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PROOF AND COMPETITION LAW IN SMALL MARKET ECONOMIES

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ABSTRACT

Standards of proof, particularly related to minimising the variance around the mean, may appropriately differ between small market economies and larger ones. Given resource differences, and different starting points of many small economies, it may be that variance of the true situation around the expectation in small economies would be higher than in larger ones. If this were not the case, small economies might not be able to address legitimate complaints, might not have sufficient throughput of cases and might find themselves not achieving their core objective of changing the business environment in the countries in which they operate from one that was permissive if anti-competitive activity to one that follow the law. Creating an environment in which companies choose to follow the law, out of their own self-interest, is crucial for the ultimate success of the competition law enterprise.

I. INTRODUCTION

Competition authorities and economic sector regulators from small market economies face particularly challenging law enforcement dilemmas. Compared to larger authorities, the core of the dilemma is that the local conditions often encompass the dual combination of greater law enforcement challenges— due to fundamentally low conditions of competition in small economies — and lower resources than larger authorities — due to the limited size of government budgets in small economies. In addition to these two fundamental challenges, others include limited judicial resources, limited private sector expertise in competition law and limited technical training for the staff in industrial organisation, competition law and even in the subjects of law and economics. The question I focus on in this note is whether and in what way levels of proof might appropriately differ in such economies, if at all. Standards of proof are decided by the law, whether written or judicial interpretation. Levels of proof relate to the strength of the evidence for achieving a very narrow range of error around the claimed likelihood of violation by the law enforcer, with the claimed likelihood needing to exceed the standard of proof determined by the system. Precision of proof relates to the extent to which the variation around the mean likelihood of a violation is lowered from the initial evidence. While the exact interpretations of levels of proof are typically subject to judicial interpretation, the general question remains of whether the standards, levels and precision should ideally and in all ways "converge" with those of larger economies.[1]

* The author wishes to thank many colleagues for extremely helpful conversations. This note speaks in part from a varied experience after working at one small country competition authority, two large-jurisdiction authorities and an international organisation and detailed discussions in more than two dozen countries. The thoughts reported here have emerged subsequent to leaving competition law en-

This question has significant operational importance in many economies. Without taking a position on what constitutes a small market economy, we can state that of the more than 130 competition authorities in the world, more than 60 are in economies with a population of less than 10 million and more than 35 in countries with population under 5 million.

Many competition law jurisdictions look for guidance in how to evaluate cases to those jurisdictions that produce the most detailed decisions and which are viewed, in some sense, as legal trendsetters, perhaps by default, for many other jurisdictions. These include, most notably, the United States and EU. The appropriateness of their types of case outcomes as models for small countries can be debated, but the sophistication and precedential value of these regimes can be substantial. Yet one point is clear: small countries cannot, with their level of resources, duplicate the EU and US approach to case investigation and levels of proof. The most detailed examination of the need for small economies to have substantive differences in methods and possible remedies is provided by Gal; the book focuses more on concrete standards and methods for evaluating cases rather than standards or levels of proof.[2]

The particular economic challenges of small market economies can include high industry concentration, inability to achieve minimum efficient scale for many enterprises and, at times, high geographic dispersion of economic activity that may further divide a country into smaller constituent markets for some products.[3] The exact nature of the challenges differs from one economy to another.

The challenges of small competition jurisdictions could conflict with the general ambition of creating legal certainty for business, if small authorities and the judiciary act in many different ways towards similar business activities. Greater degrees of legal certainty enhance economic success and willingness by business and investors to undertake investment and take chances. International organisations such as the OECD, UNCTAD, and the ICN have sought to create comparable rules for competition regimes throughout the world. This type of convergence, largely around substantive approach to analysis, makes much sense. But achieving convergence around necessary conditions for proving a case is much more difficult. In the case of small economy competition authorities, it might mean that they can, in effect, bring no cases. This is because the level of resources devoted to a single enforcement action in large jurisdictions can exceed that available to an entire authority in many small countries.

In this note I argue for the following points, supposing a competition law exists that is intended to stop the same nature of illegal activities, whatever the size of economy affected:

1. The likelihood of a competition under investigation being one that is against the law is likely higher in

forcement and considering the challenges recounted by the judiciary and other head of agency colleagues from other small country colleagues, as many of us, including myself, aimed to replicate the standards of proof, levels of proof and degrees of precision of large jurisdiction competition authorities. I would particularly like to thank colleagues such as John Davies, Eleanor Fox, Michal Gal, David Gerber, Simon Roberts and many others from small authorities with whom I discussed some of these challenges, without wishing to suggest they agree with the views expressed here.

1 David Gerber, *Global Competition: Law, Markets and Globalizatio*n (Oxford: Oxford University Press, 2010), 289. Gerber suggests that claims for convergence of competition law need to be "disaggregated". Focusing on standards of proof separately from other elements is one way to do this.

2 Michal Gal, Competition Policy for Small Market Economies (Cambridge: Harvard University Press, 2003), 253. Gal's seminal work on this topic is very complete and cannot be summarised here. Just as examples, mergers may be needed to reach minimum economies of scale more frequently in small economies. Remedies may more appropriately be behavioural than structural. Conduct regulation may be more important due to limited capacities of small economies to self correct. Typical market shares for establishing dominance may be lower in small economies. Efficiencies may deserve higher weight in small economies. Gal also argues that total welfare standards may be more appropriate than consumer welfare standards in small economies.

3 Gal, Competition Policy for Small Market Economies.

small countries than in large ones, due to lower general likelihoods of prosecution leading to lower levels of deterrence.

2. The depth of investigations is about establishing both the likelihood of a violation (mean expectation of an activity's legality) and increasing the level of precision of the likely claim (reducing the variance of the estimate of legality of the behaviour).
3. In order to achieve the same system outcome of deterrence, the depth of required evidence for enforcement action (prosecution) could be lower in small economies than in large ones, while still starting with a presumption of innocence.
4. Small country competition authorities cannot achieve an equivalently narrow variance around this estimated likelihood as in a large competition authority.
5. A choice must be made by small competition authorities over whether they wish to achieve the same substantive outcome (reducing illegal activity) or same level of substantive certainty over mean and variance, given the evidence available.
6. A reasonable choice for a small competition authority, in order to achieve highest value for the level of government resources invested in the activity, is to focus on achieving the same deterrence outcomes as in a larger authority. This could potentially involve a (slight) legal lowering of the standard of proof for variance and may also require (slightly) lower levels and precision proof, given the evidence available. It may also involve consequently greater attention being paid to avoiding enforcement actions against enterprises that are suspected violators of the law.

I am thus arguing that competition law convergence cannot occur simultaneously over multiple variables. Policymakers must make choices about which variables to focus on. I here suggest that the main variable should be increasing the level of competition in their economy. In practice, this may increase the likelihood of an error in outcomes in small economies, though attention can and should be focused on ensuring that the likelihood of prosecuting the innocent is kept low.

In practice, one may distinguish between different types of activity for these points, with cartels tending to have different types of proof (often with higher certainty) than abuse or anti-competitive mergers. The arguments outlined here are primarily about merger and abuse policy. I would not suggest any lowering of levels or precision of proof is appropriate in cartel proceedings, given the severity of the penalty in such cases. The remaining argument therefore focus solely on abuse of dominance and merger control.

II. THE LIKELIHOOD OF A COMPETITION UNDER INVESTIGATION BEING ONE THAT IS AGAINST THE LAW IS HIGHER IN SMALL COUNTRIES THAN IN LARGE ONES

Small countries typically have experienced a more recent introduction of competition law than larger countries. This recency, combined with reduced resources relative to larger countries, means that businesses will be aware that the likelihood of being discovered and prosecuted for an illegal act is lower than in larger countries. Larger countries may include more people aware of the law (e.g., by having legal compliance departments) and more other businesspeople or consumers ready to bring illegal behaviour to the attention of the competition authority.[4]

These factors may combine to change the calculus for businesses over the extent to which they take

4 Gal asserts that "prevalence of collusive conduct and abuse of dominance is generally much higher in small economies than large ones." Gal, Competition Policy for Small Market Economies, 56.

competition law seriously. Not only is the level of awareness of the law possibly lower, but the likelihood of prosecution being lower means that all companies, if acting as rational economic actors, will be more willing to break the law or go towards and sometimes over untested edges of the law.

This tendency may be counteracted by board interest in maintaining a reputation of the company as following the law; but in terms of marginal incentives, the incentives for a company to break the law are higher, given the same gains, because the likelihood of a penalty is lower. Overall, though, the fundamental conditions of small countries may affect the environment of law abidingness for competition law.

III. THE DEPTH OF INVESTIGATIONS IS ABOUT ESTABLISHING BOTH THE LEVEL OF THE LIKELIHOOD OF A VIOLATION (MEAN EXPECTATION OF AN ACTIVITY'S LEGALITY) AND INCREASING THE LEVEL OF PRECISION OF THE VIOLATION CLAIM (REDUCING THE VARIANCE OF THE ESTIMATE OF LEGALITY OF THE BEHAVIOUR)

Competition law investigations are about gathering evidence and determining the strength of a case against a potential violator of the law. The strength of the case can be portrayed as having two main elements: the assessment of likelihood that the law was violated, based on the evidence, and the narrowness of the range of that likelihood. The first is related to estimating a mean. The second is related to the variance.[5]

A substantial part of the investigative effort in large authorities is about reducing the variance, in part by closing off alternative and innocent explanations of behaviour as well as by buttressing the evidence that supports the primary argument.

But the most important effort is devoted to forming the assessment of the likelihood fo a legal violation. The level of proof can vary from being more likely than not to beyond reasonable doubt, depending on the type of activity under investigation. Note that we are assuming the burden of proof lies generally with the competition authority.

IV. IN ORDER TO ACHIEVE THE SAME EXPECTED DETERRENCE OF A SYSTEM, THE STANDARD OF PROOF FOR THE LIKELIHOOD ESTABLISHED BY THE LAW OR JUDICIARY COULD BE LOWER IN SMALL ECONOMIES THAN IN LARGE ONES, GIVEN THAT VIOLATIONS ARE MORE LIKELY TO GO UNPROSECUTED

One may imagine each type of violation (e.g., abuse) having an associated standard or proof[6]. The "likelihood" of the violation may vary from one country to another.

I would suggest that, if the prima facie expectation in an economy is for a higher expected likelihood of a violation, with evidence being more limited, the appropriate response is for the judiciary to have

5 A third element may be related to what is called the kurtosis, the extent to which the variance is one-sided, which may relate to the shape of the distribution, and the relative weight of (i) finding an innocent company guilty vs (ii) finding a guilty company innocent. For the sake of simplicity, we here ignore kurtosis, simply noting that more could be said on this topic, as it inherently relates to the likelihood of what are commonly referred to as type I and type II errors.

6 For an thorough discussion of standard of proof and evidence, see Andriani Kalintiri, Evidence Standards in EU Competition Enforcment: The EU Approach (London: Hart, 2019).

somewhat lower standards of proved by the state starting an investigation.[7] In practice, this lowering could be a relatively small level and would depend on the extent to which increased deterrence was necessary.

Evidence will be less available in smaller economies because written and documented records of decisions and strategies will tend to be more informal. Emails that might need to be sent in a multinational in order to communicate information across the group will not be equally necessary in a small economy. Decisions may be reached by discussion, without backup documents, and orders conveyed orally, instead of in writing.

The likelihood of a violation can be considered a function of the strength of collected evidence and the initial likelihood of violation that led to the investigation. For an extreme example of why this should be the case, if the initial evidence led to an assessed likelihood of a violation of 80% and the subsequent evidence (on its own) only established a 40% likelihood one might consider that the initial expectations (or underlying evidence) provide some information about the actual likelihood of a violation, though how they would be weighted in the end would be a fact-based weighting. At the same time, initial expectations would not constitute a sufficient basis for prosecution on their own and could be considerably less probative than the usually more extensive evidence subsequently collected. The relevance would follow from the objective of the competition law to achieve a more competitive environment, which might require a higher likelihood of successful prosecution when substantial evidence exists than in other environments, which could counter-balance the lower frequency of prosecutions arising from resource constraints.

Even if the initial expectations (or overall expected frequency of violations) are not taken into account (and I personally think it is quite reasonable and appropriate not to consider initial expectations or expected frequency of violation) the point remains that standard of proof related to means, if held at as high a standard as for larger countries, could reasonably be expected to result in relatively fewer prosecutions in small country authorities due to lower resources, lower evidence availability and consequent higher expected economic incentives for violating the law. Such an outcome, with few prosecutions, might actually be contrary to the parliamentary intent when passing competition laws.

None of this should be taken to suggest that I am advocating a lowering of quality standards. On the contrary, I would advocate improving quality and rigour of analysis by all sides for any case. I would also advocate presumptions of innocence (that would reduce the possibility for Bayesian approaches to evidence), ensuring due process protections, and focusing on gathering information to avoid prosecution of the innocent. The topic of this section is instead been about standards of proof and levels of proof viewed from a system perspective.

V. SMALL COUNTRY COMPETITION AUTHORITIES CANNOT ACHIEVE AN EQUIVALENTLY NARROW VARIANCE AROUND THIS ESTIMATED LIKELIHOOD OF LEGAL VIOLATION AS IN A LARGE COMPETITION AUTHORITY

One particular area to keep in mind is that even if the required level of probability for the mean estimate

7 For a paper suggesting the relationship between Bayesian reasoning and legal decisions, see, for example, Norman Fenton, David A Lagnado, Martin Neil, "A general structure for legal arguments using Bayesian networks", Cognitive Science 37, (2013), 61–102 and Martin Neil et al., "Modelling competing legal arguments using Bayesian model comparison and averaging", Artificial Intelligence Law 27, (2019), 403–430. https://doi.org/10.1007/s10506-019-09250-3

of likelihood of violation, for the prosecution, is the same for large authorities and smaller authorities, the variance of this estimate is likely to be smaller for the large authorities than the small ones. A large portion of the resources devoted to a case by the large competition authorities goes to assessing small "pieces of the puzzle", that are likely to have a modest effect on the estimated mean but to instead reduce the likelihood of error. This reduction of the variance[8] is an important characteristic of large country investigations.

The small competition authorities do not have the resources allocated to them for investigating with the same level of focus on small pieces of the puzzle. That is, in order for them to do their job, small authorities may need to focus on the evidence about the mean expectation more than the reduction of variance. The judiciary may also be more accustomed to dealing with evidence that is subject to substantial resource constraints.

Furthermore, companies may not find it in their own interest, in a small economy, to provide large amounts of evidence and to invest heavily in their defense, as the gains from winning a case are smaller than in a large jurisdiction. This means that companies may not be willing to pay expert counsel sufficiently to provide the counter-arguments to the same extent as larger jurisdictions, which are often one of the motivators for the narrower analysis performed by competition authorities in large jurisdictions.

Even if companies do wish to invest heavily in their defence, they are unlikely to find a well developed private competition bar. The individual attorney decision to specialise in competition law, which can result in much more refined counter-arguments for cases, can only be justified when there are minimum scale for such a specialisation to be worthwhile. In many small countries, very few, if any, corporate counsel would find it worthwhile to establish a primary focus in this way.

VI. A CHOICE MUST BE MADE BY SMALL ECONOMY LAWMAKERS AND JUDICIARY OVER WHETHER THEY WISH TO ACHIEVE THE SAME SUBSTANTIVE OUTCOME (E.G., ENSURING 98% OF BUSINESS ACTIVITY IS CONSONANT WITH THE LAW) OR SAME LEVEL OF SUBSTANTIVE CERTAINTY OVER MEAN AND VARIANCE OF LIKELIHOOD OF VIOLATION, GIVEN THE EVIDENCE AVAILABLE

The variance around the standard of proof may then be wider in smaller jurisdictions than larger ones. This size of variance may increase the likelihood of successful prosecutions of innocent parties as well as increasing the likelihood of letting off guilty parties. The higher variance can be viewed as a normal consequence of the expectation of results with (dramatically) lower resources. The extent to which variances would suggest that innocent parties are prosecuted may change if the initial expectation that the frequency of legal violations is high. A reasonable and appropriate response of small country prosecutors and judiciary could, in such circumstance, involve providing a greater relative stress on ensuring that errors in which the innocent are prosecuted are avoided.

The perceived effectiveness of the competition law is first driven by having careful and appropriate estimates of the means.

8 Note this can also include changing the kurtosis, e.g., to prevent finding of innocent firms guilty.

But the incentives to obey the law also require that error rates be as low as possible within the constraints of the system and that the system be perceived as fair and impartial.

VII. THE MOST REASONABLE CHOICE FOR A SMALL COMPETITION AUTHORITY, IN ORDER TO ACHIEVE HIGHEST VALUE FOR THE LEVEL OF GOVERNMENT RESOURCES INVESTED IN THE ACTIVITY, IS TO FOCUS ON ACHIEVING THE SAME SUBSTANTIVE OUTCOMES AS IN A LARGER AUTHORITY. THIS COULD INVOLVE A RELATIVE LOWERING OF THE STANDARD OF PROOF FOR VARIANCE COMPARED TO LARGER COUNTRIES AND MAY LEAD TO A LOWERING IN THE EXPECTED LIKELIHOOD OF VIOLATION. THIS MIGHT MEAN THOUGH A VERY FINE-GRAINED AND SAMLL REDUCTION, MUCH MORE MODEST THAN ONE INDICATED FROM MOVING FROM A "BEYONF REASONABLE DOUBT" TO A "MORE LIKELY THAN NOT" STANDARD

Ultimately, the objective of small country competition authorities and judicial system will be to show their resources are being devoted effectively to their mission and that they are actually making a substantive contribution to their country's economy.

For the overall system to beBeing perceived asto makinge a contribution to the economy requires demonstrable a substantial level of activity and that this activity be perceived as an even-handed application of the law to business from the perspective of business, media and politicians. as well as that politicians and media feel that real progress is being made. Success also requires that legitimate complaints, often filed by businesses, receive due attention and investigation.

This means that a large part of the challenge of competition authorities and judiciary in small economies is to have a sufficient throughput of cases while ensuring that the throughput is addressed at the highest level of quality possible in all evidence development and decision documents.

VIII. CONCLUSION

This note has focused on the standard of proof, level of proof and precision of proof in small market economies. Whatever the size of the jurisdiction, competition authorities face an ongoing challenge with respect to ensuring their levels and precision of proof are at the appropriate levels. In this note I have argued that certain aspects of level of proof, particularly related to minimising the variance around the mean, may appropriately differ between small market economies and larger ones. Given resource differences, and different starting points of the economy, it may be that variance in small economies would be higher than in larger ones. If this were not the case, small economies might not be able to address legitimate complaints, might not have sufficient throughput of cases and might find themselves not achieving their core objective of achieving a business environment in which have an incentive to follow the law. Creating an environment in which companies choose to follow the law, out of their own self-interest, is crucial for the ultimate success of the competition law enterprise. This trade-off between depth of evidence required and deterrence could lead some small jurisdictions to choose relatively different implementation strategies for their competition law regimes than large economies. Having said this, many officials in small economy competition authorities may reasonably seek to replicate approaches of large economy authorities.<small economies compared to large economies.

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