

SPECIAL ASPECTS OF COMPETITION POLICY IN SMALL ECONOMIES

INTRODUCTION

William Kovacic, writing in the Chicago-Kent Law Review makes the point that discussions about competition policy in emerging markets, which suggest that the only options are no competition statute or competition policy bureau on the one hand and immediate adoption of competition law with the full array of provisions found in wealthy market economies, ignores a number of intermediate options that might be desirable for a number of countries ¹ . The learned writer sees this “all-or-nothing” approach as obscuring important intermediate possibilities.

This comment, I submit, provides a particularly meaningful backdrop for the issues which this paper will explore. Central to the discussion, of course is a determination as to what the word “small” means in the present context. Various indicators have been advanced, ranging from population size to geographic size to level of the Gross Domestic Product to level of vulnerability to the effects of natural disasters as well as the vagaries of foreign markets. The expression “emerging” has also been used in this context. In the absence of an official definition of small economies, it could be agreed that these are economies, which by virtue of their population size and perhaps therefore, the sizes and economic strength of their firms, have a comparatively low GDP and are rendered vulnerable to vagaries of foreign markets.

ASPECTS OF SMALL ECONOMIES

A. Most small economies are characterized by low levels of economic development. As such, they require easy and predictable access to export markets. Conversely, they want to be able to attract foreign investment to boost their economies, without running the risk of having their markets flooded with foreign imports. This is especially critical, given the fact that those imports might be coming from more efficient markets and disproportionately larger firms. Local producers of goods and services could easily be ousted from the local market. The implications of such a development are obvious unemployment levels would rise and social dislocation would ensue.

¹ Chicago – Kent Law Review Volume 77 Number 1
2001 “Institutional Foundations for Economic Legal Reform in Transitional Economies”
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Competition policy must therefore perform the balancing act of expelling inefficient enterprises from the market while at the same time not contributing to the utter demise of local enterprise. Whereas the global market does not find itself catering to the protection of small markets, such markets inevitably must take their own initiatives to try to chart their own course. A prominent Jamaica businessman observed recently that if seven of our local banks should merge, that merged entity would rank no higher than fortieth in the world of banks. That is a very graphic representation of how unbalanced the scales are between small and large developed economies. It is beyond dispute that small enterprises, are to a large extent, inefficient because of their size; and small inefficient firms as they exist in most small economies cannot compete effectively in a global market. It was against this background that the architects of the Jamaican Fair Competition Act, 1993 opted for omitting from the Act, anti-monopoly provisions as well as specific provisions for merger control. The Act also provides for the authorization of "... a prohibited agreement or practice, where the Competition Agency is satisfied that the agreement or practice is likely to promote the public benefit.¹

B. Competition policy must also reflect a healthy appreciation for the objectives of trade and investment policy in a small economy. Where local industry cannot support the domestic demand, *a fortiori*, an export market, competition policy has to make room for liberal trade policies, which will bring development into the local marketplace. It is clear from the 1991 Green Paper on the Proposals for a "Competition Act" that the Jamaican policymakers did not intend for competition policy to deter foreign investment. In support of this position the FCA exempts from the reach of competition law, all trading arrangements arising out of treaties to which the Government of Jamaica is a party². One approach to accommodating foreign investment while preserving local industry is for foreign entities to bring in technology into the local economy while labour is supplied by the local market. Ultimately, local enterprise can be developed and this could lead to the growth of technology in the local market – providing improved efficiencies. This will have implications not only for the local market itself, but will help to make the local producers competitive elsewhere as well.

In recognition of the value of technology in the development process of Jamaica as a small economy, the FCA stipulates that an agreement, whose provisions would be unenforceable as having or likely

¹ Fair Competition Act, (FCA) 1993 Section 29

² FCA Section 3(f)

to have the effect of substantially lessening competition, would be enforceable if *inter alia*, it contributes to the promotion of technical or economic progress¹. Similarly, an enterprise might not be considered to be abusing its position of dominance if it is shown that “its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress ...”²,

C. Small economies are usually replete with informal enterprises which operate outside of the formally established regulatory framework. Admittedly, they are a source of employment, with all the attendant benefits, but it is a fact that their existence raises special competition issues. Often their operations are migratory, making it extremely difficult for any competition agency to enforce competition law against them. The goods which they bring into the domestic market are in many cases, sub-standard; and passing off finds fertile soil in the sector. Without being subject to competition law, their wanton disrespect for fair trading practices serves to distort the marketplace and leave consumers without appropriate redress in cases of defective goods.

One of the practices that makes the problem even more difficult to address in Jamaica is that whereby the informal sector sells to the formal sector; which in turn sells to the ultimate consumer. As has happened, when there is a case of false or misleading representation or failure to honour the terms of a warranty; and the competition agency approaches the formally established enterprise as seller of the relevant goods, it points to some nebulous “informal commercial importer” as being the importer of the goods. Section 37(4) of the FCA states, in relevant part, “that where the person who caused a representation to be expressed, is outside of Jamaica, the representation shall be deemed to be made ... by the person who imported the article ...”. While it is acknowledged that competition rules ought to apply to the informal sector, perhaps some form of regulation might be more easily enforceable.

D. In addition to the several economic factors which define small economies, there is a host of human resource factors which must enter the equation, when we explore the many facets of competition policy in these economies. It is almost trite to observe that it is not enough to establish a competition regime; that without effective enforcement of the relevant competition law, the benefits of competition policy are but an illusion. And it is human beings operating at all levels of the systems, who will make it succeed or fail.

¹ FCA Section 17(4)

² FCA Section 20(2)

(i) Recruitment of professional and technical staff is a particular challenge. Persons do not graduate with degrees in competition law. The competition agency in a small economy will therefore have to grapple with the problems of obtaining affordable and relevant training for its personnel. This often means seeking technical assistance from one donor agency or another; and it is no secret that these sources are not as fertile as they used to be. In the absence of well-trained personnel, a competition agency cannot enforce competition law, with any measure of confidence or effectiveness.

The problem is exacerbated by the high turnover experienced by many agencies – turnover which is due not only to people’s efforts to improve their knowledge base, but also to the fact that financial remuneration in many competition agencies is wholly uncompetitive, given that most are fully government funded. When trained staff leave the agency resources of all kinds go with them; the cycle goes on; and instead of growing, competition agencies in small economies seem to do a constant shuffle – unable to undertake weighty matters which could help to cement their place in the market, as a force, truly to be reckoned with.

(ii) At the pinnacle of any effective system of Government is its legal system. It is the legal system which must guarantee that breaches of the various laws are punished and the injured obtain redress. The FCA endorses this principle – not only can the Fair Trading Commission apply to the Courts to have its directives enforced; persons who are aggrieved by a finding of the Commission may appeal to the Courts. Further, any person who is injured by the conduct of any person, where that conduct constitutes a breach of the FCA, may bring an action for damages before the Court.

It is important, therefore, that the Courts be equipped to adjudicate upon competition matters. The judicial system in most small economies is chronically undermanned and under equipped in long-established areas of the Law. Resource material is in short supply. It is not surprising therefore, that material in respect of competition law is virtually non-existent. Further, judges’ understanding of this new discipline is often questionable, to say the least; and very few lawyers are any better informed than the judges are. Applying precedents set in foreign jurisdictions whose laws might be quite different from one’s domestic laws can be a non-productive and even dangerous exercise. In this environment the development of jurisprudence in competition law is severely hampered.

CONCLUSION

It could be said that the quality and efficacy of a State's Competition regime dictates to a large extent, that State's readiness and/or compatibility with globalization. Small States, used here advisedly to refer to small economies, are faced with difficulties at every stage of the implementation of a competition system. Very often policy is established without proper consultation among the players at all levels of the society; and without sufficient understanding by the policy makers themselves, of what they are getting into. This is often followed by the selection/appointment of leadership from a small homogenous network of persons whose only qualification for such appointment might be their status in the network. Personal relationships in small economies can have major implications for the leadership of important institutions. In the Jamaican context, persons are suitable to be appointed as commissioners of the Commission if they are considered to "have attained the highest status in their professions."

In some cases competition agencies were established with funding from donors and with some amount of initial and rudimentary training being provided. At the end of these projects, agencies were left to flounder as they attempted to enforce competition law on meagre government funded budgets.

The effective administration of a competition regime requires, among other things, a policy and law suited to the needs of the particular state; highly training and properly skilled human resources; advanced telecommunications systems for timely and accurate information gathering; and a reliable and well-equipped judicial system. Unfortunately, small economies seem to score low in all these areas, suggesting that these economies can only be pawns rather than players in the process of globalization.

In conclusion I will borrow from William Kovacic's comment on transition economies and guardedly take the liberty to apply it to small economies by saying that in most small economies; "... there is a significant mismatch between national implementation capabilities and the demands of new competition laws ..." ¹. This mismatch has to be addressed if the benefits of competition are to be realized by small economies.

¹ Chicago Kent Law Review Volume 77 November 1, 2001 – "Institutional Foundations for Economic Legal Reform in transition Economies". Page 314