocacy is important in all jurisdictions, large or small, it is likely to be needed more in the smaller ones, given that in many such jurisdictions family connections and social networks are more likely to lead to collusion than to independent competitive action. In addition, in small jurisdictions, price control systems tend to predominate, and this leads to the belief that controlled prices are fair prices and that competition leads to instability. Another reason is that, as already noted, government involvement in such states tends to loom large over the market, and public undertakings often clamour for exclusion from competition law provisions.

3.8 Small Population Pool and Administrative Constraints

The size of the population has a bearing of competition law and policy. In small jurisdictions, where the population pool is small, the chances of finding the necessary expertise to administer competition law and policy are smaller.[13] Although smaller jurisdictions will need a smaller number of personnel, the proportionality rule does not hold, due to the problem of indivisibility, especially in matters associated with administration. As a matter of fact, the number of personnel and the cost of administration, per capita of population, are likely to be larger in small states when compared to larger states. A related problem is that many government functions tend to be very expensive per capita when the population is small, due to the fact that certain expenses are not divisible in proportion to the number of users.

[13] To make matters worse, many trained specialists originating from small jurisdictions often emigrate to larger countries where their specialised services are better utilised and where remuneration is more attractive.

4. Conclusion

This paper has highlighted a number of areas which are associated with small jurisdictions and which are likely to have a bearing on competition law and policy. The main argument put forward in the paper is not that competition rules should not be adopted in small jurisdictions or that abuse should be tolerated. The basic contention was is that exceptions, normally based on considerations such as improved efficiency, distribution, and overall consumer benefit are more likely to be relevant in small jurisdictions. The arguments are various, and may have legal as well as policy implications.

There are issues which have been raised in this paper which warrant further research. The first relates to the question of measurement of market size within a particular jurisdiction. The second relates to the extent to which competition prevails in a particular country. It was noted that in small jurisdictions there are various factors which constrain competition, even if competition legislation is in place.

An idea that the present authors would like to propose in this regard is the computation of a "Competition Index" across countries, which could be developed in the form of a composite index of four major factors related to (a) the existence and coverage of competition legislation, and related enforcement (b) the existence of a competition culture and related advocacy measures (c) the extent of business concentration and institutional barriers to entry and (d) the inherent constraints on competition – some of which, as argued in this paper, are associated with small market size. There are a number of benefits that may be derived from such an index including that (a) the index can attract attention towards the issue of competition in different countries; and (b) it presents a quantitative measure of the overall level of competition across countries.

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