

Challenges of competition authorities in small countries with large neighbours for successful regional enforcement

by

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PRESENTATION OUTLINE

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- 2. CONCEPT OF SMALL COUNTRY**
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Competition law enforcement exists to preserve the integrity of free markets, undistorted by anti-competitive conduct. More vigorous competition has two main benefits: first, it protects consumers from companies that may, at times, seek or use market power to raise prices or reduce outputs. Second, it promotes productivity growth, largely by imposing stronger rivalry among companies to succeed in gaining the business of customers, which in turn leads to faster economic growth.

SOURCE: OECD, *Challenges of International Co-operation in Competition Law Enforcement*, 2014

1. INTRODUCTION

- **Every competition authority in the world has been small before and therefore the challenges that face any contemporary small competition authority is generally not unique but has been faced by other competition authorities (CAs).**
- **While there may be some inert stigma in classification of CAs or countries as being *small*, there are some objective parameters that qualify such without negative connotations**
- **What are the challenges of the small country/CA in regional competition enforcement in the face of a big neighbour?**

2. CONCEPT OF SMALL COUNTRY

- The Commonwealth defines ‘small states’ as those that are sovereign countries with a population of 1.5 million people or fewer.
- Statute of the *Small States Network for Economic Development* (SSNED) defines a small state as one ...
“with a population of 1.5 million or less
- Professor Michal Gal of Haifa University in Israel states that countries with high concentration levels, high barriers to entry, less dynamic economies are ‘small’ for purposes of competition policy review - and not necessarily in terms of geographical or population size

3. UNIQUE CHALLENGES FOR SMALL CAs AND ITS EFFECT ON REGIONAL ENFORCEMENT

- **Human resource constraints in effective and timeous investigations:**
 - ✓ **Inadequate staff, multi-tasking or roles**
 - ✓ **Slow response rate to information sharing requests**
 - ✓ **Capacity to conduct a regionally coordinated dawn raid**
 - ✓ **May take longer to review data collected from dawn raids**
 - ✓ **Natural focus on mergers and advocacy**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Financial Constraints:**

- ✓ **May lack funds to engage external market and legal analysts**

- **Limited staff undertake multiple and perhaps conflicting roles that may affect investigation outcomes**
- **Need for quick decisions may result in hasty, derisory and challengeable competition decisions both on legal and economic analysis.**
- **Affects flow of quality info to other CAs**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Financial Constraints (*cont'd*):**

- ✓ **The smaller the CA the higher the costs of implementing competition law (Oxera).**

- ***The UK Competition and Markets Authority (CMA) spent approximately £1 per head of population, while the Malta Competition and Consumer Affairs Authority spent £9 per head of population, and the Channel Islands Competition and Regulatory Authorities (CICRA) spent £3 per head on its competition functions.***

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Lack of Competition Law and Economics for Competition Law experts in the country**
 - ✓ **Small Countries rely on experts existing in a larger neighbouring country. This may make it more costly for the small agency to access such expertise, late alone, it may affect the time related to completing investigations or analysis within a certain time-frame - where such time frames are at play.**
 - ✓ **Problems of data availability: De novo research**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- ✓ FIJI observes inability to engage qualified subject matter specialists because:**
 - These qualified people cannot be attracted from external market because of very low salary structure that exists...; and**
 - Those who acquire hands-on training in the Commission over a period of time, are snatched by private sector firms because of the inability for the Commission to match the pay that is offered by the private sector.**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Complexity of Regional Enforcement**
 - ✓ **Coordinated regional enforcement of competition law may be complex. COMITY principle of international co-operation for countries to take other's important interests into account while conducting its law enforcement activities, in return for their commitment to do the same.**
 - ✓ **The assumption here is that the countries engaging with each other under these circumstances have equal capacity to engage accordingly.**
 - ✓ **Small CA may not have capacity to reciprocate**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Reliance on External Training**
 - ✓ **Often, the overseas training sessions are not tailor-made to the needs of small countries and the training may not have immediate bearing on the legal and economic analysis capacity of the staff in the realism of their law or legal system.**
 - ✓ **How does this affect regional enforcement? The small agency will benefit from such trainings which are held with peers CA, using regional cases that speak to the development stage and legal realities**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Big Brother Effect**

- ✓ **Big brother success may pressure the small CA to undertake similar investigations to ward off accusations of being ineptitude. Investigations may thus be taken up hurriedly and in the process, certain legal and analysis details missed out as already outlined above.**
- ✓ **'No one size fits all' - small CA must learn from the successes and failures of the big brother and undertake investigations soberly and at a pace that does not compromise process & outcomes**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Big Brother Effect...*cont'd***
 - ✓ **Copy and paste of procedural guidelines, leniency programs, merger guidelines, investigation guidelines, etc., which it may not have capacity to implement**
 - ✓ **Small CA may equally slip into 'copy and paste' of analysis and case law made by other advanced CAs. Such approach may be legally not contextual to the local law.**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **The Oligarchs and entrenched business dominance**
 - ✓ **While most small CAs not done much on Abuse and cartel cases. The quest for fine as a goal and test of effectiveness may clash with oligarchy and related business interests.**
 - ✓ **The oligarchs, who may be prevalent in small countries and wield enormous power, may frustrate any efforts, national or regional, that would lead to the destabilization of their economic power bases**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **The Oligarchs and entrenched business dominance (*cont'd*)**
 - ✓ **Oligarchs and cohorts may equally frustrate the inter-relationships and connectedness and the prevalence of a culture of silence makes enforcement of competition law a daunting task. (e.g., price inspectors in Fiji have their random survey timetable leaked to traders because of interrelationships)**
 - ✓ **Strong enforcement of competition law may scare away investors to other countries with relaxed enforcement?**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Commitment to Regional Enforcement**
 - ✓ **International commitment to cooperation on regional cases vital where e.g., dawn raids have to be synchronised**
 - ✓ **Big country commitment to regional enforcement of competition may not be as high**
 - **Kenya (COMESA)**
 - **South Africa (SACU)**
 - **Tripartite Competition Enforcement (COMESA-EAC-SADC)**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Commitment to Regional Enforcement...*cont'd***
 - ✓ **Good examples are found in Francophone Africa, although little is known (by this author) of their cooperative success in enforcement:**
 - **WAEMU (West Africa)**
 - **CEMAC (Central Africa)**
 - **Mahgreb Region (North Africa)**
 - ✓ **ECOWAS has not progressed due to big brother/s Ghana and Nigeria who have not shown commitment to strong competition enforcement**

3. UNIQUE CHALLENGES FOR SMALL CAs...*cont'd*

- **Proliferation of regional enforcement systems**
 - ✓ **Several trading blocks in Africa, which have regional competition enforcement frameworks**
 - ✓ **While the larger CAs may stretch their staff and resources to comply substantially, the smaller CAs do not have such**
 - ✓ **Compliance will most likely tend to be haphazard and affect effective compliance on some**
 - ✓ **In addition to BTAs with articles on competition, southern Africa has: SADC-SACU-EAC-COMESA and Tripartite (in the offing)**

4. WHAT ARE THE OPTIONS FOR THE SMALL CA?

- (I) Recognize, acknowledge and understand the enforcement challenges they face – natural challenges or otherwise**
- (II) Come up with strategies on how it can meaningfully tap into the economies of scope of its larger neighbor – formal (MoUs), informal means.**
- (III) Supervised, tailormade, measurable attachments to a larger CA**
- (IV) Exploit available regional expertise (can be accessed directly or through ACF, ICN)**

4. WHAT ARE THE OPTIONS...? *cont'd*

(V) Effective prioritisation of activities can assist to focus on more impactful areas of enforcement than where there is a lack of such. It is tempting to show power on anything and everything but at the end of the day there is less impact - in spite of the fact that on the ground, the staff of a competition authority have put in considerable overtime

5. CONCLUSIONS

- **Varied reasons why countries choose to integrate (more of a political process) – which normally takes a long time to actualise on the ground.**
- **Almost all trade agreements contain an article on competition policy cooperation. The benefits for cooperation in regional enforcement are mammoth and benefit both small and large countries/CAs**
- **Cooperation would be frustrated where the benefits for the bigger countries are not obvious and where the smaller CAs do not have capacity to effectively and efficiently feed into the regional framework**

5. CONCLUSIONS...*cont'd*

- **Apolitical initiatives under ICN, ACF and ACER are assisting in building the confidence and capacity of small CAs and should be commended**
- **Larger countries/CAs have an obligation to assist their smaller counterparts to develop the requisite support capacity to regional enforcement**
- **Regional systems for competition also under COMESA, EAC, SADC should be commended for having not just left capacity building to national CAs but have undertaken to train, facilitate and initiate best practice tools**

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